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# CASES REPORTED.

	Page		Page
Abbott, Sklower v. (Mont.).....	901	Bank of Camas Prairie, Rice v. (Idaho)...	856
Ada County v. First Nat. Bank of Idaho (Idaho).....	1098	Bank of Glasco v. Marshall (Kan. App.)...	561
Ada County, Davis v. (Idaho).....	93	Barger v. Barger (Or.).....	702
Adams v. City of Argentine (Kan. App.)...	1100	Barger v. Taylor (Or.).....	618
Agree, Hoeffer v. (Colo. App.).....	973	Barney, People v. (Cal.).....	41
Akey, Shockey v. (Kan. App.).....	562	Barnhart v. Edwards (Cal.).....	251
Alaska Imp. Co. v. Hirsch (Cal.).....	124	Baroteau, California Imp. Co. v. (Cal.)...	1018
Aldaffer, Hale v. (Kan. App.).....	320	Barrett v. Superior Court of Placer County (Cal.).....	592
Allen v. King (Colo. Sup.).....	266	Bartholomew v. First Nat. Bank of Salina (Kan. Sup.).....	519
Allen, Vivian v. (Colo. App.).....	844	Bartholomew, Morrison v. (Colo. App.)...	410
Ambrose v. Gwinnup (Wash.).....	737	Bash v. Eisenbeis (Wash.).....	886
American Developing & Mining Co., Morrison v. (Idaho).....	94	Bates, State v. (Utah).....	78
American Fire Ins. Co., Stephens v. (Utah).....	83	Baxter, Deutsch v. (Colo. App.).....	405
American Nat. Bank, Branch v. (Kan. Sup.).....	516	Beal v. Dillon (Kan. App.).....	317
American Nat. Bank of Denver, Heinz v. (Colo. App.).....	403	Beale, Keokuk Falls Imp. Co. v. (Okl.)...	481
Ames, Last Chance Mining & Milling Co. v. (Colo. Sup.).....	382	Beard, Scott v. (Kan. App.).....	986
Ames & Frost Co. v. Heslet (Mont.).....	805	Becker, Huston v. (Wash.).....	10
Anderson v. Bigelow (Wash.).....	426	Beckstead v. Montana Union R. Co. (Mont.).....	795
Anderson, Benson v. (Utah).....	142	Bell v. Kaufman (Colo. App.).....	1035
Anderson, Employers' Liability Assur. Corp. v. (Kan. App.).....	331	Bellingham Bay Imp. Co., City of New Whatcom v. (Wash.).....	236
Anderson, Senior v. (Cal.).....	454	Bellingham Bay Imp. Co., City of New Whatcom v., two cases (Wash.).....	1102
Anthony Nat. Bank, Gardner v. (Kan. Sup.).....	516	Bellingham Bay & B. C. R. Co., City of New Whatcom v. (Wash.).....	237
Antle, Duck v. (Okl.).....	1058	Bennett's Estate, Missouri Pac. R. Co. v. (Kan. App.).....	183
Archibald, Suman v. (Cal.).....	865	Benson v. Anderson (Utah).....	142
Arkansas City Lumber Co. v. Scott (Kan. App.).....	545	Bergin, Williams v. (Cal.).....	877
Armstrong, Sawyer v. (Colo. Sup.).....	391	Berry v. Berry (Kan. Sup.).....	837
Arne, Sykes v. (Cal.).....	868	Bicknell, Dillon v. (Cal.).....	937
Arnoldy, Phoenix Ins. Co. of Brooklyn v. (Kan. App.).....	178	Bigelow, Anderson v. (Wash.).....	426
Atchison, T. & S. F. R. Co. v. Green (Kan. Sup.).....	514	Billings Water-Power Co., Sanderson v. (Mont.).....	998
Atchison, T. & S. F. R. Co. v. Hine (Kan. App.).....	190	Birkholm, Pierce v. (Cal.).....	681
Atchison, T. & S. F. R. Co. v. Long (Kan. App.).....	993	Bismarck Bank of North Dakota, Gerry v. (Mont.).....	810
Atchison, T. & S. F. R. Co., Dale v. (Kan. Sup.).....	521	Bivert v. Perkins (Okl.).....	475
Atchison, T. & S. F. R. Co., Lawrence v. (Kan. Sup.).....	510	Black, Brewer v. (Okl.).....	1089
Atherton, Lewis v. (Okl.).....	1070	Black, General Electric Co. v. (Mont.)...	639
Atlantic & P. R. Co., United States Trust Co. of New York v. (N. M.).....	725	Black, Smith v. (Colo. App.).....	394
Atlas Assur. Co., Davis v. (Wash.).....	436	Blake v. Board of Com'rs of Ada County (Idaho).....	734
Atlas Assur. Co., Davis v. (Wash.).....	885	Blasdel, Bowers Rubber Co. v. (Cal.).....	931
Auld, Rhodes v. (Kan. App.).....	170	Blevins v. Morledge (Okl.).....	1068
Ault v. Interstate Savings & Loan Ass'n (Wash.).....	13	Blyth, Taylor v. (Colo. App.).....	662
Aultman-Taylor Co. v. Frazier (Kan. App.).....	156	Blythe's Estate, In re, two cases (Cal.)...	1097
Austin Bluff Land & Water Co., Cascade Ice Co. v. (Colo. Sup.).....	268	Board of Com'rs of Ada County, Blake v. (Idaho).....	734
Avery v. Butler (Or.).....	706	Board of Com'rs of Blaine County, Ravenscraft v. (Idaho).....	942
Ayres v. Thomas (Cal.).....	1013	Board of Com'rs of Cloud County, Demers v. (Kan. App.).....	567
Bach, Cory & Co., Laubenheimer v. (Mont.).....	803	Board of Com'rs of Cloud County, Sullivan v. (Kan. App.).....	165
Bacon v. City of Seattle (Wash.).....	1102	Board of Com'rs of Grand County, Forbes v. (Colo. Sup.).....	388
Badostain v. Grazide (Cal.).....	118	Board of Com'rs of Salt Lake County, Fritsch v. (Utah).....	1028
Bailey v. Tacoma Traction Co. (Wash.)...	241	Board of Com'rs of Snohomish County, Heffner v. (Wash.).....	430
Baker, Evans v. (Kan. App.).....	314	Board of County Com'rs, Long v. (Okl.)...	1063
Baker, Union Pac. R. Co. v. (Kan. App.)...	563	Board of County Com'rs, Sherman v. (Colo. App.).....	973
Baker County, Stuller v. (Or.).....	705	Board of Education of City of Pond Creek v. Boyer (Okl.).....	1090
Baldwin, Wilbourne v. (Okl.).....	1045	Board of Pilot Com'rs, Patterson v. (Or.)...	786
Bancroft v. San Francisco Tool Co. (Cal.)...	684	Board of Sup'rs of Kern County, Leet v. (Cal.).....	595
Bank of British Columbia v. Freese (Cal.)...	793	Boggs, State v. (Wash.).....	417
Bank of British Columbia of Victoria v. City of Port Townsend (Wash.).....	896		

	Page		Page
Bohen, <i>Ex parte</i> (Cal.).....	55	Carlson v. Supreme Council, American Le-	
Bolinger v. Brake (Kan. Sup.).....	537	gion of Honor (Cal.).....	375
Borgwardt, Williams v. (Cal.).....	594	Carmichael, Eberle v. (N. M.).....	717
Bosquet, People v. (Cal.).....	879	Carpy v. Dowdell (Cal.).....	696
Boston Nat. Bank of Seattle, Carkeek v.		Carstens, Oregon Mortg. Co. v. (Wash.)...	421
(Wash.).....	884	Carver v. Steele (Cal.).....	1007
Bowers Rubber Co. v. Blasdel (Cal.).....	931	Cascade Ice Co. v. Austin Bluff Land &	
Bowman, Peters v. (Cal.).....	113	Water Co. (Colo. Sup.).....	268
Bowman, Peters v. (Cal.).....	598	Cascade Oatmeal Co., Titlow v. (Wash.)...	19
Boyer, Board of Education of City of Pond		Case Plow Works v. Montgomery (Cal.)...	108
Creek v. (Okl.).....	1090	Cash Gold Mining & Milling Co., St. Clair	
Bradbury, Gale v. (Oal.).....	778	v. (Colo. App.).....	468
Bradbury, Hentzler v. (Kan. App.).....	330	Chambers, Leavitt v. (Wash.).....	755
Bradley v. Larkin (Kan. App.).....	315	Chandos, Warren v. (Cal.).....	132
Brake, Bolinger v. (Kan. Sup.).....	537	Chandos, Warren v. (Cal.).....	1097
Bramwell, Horner v. (Colo. Sup.).....	462	Chicago, R. I. & P. R. Co. v. Mills (Kan.	
Branch v. American Nat. Bank (Kan. Sup.)	516	Sup.).....	834
Branch v. Milford Sav. Bank (Kan. App.)	555	Chicago Title & Trust Co. v. O'Marr (Mont.)	4
Branham v. Nye (Colo. App.).....	402	Chilberg, Starr & Co. v. (Wash.).....	10
Brautigam, Smithson Land Co. v. (Wash.)	434	Chisholm v. Weise (Okl.).....	1086
Brewer v. Black (Okl.).....	1089	City and County of San Francisco v. Grote	
Brigham, Everett v. (Utah).....	75	(Cal.).....	938
Brigham, Petrovitzky v. (Utah).....	666	City and County of San Francisco, Sievers	
Brinker v. Peasley (Wash.).....	30	v. (Cal.).....	687
Broadway Ins. Co., Van Slyke v. (Cal.).....	689	City and County of San Francisco, Symons	
Broadway Ins. Co., Van Slyke v. (Cal.)...	928	v. (Cal.).....	453
Brooks v. James (Wash.).....	751	City of Argentine, Adams v. (Kan. App.)...	1100
Brown v. Crabtree (Kan. Sup.).....	525	City of Argentine, Kansas Town Co. v.	
Brown v. Jenks (Kan. App.).....	324	(Kan. App.).....	542
Brown v. Rouse (Cal.).....	601	City of Argentine, King v. (Kan. App.)...	1100
Brown v. Seattle City R. Co. (Wash.).....	890	City of Ballard, State v. (Wash.).....	970
Brown, Johnston v. (Cal.).....	686	City of Burlington v. Stockwell (Kan. App.)	988
Brown, Johnston v. (Cal.).....	1097	City of Denver v. Hickey (Colo. App.)...	908
Brown, Missouri Pac. R. Co. v. (Kan. App.)	553	City of Denver v. Human (Colo. App.)...	911
Brown, National Cash-Register Co. v.		City of Eldorado v. Drapeere (Kan. App.)...	545
(Mont.).....	995	City of Emporia, State v. (Kan. Sup.)...	833
Brueuing v. Dorr (Colo. Sup.).....	290	City of Garden City v. Trigg (Kan. Sup.)	524
Buchel v. Gray (Cal.).....	112	City of Helena, Palmer v. (Mont.).....	209
Buckley v. Conley (Wash.).....	735	City of Highlands v. Raine (Colo. Sup.)...	283
Buckley, People v. (Cal.).....	1009	City of Highlands, Meskeu v. (Colo. App.)	846
Budd, People v. (Cal.).....	594	City of Junction City, Dever v. (Kan.	
Buell, Wigmore v. (Cal.).....	927	App.).....	152
Buhmann, State v. (Wash.).....	961	City of Lincoln Center v. Linker (Kan.	
Bull, Matthews v. (Cal.).....	773	App.).....	174
Bullen Bridge Co., County of Ada v. (Ida-		City of Los Angeles, Frick v. (Cal.).....	260
ho).....	818	City of New Whatcom v. Bellingham Bay	
Bullock, Newman v. (Colo. Sup.).....	379	Imp. Co. (Wash.).....	236
Bunce v. Hays (Utah).....	90	City of New Whatcom v. Bellingham Bay	
Burchett v. Hamill (Okl.).....	1053	Imp. Co., two cases (Wash.).....	1102
Burckhardt, Nickum v. (Or.).....	788	City of New Whatcom v. Bellingham Bay	
Burke v. McCowen (Cal.).....	367	& B. C. R. Co. (Wash.).....	237
Burnham v. Dickson (Okl.).....	1059	City of New Whatcom, Collensworth v.	
Burnham, Palmer v. (Cal.).....	599	(Wash.).....	439
Burnham, Symms Grocer Co. v. (Okl.)...	1059	City of New Whatcom, Felker v. (Wash.)	505
Burresen, Emery County v. (Utah).....	91	City of Olympia v. Stevens (Wash.).....	11
Burleson, People v. (Utah).....	87	City of Oregon City v. Moore (Or.).....	851
Burton v. Cochran (Kan. App.).....	569	City of Pasadena, N. P. Perine Contract-	
Burton, Lombard Inv. Co. v. (Kan. App.)	154	ing & Paving Co. v. (Cal.).....	777
Busenbark v. Park (Kan. App.).....	324	City of Port Townsend, Bank of British Co-	
Buster, State v. (Nev.).....	194	lumbia of Victoria v. (Wash.).....	896
Butler, Avery v. (Or.).....	706	City of Port Townsend, First Nat. Bank of	
Butte v. Pleasant Valley Coal Co. (Utah)...	77	Port Townsend v. (Wash.).....	1103
Byrne v. Hoag (Cal.).....	775	City of Port Townsend, Heuschobor v.	
Byrnes, New Hampshire Banking Co. v.		(Wash.).....	1103
(Kan. App.).....	543	City of Port Townsend, Johnson v.	
Byzbee v. Dewey (Cal.).....	52	(Wash.).....	1103
Cairns, Interstate Savings & Loan Ass'n v.		City of Seattle, Bacon v. (Wash.).....	1102
(Wash.).....	509	City of Seattle, Cooper v. (Wash.).....	887
Caldwell, Haines v. (Okl.).....	1101	City of Seattle, Fidelity & Casualty Co. v.	
Calhoun v. Violet (Okl.).....	479	(Wash.).....	963
California Horseshoe Co., Foley v. (Cal.)...	42	City of Seattle, Taake v. (Wash.).....	220
California Imp. Co. v. Baroteau (Cal.)...	1018	City of Spokane, German-American Sav.	
Callantine, Morse v. (Mont.).....	635	Bank of Burlington, Iowa, v. (Wash.)...	1103
Calloway, St. Louis Commission Co. v.		City of Spokane, McEwan v. (Wash.)...	433
(Okl.).....	1088	City of Spokane, Smith v. (Wash.).....	888
Cambern, Walker v. (Kan. App.).....	980	City of Tacoma v. Tacoma Light & Water	
Campbell v. Hays (Utah).....	90	Co. (Wash.).....	738
Campbell, Phinney v. (Wash.).....	502	City of Tacoma, Frace v. (Wash.).....	219
Campbell, Randolph v. (Kan. App.).....	560	City of Tacoma, Mullen v. (Wash.).....	215
Campbell, Ross v. (Colo. App.).....	465	City of Walla Walla v. Moore (Wash.)...	753
Carey, Supreme Lodge of Order of Select		Clallam County v. Clump (Wash.).....	13
Friends v. (Kan. Sup.).....	621	Clark v. Lindsay & Co. (Mont.).....	102
Carkeek v. Boston Nat. Bank of Seattle		Clift, Culmer v. (Utah).....	85
(Wash.).....	884	Cloud County Bank v. Providence-Washing-	
		ton Ins. Co. (Kan. App.).....	1100

	Page		Page
Clump, Chatham County v. (Wash.).....	13	Denver & R. G. R. Co. v. Nye (Colo. App.)	654
Coates, Walker v. (Kan. App.).....	158	Denver & R. G. R. Co. v. Pilgrim (Colo. App.)	657
Cochran, Burton v. (Kan. App.).....	569	Denver & R. G. R. Co. v. Priest (Colo. App.)	653
Coleman v. Territory (Okl.).....	1079	Denver & R. G. R. Co. v. Sipes (Colo. Sup.)	287
Colgan, Lewis v. (Cal.).....	357	Deseret Nat. Bank, Walley v. (Utah)....	147
Collensworth v. City of New Whatcom (Wash.).....	439	Deutsch v. Baxter (Colo. App.).....	405
Colonial & United States Mortg. Co., Cunningham v. (Kan. Sup.).....	830	Dever v. City of Junction City (Kan. App.)	152
Columbia, Reamer v. (Kan. App.).....	186	Dewey, Byxbee v. (Cal.).....	52
Commercial Nat. Bank of Denver, Joseph Holmes Fuel & Feed Co. v. (Colo. Sup.)	289	De Witt v. Superior Court of Fresno County (Cal.).....	871
Commercial Union Assur. Co. v. Norwood (Kan. Sup.).....	529	Dickerman v. Gelsthorpe (Mont.).....	999
Company D, First Brigade, Nevada National Guard, Reinhart v. (Nev.).....	979	Dickson, Burnham v. (Okl.).....	1059
Conine-Eaton Lumber Co., Cornell v. (Colo. App.).....	912	Dietz, McKadden v. (Cal.).....	777
Conley, Buckley v. (Wash.).....	735	Dillon v. Bicknell (Cal.).....	937
Conner v. Scott (Wash.).....	761	Dillon, Beal v. (Kan. App.).....	317
Connor, Warren v. (Cal.).....	48	D. M. Osborne & Co., Goggin v. (Cal.)....	248
Conrow, State v. (Mont.).....	640	Dobson, Westover v. (Kan. Sup.).....	620
Considine, State v. (Wash.).....	755	Doherty, State v. (Wash.).....	958
Converse, Singer Manuf'g Co. v. (Colo. Sup.).....	264	Donohoe-Kelly Banking Co., Horton v. (Wash.).....	435
Cooper v. City of Seattle (Wash.).....	887	Don Yook v. Washington Mill Co. (Wash.)	964
Cooper v. German Nat. Bank of Denver (Colo. App.).....	1041	Dooly v. Hanover Fire Ins. Co. of New York (Wash.).....	507
Cooper, Heintz v. (Cal.).....	360	Dorr, Bruening v. (Colo. Sup.).....	290
Coos Bay, R. & E. R. & Nav. Co. v. Coos County (Or.).....	1101	Douglass v. Heady (Kan. App.).....	134
Coos County, Coos Bay, R. & E. R. & Nav. Co. v. (Or.).....	1101	Dowdell, Carpy v. (Cal.).....	695
Coos County, Oregon Coal & Navigation Co. v. (Or.).....	851	Downer, McHenry v. (Cal.).....	779
Coos County, Southern Oregon Co. v. (Or.)	852	Downs, Rouse v. (Kan. App.).....	982
Cornell v. Conine-Eaton Lumber Co. (Colo. App.).....	912	Doyle v. Herod (Colo. App.).....	846
County Com'rs of Wyandotte County v. Kansas City, Ft. S. & M. R. Co. (Kan. App.).....	826	Drapeere, City of Eldorado v. (Kan. App.)	545
County Court of Arapahoe County, People v. (Colo. App.).....	469	Duck v. Antle (Okl.).....	1056
County of Ada v. Bullen Bridge Co. (Idaho).....	818	Duffy v. MacMahon (Or.).....	787
County of Los Angeles, Johnston v. (Cal.)	374	Dundon, Grady v. (Or.).....	915
County of Thruston, Mills v. (Wash.)....	759	Dusenbery, Kennedy & Shaw Lumber Co. v. (Cal.).....	1008
Courvoisier v. Raymond (Colo. Sup.).....	284	Dutcher v. Howard (Wash.).....	28
Cove, Glover v. (Wash.).....	737	Dwyer v. Parker (Cal.).....	372
Cox v. State (Kan. App.).....	191	Dwyer v. Salt Lake City Copper Manuf'g Co. (Utah).....	311
Crabtree, Brown v. (Kan. Sup.).....	525	Dyerville Manuf'g Co., Heller v. (Cal.)....	1016
Crane, Hughson v. (Cal.).....	120	Eaton, State v. (Kan. App.).....	317
Crawford v. Lamar (Colo. App.).....	665	Eberle v. Carmichael (N. M.).....	717
Crisman v. Johnson (Colo. Sup.).....	296	Edinger v. Thomas (Colo. App.).....	847
Crocker, Peres v. (Cal.).....	928	Edmiston, Hendricks v. (Wash.).....	29
Crooks, United States v. (Cal.).....	870	Edwards, Barnhart v. (Cal.).....	251
Crump, State v. (Idaho).....	814	Edwards, Sanford v. (Mont.).....	212
Culmer v. Cliff (Utah).....	85	Eide, Priest v. (Mont.).....	206
Cunningham v. Colonial & United States Mortg. Co. (Kan. Sup.).....	830	Eide, Priest v. (Mont.).....	958
Cunningham v. Los Angeles R. Co. (Cal.)..	452	Eisenbeis, Bash v. (Wash.).....	886
Cunningham, Gotthauer v. (Okl.).....	479	Ellsworth, State v. (Or.).....	199
Dale v. Atchison, T. & S. F. R. Co. (Kan. Sup.).....	521	Emerson v. Shannon (Colo. Sup.).....	302
Daniels, Newell v. (Kan. App.).....	565	Emery County v. Buresen (Utah).....	91
Davis, Ex parte (Cal.).....	258	Employers' Liability Assur. Corp. v. Anderson (Kan. App.).....	331
Davis v. Ada County (Idaho).....	93	Ensign v. Fisher (Utah).....	950
Davis v. Atlas Assur. Co. (Wash.).....	436	Erreca, First Nat. Bank of Santa Ana v. (Cal.).....	926
Davis v. Atlas Assur. Co. (Wash.).....	885	Evans v. Baker (Kan. App.).....	314
Davis v. Imperial Ins. Co. (Wash.).....	439	Everett v. Brigham (Utah).....	75
Davis v. Imperial Ins. Co. (Wash.).....	885	Fairbanks v. San Francisco & N. P. R. Co. (Cal.).....	450
Davis v. Morgan (Mont.).....	793	Farmers' Bank of Fresno, Marshall v. (Cal.)	52
Davis, Ogden v. (Cal.).....	772	Fassett v. Wise (Cal.).....	47, 1095
Day v. Larsen (Or.).....	101	Featherkile v. Montana Union R. Co. (Mont.).....	795
De Graffenried v. Savage (Colo. App.)....	902	Felker v. City of New Whatcom (Wash.)..	505
De Lin-River-Finley Co., Holman v. (Or.)..	708	Fenton v. Morgan (Wash.).....	214
De Norte County, Wright v. (Cal.).....	258	Fenton v. White (Okl.).....	472
De Martin v. Phelan (Cal.).....	356	Ferguson v. Sherman (Cal.).....	1023
Demers v. Board of Com'rs of Cloud County (Kan. App.).....	567	Fidelity & Casualty Co. v. City of Seattle (Wash.).....	963
Dennis v. State Bank of Seneca (Kan. Sup.).....	1100	Fife, Penn Mut. Life Ins. Co. v. (Wash.)..	27
Denver Chamber of Commerce and Board of Trade v. Green (Colo. App.).....	140	Filby v. Turner (Colo. App.).....	1037
		Finn, Powell v. (Kan. App.).....	573
		First Nat. Bank of Albuquerque, Western Homestead & Irrigation Co. v. (N. M.).....	721
		First Nat. Bank of Greeley, Sanborn v. (Colo. App.).....	660
		First Nat. Bank of Hays City, Hall v. (Kan. App.).....	566

	Page		Page
First Nat. Bank of Idaho, Ada County v. (Idaho) .....	1098	Gotthauer v. Cunningham (Okl.) .....	479
First Nat. Bank of Portland v. Linn County Nat. Bank (Or.) .....	614	Gould v. Fredenburg (Wash.) .....	736
First Nat. Bank of Port Townsend v. City of Port Townsend (Wash.) .....	1103	Grady v. Dundon (Or.) .....	915
First Nat. Bank of Russell, Kan., Lloyd v. (Kan. App.) .....	575	Graham, Morris v. (Wash.) .....	752
First Nat. Bank of Salina, Bartholomew v. (Kan. Sup.) .....	519	Graham Paper Co. v. Sanderson (Colo. App.) .....	904
First Nat. Bank of San Diego v. Nason (Cal.) .....	595	Grant v. Los Angeles & P. E. Co. (Cal.) ..	872
First Nat. Bank of San Diego v. Nason (Cal.) .....	1097	Grant v. Paddock (Or.) .....	712
First Nat. Bank of Santa Ana v. Erreca (Cal.) .....	926	Graves, Jacob v. (Kan. Sup.) .....	1100
First Nat. Bank of Seattle v. Hagan (Wash.) ..	223	Gray v. Lucas (Cal.) .....	354
Fischer v. Hanna (Colo. App.) .....	303	Gray v. Lucas (Cal.) .....	687
Fisher, Ensign v. (Utah) .....	850	Gray v. Mahon, three cases (Cal.) .....	1097
Fisher, Waterbury v. (Colo. Sup.) .....	277	Gray, Buchel v. (Cal.) .....	112
Foley v. California Horseshoe Co. (Cal.) ..	42	Gray, State v. (Mont.) .....	900
Foley, Small v. (Colo. App.) .....	64	Gray, Wilson v. (Idaho) .....	942
Forbes v. Board of Com'rs of Grand County (Colo. Sup.) .....	388	Gray's Harbor Commercial Co., Verdelli v. (Cal.) .....	364
Forker, Nippel v. (Colo. App.) .....	766	Gray's Harbor Commercial Co., Verdelli v. (Cal.) .....	778
Foster v. Smith (Cal.) .....	591	Grazide, Badoestain v. (Cal.) .....	118
Foster v. Superior Court of City and County of San Francisco (Cal.) .....	58	Great Northern R. Co., Henry v. (Wash.) ..	895
Fournier, People v. (Cal.) .....	1014	Great Northern R. Co., Illman v. (Wash.) ..	1103
Fowle v. House (Or.) .....	787	Great Western Manuf'g Co. v. Richardson (Kan. Sup.) .....	537
Fowler, Lyons v. (Wash.) .....	16	Green v. Hughes (Colo. App.) .....	401
Frace v. City of Tacoma (Wash.) .....	219	Green v. State Board of Canvassers (Idaho) ..	259
Fraser, Sun Fire Office of London, England, v. (Kan. App.) .....	327	Green, Atchison, T. & S. F. R. Co. v. (Kan. Sup.) .....	514
Frat v. Wilson (Or.) .....	706	Green, Denver Chamber of Commerce and Board of Trade v. (Colo. App.) .....	140
Frazier, Kleeb v. (Wash.) .....	11	Green, Schnitzler v. (Kan. App.) .....	990
Frazier, Aultman-Taylor Co. v. (Kan. App.) .....	156	Greer v. Thompson (Kan. App.) .....	547
Fredenburg, Gould v. (Wash.) .....	736	Gregory, Latham v. (Colo. App.) .....	975
Frese, Bank of British Columbia v. (Cal.) ..	783	Gribben, In re (Okl.) .....	1074
Frick v. City of Los Angeles (Cal.) .....	250	Griffith v. Seattle Nat. Bank Bldg. Co. (Wash.) .....	749
Fritsch v. Board of Com'rs (Utah) .....	1026	Groeziinger, Reid v. (Cal.) .....	374
Fritz, Kauter v. (Kan. App.) .....	187	Grote, City and County of San Francisco v. (Cal.) .....	938
Froelic v. Morse (Wash.) .....	22	Groth v. Kersting (Colo. Sup.) .....	393
Fugelli, Laurendeau v. (Wash.) .....	759	Guthrie Nat. Bank v. McElhinney (Okl.) ..	1062
Gaffney, Persse v. (Colo. Sup.) .....	293	Gwinnup, Ambrose v. (Wash.) .....	737
Gage, Southern Oregon Co. v. (Or.) .....	1101	Hagan, First Nat. Bank of Seattle v. (Wash.) .....	223
Gale v. Bradbury (Cal.) .....	778	Haines v. Caldwell (Okl.) .....	1101
Gardner v. Anthony Nat. Bank (Kan. Sup.) ..	516	Hale v. Alduffer (Kan. App.) .....	320
Gardner v. Samuels (Cal.) .....	935	Haley v. Latham (Colo. App.) .....	975
Gawith, State v. (Mont.) .....	207	Haley v. Parker (Cal.) .....	1097
Gelsthorpe, Dickerman v. (Mont.) .....	999	Haley, Kahaley v. (Wash.) .....	23
General Electric Co. v. Black (Mont.) .....	639	Hall v. First Nat. Bank of Hays City (Kan. App.) .....	566
George v. Hunter (Kan. App.) .....	559	Hallock, Scott v. (Wash.) .....	968
German-American Nat. Bank v. Thomson (Kan. App.) .....	169	Hambleton, Stephens v. (Cal.) .....	51
German-American Sav. Bank of Burlington, Iowa, v. City of Spokane (Wash.) .....	1103	Hamill, Burchett v. (Okl.) .....	1053
German Nat. Bank of Denver, Cooper v. (Colo. App.) .....	1041	Hankins v. Ottinger (Cal.) .....	254
German Savings & Loan Soc. v. Weber (Wash.) .....	224	Hanna, Fischer v. (Colo. App.) .....	303
Gerry v. Bismarck Bank of North Dakota (Mont.) .....	810	Hannon v. Holmes (Kan. App.) .....	162
Geuda Springs Town & Water Co. v. Lombard (Kan. Sup.) .....	532	Hanover Fire Ins. Co. of New York, Dooly v. (Wash.) .....	507
Gibson Consol. Mining & Milling Co. v. Sharp (Colo. Sup.) .....	266	Hardin v. Sin Claire (Cal.) .....	363
Gibson Consolidated Mining & Milling Co. v. Summers (Colo. Sup.) .....	1097	Hardy, Stanton v. (Utah) .....	1102
Gilbert Hunt Manuf'g Co. v. Wheeler (Wash.) .....	26	Harrel, Skilton v. (Kan. App.) .....	177
Gilmore, Moore v. (Wash.) .....	239	Harris v. Harris (Colo. App.) .....	841
Gin Pon, State v. (Wash.) .....	901	Harris, Wilson v. (Mont.) .....	1101
Giroux, State v. (Mont.) .....	798	Harrison v. Sutter St. R. Co. (Cal.) .....	1019
Glancy, Sloan v. (Mont.) .....	334	Harshbarger, Webber v. (Kan. App.) .....	166
Gleason v. Tacoma Hotel Co. (Wash.) .....	894	Hart, O'Neal v. (Cal.) .....	926
Gleim, Wood v. (Mont.) .....	5	Hartigan v. Hoffman (Wash.) .....	217
Glover v. Cove (Wash.) .....	737	Hartwitz, Schwed v. (Colo. Sup.) .....	295
Goetzinger v. Rosenfeld (Wash.) .....	882	Hauser, Jurgens v. (Mont.) .....	809
Goggin v. D. M. Osborne & Co. (Cal.) .....	248	Hays, Ex parte (Utah) .....	612
Golden Cross Mining & Milling Co. v. Spiers (Cal.) .....	108	Hays v. Hays (Idaho) .....	732
Goodfellow v. Le May (Wash.) .....	25	Hays, Bunce v. (Utah) .....	90
Goon Gan v. Richardson (Wash.) .....	762	Hays, Campbell v. (Utah) .....	90
		Hays, Hennefer v. (Utah) .....	90
		Hays, McLaughlin v. (Utah) .....	90
		Hayter, Wright v. (Kan. App.) .....	546
		Heady, Douglass v. (Kan. App.) .....	134
		Hearst, Turner v. (Cal.) .....	129
		Heaton v. Norton County State Bank (Kan. App.) .....	576
		Hefferlin v. Krieger (Mont.) .....	638
		Heffner v. Board of Com'rs of Snohomish County (Wash.) .....	430
		Heinrich v. Johnson (Colo. Sup.) .....	296

	Page		Page
Heints v. Cooper (Cal.).....	360	Johnson v. Puritan Mining & Milling Co. (Mont.) .....	337
Heinz v. American Nat. Bank of Denver (Colo. App.) .....	403	Johnson v. Tootle (Utah) .....	1033
Heller v. Dyerville Manuf'g Co. (Cal.).....	1016	Johnson, Crisman v. (Colo. Sup.) .....	296
Henderson, Owen v. (Wash.).....	215	Johnson, Heinrich v. (Colo. Sup.) .....	296
Henderson, State v. (Wash.).....	19	Johnson, Jones v. (Kan. Sup.) .....	523
Hendricks v. Edmiston (Wash.).....	29	Johnson, Malone v. (Cal.).....	579
Hennefer v. Hays (Utah).....	90	Johnston v. Brown (Cal.).....	686
Henry v. Great Northern R. Co. (Wash.)..	895	Johnston v. Brown (Cal.).....	1097
Hentzler v. Bradbury (Kan. App.).....	330	Johnston v. County of Los Angeles (Cal.)..	374
Herod, Doyle v. (Colo. App.).....	846	Johnston v. Meaghr (Utah).....	861
Herrick v. Niesz (Wash.).....	414	Johnston v. Sawyer (Cal.).....	1097
Hershfield, Morrill v. (Mont.).....	997	Johnston v. Shore (Cal.).....	1097
Heslet, Ames & Frost Co. v. (Mont.).....	805	John's Will, In re (Or.).....	341
Henschobor v. City of Port Townsend (Wash.) .....	1103	Jones v. Johnson (Kan. Sup.).....	523
Hibernia Savings & Loan Soc. v. Lewis (Cal.) .....	602	Jones v. New York Life Ins. Co. (Utah)...	74
Hice v. Orr (Wash.).....	424	Jones v. People (Colo. Sup.).....	275
Hickey, City of Denver v. (Colo. App.)....	908	Jones v. St. Paul, M. & M. R. Co. (Wash.)	226
Hider, Miller v. (Colo. App.).....	406	Jones v. Wolverton (Wash.).....	36
Hill, Sengfelder v. (Wash.).....	757	Jones, Ogle v. (Wash.).....	747
Hine, Atchison, T. & S. F. R. Co. v. (Kan. App.) .....	190	Jones, Sutton v. (Colo. App.).....	400
Hirsch, Alaska Imp. Co. v. (Cal.).....	124	Jones, Westervelt v. (Kan. App.).....	322
Hitchcock v. Nixon (Wash.).....	412	Jose v. Lynch (Wash.).....	105
Hoag, Byrne v. (Cal.).....	775	Joseph Holmes Fuel & Feed Co. v. Commer-	
Hodson v. Union Pac. R. Co. (Utah).....	859	cial Nat. Bank of Denver (Colo. Sup.)...	289
Hoeffner v. Agee (Colo. App.).....	973	Jurgens v. Hauser (Mont.).....	809
Hoffman, Hartigan v. (Wash.).....	217		
Holbrook v. Investment Co. (Or.).....	920	Kahaley v. Haley (Wash.).....	23
Holman v. De Lin-River-Finley Co. (Or.)..	708	Kahn v. Matthai (Cal.).....	698
Holman, Mitchell v. (Or.).....	616	Kane & Co. v. School Dist. No. 112 of Os-	
Holmes, Hannon v. (Kan. App.).....	162	borne County (Kan. App.).....	561
Holmes Fuel & Feed Co. v. Commercial Nat. Bank of Denver (Colo. Sup.).....	289	Kansas City, Ft. S. & M. R. Co. v. Mur-	
Holter v. Waasweiler (Mont.).....	806	ray (Kan. Sup.).....	835
Home Mut. Ins. Co., Waldron v. (Wash.)..	425	Kansas City, Ft. S. & M. R. Co., County	
Horlacher, State v. (Wash.).....	748	Com'rs of Wyandotte County v. (Kan. App.) .....	326
Horner v. Bramwell (Colo. Sup.).....	462	Kansas Town Co. v. City of Argentine (Kan. App.) .....	542
Horton v. Donohoe-Kelly Banking Co. (Wash.) .....	435	Kaufman, Bell v. (Colo. App.).....	1035
Hoskinson, Kerr v. (Kan. App.).....	172	Kauter v. Fritz (Kan. App.).....	187
Hotaling, Laver v. (Cal.).....	503	Kearney, Turner v. (Cal.).....	846
Hotchkiss, Scott v. (Cal.).....	45	Kelley v. Owens (Cal.).....	369
House, Fowle v. (Or.).....	787	Kelley, Meyer Bros. Drug Co. v. (Okla.)...	1065
Howard, Dutcher v. (Wash.).....	28	Kelly, Mueller v. (Colo. App.).....	72
Howland v. Oakland Consol. St. R. Co. (Cal.) .....	255	Kennedy & Shaw Lumber Co. v. Dusenbery (Cal.) .....	1008
Hughes, Green v. (Colo. App.).....	401	Keokuk Falls Imp. Co. v. Beale (Okla.)...	481
Hughson v. Crane (Cal.).....	120	Keokuk Falls Imp. Co. v. Kingsland & Douglas Manuf'g Co. (Okla.).....	484
Human, City of Denver v. (Colo. App.)....	911	Kern, Oregon Pottery Co. v. (Or.).....	917
Hume v. Robinson (Colo. Sup.).....	271	Kerr v. Hoskinson (Kan. App.).....	172
Hunter, George v. (Kan. App.).....	569	Kersting, Groth v. (Colo. Sup.).....	393
Hunter, Taggart v. (Kan. App.).....	813	Kind, Robinson v. (Nev.).....	1
Hunt Manuf'g Co. v. Wheeler (Wash.).....	28	Kind, Robinson v. (Nev.).....	977
Huston v. Becker (Wash.).....	10	King v. City of Argentine (Kan. App.)....	1100
Huston v. Nuss (Mont.).....	634	King, Allen v. (Colo. Sup.).....	266
Hutchinson, Sweedlund v. (Kan. App.)....	163	Kingsland & Douglas Manuf'g Co., Keokuk Falls Imp. Co. v. (Okla.).....	484
		Kleeb v. Frazer (Wash.).....	11
Idaho Gold-Min. Co. v. Union Mining & Milling Co. (Idaho).....	95	Kloss, People v. (Cal.).....	459
Illinois Trust & Savings Bank v. Pacific R. Co. (Cal.) .....	60	Knapp, Niagara Ins. Co. of New York v. (Kan. App.) .....	628
Illman v. Great Northern R. Co. (Wash.)..	1103	Knight v. Le Beau (Mont.).....	952
Imperial Ins. Co., Davis v. (Wash.).....	439	Knight, People v. (Cal.).....	925
Imperial Ins. Co., Davis v. (Wash.).....	885	Kohler's Estate, In re (Wash.).....	30
Inman, Poulsen & Co. v. Sprague (Or.)...	826	Kremer v. Walton (Wash.).....	238
Interstate Savings & Loan Ass'n v. Cairns (Wash.) .....	509	Krieger, Hefferlin v. (Mont.).....	638
Interstate Savings & Loan Ass'n, Ault v. (Wash.) .....	13	Kyes, Williams v. (Colo. App.).....	839
Investment Co., Holbrook v. (Or.).....	920		
Investment Co., Rigger v. (Or.).....	923	Lake View Land Co., Richards v. (Cal.)...	683
		Lamar, Crawford v. (Colo. App.).....	665
Jackson v. Puget Sound Lumber Co. (Cal.)	603	Landers, Pawtucket Mut. Fire Ins. Co. v. (Kan. App.).....	621
Jacob v. Graves (Kan. Sup.).....	1100	Lange v. Schoettler (Cal.).....	139
Jaffrey v. Wolf (Okla.).....	496	Lannen, McDonald v. (Mont.).....	648
James, Brooks v. (Wash.).....	751	Lantz, Nichols v. (Colo. App.).....	70
James-Spencer-Bateman Co., Wyeth Hardware & Manufacturing Co. v. (Utah)...	604	Larkin, Bradley v. (Kan. App.).....	315
Jenks, Brown v. (Kan. App.).....	324	Larkins, State v. (Idaho).....	945
J. I. Case Plow Works v. Montgomery (Cal.) .....	108	Larsen, Day v. (Or.).....	101
Johnson v. City of Port Townsend (Wash.)	1103	Lash, National Mortgage & Debuture Co. v. (Kan. App.).....	548
		Last Chance Mining & Milling Co. v. Ames (Colo. Sup.) .....	382
		Latham v. Gregory (Colo. App.).....	975
		Latham, Huley v. (Colo. App.).....	975

	Page		Page
Laubenheimer v. Bach, Cory & Co. (Mont.)	803	Marshall v. Luiz (Cal.)	597
Laurendeau v. Fugelli (Wash.)	759	Marshall, Bank of Glasco v. (Kan. App.)	561
Laver v. Hotaling (Cal.)	593	Martin, State v. (Or.)	196
Lawrence v. Atchison, T. & S. F. R. Co. (Kan. Sup.)	510	Matthal, Kahn v. (Cal.)	698
Leavitt v. Chambers (Wash.)	755	Matthews v. Bull (Cal.)	773
Le Beau, Knight v. (Mont.)	952	Maynard v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n (Utah)	1030
Lee v. Southern Pac. R. Co. (Cal.)	932	Meagher, Johnston v. (Utah)	861
Leet v. Board of Sup'rs of Kern County (Cal.)	595	Meeker v. Shuster (Cal.)	580
Le May, Goodfellow v. (Wash.)	25	Meeker, Utterback v. (Wash.)	428
Leppard, Union Pac. R. Co. v. (Kan. App.)	625	Melbye v. Melbye (Wash.)	16
Letson v. Roach (Kan. App.)	321	Merchants' Nat. Bank of Great Falls, Tuttle v. (Mont.)	203
Lewis v. Atherton (Okla.)	1070	Merchants' & Miners' Tunnel Co., Rustin v. (Colo. Sup.)	300
Lewis v. Colgan (Cal.)	357	Merriam v. Ridpath (Wash.)	416
Lewis, Hibernia Savings & Loan Soc. v. (Cal.)	602	Merrill v. Young (Kan. App.)	187
Lewisohn, Richards v. (Mont.)	645	Meskeu v. City of Highlands (Colo. App.)	846
Leyba, Territory of New Mexico v. (N. M.)	718	Meyer Bros. Drug Co. v. Kelley (Okla.)	1065
Lindsay & Co., Clark v. (Mont.)	102	Miles v. Woodward (Cal.)	360
Link, Woodland Lumber Co. v. (Wash.)	222	Miles, Robinson v. (Kan. App.)	553
Linker, City of Lincoln Center v. (Kan. App.)	174	Milford Sav. Bank, Branch v. (Kan. App.)	555
Linker, State v. (Kan. App.)	570	Milford Sav. Bank, Wolfert v. (Kan. App.)	175
Linn County Nat. Bank, First Nat. Bank of Portland v. (Or.)	614	Miller v. Hider (Colo. App.)	406
Littlejohn, Ramage v. (Wash.)	888	Mills v. County of Thurston (Wash.)	759
Livingston v. Widber (Cal.)	247	Mills, Chicago, R. I. & P. R. Co. v. (Kan. Sup.)	834
Lloyd v. First Nat. Bank of Russell, Kan. (Kan. App.)	575	Mills, Union Pac. R. Co. v. (Kan. App.)	623
Locomotive Engineers' Mut. Life & Accident Ins. Ass'n, Maynard v. (Utah)	1030	MISSOURI, K. & T. R. Co. v. Lycan (Kan. Sup.)	526
Lombard, Geuda Springs Town & Water Co. v. (Kan. Sup.)	532	Missouri Pac. R. Co. v. Bennett's Estate (Kan. App.)	183
Lombard Inv. Co. v. Burton (Kan. App.)	154	Missouri Pac. R. Co. v. Brown (Kan. App.)	553
Long v. Board of County Com'rs (Okla.)	1063	Mitchell v. Holman (Or.)	616
Long, Atchison, T. & S. F. R. Co. v. (Kan. App.)	993	Mitchell, Lewis & Staver Co. v. O'Neil (Wash.)	235
Long, Lowe v. (Idaho)	93	Mohney, Sayre v. (Or.)	197
Long, Mulkey v. (Idaho)	949	Mollie Gibson Consol. Mining & Milling Co. v. Sharp (Colo. Sup.)	286
Los Angeles R. Co., Cunningham v. (Cal.)	452	Mollie Gibson Consolidated Mining & Milling Co. v. Summers (Colo. Sup.)	1097
Los Angeles & P. R. Co., Grant v. (Cal.)	872	Montana Cent. R. Co., Sweeney v. (Mont.)	791
Lovi, Province v. (Okla.)	476	Montana Union R. Co., Beckstead v. (Mont.)	795
Lowe v. Long (Idaho)	93	Montana Union R. Co., Featherkile v. (Mont.)	795
Lowell, Rialto Mining & Milling Co. v. (Colo. Sup.)	263	Montana Union R. Co., Mulligan v. (Mont.)	795
Lucas, Gray v. (Cal.)	354	Montandon v. Wingert (Idaho)	814
Lucas, Gray v. (Cal.)	687	Montgomery, J. I. Case Plow Works v. (Cal.)	108
Luce v. Luce (Wash.)	21	Montgomery, Murray v. (Wash.)	1103
Luiz, Marshall v. (Cal.)	597	Montgomery, Tompkins v. (Cal.)	1006
Luman, Rock Springs Nat. Bank v. (Wyo.)	73	Moore v. Gilmore (Wash.)	239
Lycan, Missouri, K. & T. R. Co. v. (Kan. Sup.)	526	Moore, City of Oregon City v. (Or.)	851
Lynch, Jose v. (Wash.)	105	Moore, City of Walla Walla v. (Wash.)	753
Lynde v. Wakefield (Mont.)	5	Moore, State v. (Wash.)	757
Lyons v. Fowler (Wash.)	16	Morgan, Davis v. (Mont.)	793
		Morgan, Fenton v. (Wash.)	214
McCann v. Wetherill (Or.)	100	Morledge, Blevins v. (Okla.)	1068
McCann, State v. (Wash.)	443	Morrill v. Hershfield (Mont.)	997
McCarthy v. O'Marr (Mont.)	953	Morris v. Graham (Wash.)	752
McClure, O'Farrel v. (Kan. App.)	160	Morris, Stebbins v. (Mont.)	642
McCornick v. Sadler (Utah)	667	Morrison v. American Developing & Mining Co. (Idaho)	94
McCowen, Burke v. (Cal.)	367	Morrison v. Bartholomew (Colo. App.)	410
McDonald v. Lannen (Mont.)	648	Morse v. Callantine (Mont.)	635
McElhinney, Guthrie Nat. Bank v. (Okla.)	1062	Morse, Froelic v. (Wash.)	22
McEwan v. City of Spokane (Wash.)	433	Morse, Van Lehn v. (Wash.)	435
McFadden v. Dietz (Cal.)	777	Mount v. Seattle, L. S. & E. R. Co. (Wash.)	233
McGinnis v. Wood (Okla.)	492	Mueller v. Kelly (Colo. App.)	72
McHenry v. Downer (Cal.)	779	Muhlner, People v. (Cal.)	128
Mack, State v. (Nev.)	763	Mulkey v. Long (Idaho)	949
Mackey, Thisher v. (Kan. App.)	175	Mullen v. City of Tacoma (Wash.)	215
McLaughlin v. Hays (Utah)	90	Mulligan v. Montana Union R. Co. (Mont.)	795
McLaughlin v. Mulloy (Utah)	1031	Mulloy, McLaughlin v. (Utah)	1031
MacMahon, Duffy v. (Or.)	787	Mulville v. Pacific Mut. Life Ins. Co. of California (Mont.)	650
McMenomy v. White (Cal.)	109	Murray v. Montgomery (Wash.)	1103
McMicken, Prefontaine v. (Wash.)	231	Murray v. Murray (Cal.)	37
McRae, Salomon v. (Colo. App.)	409	Murray, Kansas City, Ft. S. & M. R. Co. v. (Kan. Sup.)	835
Maddox v. Teague (Mont.)	209		
Magnuson, United States Nat. Bank of Atchison, Kan. v. (Kan. Sup.)	518	Nason, First Nat. Bank of San Diego v. (Cal.)	595
Maharry v. Maharry (Okla.)	1051		
Mahon, Gray v., three cases (Cal.)	1097		
Malone v. Johnson (Cal.)	579		
Maple, State v. (Wash.)	966		
Marshall v. Farmers' Bank of Fresno (Cal.)	52		



	Page		Page
Nason, First Nat. Bank of San Diego v. (Cal.)	1097	People v. Tucker (Cal.)	111
National Cash-Register Co. v. Brown (Mont.)	995	People v. White (Cal.)	771
National Mortgage & Debenture Co. v. Lash (Kan. App.)	548	People, Jones v. (Colo. Sup.)	275
Nelson v. Ware (Kan. Sup.)	540	People, Newman v. (Colo. Sup.)	278
Newell v. Daniels (Kan. App.)	565	People, Ritchey v. (Colo. Sup.)	272
New Hampshire Banking Co. v. Byrnes (Kan. App.)	543	People, Ritchey v. (Colo. Sup.)	384
New Hampshire Banking Co. v. Waller (Kan. App.)	543	People, Roland v. (Colo. Sup.)	269
Newman v. Bullock (Colo. Sup.)	379	Peres v. Crocker (Cal.)	928
Newman v. People (Colo. Sup.)	278	Perine Contracting & Paving Co. v. City of Pasadena (Cal.)	777
Newman, State v. (Kan. Sup.)	881	Perkins, Bivert v. (Okla.)	475
New York Life Ins. Co., Jones v. (Utah)	74	Persse v. Gaffney (Colo. Sup.)	293
Niagara Ins. Co. of New York v. Knapp (Kan. App.)	628	Peters v. Bowman (Cal.)	113
Nichols v. Lantz (Colo. App.)	70	Peters v. Bowman (Cal.)	598
Nickum v. Burckhardt (Or.)	788	Petrovitzky v. Brigham (Utah)	666
Niesz, Herrick v. (Wash.)	414	Phelan, De Martin v. (Cal.)	356
Nippel v. Forker (Colo. App.)	766	Phinney v. Campbell (Wash.)	502
Nixon, Hitchcock v. (Wash.)	412	Phoenix Ins. Co. of Brooklyn v. Arnoldy (Kan. App.)	178
Norton County State Bank, Heaton v. (Kan. App.)	576	Pickard, Silva v. (Utah)	144
Norwood, Commercial Union Assur. Co. v. (Kan. Sup.)	529	Pierce v. Birkholm (Cal.)	681
N. P. Perine Contracting & Paving Co. v. City of Pasadena (Cal.)	777	Pierce v. Southern Pac. Co. (Cal.)	874
Nuss, Huston v. (Mont.)	634	Pilgrim, Denver & R. G. R. Co. v. (Colo. App.)	657
Nye, Branham v. (Colo. App.)	402	Pleasant Valley Coal Co., Butte v. (Utah)	77
Nye, Denver & R. G. R. Co. v. (Colo. App.)	654	Plummer v. Struby-Estabrooke Mercantile Co. (Colo. Sup.)	294
Oakland Consolidated St. R. Co., Howland v. (Cal.)	255	Potvin v. Wickersham (Wash.)	25
O'Brien, State v. (Mont.)	103	Powell v. Finn (Kan. App.)	573
O'Farrel v. McClure (Kan. App.)	160	Powell, Smith v. (Kan. App.)	992
Ogden v. Davis (Cal.)	772	Prefontaine v. McMicken (Wash.)	231
Ogle v. Jones (Wash.)	747	Priest v. Eide (Mont.)	206
O'Marr, Chicago Title & Trust Co. v. (Mont.)	4	Priest v. Eide (Mont.)	958
O'Marr, McCarthy v. (Mont.)	953	Priest, Denver & R. G. R. Co. v. (Colo. App.)	653
O'Neal v. Hart (Cal.)	926	Providence-Washington Ins. Co., Cloud County Bank v. (Kan. App.)	1100
O'Neil, Mitchell, Lewis & Staver Co. v. (Wash.)	235	Provident Loan Trust Co. v. Walcott (Kan. App.)	8
Oregon Coal & Navigation Co. v. Coos County (Or.)	851	Province v. Lovi (Okla.)	476
Oregon Mortg. Co. v. Carstens (Wash.)	421	Puget Sound Lumber Co., Jackson v. (Cal.)	603
Oregon Pottery Co. v. Kern (Or.)	917	Puritan Mining & Milling Co., Johnson v. (Mont.)	337
Orr, Hice v. (Wash.)	424	Radebaugh v. Wolf (Okla.)	1101
Orr Extension Ditch Co., Shields v. (Nev.)	194	Raine, City of Highlands v. (Colo. Sup.)	283
Osborne & Co., Goggin v. (Cal.)	248	Ramage v. Littlejohn (Wash.)	888
Ottinger, Hankins v. (Cal.)	254	Randolph v. Campbell (Kan. App.)	560
Owen v. Henderson (Wash.)	215	Rankin v. Underwood (Colo. App.)	972
Owens, Kelley v. (Cal.)	369	Ravenscraft v. Board of Com'rs of Blaine County (Idaho)	942
Pacific Mut. Life Ins. Co. of California, Mulville v. (Mont.)	650	Raymond, Courvoisier v. (Colo. Sup.)	284
Pacific R. Co., Illinois Trust & Savings Bank v. (Cal.)	60	Raymond, Supreme Lodge of Order of Select Friends v. (Kan. Sup.)	533
Paddock, Grant v. (Or.)	712	Reamer v. Columbia (Kan. App.)	186
Painter's Estate, In re (Cal.)	700	Reardon v. Patterson (Mont.)	956
Palmer v. Burnham (Cal.)	599	Reid v. Groezinger (Cal.)	374
Palmer v. City of Helena (Mont.)	209	Reinhart v. Company D, First Brigade, Nevada National Guard (Nev.)	979
Park, Busenbark v. (Kan. App.)	324	Reynolds, State v. (Kan. App.)	573
Parker, Dwyer v. (Cal.)	372	Rhodes v. Auld (Kan. App.)	170
Parker, Haley v. (Cal.)	1097	Rialto Mining & Milling Co. v. Lowell (Colo. Sup.)	263
Patterson v. Board of Pilot Com'rs (Or.)	786	Rice v. Bank of Camas Prairie (Idaho)	856
Patterson, Reardon v. (Mont.)	956	Richards v. Lake View Land Co. (Cal.)	683
Pawtucket Mut. Fire Ins. Co. v. Landers (Kan. App.)	621	Richards v. Lewisohn (Mont.)	645
Peasley, Brinker v. (Wash.)	30	Richards, Ritchie v. (Utah)	670
Penn Mut. Life Ins. Co. v. Fife (Wash.)	27	Richards, Rogers v. (N. M.)	719
Pennsylvania Mortg. Inv. Co. v. Simms (Wash.)	441	Richardson v. Woodlawn Town Co. (Kan. App.)	556
People v. Barney (Cal.)	41	Richardson v. Woodlawn Town Co. (Kan. App.)	1101
People v. Bosquet (Cal.)	879	Richardson, Goon Gan v. (Wash.)	702
People v. Buckley (Cal.)	1009	Richardson, Great Western Manufg Co. v. (Kan. Sup.)	537
People v. Budd (Cal.)	594	Ricks Water Co., Van Horn v. (Cal.)	361
People v. Burtleson (Utah)	87	Ridpath, Merriam v. (Wash.)	416
People v. County Court of Arapahoe County (Colo. App.)	469	Riggen v. Investment Co. (Or.)	923
People v. Fournier (Cal.)	1014	Ritchey v. People (Colo. Sup.)	272
People v. Kloss (Cal.)	459	Ritchey v. People (Colo. Sup.)	384
People v. Knight (Cal.)	925	Ritchie v. Richards (Utah)	670
People v. Muhliner (Cal.)	128	Roach, Letson v. (Kan. App.)	321
		Robinson v. Kind (Nev.)	1
		Robinson v. Kind (Nev.)	977
		Robinson v. Miles (Kan. App.)	553
		Robinson, Hume v. (Colo. Sup.)	271

	Page		Page
Rockford Ins. Co. v. Rogers (Colo. App.)	848	Shore, Johnston v. (Cal.)	1097
Rockford Ins. Co. v. Winfield (Kan. Sup.)	511	Showalter, Southern Kansas R. Co. v. (Kan. Sup.)	831
Rock Springs Nat. Bank v. Luman (Wyo.)	73	Shuster, Meeker v. (Cal.)	580
Rogers v. Richards (N. M.)	719	Sievers v. City and County of San Francisco (Cal.)	687
Rogers, Rockford Ins. Co. v. (Colo. App.)	848	Silva v. Pickard (Utah)	144
Roland v. People (Colo. Sup.)	269	Sime v. Spencer (Or.)	919
Rosenfeld, Goetzinger v. (Wash.)	882	Simms, Pennsylvania Mortg. Inv. Co. v. (Wash.)	441
Ross v. Campbell (Colo. App.)	465	Sin Claire, Hardin v. (Cal.)	363
Rouse v. Downs (Kan. App.)	982	Singer Manuf'g Co. v. Converse (Colo. Sup.)	264
Rouse, Brown v. (Cal.)	601	Sipes, Denver & R. G. R. Co. v. (Colo. Sup.)	237
Royal v. Royal (Or.)	828	Sisson Mill & Lumber Co., Shade v. (Cal.)	135
Royce v. Territory (Okl.)	1083	Skilton v. Harrel (Kan. App.)	177
Ruff, Snohomish County v. (Wash.)	35, 441	Sklower v. Abbott (Mont.)	901
Rustin v. Merchants' & Miners' Tunnel Co. (Colo. Sup.)	300	Skym v. Weake Consolidated Co. (Cal.)	116
R. Wallace & Sons Manuf'g Co. v. Sharick (Wash.)	20	Sloan v. Glancy (Mont.)	834
Ryan v. Ryan (Or.)	101	Small v. Foley (Colo. App.)	64
Sadler, McCormick v. (Utah)	667	Smith v. Black (Colo. App.)	394
Sadler, State v. (Nev.)	450	Smith v. City of Spokane (Wash.)	888
St. Clair v. Cash Gold Mining & Milling Co. (Colo. App.)	406	Smith v. Powell (Kan. App.)	992
St. Louis Commission Co. v. Calloway (Okl.)	1088	Smith v. San Francisco & N. P. R. Co. (Cal.)	582
St. Paul, M. & M. R. Co., Jones v. (Wash.)	226	Smith, Foster v. (Cal.)	591
Salomon v. McRae (Colo. App.)	409	Smith, State v. (Kan. Sup.)	535
Salt Lake City Copper Manuf'g Co., Dwyer v. (Utah)	311	Smith, State v. (Kan. Sup.)	541
Samuels, Gardner v. (Cal.)	935	Smithson Land Co. v. Brautigam (Wash.)	434
Sanborn v. First Nat. Bank of Greeley (Colo. App.)	660	Snohomish County v. Ruff (Wash.)	35, 441
Sanderson v. Billings Water-Power Co. (Mont.)	998	Southern Kansas R. Co. v. Showalter (Kan. Sup.)	831
Sanderson, Graham Paper Co. v. (Colo. App.)	904	Southern Oregon Co. v. Coos County (Or.)	852
Sanford v. Edwards (Mont.)	212	Southern Oregon Co. v. Gage (Or.)	1101
San Francisco Tool Co., Bancroft v. (Cal.)	684	Southern Pac. Co., Pierce v. (Cal.)	874
San Francisco & N. P. R. Co., Fairbanks v. (Cal.)	450	Southern Pac. R. Co., Lee v. (Cal.)	932
San Francisco & N. P. R. Co., Smith v. (Cal.)	582	South Ogden Land, Building & Improvement Co., Stevens v. (Utah)	81
Savage, De Graffenried v. (Colo. App.)	902	Spaulding v. Wesson (Cal.)	249
Sawyer v. Armstrong (Colo. Sup.)	361	Spencer, Sime v. (Or.)	919
Sawyer, Johnston v. (Cal.)	1097	Spencer, United States v. (N. M.)	715
Sayre v. Mohny (Or.)	197	Spiers, Golden Cross Mining & Milling Co. v. (Cal.)	108
Schart v. Schart (Cal.)	927	Sprague, Inman, Poulsen & Co. v. (Or.)	826
Schnitzler v. Green (Kan. App.)	990	Sprenger v. Tacoma Traction Co. (Wash.)	17
Schoettler, Lange v. (Cal.)	139	Stanton v. Hardy (Utah)	1102
School Dist. No. 17 of Garfield County v. Zediker (Okl.)	482	Starr & Co. v. Chilberg (Wash.)	10
School Dist. No. 112 of Osborne County, Thos. Kane & Co. v. (Kan. App.)	561	State v. Bates (Utah)	78
School Dist. No. 7 of Clallam County, Taylor v. (Wash.)	758	State v. Boggs (Wash.)	417
Schwed v. Hartwitz (Colo. Sup.)	295	State v. Buhmann (Wash.)	961
Schweizer v. Territory (Okl.)	1094	State v. Buster (Nev.)	194
Scott v. Beard (Kan. App.)	986	State v. City of Ballard (Wash.)	970
Scott v. Hallock (Wash.)	968	State v. City of Emporia (Kan. Sup.)	833
Scott v. Hotchkiss (Cal.)	45	State v. Conrow (Mont.)	640
Scott, Arkansas City Lumber Co. v. (Kan. App.)	545	State v. Considine (Wash.)	755
Scott, Conner v. (Wash.)	761	State v. Crump (Idaho)	814
Seattle City R. Co., Brown v. (Wash.)	890	State v. Doherty (Wash.)	958
Seattle, L. S. & E. R. Co., Mouat v. (Wash.)	233	State v. Eaton (Kan. App.)	317
Seattle Nat. Bank Bldg. Co., Griffith v. (Wash.)	749	State v. Ellsworth (Or.)	199
Second Judicial District Court of Nevada, State v. (Nev.)	100	State v. Gawith (Mont.)	207
Sengfelder v. Hill (Wash.)	757	State v. Gin Pon (Wash.)	961
Senior v. Anderson (Cal.)	454	State v. Giroux (Mont.)	798
Seube, Ex parte (Cal.)	596	State v. Gray (Mont.)	900
Shade v. Sisson Mill & Lumber Co. (Cal.)	135	State v. Henderson (Wash.)	19
Shain, Whelan v. (Cal.)	57	State v. Horlacher (Wash.)	748
Shannon, Emerson v. (Colo. Sup.)	302	State v. Larkins (Idaho)	945
Sharick, R. Wallace & Sons Manuf'g Co. v. (Wash.)	20	State v. Linker (Kan. App.)	570
Sharp, Mollie Gibson Consol. Mining & Milling Co. v. (Colo. Sup.)	266	State v. McCann (Wash.)	443
Sherman v. Board of County Com'rs (Colo. App.)	973	State v. Mack (Nev.)	763
Sherman, Ferguson v. (Cal.)	1023	State v. Maple (Wash.)	966
Shields v. Orr Extension Ditch Co. (Nev.)	194	State v. Martin (Or.)	196
Shockey v. Akey (Kan. App.)	562	State v. Moore (Wash.)	757
Shoemaker v. Stimson (Wash.)	218	State v. Newman (Kan. Sup.)	881
		State v. O'Brien (Mont.)	103
		State v. Reynolds (Kan. App.)	573
		State v. Sadler (Nev.)	450
		State v. Second Judicial District Court of Nevada (Nev.)	100
		State v. Smith (Kan. Sup.)	535
		State v. Smith (Kan. Sup.)	541
		State v. Straub (Wash.)	227
		State v. Superior Court of Lewis County (Wash.)	965
		State v. Superior Court of Snohomish County (Wash.)	754
		State v. Superior Court of Spokane County (Wash.)	31

	Page		Page
State v. Superior Court of Spokane County (Wash.)	1103	Territory, Wright v. (Okl.)	1069
State v. Walters (Kan. Sup.)	839	Territory of New Mexico, In re (N. M.)	725
State v. Wickersham (Wash.)	421	Territory of New Mexico v. Leyba (N. M.)	718
State v. Wrote (Mont.)	898	Terry v. Wright (Colo. App.)	905
State v. Wroth (Wash.)	106	Thisler v. Mackey (Kan. App.)	175
State v. Yates (Mont.)	1004	Thomas, Ayres v. (Cal.)	1013
State v. Zettler (Wash.)	35	Thomas, Edinger v. (Colo. App.)	847
State, Cox v. (Kan. App.)	191	Thos. Kane & Co. v. School Dist. No. 12 of Osborne County (Kan. App.)	561
State, Winters v. (Idaho)	855	Thompson v. Wood (Cal.)	50
State Bank of Seneca, Dennis v. (Kan. Sup.)	1100	Thompson, Greer v. (Kan. App.)	547
State Board of Canvassers, Green v. (Idaho)	259	Thomson, German-American Nat. Bank v. (Kan. App.)	169
Stebbins v. Morris (Mont.)	642	Tillaux v. Tillaux (Cal.)	691
Steele, Carver v. (Cal.)	1007	Titlow v. Cascade Oatmeal Co. (Wash.)	19
Stephens v. American Fire Ins. Co. (Utah)	83	Tompkins v. Montgomery (Cal.)	1006
Stephens v. Hambleton (Cal.)	51	Tootle, Johnson v. (Utah)	1033
Stephens, Stevens v. (Utah)	76	Town of Colorado City v. Townsend (Colo. App.)	603
Stevens v. South Ogden Land, Building & Improvement Co. (Utah)	81	Townsend, Town of Colorado City v. (Colo. App.)	603
Stevens v. Stephens (Utah)	76	Trigg, City of Garden City v. (Kan. Sup.)	524
Stevens, City of Olympia v. (Wash.)	11	Tucker, People v. (Cal.)	111
Stewart, Wiss v. (Wash.)	736	Turner v. Hearst (Cal.)	129
Stimson, Shoemaker v. (Wash.)	218	Turner v. Kearney (Cal.)	866
Stinson, Wright v. (Wash.)	761	Turner, Filby v. (Colo. App.)	1037
Stockwell, City of Burlington v. (Kan. App.)	988	Tuttle v. Merchants' Nat. Bank of Great Falls (Mont.)	203
Storke v. Storke (Cal.)	869	Underwood, Rankin v. (Colo. App.)	972
Stossel v. Van de Vanter (Wash.)	221	Union Mining & Milling Co., Idaho Gold-Min. Co. v. (Idaho)	95
Straub, State v. (Wash.)	227	Union Pac. R. Co. v. Baker (Kan. App.)	563
Struby-Estabrooke Mercantile Co., Plummer v. (Colo. Sup.)	294	Union Pac. R. Co. v. Leppard (Kan. App.)	625
Stuller v. Baker County (Or.)	705	Union Pac. R. Co. v. Mills (Kan. App.)	623
Sullivan v. Board of Com'rs of Cloud County (Kan. App.)	165	Union Pac. R. Co., Hodson v. (Utah)	859
Suman v. Archibald (Cal.)	865	United States v. Crooks (Cal.)	870
Summers, Mollie Gibson Consolidated Mining & Milling Co. v. (Colo. Sup.)	1097	United States v. Spencer (N. M.)	715
Sun Fire Office of London, England, v. Fraser (Kan. App.)	327	United States Nat. Bank of Atchison, Kan., v. Magnuson (Kan. Sup.)	518
Superior Court of City and County of San Francisco, Foster v. (Cal.)	58	United States Trust Co. of New York v. Atlantic & P. R. Co. (N. M.)	725
Superior Court of Fresno County, De Witt v. (Cal.)	871	Utterback v. Meeker (Wash.)	428
Superior Court of Lassen County, Williams v. (Cal.)	783	Van de Vanter, Stossel v. (Wash.)	221
Superior Court of Lewis County, State v. (Wash.)	965	Van Horn v. Ricks Water Co. (Cal.)	361
Superior Court of Placer County, Barrett v. (Cal.)	592	Van Lehn v. Morse (Wash.)	435
Superior Court of Snohomish County, State v. (Wash.)	754	Van Slyke v. Broadway Ins. Co. (Cal.)	689
Superior Court of Spokane County, State v. (Wash.)	31	Van Slyke v. Broadway Ins. Co. (Cal.)	928
Superior Court of Spokane County, State v. (Wash.)	1103	Verdelli v. Gray's Harbor Commercial Co. (Cal.)	364
Supreme Council, American Legion of Honor, Carlson v. (Cal.)	375	Verdelli v. Gray's Harbor Commercial Co. (Cal.)	778
Supreme Lodge of Order of Select Friends v. Carey (Kan. Sup.)	621	Vinton, Ex parte (Cal.)	1019
Supreme Lodge of Order of Select Friends v. Raymond (Kan. Sup.)	533	Violet, Calhoun v. (Okl.)	479
Sutter St. R. Co., Harrison v. (Cal.)	1019	Vivian v. Allen (Colo. App.)	844
Sutton v. Jones (Colo. App.)	400	Wakefield, Lynde v. (Mont.)	5
Sweedlund v. Hutchinson (Kan. App.)	163	Walcott, Provident Loan Trust Co. v. (Kan. App.)	8
Sweeney v. Montana Cent. R. Co. (Mont.)	791	Waldron v. Home Mut. Ins. Co. (Wash.)	425
Sykes v. Arne (Cal.)	868	Walker v. Cambren (Kan. App.)	980
Symms Grocer Co. v. Burnham (Okl.)	1059	Walker v. Coates (Kan. App.)	158
Symons v. City and County of San Francisco (Cal.)	453	Wallace & Sons Manuf'g Co. v. Sharick (Wash.)	20
Taake v. City of Seattle (Wash.)	220	Waller, New Hampshire Banking Co. v. (Kan. App.)	543
Tacoma Hotel Co., Gleason v. (Wash.)	894	Walley v. Deseret Nat. Bank (Utah)	147
Tacoma Light & Water Co., City of Tacoma v. (Wash.)	738	Walters, State v. (Kan. Sup.)	839
Tacoma Traction Co., Bailey v. (Wash.)	241	Walton, Kremer v. (Wash.)	238
Tacoma Traction Co., Sprenger v. (Wash.)	17	Ware, Nelson v. (Kan. Sup.)	540
Taggert v. Hunter (Kan. App.)	313	Warren v. Chandos (Cal.)	132
Taylor v. Blyth (Colo. App.)	662	Warren v. Chandos (Cal.)	1097
Taylor v. School Dist. No. 7 of Clallam County (Wash.)	758	Warren v. Connor (Cal.)	48
Taylor, Barger v. (Or.)	618	Washington Mill Co., Don Yook v. (Wash.)	964
Teague, Maddox v. (Mont.)	209	Wassweiler, Holter v. (Mont.)	806
Territory, Coleman v. (Okl.)	1079	Waterbury v. Fisher (Colo. Sup.)	277
Territory, Royce v. (Okl.)	1083	Webber v. Harshbarger (Kan. App.)	166
Territory, Schweizer v. (Okl.)	1094	Weber, German Savings & Loan Soc. v. (Wash.)	224
		Weise, Chisholm v. (Okl.)	1086
		Weske Consolidated Co., Skym v. (Cal.)	116
		Wesson, Spaulding v. (Cal.)	249
		Western Homestead & Irrigation Co. v. First Nat. Bank of Albuquerque (N. M.)	721
		Westervelt v. Jones (Kan. App.)	322

	Page		Page
Westover v. Dobson (Kan. Sup.).....	620	Wolfert v. Milford Sav. Bank (Kan. App.)	175
Wetherill, McCann v. (Or.).....	100	Wolverton, Jones v. (Wash.).....	36
Wheeler, Gilbert Hunt Manuf'g Co. v. (Wash.).....	28	Wood v. Gleim (Mont.).....	5
Whelan v. Shain (Cal.).....	57	Wood, McGinnis v. (Okl.).....	492
White, Fenton v. (Okl.).....	472	Wood, Thompson v. (Cal.).....	50
White, McMenomy v. (Cal.).....	109	Woodland Lumber Co. v. Link (Wash.)...	222
White, People v. (Cal.).....	771	Woodlawn Town Co., Richardson v. (Kan. App.) .....	556
Wickersham, Potvin v. (Wash.).....	25	Woodlawn Town Co., Richardson v. (Kan. App.) .....	1101
Wickersham, State v. (Wash.).....	421	Woodward, Miles v. (Cal.).....	360
Widber, Livingston v. (Cal.).....	247	Wright v. Del Norte County (Cal.).....	258
Wigmore v. Buell (Cal.).....	927	Wright v. Hayter (Kan. App.).....	546
Wilbourne v. Baldwin (Okl.).....	1045	Wright v. Stinson (Wash.).....	761
Williams v. Bergin (Cal.).....	877	Wright v. Territory (Okl.).....	1069
Williams v. Borgwardt (Cal.).....	594	Wright, Terry v. (Colo. App.).....	905
Williams v. Kyes (Colo. App.).....	839	Wrote, State v. (Mont.).....	898
Williams v. Superior Court of Lassen County (Cal.) .....	783	Wroth, State v. (Wash.).....	106
Wilson v. Gray (Idaho).....	942	Wyeth Hardware & Manufacturing Co. v. James-Spencer-Bateman Co. (Utah).....	604
Wilson v. Harris (Mont.).....	1101		
Wilson, Fratt v. (Or.).....	706	Yates, State v. (Mont.).....	1004
Winfield, Rockford Ins. Co. v. (Kan. Sup.)	511	Young, Merrill v. (Kan. App.).....	187
Wingert, Montandon v. (Idaho).....	814		
Winters v. State (Idaho).....	855	Zediker, School Dist. No. 17 Garfield County v. (Okl.).....	482
Wise, Fassett v. (Cal.).....	47, 1095	Zettler, State v. (Wash.).....	35
Wiss v. Stewart (Wash.).....	736		
Wolf, Jaffrey v. (Okl.).....	496		
Wolf, Radebaugh v. (Okl.).....	1101		

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**ROBINSON v. KIND et al.** (No. 1,472.)<sup>1</sup>  
(Supreme Court of Nevada. Dec. 24, 1896.)

**TRUST DEED—ACTION TO SET ASIDE—DEFECT OF PARTIES—MANDATORY STATUTE.**

1. Where the owners of property convey it to a trustee upon specified terms and conditions, and one of them brings an action against the trustee to have the trust deed annulled and the trustee enjoined from acting or claiming thereunder, the other owners are necessary parties.

2. Gen. St. § 8030, which provides, among other things, that "when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in," is mandatory, and hence a defect of parties is not waived, in such case, by defendant pleading to the merits.

Appeal from district court, Eureka county; A. L. Fitzgerald, Judge.

Action by Irene M. Robinson against Henry Kind and Eugene Howell to set aside a trust deed and for an injunction. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Thomas Wren, for appellants. Robert M. Clarke and Peter Breen, for respondent.

**BONNIFIELD, J.** This action was brought to have a certain instrument and deed of trust annulled and canceled, and the defendants and each of them perpetually enjoined from asserting or acting or claiming under the same, from leasing, operating, incumbering, or in any manner disposing of, using, or selling the property mentioned in said instrument, or any part thereof. The deed or instrument was executed on August 2, 1892, by James A. Church and E. D. Church and Irene M. Robinson, parties of the first part, to Henry Kind, party of the second part, and conveyed to him, and to his heirs and assigns, certain real estate and personal property, therein described, and by its terms, "in trust for the said parties of the first part upon the terms and conditions hereinafter specified, . . . to have and to hold all and singular the said hereinbefore granted and described premises unto the said Henry Kind, his heirs and assigns, upon the trust, nevertheless, and to and for the uses and purposes hereinafter limited, described, and declared, that is to

say: Upon the sale of any or all of said property, the proceeds thereof shall be applied, first, to the payment of the mining expenses incurred upon said property, the wages of a watchman, and taxes, and upon the claim of Eugene Howell against said parties of the first part for services and salary up to May 31, 1892, as the same appears charged upon the books of Robinson, Church & Co., but the amount not to exceed \$4,100. Said Eugene Howell to have charge of the property as manager as heretofore, and to work, sell, or lease all or any of said property, as he may deem best, and for the best interests of the respective parties, but to receive no compensation for his services. Said Eugene Howell to keep a correct set of books of all receipts from said property and all expenditures thereon, and to furnish said party of the second part vouchers for all moneys expended upon said property. Whenever said Eugene Howell shall be paid in full, and all other payments shall be made as hereinbefore described and provided, said party of the second part shall reconvey unto said parties of the first part all or any of said properties that remain unsold, one-half to said Irene M. Robinson and one-half to said James A. and E. D. Church; said Irene M. Robinson hereby releasing any and all claims she may have against said James A. and E. D. Church in consideration of the conveyance of one-half of said property to her as aforesaid."

**Complaint.** The plaintiff by her complaint alleges, in substance and in brief, that at the time she executed said deed and instrument she was the owner of the property therein described; that she was then sick in both body and mind, and was non compos mentis, and had not the capacity to manage said property, or to transact any business concerning the same, and that, particularly, she was mentally incapacitated to make and execute or comprehend the meaning of said instrument; that said defendants, and each of them, well knowing the premises, and fully advised concerning the plaintiff's said physical and mental ailments, and her inability to take care of said property, and well knowing that plaintiff did not understand or comprehend, and had not mental capacity to legally

<sup>1</sup> For opinion on rehearing, see 47 Pac. 977.  
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execute, the deed of trust and power annexed thereto, did, on the 2d day of August, 1892, knowingly, falsely, and fraudulently, and without consideration, and with intent, etc., cause and procure the plaintiff to make, execute, and deliver the said conveyance of her aforesaid real and personal property, mentioned and described in said deed of trust, etc., and caused and procured the plaintiff, by the deed and instrument aforesaid, falsely, fraudulently, and knowingly, etc., to appoint said defendant Eugene Howell to have charge of said property, as manager, to work, sell, and lease all or any part thereof as he might deem best, and apply the proceeds, etc., and when said Howell should be paid, and all other payments provided for in said instrument should be made, to convey the said property, or the portion thereof remaining, one-half to the plaintiff, Irene M. Robinson, and one-half to James A. Church and E. D. Church. It is also alleged in the complaint that the defendants are proceeding to execute the terms and provisions of said false and fraudulent instrument; that they have taken possession, and now have possession and control of the said property under said instrument, and have advertised for sale at public auction said property, etc. The said deed of trust or instrument is annexed to the complaint and made part thereof.

**Demurrer and Answer.** The defendants demurred to the complaint, one of the grounds of which was that it appears upon the face of said complaint that there is a defect of parties defendant, in that James A. Church and E. D. Church are necessary parties defendant. The demurrer was overruled, and the defendants answered, denying each material allegation of the complaint specifically, and denied that the plaintiff was the sole owner of the property described, and alleged that she was the joint owner of said property with James A. Church and E. D. Church, and that at the time the trust deed was executed by the plaintiff she well knew that the said Churches were the joint owners of said property with said plaintiff. And they alleged "that there is a defect of parties defendant to said action; that said James A. Church and E. D. Church are necessary parties defendants in said action."

**Judgment and Decree.** The case was tried by the court without a jury, and resulted in a judgment and decree, in favor of the plaintiff, to the effect "that the said deed of trust mentioned and described in the complaint in this action is fraudulent and void, and set aside as against the said plaintiff, Irene M. Robinson; and the said defendants, Eugene Howell and Henry Kind, and each of them, are hereby perpetually enjoined from claiming, holding, or asserting any title or right, or in exercising any power or authority over or concerning the said property mentioned and described in said deed, and from making, executing, or delivering any conveyance of said property, or any portion thereof, and

from selling, delivering, or otherwise disposing of said property, or any part thereof, and from in any manner interfering with said property, or with the use and enjoyment thereof." Judgment was given against the defendants for plaintiff's costs, taxed at \$77.35. The defendants appeal from the decree and judgment.

**Contention.** Counsel for appellants contends that James A. Church and E. D. Church are necessary parties defendant; that they are the principal parties in interest; and contends, in substance, that the court erred in overruling the demurrer, and in proceeding with the trial of the case, and rendering the judgment and decree therein, without acquiring jurisdiction over said necessary parties defendant.

**Authorities.** "It seems to be well established by the authorities, as a general rule in equity, subject to certain exceptions, that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree which shall bind them all." Story, Eq. Pl. (9th Ed.) § 72 and note 4; Id. §§ 75, 76. "Where a person has a direct interest in the subject-matter of the suit, his rights will be affected by the final decree, and he is a necessary party." Richards v. Richards, 9 Gray, 313, 315. "A person is a necessary party to a suit when no decree in relation to the subject-matter of the litigation can be made until he is properly before the court as a party, or where the defendants in the suit have such interest in having such person before the court as would enable them to make the objection if he were not a party." Bailey v. Inglee, 2 Paige, 278. "If the interest of the absent parties may be affected or bound by the decree, they must be brought before the court, or it will not proceed to a decree." Story, Eq. Pl. (9th Ed.) § 137. "If the defendants actually before the court may be subjected to undue inconvenience, or to danger of loss, or to future litigation, or to a liability, under the decree, more extensive and direct than if the absent parties were before the court, that, of itself, will, in many cases, furnish a sufficient ground to enforce the rule of making the absent persons parties." Id. § 338.

The defendants Kind and Howell, and each of them, may be subjected to future litigation, by said James A. and E. D. Church, to enforce the trust, and to account for said property and their stewardship thereof; and the said Howell may be defeated in the collection of his said claim, as against said Church & Church, if he fail to use all reasonable diligence to collect the same out of the proceeds of said property. In any such suits between the defendants and the Churches, the judgment and decree in this case could not avail them for any purpose. It appears, by the complaint, that the said

James A. and E. D. Church have a direct interest in the subject-matter of the suit, and that their interest under the said instrument is identical with that of the plaintiff, with the additional interest therein of having the release, made by the plaintiff, of all and any claim she may have against them, completed and made effective by a conveyance to her by defendant Kind of one-half of all or any of said property that remains unsold, as provided in said instrument, after the payments therein named are made out of the proceeds of said property.

**Effect of Decree.** The decree annuls said instrument as to the plaintiff, and takes the property out of the hands and control of the trustee, Henry Kind, and the agent, Eugene Howell, who are made by said instrument the trustee and agent, respectively, of the said James A. and E. D. Church and the plaintiff, the beneficiaries of said trust, and it puts the same into the hands and control of the plaintiff. It perpetually restrains the defendants, as such trustee and agent, or otherwise, from in any manner interfering with said property or with the use and enjoyment thereof. It in effect ousts said James A. and E. D. Church of said property, and strips them of all their rights and interest therein. It seems that it was intended that the decree should have such effect. The plaintiff claims in her complaint to be the owner of said property, and her counsel argues and contends, as matter of law, the action being to revoke a trust, that the cestuis que trust or beneficiaries were not necessary parties; that they were represented by the defendants, who were their trustees, and who defended the trust for them. The contention is to the effect that, in law, James A. and E. D. Church being beneficiaries, the defendants, as trustees, defended for them; that, this being an action to revoke the trust, they represented said Churches, and bound them in the action; and that their interest in the said deed and instrument and property is concluded by said decree. But we cannot agree with counsel in his theory of the law. The said trustees do not represent the said two beneficiaries, the Churches, in any greater degree or for any other purpose than they represent the other beneficiary, the plaintiff, and cannot bind the former any more than the latter by anything they may or can do by virtue of their powers or relations as trustees.

**In Cases of Trusts.** Story, in his *Equity Pleadings* (9th Ed. § 207), gives the general rule as to parties in cases of trusts as follows: "The general rule in cases of this sort is that, in suits respecting the trust property, brought by or against the trustees, the cestuis que trust, or beneficiaries, as well as the trustees, are necessary parties. The trustees have the legal interest, and therefore they are necessary parties. The cestuis que trust, or beneficiaries, have the equitable and ultimate interest to be affected by the decree, and there-

fore they are necessary parties." "If there are divers cestuis que trust, all of them should be made parties to a bill touching the common interest." *Id.* § 210, note 2. "In contests respecting property held in trust, where the interests of the cestuis que trust stand opposed to the right set up by the complainant, the cestuis que trust are necessary parties." *Brokaw v. Brokaw*, 41 N. J. Eq. 216, 7 Atl. 414; *Tyson v. Applegate*, 40 N. J. Eq. 305. "It is undoubtedly a general rule that, in suits respecting trust property, brought either by or against trustees, the cestuis que trust are necessary parties." *Boyden v. Partidge*, 2 Gray, 194; *Bank v. Crafts*, 145 Mass. 447, 14 N. E. 758. In an action by a beneficiary against the trustee, when the right asserted, if it exists at all, is also held by all other parties similarly situated with the one who sues, and the decision would in fact determine all their rights, the equitable doctrine primarily requires that the beneficiaries should unite as plaintiffs; but, if any refuse to join, they should be made defendants, in order that the trustee may not be subjected to a multiplicity of suits when the whole controversy could be decided in one. *Pom. Rem. & Rem. Rights*, § 355. In harmony with the above rule it was held, in *Dillon v. Bates*, 39 Mo. 292, that, "In a suit in equity, brought by one distributee of an estate against the administrator, to set aside a settlement on the ground of fraud, all the distributees must be made parties, either as plaintiffs or defendants, to avoid a multiplicity of suits, and to enable the court to make a complete and binding decree." In the case at bar we are of opinion that a multiplicity of suits cannot be avoided, and that a complete and binding decree cannot be made, as to all the parties directly interested, without the said two other beneficiaries being brought into court by being made parties.

**Statute Provision.** By Gen. St. § 3039, it is provided: "The court may determine any controversy between parties before it, when it can be done without prejudice, to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in. \* \* \*" In *Pom. Rem. & Rem. Rights* (2d Ed.) § 419, the author, in commenting upon the above provision, found perhaps in all the Codes, says: "If there are other persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, then the statute is peremptory. The court must cause such persons to be brought in. It is not a matter of discretion, but of absolute judicial duty. The enforcement of this duty does not rest entirely upon the parties to the record. If they should neglect to raise the question, and to apply for the proper order, the court, upon its own motion, will supply the omission, and will either directly bring in the new parties, or remand the cause in order that the

plaintiff may bring them in." Where, then, a case comes under the above rule as to parties, the defect is not waived by the defendant answering to the merits. The contention of counsel, that by answering the complaint, and going to trial, the demurrer of the defendants on the ground of defect of parties was waived, is not tenable. "Under some circumstances a trustee may represent his beneficiaries in all things relating to their common interests in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him as by what is done by him. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against strangers to enforce the trust, or to one by a stranger against him to defeat it, in whole or in part." *Kerrison v. Stewart*, 93 U. S. 155. See page 160. And so it is held, in effect, in other cases cited by counsel for respondent.

But these authorities are not applicable to this case. This is not a suit by the trustee against a stranger to enforce the trust, nor is it a suit by a stranger against the trustee to defeat the trust. Besides, defendant Kind, the trustee, was not invested with such powers and subjected to such obligations that the beneficiaries Church will be bound by what was done against him in this action. His powers and obligations under the deed are very limited. The judgment and decree of the trial court must be reversed, and it is so ordered.

BIGELOW, C. J., and BELKNAP, J., concur.

(18 Mont. 568)

CHICAGO TITLE & TRUST CO. v.  
O'MARR, Sheriff, et al. (BROWN  
et al., Interveners).

(Supreme Court of Montana. Dec. 7, 1896.)

#### STIPULATION—CONSTRUCTION.

In conversion, the complaint alleged the property to be worth \$12,500. Defendants, by answer, denied that the property was of any greater value than \$6,000. The allegations of defendants as to the value were stricken out as immaterial. At the trial counsel agreed that no proof need be offered to sustain plaintiff's allegation that the value was \$12,500. On appeal the court determined the question of value to be material. *Held*, that the stipulation was made for the purposes of the trial only, and did not prevent defendants from trying the issues as to value on a new trial.

Motion for rehearing. Denied.

For original opinion, see 46 Pac. 809.

PER CURIAM. Motion for rehearing is made upon the ground that the court overlooked the fact that the value of the property sold was agreed to be \$12,500 by stipulation of the parties at the trial, and that therefore the issue of value was eliminated from the case. But a re-examination of the record

upon this point confirms us in our opinion that the question of value ought to be retried. Plaintiff's complaint avers that, when plaintiff took possession of the property described in the chattel mortgage, its value was \$12,500. The defendants, by answer, denied this averment, or that the property was of any greater value than \$6,000. The same denial was made to interveners' allegations of value. This was the condition of the pleadings as to the issue of value upon the day of the trial. Upon that date defendants filed an amended answer to the plaintiff's complaint. In this answer the defendants elaborately set forth the mortgage to themselves, and their contention that the plaintiff ought not to be permitted to assert any claim against defendants on account of their attachment of the goods, or to receive any moneys "of the value of said goods as found to be at the time of the taking until there shall have first been deducted, and awarded to defendants other than the sheriff, the sum of \$3,100, so deposited by them and received by the plaintiff," etc. This pleading of the defendants amounted to a contention for the very rights which the court in the opinion preserved to them, and we think the language used demonstrates that defendants insisted on an issue of the value. The plaintiff moved the court to strike out all such contentions of defendants, because they were sham and immaterial, and constituted no defense. The court sustained this motion. Just when the order in relation to this motion was made does not clearly appear. It appears, too, that at the trial, on motion of interveners, the court struck out substantially the same matter pleaded by the defendants in answer to the complaints in intervention. The admission of counsel, made prior to the trial, that no proof need be offered to sustain the allegation of that paragraph of the complaint to the effect that the value of the property was \$12,500, and that, at the time of the trial, the allegation of value was true, seems to have been made for the purposes of the trial as the court viewed the issues to be tried. Under the view we took of the case, the matter contained in paragraph B, which was stricken out, constituted proper defenses. The defendants could never have meant to surrender the issue of value so long as their defenses stood raising that issue. But, when the court struck out the paragraphs pertaining to the value of the property, it would seem that proof upon that issue then became immaterial because of the ruling of the court. Upon the argument of the case in this court, we were advised by the counsel that the district court was of the opinion that defendants and interveners never had possession of the property, and that therefore they had no rights. If such were the views of the district court at the time of the trial, plainly the defendants could not rely upon the issue of value. Therefore, proof upon that issue may have been dispensed with by an admission that, because of the



ruling of the court, for the purposes of that trial, the value might be taken as greater than the pleadings themselves had confessed it to be. It is difficult for us to believe, from all the pleadings filed and proceedings had, and from their brief filed herein, that the learned counsel for the defendants intentionally abandoned the issue of value, and thus practically abandoned their pleaded case; for, if their defense of value could prevail, its advantage to them would be to show a value lower than the amount of the claims of the plaintiff and interveners. The record is not as clear as it should be as to how the stipulation came to be made; but, inasmuch as the issue of value has become so very important under our opinion, and was so immaterial in the lower court, we do not feel justified in holding that any ambiguities in the record should deny to the defendants the opportunity to retry the issue, especially when the defendants contend they did not waive the issue at all. The error in the statement of amount claimed by the plaintiff will be corrected. Rehearing denied.

(19 Mont. 22)

## WOOD v. GLEIM.

(Supreme Court of Montana. Dec. 7, 1896.)

## REVIEW ON APPEAL—INSUFFICIENT RECORD.

An order denying a motion for new trial will be affirmed where no statement of the case appears in the record, and there is no specification of errors of law or of particulars in which the evidence is insufficient to sustain the verdict.

Appeal from district court, Missoula county; Frank H. Woody, Judge.

Action by J. K. Wood against Mary Gleim to recover for legal services. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Crouch & Musgrave, for appellant. J. K. Wood, in pro. per.

PER CURIAM. The plaintiff obtained judgment against the defendant on account of services rendered to her as an attorney at law. The defendant moved for a new trial. From the order denying the same, and from the judgment, the defendant appeals.

The notice of motion for a new trial sets forth that a motion would be made on a statement of the case. No statement of the case appears in the record, nor, as far as the record discloses, was any ever prepared. There is no specification of errors of law or of particulars in which the evidence is insufficient to sustain the verdict. No such alleged errors can, therefore, be considered. This disposes of the appeal from the order denying the motion for a new trial. In examining the appeal from the judgment, there is no error apparent in the judgment roll. The judgment and order denying a new trial are therefore affirmed.

(19 Mont. 35)

## LYNDE v. WAKEFIELD.

(Supreme Court of Montana. Dec. 7, 1896.)

## ACTION FOR DOWER—RENTS AND PROFITS—REVIVAL OF ACTION—SHERIFF'S SALE—EFFECT ON DOWER.

1. Under Code Civ. Proc. § 22 (Comp. St. 1887, p. 63), providing that an action shall not abate by the death of a party, but shall in all cases survive, and be maintained by his representatives, —on the death of widow pending an action for dower, and for rents and profits, the right to collect the rents and profits of the dower estate survives to her personal representative.

2. The purchaser at a sheriff's sale of the land of the husband, on judgment against the husband, takes the land subject to the wife's inchoate right of dower.

3. A quitclaim deed by a husband to land, after its sale on execution, does not convey the wife's inchoate dower, but merely the husband's right of redemption.

4. Code Civ. Proc. c. 3, relating to limitation of actions other than for the recovery of real property, which provides (section 47) that "an action for relief not hereinbefore provided for must be commenced within three years after the cause of action shall have accrued," does not apply to actions for the assignment of dower. *Burt v. Sheep Co.*, 27 Pac. 399, 10 Mont. 571, followed.

Appeal from district court, Gallatin county; Dudley Du Bose, Judge.

Action by Mary A. Black against George W. Wakefield. On the death of the plaintiff, T. J. Lynde was substituted. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Leander M. Black, in the year 1881, died, intestate, in the county of Gallatin, in this state. During his lifetime he had been the owner in fee of a large amount of real estate, situated in the city of Bozeman, in said county, and which real estate is described in the complaint in this action. The said Leander M. Black left, surviving him, as his widow and relict, Mary A. Black, the original plaintiff in this case. It appears from the record that during the years 1876, 1877, and 1878 the real estate mentioned in the complaint as having been the property of said Leander M. Black was attached in divers suits commenced against him by divers parties in the district court of Gallatin county; that judgments were obtained in said suits against said Black, and on the 22d day of January, 1879, all of said real estate was sold by the sheriff of said county, upon execution, at public sale, to one George W. Wakefield, and a certificate of sale regularly given to said purchaser by the sheriff of said county; that said Wakefield assigned said certificate of purchase to one Joseph J. Davis, and, by direction of said Wakefield, the sheriff of said county, on the 25th day of July, 1879, the time of redemption having expired, made to said Joseph J. Davis a deed conveying to him said lands; that afterwards, by mesne conveyances, the titles of said property were conveyed from Joseph J. Davis to the defendant George W. Wakefield, who now claims to be the owner of said real

estate. The record further shows that after the real estate was sold by the sheriff, but before the sheriff had executed his deed to the purchaser thereof, the said Leander M. Black made a quitclaim deed embracing all of said property to one E. W. Toole. No attempt was ever made by any one to redeem said lands, or any part thereof, at any time. It is not disputed that the defendant Wakefield is in possession of said real estate, and has been in such possession since his purchase at said sheriff's sale. The complaint alleges the property to be of the value of \$15,000, and its rental value to be \$1,500 per annum. On the 12th day of February, 1894, Mary A. Black filed her amended complaint in this suit, claiming her dower rights and interest in said real estate, and for the value of the rents and profits during the time she had been de-forded of her dower by the defendant. The case was tried to the court, without a jury. Judgment was rendered by the court that Mary A. Black have and recover dower in the premises described in the complaint, and a commission was appointed to lay off and allot to her her dower in the premises. From the judgment and an order overruling a motion for a new trial, the defendant appeals. After the appeal to this court, Mary A. Black, the respondent, died, intestate; and on 24th day of March, 1896, a motion was made to substitute T. J. Lynde, her administrator, as respondent in the cause, and that the same proceed in his name.

Luce & Luce, and Toole & Wallace, for appellant. Smith & Word, for respondent.

PEMBERTON, C. J. (after stating the facts). Counsel for the appellant object to the substitution of the administration of Mary A. Black, because, they contend, the entire cause of action abated by her death, and that the right to sue for and collect the rents and profits of the dower estate, which had accrued between the time Mary A. Black commenced her suit and her death, does not survive to her legal representative. This contention presents the first question for our consideration. This cause was commenced under, and must be determined by, the provisions of section 22, Code Civ. Proc. (Comp. St. 1887, p. 63), which is as follows: "An action, or cause of action, or defense, shall not abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, but shall, in all cases where a cause of action or defense arose in favor of such party prior to his death, marriage or other disability, or transfer of interest therein, survive, and be maintained by his representatives or successors in interest; and in case such action has not been begun or defense interposed, the action may be begun or defense set up in the name of his representatives or successors in interest; and in case the action has been begun or defense set up, the courts shall, on motion, allow the action or proceeding to be

continued by or against his representatives or successors in interest. In case of any transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

We are aware that at the common law, if the widow die before the damages in such cases are assessed, her personal representative cannot claim or recover them. 1 Story, Eq. Jur. (10th Ed.) § 625. This is so clear to our minds that we will not cite further authority, or further discuss the question. But we think, under our statute and the great weight of authority, a different rule prevails in equity. Judge Story, in the same section referred to above, says: "But a court of equity will, in such cases, entertain a bill for relief, and decree an account of rents and profits against the respective representatives of the several persons who may have been in possession of the estate since the death of the husband; provided, at the time of filing the bill, the legal right to damages is not gone." And in section 626, following, the same author says: "Upon principle, there would not seem to be any real difficulty in maintaining the concurrent jurisdiction in courts of equity in all cases of dower; for a case can scarcely be supposed in which the widow may not want either a discovery of the title deeds, or of dowerable lands, or some impediment to her recovery at law removed, or an account of mesne profits before the assignment of dower, or a more full ascertainment of the relative values of the dowerable lands; and, for any of these purposes (independent of cases of accident, mistake, or fraud, or other occasional equities), there seems to be a positive necessity for the assistance of a court of equity; and, if a court of equity has once a just possession of the cause in point of jurisdiction, there seems to be no reason why it should stop short of giving full relief, instead of turning the dowress round to her ultimate remedy at law, which is often dilatory, and always expensive. Dower is favored, as well in law as in equity." In Pollitt v. Kerr, 49 N. J. Eq. 65, 22 Atl. 800, the rule at law and in equity in such cases is ably discussed, and the authorities collated. In that case the court says of the rule at law: "The reason given for the rule is that damages can only be given for the detention of the possession; and in writs of right, where the right itself is disputed, no damages are given, because no wrong is done until the right is determined. This is the rule at law. By force of it, it is clear that the petitioner, if he were in a court of law, would be without a right, and, consequently, without a remedy." The court then continues: "A somewhat more liberal rule in favor of the widow prevails in equity. The rule in equity I understand to be this: that where a widow files a bill in chancery for dower, and dies pending the suit, her personal representative may revive the

suit, and recover mesne profits. This is the rule that Lord Alvanley enforced in *Curtis v. Curtis*, 2 Brown, Ch. 620. In that case a widow filed a bill for dower against her husband's brother. The defendant denied the fact of marriage. The court thereupon directed that the bill be retained until the widow established her right by a judgment at law. She then brought an action at law, and had a recovery, and then died. On a bill of revivor and supplement, Lord Alvanley held that the widow's personal representative was entitled to a decree for mesne profits. Park states the rule in equity as follows: 'We have seen that at law the widow loses her damages if the tenant dies after judgment, and before they are assessed, and also that, if she herself dies before the damages are ascertained, her personal representative cannot claim them. But in equity a different rule prevails, and the court will decree an account of rents and profits against the persons who have been in possession since the death of the husband, provided that, at the time when the bill is filed, the legal right to damages was not gone.' Park, Dower, 330. Judge Story states the rule in almost precisely the same words. 1 Story, Eq. Jur. § 625. The instances in which the court have been called upon to apply the rule are but few in number, but in every instance where it was applicable that has come under my observation the rule has been enforced." To the same effect, see *Magruder v. Smith*, 79 Ky. 512; *McLaughlin v. McLaughlin*, 20 N. J. Eq. 190; *Paul's Ex'rs v. Paul*, 36 Pa. St. 270; *Harper v. Archer*, 28 Miss. 212; *Price v. Hobbs*, 47 Md. 339. We think it useless to cite further authority upon this question. We are clearly of the opinion, under our system of jurisprudence, where we have "but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be same at law and in equity" (Code Civ. Proc. c. 1, § 1; Comp. St. 1887, p. 59), and where law and equity are merged in the same tribunals, that the right to prosecute this suit for the collection of the rents and profits of the dower estate of Mary A. Black survives to her legal representative.

Counsel for appellant contend that, if Mary A. Black was ever entitled to dower in the real estate mentioned in the complaint, her right thereto is barred by the statutes of limitations. The question as to whether a widow's dower is barred by the general statutes of limitations in this state was determined by this court in *Burt v. Sheep Co.*, 10 Mont. 571, 27 Pac. 399, and in that case we held her right of action was not so barred. We think that case decisive of the question raised in the case at bar. Counsel for appellant contend that the statute was not properly before the court in *Burt v. Sheep Co.* This contention is not supported by any sufficient showing, for in that case the court not only held that it was raised, but said it had been argued

"with great ability and research." And, besides, we think *Burt v. Sheep Co.* is in harmony with the best reasoning, and supported by the great weight of authority on the subject.

Counsel for appellant contend, also, that the widow is not entitled to dower in the lands described in the complaint, because, they say, the sheriff's deed to the lands conveyed the whole title, relieved of dower. In the ably-written opinion on file in this cause, of the Honorable Dudley Du Bose, the judge who tried the case below, we find this language in reference to the effect of such a sale upon the widow's dower: "The court is of the opinion that, under our statute, the only title the purchaser obtains at a sheriff's sale is the title of the husband, and not the inchoate right of dower of the wife. This doctrine is laid down by the supreme court of New Jersey, and by the supreme courts of Illinois, Massachusetts, Ohio, Missouri, Indiana, New York, Maryland, and by Kent, Scribner on Dower, and Williams on Real Property, and many other cases." In *Harrison v. Eldridge*, 7 N. J. Law, 408, the court, in discussing the question as to whether a sale by the sheriff on a common-law judgment will bar the widow of dower, says: "It has been repeatedly determined that, by such a proceeding, the widow's claim will not be affected, and the doctrine of the law is conclusively settled upon that point." See Code Civ. Proc. Mont. § 340; *Barker v. Parker*, 17 Mass. 564; 4 Kent, Comm. p. 45; 1 Scrib. Dower, p. 603; Williams, Real Prop. 224; *Ayer v. Spring*, 10 Mass. 80; *Blain v. Harrison*, 11 Ill. 384; *Summers v. Babb*, 13 Ill. 483; *McClanahan v. Porter*, 10 Mo. 746; *Taylor v. Fowler*, 18 Ohio, 567; *Combs v. Young*, 26 Am. Dec. 225, and note; *Hawley v. Bradford*, 37 Am. Dec. 392; *Nance v. Hooper*, 11 Ala. 552; *Herm. Ex'rs*, pp. 359, 360, 364; *Bank v. Thomson*, 55 N. Y. 7; *Dunham v. Osborn*, 1 Paige, 634; *Freem. Ex'ns*, p. 560, § 338; *McClanahan v. Wyant*, 21 Am. Dec. 363; *Den v. Frew*, 22 Am. Dec. 710, and note; *Taylor v. Fowler*, 51 Am. Dec. 470; *Dayton v. Corser* (Minn.) 53 N. W. 717; *Vinson v. Gentry* (Ky.) 21 S. W. 578; *House v. Fowle* (Or.) 29 Pac. 890; *Blevins v. Smith* (Mo. Sup.) 16 S. W. 213; *Smith v. Rothschild*, 4 Ohio Cir. Ct. R. 544.

The court below held that the quitclaim deed executed by Black to E. W. Toole of the lands in question, after the same had been sold by the sheriff, but before the sheriff's deed had been executed, amounted, in effect, to a sale of the right to redeem the land. We think this a correct view of the question. Black, at the date of the quitclaim deed, only had the right of redemption. He could sell no more than he had. There was no redemption by Toole, and consequently he never acquired any title to the land. We think the contention that Black's deed to Toole conveyed the whole title to the lands, relieved of dower, because Mary A. Black was not residing in the state at the time, is without founda-

tion, especially as Toole, by failing to redeem, never acquired any title to the land.

We have considered all the questions presented by the record in this case. We are of opinion that the only serious question involved is as to whether the right to collect rents and profits survived to Mrs. Black's representatives upon her death. Having disposed of that question against the appellant, we are of the opinion that the other assignments of error are without merit, although we have treated some of them at considerable length. T. J. Lynde, administrator of Mary A. Black, deceased, will be substituted for Mary A. Black as respondent, and the suit will proceed in his name. The judgment and order appealed from are affirmed. The cause, however, is remanded, with instructions to the court below to take such proceedings as are authorized by law, and proper to ascertain the value of the rents and profits of the dower estate from the time of the commencement of the suit by Mary A. Black to her death, and that, when the value of such rents and profits has been ascertained, judgment be entered for the amount, with costs, in favor of the legal representative of said Mary A. Black.

DE WITT and HUNT, JJ., concur.

(5 Kan. A. 473)

PROVIDENT LOAN TRUST CO. v.  
WALCOTT et al.

(Court of Appeals of Kansas, Northern Department, W. D. Dec. 4, 1895.)

**LIMITATIONS—ACCRUAL OF CAUSE OF ACTION.**

1. A cause of action against an abstractor of titles for giving a wrong certificate of title accrues at the date of the delivery, and not at the time the negligence is discovered or consequential damages arise.

2. An action against an abstractor of titles, to recover damages for giving a false certificate of title, was commenced nearly five years after the abstract was delivered. *Held*, that the action was barred by the three-years statute of limitations. Civ. Code, § 18, subd. 2.

(Syllabus by the Court.)

Error from district court, Russell county.

Action by the Provident Loan Trust Company against Nelson A. Walcott and others. Judgment for defendants. Plaintiff brings error. Affirmed.

Jas. V. Humphreys, for plaintiff in error.  
Sutton & Dollison and H. G. Laing, for defendants in error.

GILKESON, P. J. During the year 1889, the defendant in error Nelson A. Walcott was engaged in the business of making abstracts of title to real estate in the city of Russell, Russell county, Kan., and, as such abstractor, had qualified by filing the bond required by law with his co-defendants in error, William Blair, Charles A. Walcott, C. M. Lewis, as his sureties thereon, which bond had been approved by the proper officers of

the county. In 1890, the Central Kansas Loan & Investment Company, a corporation, employed said Nelson Walcott to make for it an abstract to certain real estate lying and being situate in the county of Russell, Kan., and, pursuant to such employment, Walcott made for and delivered to the said company an abstract which purported on its face and by its terms to be a complete and correct abstract of the title to said real estate, up to and including the 25th day of March, 1890. At the date of the delivery of said abstract, one A. O. Pierce and Harry L. Pierce were negotiating with the said Central Kansas Loan & Investment Company for a loan of \$1,500, on the real estate mentioned in the abstract. Relying on the statements contained in the abstract, the company made the loan, and paid over to the Pierces the amount thereof, taking from them an ordinary mortgage bond for the said amount, and a real-estate mortgage, securing the same, upon said land. On the 19th day of September, 1889, one A. Bnanck Witt had commenced an action in the district court of Russell county, Kan., against John H. Franklin, Irene P. Franklin, and Charles A. Walcott, to recover the sum of \$1,500 upon a certain promissory note given by the Franklins, and guaranteed by A. O. Pierce, which note was secured by mortgage on certain real estate other than that mentioned in the abstract; and on the 18th day of March, 1890, judgment was rendered in said action against the Franklins and A. O. Pierce, which said judgment was entirely omitted from the abstract so as aforesaid furnished. In May, 1890, the Central Kansas Loan & Investment Company reorganized, and changed its name to that of the Provident Loan Trust Company, and became incorporated under the laws of the state of Missouri. On the 18th day of December, 1894, an execution was issued on said judgment in favor of Witt, against the Franklins and Pierce; and the lands mentioned in said abstract were levied upon under the execution, and on the 21st day of January, 1895, were sold to S. W. Pierce, who was the president of the original company, and also of the Provident Loan Trust Company, at the time this sale was made. On March 19, 1895, the Provident Loan Trust Company commenced its action against the said Nelson Walcott and his sureties for the sum of \$1,500, with interest from the 18th day of December, 1894, as damages sustained by reason of the incompleteness, error, or imperfection in the compiling of said abstract, claiming the right to maintain this action by reason of the reorganization of the Central Kansas Loan & Investment Company.

There is but one question necessary to be considered in this action: Was the action barred by the statute of limitations? The plaintiff in error contends that the cause of action is one upon "an agreement, contract, or promise in writing," and governed by the first subdivision of said paragraph 4095, Gen. St. 1889

(section 18, Civ. Code), or it is an action upon the bond required by statute, and falls within the first subdivision of said paragraph; while the defendants in error claim that "it is an action upon a contract, not in writing," or it is an action for injury to the rights of another not arising upon contract,—a tort,—and is controlled by either the second or third subdivision of paragraph 4095. The first proposition to be disposed of is: When did the cause of action arise? "A cause of action against an abstractor of titles for giving a wrong certificate of title accrues at the date of the delivery, and not at the time the negligence is discovered, or consequential damages arise." *Lattin v. Gillette* (Cal.) 30 Pac. 545; *Russell v. Abstract Co.* (Iowa) 54 N. W. 212. And we think the question is settled in this state. *Bartlett v. Bullene*, 23 Kan. 606. This, then, brings us to the consideration of the questions of the nature of the cause of action, and we will dispose of them in the order stated.

Is it an action upon an agreement or promise in writing? We think not. The written certificate of title given to the plaintiff by defendant Nelson Walcott, although an instrument in writing, is not an instrument upon which defendants' liability is founded. The supreme court of California, in passing upon a statute of limitations like ours, held "that this provision of the section, by its language, refers to contracts, obligations, or liabilities resting in or growing out of written instruments, not remotely or ultimately, but immediately; that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged, in favor of those who seek to enforce the contracts, obligations, or liabilities." *Chipman v. Morrill*, 20 Cal. 131. And applying this doctrine in an action against an abstractor for making a false certificate of title (*Lattin v. Gillette*, supra), the court, by Harrison, J., says: "The contract which is the basis of the plaintiff's cause of action herein does not 'rest in' or 'grow out' of this certificate; nor does the certificate contain any obligation or contract that can be enforced, or which is susceptible of a violation on the part of the defendants, or under which any liability can accrue against them. The obligation assumed by them was that created at the time of their acceptance of the employment by the plaintiff, and antedated the making of the certificate. The certificate is not the evidence of this obligation, but is merely evidence of the act done by them in purported satisfaction of the obligation assumed by them in accepting their employment. Instead of establishing the contract made between them and the plaintiff, it is the evidence relied upon by him to establish the breach of that contract, and necessarily presumes that the contract was complete before it was given. As in the case of an erroneous deed drawn by an attorney, or a defective plat made by a surveyor, or a wrong prescription given by a physician, it is only evidence in support of the averment that the implied contract

for the exercise of skill and care was violated, and is not the contract itself. That was created by the oral agreement of employment."

Is it an action on the bond? We think not. "While there is some little conflict in the decisions, the highest and most decisive authority favors the view that the malfeasance of a person, or the negligence or breach of duty of an officer, is the gist of the action, and not the injury consequent thereon. \* \* \* In actions for official or professional negligence, the cause of action is founded on the breach of duty which actually injured the plaintiff, and not the consequential damage." *Bartlett v. Bullene*, 23 Kan. 611; 2 Greenl. Ev. § 433; *Betts v. Norris*, 21 Mo. 315; *Caesar v. Bradford*, 13 Mass. 169; *Kerns v. Schoonmaker*, 4 Ohio, 331; *Wilcox v. Plummer's Ex'rs*, 4 Pet. 172; *Argall v. Bryant*, 1 Sandf. 98; *Fee v. Fee*, 10 Ohio, 469; *Lathrop v. Snellbaker*, 6 Ohio St. 276; *Ellis v. Kelso*, 18 B. Mon. 296; *Howell v. Young*, 5 Barn. & C. 259. We think the plaintiff in error fails to distinguish the right to maintain the action from the damages. The petition sets forth a contract for services which were to be rendered with care, and states that they were not, but, on the contrary, were incompletely, imperfectly, erroneously performed,—in other words, carelessly and negligently performed; that, in consequence thereof, the plaintiff's property was injured (he was damaged in his security); so that the carelessness and negligence of the officer was the sole cause of the injury. Now, what would be the legitimate order of proof under this petition? We think: (1) The contract; (2) the breach; and (3) the damage. Now, if the contract had been in writing, then the limitation would have been five years; if not, it would be three. *Howard v. Ritchie*, 9 Kan. 102.

As we have said, the wrong committed by Walcott is the real, substantial foundation for plaintiff's cause of action. The bond is virtually only a collateral security for the enforcement of such causes of action. It does not give the cause of action, but the wrong does; and the bond merely furnishes security or indemnity to the person who may suffer by reason of such wrong; and the statute, which gives five years for action to be commenced upon bonds, does not operate to suspend the operation of the other statutes of limitations, or continue in force or revive a cause of action which had already been barred by some of the other statutes of limitation. Whenever a cause of action is barred by any statute of limitations, the right to maintain an action therefor on a bond, which already operates as a security for this same thing, must necessarily cease to exist. "The wrong committed by a sheriff (in the wrongfully levying upon and selling personal property) furnishes the real, substantial foundation for the plaintiff's cause of action, and the sheriff's bond is virtually only a collateral security to indemnify any person who may suffer by reason of any

official wrong committed by the sheriff." *Ryus v. Gruble*, 31 Kan. 767, 3 Pac. 518. We think, the real, substantial foundation of the plaintiff's cause of action is the breach of the contract of employment, and therefore falls within the second subdivision of paragraph 4095, being an action upon a contract not in writing, and was barred within three years from the date of the delivery of the certificate, which is admitted to have been on March 25, 1890. The judgment of the district court will therefore be affirmed.

(15 Wash. 700)

**STARR & CO. v. CHILBERG et al.**

(Supreme Court of Washington. Nov. 21, 1896.)

**NONSUIT—INSUFFICIENCY OF EVIDENCE.**

Where the testimony, even if uncontradicted, is insufficient to sustain a verdict, a motion for nonsuit is properly granted.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Starr & Co., a corporation, against J. E. Chilberg and others. From a judgment of nonsuit, the plaintiff appeals. Affirmed.

Metcalf & Jurey, for appellant. John E. Humphries, E. P. Edsen, and Stratton, Lewis & Gilman, for respondents.

**PER CURIAM.** An investigation of the pleadings and of the testimony in this case convinces us that no testimony was offered by the plaintiff which would have been sufficient, if uncontradicted, to have sustained the verdict. The motion for a nonsuit was therefore properly sustained, and the judgment will be affirmed.

(15 Wash. 586)

**HUSTON et al. v. BECKER et al.**

(Supreme Court of Washington. Nov. 21, 1896.)

**ADMINISTRATOR—EXPENDITURES—LIEN—COLLECTION.**

1. A judgment of the probate court is void which purports to create a lien upon the heirs' interests in a decedent's property, by directing a distribution of the estate to the heirs charged with a lien in favor of the administrator, on account of money expended by him for the benefit of the estate.

2. Proper charges in favor of an administrator cannot be collected otherwise than by his retention of the property until they are paid.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by R. J. Huston and S. G. Hill against Charles Becker and others to enforce an alleged lien on real property. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

John E. Humphries, E. P. Edsen, and Relfe & McCutcheon, for appellants. White, Munday & Fulton and Stratton, Lewis & Gilman, for respondents.

**HOYT, C. J.** Prior to January 21, 1888, Charles Becker and Katharina Becker, hus-

band and wife, were the owners in fee simple of the land described in the complaint. On said day, the wife died intestate, and left, as her only heirs at law, her husband, Charles Becker, and their children. Thereafter Charles Becker was appointed administrator of the estate of his deceased wife, and qualified and entered upon the discharge of his duties as such. He took possession of said real estate, improved the same, and built upon the property lasting and valuable improvements. He also paid the expenses of administration. On the 26th day of April, 1893, he filed a report in the superior court of King county, in which he asked that the amount expended in improving the land, as well as that paid for expenses of administration, should be allowed in the settlement of his trust. Thereupon such proceedings were had that it was found that such administrator was entitled to be credited with the amount so expended, and should be charged with something over \$1,600 for use and occupation of the premises; and judgment was entered declaring the balance a lien upon the whole of said real estate, and decreeing that one-half thereof should be a lien upon the interest of the children therein. Afterwards said Charles Becker sold and assigned all his right, title, and interest in and to the said lien and decree to the plaintiffs. In the first count of the complaint filed in this action, these facts were alleged, and a claim made that, by the force of the judgment rendered in the probate proceedings, the administrator was entitled to recover of the children the amount adjudged to be a lien upon their interest in the property, and to have such lien enforced, and for that purpose a partition of the property decreed, and that plaintiffs, having purchased his rights, were entitled to the same relief. For the second cause of action, substantially the same facts were set up, and thereunder it was claimed that the said Charles Becker, as tenant in common with the children, was entitled to have one-half of the expenditures made by him declared to be a lien upon their interest, and to have such lien enforced by a partition of the property, or otherwise, as the court might direct, and that plaintiffs were entitled to such relief by reason of having succeeded to the rights of said Charles Becker. To this complaint a demurrer was interposed by the defendants, and sustained by the court. The plaintiffs elected to stand upon their complaint, and judgment was entered against them, from which they have prosecuted this appeal.

If the first count stated a cause of action, it is because the judgment entered in the superior court in the probate proceeding was final and binding upon the minor heirs of Katharina Becker. This judgment, though in the superior court, was in a proceeding which authorized such court to exercise only probate jurisdiction. This being so, the judgment is void, unless it is one that could be rendered by the court exercising such juris-

diction in the matter of the estate of Katharina Becker, deceased. But the object of the administration of such estate was not to incur indebtedness on its account, or that of its heirs, but to provide for the payment of claims against such estate, and the distribution of the assets after such claims were paid; and, unless this judgment can be fairly construed to have been for the purpose of accomplishing these objects, it was void, and of no effect. A superficial examination of the judgment will show that, though it purported to be by way of approval of the final report of the administrator, it was rendered when it appeared from such purported final report that the estate was not in condition to be closed up, and the property distributed. If the money expended by the administrator, as shown by such report, or any part thereof, was a proper claim against the estate of the wife, it was the duty of the court to see that such claim was paid out of the property of the estate. It had no power to direct a distribution of the estate to the heirs, charged with the lien in favor of the administrator on account of money expended by him for the benefit of the estate. So far, at least, as the judgment purported to create a lien upon the interest of the heirs in the property described in the complaint, it was void; and, unless it appeared that plaintiffs had some interest in or lien upon the property, no right of action was shown.

The facts alleged to constitute the second cause of action were insufficient, for the reason that the larger portion of the expenditures was not such as could be made by Charles Becker at the expense of his co-tenants, and that which was a proper charge could not be collected otherwise than by the retention of the property until it was paid. Besides, it may well be questioned whether a claim which one co-tenant might enforce as a lien against the interest of his co-tenant could be assigned and enforced by the assignee, who had no interest in the property.

We are unable to discover any theory upon which either of the counts stated a cause of action. The judgment will be affirmed.

DUNBAR, ANDERS, and GORDON, JJ., concur.

(15 Wash. 517)

#### KLEEB v. FRAZER et al.

(Supreme Court of Washington. Nov. 16, 1896.)  
FRAUDULENT CONVEYANCES—SUFFICIENCY OF EVIDENCE.

In an action to set aside a deed and bill of sale as fraudulent, where the evidence shows only one incident in the whole transaction not consistent on its face with the theory of good faith, a judgment for defendants will not be disturbed. Hoyt, C. J., dissenting.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by John W. Kleeb against Benjamin Frazer and Henry Frazer to set aside

and annul an alleged fraudulent deed and bill of sale. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Parsons, Corell & Parsons, for appellant.  
O'Brien & Robertson, for respondents.

DUNBAR, J. This action was brought to set aside and annul an alleged fraudulent deed and bill of sale, made by the defendant Benjamin Frazer to his brother, Henry Frazer, respondents in this case. The appellant relies upon the judgment in this court in *O'Leary v. Duvall*, 10 Wash. 606, 30 Pac. 163, but a careful review of all the testimony in this case convinces us that the rule applied in that case is not applicable to this. While it is true that fraud is hard to prove, yet it is equally true that it must be proven before judgment of fraud can be entered; and while there are one or two suspicious circumstances in this case,—as, for instance, the sending of the \$1,000 draft to Henry Frazer for the benefit of his brother, Benjamin Frazer,—yet this was only an incident in the whole transaction, and the only one we have been able to discover which is not consistent on its face with the theory of good faith; and, as the transaction was several years ago, it might well happen that the witness had forgotten many things which would serve to explain. We have examined with particular care the testimony in reference to deposits in the banks, and we think it not unlikely that men of the business character of these respondents would not be able to produce any evidence of the mode of their transaction with the banks, or with the volume of business transacted at a time so long ago; and the testimony of the officers of the banks was not by any means conclusive that the respondents did not have the money deposited in the respective banks which they testified they had. On the whole, we think, applying the most liberal rules in favor of the appellant, that he has failed to overcome the burden of establishing fraud upon these respondents in the transaction attacked, and, finding no error in any other respect, the judgment will be affirmed.

SCOTT, GORDON, and ANDERS, JJ., concur. HOYT, C. J., dissents.

(15 Wash. 601)

#### CITY OF OLYMPIA v. STEVENS.

(Supreme Court of Washington. Nov. 23, 1896.)

TAXATION—ASSESSMENT ROLL—ENFORCEMENT OF TAX LIEN—VALUATION OF PROPERTY.

1. In an action to enforce a lien for taxes assessed by the plaintiff city, proof that the assessment roll had been regularly certified was sufficient, *prima facie*, to authorize a decree of foreclosure against the defendant for the nonpayment of taxes.

2. In an action to enforce a lien for taxes assessed by the plaintiff city, proof that certain members of the board of equalization had stated that they had raised the assessment on some prop-

erty because it was necessary that there should be a high valuation, in order to enable the city to meet its obligations, is insufficient to show a fraudulent intent on the part of the board to value property at a higher rate than it was worth.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Action by the city of Olympia against Hazard Stevens to enforce a lien for city taxes. From a judgment for plaintiff limiting the lien, both parties appeal. Reversed.

A. J. Falknor and Preston M. Troy, for plaintiff. Charles H. Ayer, Charles M. Dial, and George Donworth, for defendant.

HOYT, C. J. This action was brought to foreclose the lien upon the property of the defendant, created by certain taxes which it was alleged had been assessed against it. After certain denials, the defendant set up two affirmative defenses,—the first founded upon the claim that the assessment roll had not been properly certified; and the second upon the allegation that the board of equalization had, in pursuance of an illegal combination, fraudulently raised the value of the property as returned by the assessor; that the increase of valuation was not for the purpose of equalizing the value of the property of the city, but for the purpose of increasing its total valuation, to the end that larger indebtedness might be incurred. Trial was had, and the conclusion reached by the court that the assessment was sufficient, and that such amount of the taxes as would have been properly levied upon the values returned by the assessor were a lien upon the property, and that therefore the city was entitled to a decree of foreclosure; but that the action of the board of equalization in raising the value returned by the assessor was illegal, and that the taxes levied upon such increased amount could not be collected. Each of the parties appealed to this court, and these appeals present two questions for consideration,—one upon the appeal of the defendant, which grows out of the action of the court in denying his motion for a nonsuit at the close of plaintiff's case; the other upon the appeal of the plaintiff, which challenges the sufficiency of the evidence to sustain the finding to the effect that the board of equalization had acted fraudulently or illegally in raising the valuation made by the assessor.

Upon the first question, defendant contends that the motion for nonsuit should have been granted for the reasons (1) that the assessment roll offered in evidence was not sufficiently identified or authenticated; (2) that such roll, if regular, was not sufficient to show that the taxes had been levied as set out therein. The trial court found as a fact that the roll had been properly identified, and that the certificate thereto was sufficient; and there was, in our opinion, sufficient evidence to sustain this finding.

As to the second reason, it might well be

held that defendant was not in a situation to avail himself of the insufficiency of the proof of the levy of the assessment, if such insufficiency existed; for, while it is true that there were general denials contained in his answer, some of them, at least, were inconsistent with the facts set up in the affirmative defenses. But, in our opinion, the proofs upon the part of the plaintiff were sufficient to establish at least a prima facie case. Under the ordinances which were introduced in evidence, and the statutes in force relating to the assessment and collection of taxes in cities of this class, the assessment roll, when regularly certified, was sufficient to authorize the collection of the taxes assessed against the property therein named; and, if it was sufficient to authorize the proper officer of the city to collect the taxes, it was prima facie sufficient to authorize the court to decree foreclosure for nonpayment of such taxes. Especially is this true when taken in connection with the other proofs offered on the part of the plaintiff. To show improper action on the part of the board of equalization, evidence was introduced which tended to show that the valuation made by the assessor was nearer the cash value of the property than the valuation placed thereon by the board of equalization, and that statements had been made by three or four of the members of such board to the effect that it was necessary to place a high valuation upon the property of the city to enable it to meet necessary obligations. It is not necessary to decide the effect of statements by the members of the board that such board would raise the value of the property beyond what was believed to be its cash value, for the reason that none of the statements proven fairly warrant the assumption that any such action was intended. The statements testified to did not show any such illegal intention. The most that they tended to show was that, by reason of the financial condition of the city, it was necessary that its property should be kept at a high valuation; and there was not a suggestion, even, that for that or any other reason it was the intention of the board to value the property at a higher sum than they considered it to be worth. But even if some of the statements would have warranted the inference that such was the intention, it was at most but a rebuttable inference, and was so clearly overcome by the positive evidence of the members of the board as to their action that a finding in accordance with such inference cannot be allowed to stand. It will not do to convict public bodies, the members of which are acting under the sanction of an oath, of improper action, without proof which can be fairly explained upon no other hypothesis than that of such improper action. The facts shown by the evidence, construed most strongly against the board, can all be harmonized with proper action on their part, and, this being so, it must be so harmonized. That part of the proof which tended to show that



the value of the property was less than that placed upon it by the board of equalization was without force, except that in connection with other facts it might have had a tendency to show fraudulent action on the part of the board of equalization. No question of fact could be presented as to the value placed upon the property unless it was first shown that the action of the board in valuing it was illegal or fraudulent. In our opinion, the city made out a prima facie case, and it was not overcome by the proof offered on the part of the defendant. The judgment will be reversed, and the cause remanded, with instructions to enter a decree as prayed for in the complaint.

DUNBAR and ANDERS, JJ., concur.

GORDON, J. I concur in the result.

(15 Wash. 593)

CLALLAM COUNTY v. CLUMP et al.  
(Supreme Court of Washington. Nov. 23, 1896.)  
APPELLATE JURISDICTION—ORDER GRANTING NEW TRIAL AT INSTANCE OF BOTH PARTIES.

Neither party can appeal from an order setting aside the verdict, and awarding a new trial, where both submitted motions therefor, though the order purports on its face to grant the motion of defendant only, and to overrule that of plaintiff.

Appeal from superior court, Clallam county; R. A. Ballinger, Judge.

Action by the county of Clallam against M. J. Clump and others on an official bond. Plaintiff recovered a verdict for a part of its claim only, and from an order purporting to overrule its motion for a new trial it appeals. Affirmed.

James Stewart and J. T. Ronald, for appellant. A. R. Coleman and Trumbull & Trumbull, for respondents.

HOYT, C. J. The issues made by the pleadings in this action were tried to a jury, which returned a verdict in favor of the plaintiff for a part only of its claim. The plaintiff made a motion to vacate and set aside this verdict, for errors of law occurring upon the trial, to which it had excepted. Thereafter the defendants also moved for a new trial, for reasons set out in the motion. The two motions were submitted to the court without argument, and an order was made by it which, in terms, granted the motion of the defendants, and set aside the verdict, and overruled the motion of the plaintiff. From this order this appeal has been prosecuted.

We cannot go into the alleged errors discussed in appellant's brief, for the reason that appellant is not now in a position to obtain any benefit from such errors, if errors they were. The order appealed from, though on its face purporting to grant the motion of the defendants only, and to deny that of the plaintiff, in fact granted what each of the parties

asked. That was, to have the verdict vacated and set aside. This being so, neither of the parties could appeal from such order, for the reason that it must be held to have been entered at the request of each of them. The order will be affirmed.

DUNBAR, SCOTT, ANDERS, and GORDON, JJ., concur.

(15 Wash. 627)

AULT v. INTERSTATE SAVINGS & LOAN ASS'N.

(Supreme Court of Washington. Nov. 27, 1896.)

ACCOUNT STATED—EVIDENCE—PRESUMPTIONS.

1. Where plaintiff mailed an account stated August 25th to defendant, in another state, and on September 19th received an answer from defendant, requesting information as to certain items of the account, and, in his reply to the letter asking such information, neglected to give defendant the information requested, and began action on October 26th, there was not such a failure to object on the part of defendant as to warrant an assumption that the account had been consented to.

2. Mailing a letter raises a prima facie presumption that it was received, which is overcome by direct testimony of the person to whom it was sent that it was not so received.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by John B. Ault against the Interstate Savings & Loan Association. Judgment for plaintiff. Defendant appeals. Reversed.

Shank & Smith, for appellant. Coleman & Hart, for respondent.

HOYT, C. J. It was alleged in the complaint filed in this action that on the 26th day of August, 1895, an account was stated between the plaintiff and defendant, upon which statement a balance was found to be due from the defendant to the plaintiff of \$1,873.25; that said defendant then and there agreed to pay the said sum; but that it had not paid the same, nor any part thereof. Defendant's answer denied that any account had been stated, or that it had agreed to pay the respondent, as alleged in his complaint, and further denied that defendant had agreed to pay the plaintiff any sum whatever which had not been paid. Such answer also set up certain counterclaims, and asked for judgment thereon. The items of these counterclaims were admitted in the reply of the plaintiff, but it was alleged that the amount thereof had been credited to the defendant in the stated account sued upon. Upon the issues made by these pleadings, a trial was had, and a verdict returned by the jury, in favor of the plaintiff, upon which, after a motion for a new trial had been made and denied, judgment was rendered for \$1,959.90 in favor of the plaintiff, and against the defendant.

One of the errors alleged is that the evidence was not sufficient to sustain the verdict. Plaintiff testified: That on August 26,

1895, he made up an account against the defendant in substantially the following form:

Interstate Savings & Loan Ass'n, Minneapolis, Minn.

To John B. Ault, Dr.

To services rendered between the years 1889 and 1895.....	\$1,720 00
To Hudson & Sipprell and Stingley and Downs foreclosure suits.....	195 00
To Gustav Sorenson foreclosure suit..	60 00
To Nelson Eddy foreclosure suit.....	60 00
To draft C. B. Aldrich.....	100 00
To interest on above draft.....	50 00
To withdrawal value of Zwiefelhofer and Zelhi certificate of stock, assigned over for a valuable consideration	185 83
	<hr/> \$2,370 83

Credits.

By cash .....	\$85 00
By ½ M. D. Montgomery's due.....	

—That in connection therewith he wrote a letter of transmittal, of which the following is a copy: "Dictated by J. B. A. Snobomish, Wash., Aug. 26th, 1895. Interstate Savings & Loan Association, Minneapolis, Minn.—Gentlemen: Inclosed please find my bill for services rendered for you per your request; also, Hudson & Sipprell and Stingley & Downs foreclosure cases; also, Gustav Sorenson foreclosure suit; also, Nelson Eddy foreclosure suit; also, draft of C. B. Aldrich and interest; also, withdrawal value of Zwiefelhofer & Zelhi stock, No. 2,651. I have credited your account with the eighty-five (\$85.00) dollars you sent me; also, will credit your account with the amount due you from M. D. Montgomery's one-half on the Phoebe Steacy loan, when you send it to me. I want to say that you will be indebted to me in damages for all business you give to any other attorney for this county under my contract with you. Asking you for an immediate settlement, I remain, yours, truly, John B. Ault." He further testified: That, at the same time, he wrote an additional letter, of which the following is a copy: "Aug. 26th, 1895. Interstate Savings & Loan Association, Minneapolis, Minn.—Gentlemen: Since writing the inclosed letter, and making up the inclosed statement of my bill against you, I left the Montgomery item blank, which I have, by looking the matter up, found it to be \$412.58. So add it to the \$85.00 cash received, credited on inclosed bill; and it will make a total credit due you of \$497.58. Deduct same from the total of my bill of \$2,370.83, and it leaves a balance due me of \$1,873.25. Yours, truly, John B. Ault." That he inclosed it with the account and the other letter, and mailed the package containing these inclosures to the defendant on said 26th day of August, 1895. This letter, in due course, should have reached the defendant about four days after it was mailed, and the testimony upon the part of the defendant showed that an envelope containing the account and letter first above set out was received at its office in Minneapolis. But it also showed that the second letter was never received by defendant.

The testimony in behalf of the defendant further showed that, at the time this account and letter of transmittal were received, its president and general manager was out of the city for a few days, and that his presence was necessary before it could receive attention; that, for this reason, no action was taken upon the account rendered by the plaintiff until September 19th, at which time a letter was written by the general manager of the defendant to the plaintiff, of which the following is a copy: "Sept. 19th, 1895. Mr. John B. Ault, Snobomish, Wash.—Dear Sir: Yours of the 26th ult. with account inclosed, comes to my desk for consideration. As we are without data as to the alleged contract mentioned in the last paragraph of your favor, and as the terms of such contract will probably enter into the consideration of the account, we will be obliged to you for a copy thereof, and promise you that, an early day after the receipt of the same, your bill shall be taken up, and considered upon its merits. Yours, truly, Horace Austin, Gen'l Manager." This letter was sent to the plaintiff by registered mail, and the return receipt showed that it was delivered about the 24th day of September. No action was taken in reference thereto by the plaintiff until September 30, 1895, at which time his testimony tended to show that he wrote and mailed to the defendant a letter in the following language: "Sept. 30th, 1895. Horace Austin, Esq., Gen'l Manager, Interstate Savings & Loan Association, Minneapolis, Minn.—Dear Sir: Yours of the 19th inst. to hand. The first item of my bill rendered you is for work done for the association at its special instance and request, and therefore is executed, and you are well aware of that work done, and that the price is reasonable. I told the association, when in your city the last time, that I had paid for the attorneyship for this county, and related the facts with your Secretary Mendel, and he said it was all right, and would acknowledge that I had a good contract. As I stated in my letter of the 26th of August last that I would hold the association liable in damages for all business it would give to any other attorneys outside of myself for this county under my contract with the association, I still adhere to that. I shall take it the association has agreed to my bill rendered if it does not deny the same. Yours, truly, John B. Ault." The testimony on the part of the defendant was to the effect that this letter was never received by it. On the 19th of October following, the complaint in this action was verified; and, on the 26th of the same month, the action was commenced.

This statement contains all the proofs relied upon by the plaintiff to show that the account had become stated between himself and the defendant, and substantially all that was proven by the defendant to negative this claim of the plaintiff. Some other facts were relied upon by the defendant, but, in our opinion, it is not necessary to notice them in

deciding the question as to the sufficiency of the proof to sustain a verdict which could only have been rendered by reason of proof of an account having been stated between the plaintiff and the defendant, as alleged in the complaint. That an account made out by one, and presented to the person against whom the charges are made, and not objected to by him within a reasonable time, will be taken to have been consented to, so as to become stated, is shown by nearly or quite all modern authorities. The old decisions, to the effect that this rule applied only to transactions between merchants, have become obsolete; and it is now held to apply to all classes, uninfluenced by their relation to each other, except that such relation will be taken into consideration in determining as to what is a reasonable time within which a failure to object will be held to have amounted to a consent that the account is correctly stated. As to what is such reasonable time, when the facts are agreed upon, is, under all the authorities, a question of law; and, when the facts are not agreed upon, it is a mixed question of law and fact. In either case, what is a reasonable time will depend upon all the circumstances surrounding the business transactions of the parties; and until there has been such a delay in making the objection that, in the light of all such circumstances, it could not have been reasonably expected, a consent to the correctness of the account will not be presumed.

Under these rules, was there such delay on the part of the defendant as to make the account in question a stated one, even if the proofs offered on the part of the plaintiff were taken to be true, and not to have been affected by any testimony offered on the part of the defendant? All that was shown by these proofs was that on August 26th the account was mailed to the defendant in Minneapolis; that nothing was done in reference thereto until September 19th, at which time certain information was asked of the plaintiff to enable the defendant to determine as to the justness of the account, and that, in his reply to the letter asking this information, the plaintiff neglected to give to the defendant the information requested; that thereafter nothing was done until the commencement of the action, on October 26th. And, in our opinion, it did not appear therefrom that there had been such a failure to object on the part of the defendant as to warrant the assumption that the account had been consented to. It is true that there was a delay of some 15 or 20 days from the time it received the letter containing the account before it called for information in reference thereto. But, in view of the course of business between the parties, such delay was not in itself so unreasonable as to warrant the assumption that the account had been approved. Nor was the lapse of 20 or 25 days after the receipt by the defendant of plaintiff's letter of September 30th sufficient for

that purpose, especially in view of the delay of the plaintiff in answering defendant's letter of the 19th. Besides, it may well be questioned whether the failure to further object to the account for any length of time would have amounted to a consent thereto, after the letter of September 19th, calling upon the plaintiff for information, had been written, until the information therein called for had been furnished, or the failure to furnish it explained.

In our opinion, the plaintiff failed to make out a prima facie case; but, even if such a case was made out, it was entirely overcome by the undisputed proofs on the part of the defendant. If the second of the letters above set out never reached the defendant, then there never was such an account rendered as could, by any lapse of time, become an account stated. One of the items of such account was not filled out; hence it was not a complete statement of the account between the parties. If this letter was received with the account, it was probably sufficient to complete it. But, while the testimony on the part of the plaintiff may have been sufficient to raise a presumption that it was received, that presumption was entirely overcome by the testimony on the part of the defendant, which was to the effect that such letter had never been received. The letter might have been inclosed, as stated by plaintiff, and yet never have come to the attention of the defendant. If it was in the envelope, the fact that the account was there with one letter of transmittal may have led the defendant to overlook the second letter. The prima facie showing made by the plaintiff as to the letter of September 30th was even more completely overcome by the testimony on the part of the defendant. From the mailing of the letter to the defendant, but a prima facie presumption that it was received in due course of mail arose; and, when the defendant testified in express terms that it was not received, this presumption was entirely negatived; not because such testimony was in conflict with that of the plaintiff, but because it overcame a presumption flowing from the acts proved. A letter mailed to a person does not necessarily reach him; and while, for convenience sake, and from the necessity of business, its reception will be presumed, this presumption, flowing from the fact that letters usually reach their destination, can have little weight, as against positive testimony to the effect that the letter was never received. It does not appear from all the proofs that the account was consented to by the defendant. It follows that the judgment must be reversed; but, in view of the circumstances and of the lapse of the time since the action was brought, justice will be best subserved by remanding the cause for a new trial, with leave to file amended pleadings.

DUNBAR, ANDERS, and GORDON, JJ.,  
concur.

(15 Wash. 618)

**LYONS et al. v. FOWLER et al.**

(Supreme Court of Washington. Nov. 25, 1896.)

**ESTOPPEL IN PAIS.**

Judgment creditors caused an execution to be levied on land previously conveyed by the debtors, and, at the execution sale, bid it in. *Held*, that the grantees of the debtors were not estopped from asserting title against such creditors by the fact that in answer to a proposition made by such creditors several months before the levy, to trade other real estate for the land in question, they stated that they had deeded the property to one of such debtors, and the trade, if made, would have to be made with her.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by Lysander Lyons and others against George Fowler and others for a decree declaring plaintiffs to be the owners of certain land at the time of the levy on it of an execution issued on a judgment in favor of defendants, and against John W. McMahan and Merritta McMahan, his wife, and a sale thereunder to defendants, and for other relief. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Jas. M. Epler, for appellants. Elwood Harshman, for respondents.

HOYT, C. J. Prior to November 2, 1893, John W. McMahan and Merritta McMahan, husband and wife, were the owners of the land the title to which was in question in this action. On that day, for a valuable consideration, they conveyed it to the respondents. On the 13th day of July, 1894, a judgment was duly rendered in the superior court of Snohomish county, in favor of Jacob Brandt & Co., against the said John W. McMahan and Merritta McMahan, upon which an execution was issued on the 4th day of August, 1894, and levied upon the property in controversy, which was thereafter sold to satisfy the execution, and bid in by the appellants, to whom a certificate of sale was duly issued. There is no contention that the paper title, both of record and in fact, was not in the respondents at the time of the levy and sale; but the appellants claim that the respondents should not be allowed to assert their title against that acquired by appellants under the execution sale, for the reason that they are estopped from so doing by certain declarations and representations made by them to appellants. These representations were made in February and March, 1894, and grew out of a proposition made by the appellants to the respondents to trade certain real estate in the city of Seattle for the property in question. In answer to this proposition, the respondent Lysander Lyons wrote the appellant George Fowler to the effect that he had deeded the property to Mrs. McMahan, and that a trade, if made, would have to be with her. It was also claimed that like statements were made by said respondent to the appellant in a conversation between them, and that the respondent Rhoda S. Lyons had made statements to

the same effect; and the claim was that, by reason of these statements, respondents were estopped from denying that the title to the property was in the McMahans. As to whether or not some of these statements were made, there was a conflict in the evidence; but, even if they were all made just as claimed by the appellants, we are of the opinion that they were not sufficient to estop the respondents from asserting their title as against that acquired by the appellants under the execution sale. If the statements had been made at or near the time of the execution sale, and in view of a purchase thereunder by the appellants, they might have been sufficient to estop respondents. But the statements relied upon were made several months before the levy of the execution upon the property; and, while it is true that there had been no change of the legal title between the time that such statements were made and the date of such levy, there might have been such changes in the surrounding circumstances as to greatly affect the relations of the McMahans to the legal title, which was all the time in the respondents. Besides, the representations were only material in connection with the transaction in which they were made, which was the proposed trade of certain property of the appellants for that in question. They had no reference whatever to the action of the appellants in purchasing the property at forced sale. The respondents may well have been willing to have had the appellants treat the title as vested in the McMahans for the purpose of a trade for other property, yet unwilling that the title should be so treated for the purpose of having made therefrom the money due upon the judgment against the McMahans. In the one case it would have been within the power of the McMahans to use the property received in the trade for the benefit of the respondents; in the other the McMahans would have nothing with which they could reimburse the respondents for the property taken in execution. Judgment affirmed.

DUNBAR, SCOTT, ANDERS, and GORDON, JJ., concur.

(15 Wash. 648)

**MELBYE v. MELBYE.**

(Supreme Court of Washington. Nov. 30, 1896.)

**CHATTEL MORTGAGES — FRAUD AS TO CREDITOR — IN PARI DELICTO.**

In an action to foreclose a chattel mortgage, defendant pleaded failure of consideration, alleging that it was given at the suggestion of the mortgagee, his brother, to protect defendant from creditors. It appeared that the mortgagee had come from Norway some years before, and had good business ability and knowledge. The defendant had but lately come to this country, and knew but little of business methods or of the language. There were, in fact, no creditors pressing him, except one, whom he paid; but, upon the representations of his brother that he was in danger, he had given this and other mortgages to

cover his property. *Held*, that the parties were not in *pari delicto*, so as to render affirmative relief for defendant unwarranted.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by Gustave Melbye against Oskar Melbye to foreclose a chattel mortgage. From a judgment for defendant on his cross complaint, plaintiff appeals. Affirmed.

Million & Houser, for appellant. Carr & Preston and W. R. Bell, for respondent.

SCOTT, J. The complaint in this action was in the ordinary form to foreclose a chattel mortgage, and to recover upon a promissory note for \$500, which the mortgage was given to secure. The answer admitted the execution of the note and mortgage, but alleged a want of consideration; and, by way of a cross complaint, the defendant alleged that on the same day, but prior to the execution of the note and mortgage aforesaid, the defendant had given the plaintiff another note, for \$478, secured also by a chattel mortgage upon the same property. It was conceded that this mortgage was valid. It appears that the defendant at that time was engaged in the mercantile business, and one of his creditors was pressing him for payment of a debt due, and he obtained the money for which the last-mentioned note and mortgage were given for the purpose of discharging it. It is further alleged, in substance, that thereafter, on said day, the plaintiff represented to the defendant that he was in danger of being prosecuted by other creditors, and he advised the defendant to give him another note and a mortgage upon the same property, for the purpose of protecting him against such creditors, and agreed that he would never undertake to enforce the same, and would surrender it to him when his other creditors were paid, or he was relieved from danger of being proceeded against by them. The court afterwards permitted the answer to be amended upon the trial,—to set up, in substance, that thereafter, upon like representations, the defendant also executed to the plaintiff two real-estate mortgages upon lands in Skagit county. The payment of a certain sum on the note secured by the mortgage admitted to have been given for a valuable consideration was pleaded, and also a tender of a sufficient sum to discharge the same; and the defendant asked that all of such mortgages be canceled. Judgment was rendered in favor of the defendant upon his cross complaint, and the plaintiff has appealed.

It is contended that the court had no authority to grant the defendant any affirmative relief,—not on the ground that such relief could not be granted in the action pending, as having no sufficient relation thereto, but on the ground that the proof did not support the findings, and that the testimony showed that the defendant had given the chattel mortgage sought to be foreclosed, and the real-estate mortgages, for the purpose of covering up his

property and defrauding his creditors; that the parties were in *pari delicto*; and that, under this view of the case, the most the court could have done was to have dismissed the plaintiff's complaint. It appears from the testimony that the parties were brothers, and that they were born in Norway; that plaintiff had resided in this country for a great many years, and was well educated, understood the English language, and had had large experience in business and business affairs; while the defendant had resided here for a much shorter time, and had a very limited education, and an imperfect understanding of the English language and of business matters, and that he had always relied upon his brother, the plaintiff, and had confidence in his honesty, integrity, and business ability. And, while the general rule contended for by appellant is conceded, it is contended that this case does not fall within it, as the parties were not equal in guilt, and the defendant is the more excusable of the two, if found to have been consciously guilty at all, and that the law will not deny him relief against the one who unduly influenced and imposed upon him, and was principally responsible for the fraudulent undertaking. This limitation of the rule is well established by the authorities, and has been directly recognized by this court in the case of *Rozell v. Vansyckle*, 11 Wash. 79, 39 Pac. 270. It does not appear that there was any intention on the part of the defendant to defraud his creditors. The only money that he obtained from his brother was obtained for the purpose of paying one of them, and was used for that purpose. There was no evidence to show that any of his other creditors were pressing him for payment, and the court was warranted in finding that he was induced to give the mortgages upon the representations, influence, and advice of the plaintiff; and there was sufficient proof to support the other findings. Affirmed.

DUNBAR, ANDERS, and GORDON, JJ., concur.

(15 Wash. 660)

SPRENGER v. TACOMA TRACTION CO.

(Supreme Court of Washington. Nov. 30, 1896.)

#### CARRIERS—EJECTING PASSENGER—EVIDENCE.

1. In an action for an ejection from a street car for nonpayment of fare, plaintiff cannot be asked, on cross-examination, whether he had not been put off of a Northern Pacific car for nonpayment of fare.

2. In a trial for ejecting plaintiff from a street car for failure to pay his fare, where the conductor testifies that plaintiff had not paid his fare, he cannot be further asked for the reason which led him to come to the conclusion to which he had testified.

3. Where plaintiff was ejected from a street car for an alleged failure to pay his fare, under the definite charge of the conductor that he was attempting to beat his way over the road, he was not required to use another street-car ticket, in his possession, to avoid expulsion, in order to reduce the damages as much as possible.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by Frank Sprenger against the Tacoma Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Doolittle & Fogg, for appellant. Frank D. Nash, for respondent.

HOYT, C. J. Defendant was operating a street-car line in the city of Tacoma, and plaintiff was a passenger on one of its cars. He was ejected therefrom by the conductor for the alleged nonpayment of his fare, and brought this action to recover damages, claiming that he had paid his fare, and that he was unlawfully ejected. The trial resulted in a verdict for \$100 damages, upon which judgment was duly rendered. In its brief defendant has discussed the alleged errors of the trial court under numerous heads, but for the purposes of this opinion they can be so grouped as to present but four distinct propositions. Of these two relate to the rejection of testimony offered on the part of the defendant, the third to instructions given to the jury and refusals to instruct, and the fourth to the measure of damages.

Plaintiff, having testified that he had paid his fare, and that thereafter he had been compelled to leave the car by the action of the conductor and motorman, was asked by defendant's counsel if he had not been put off of the street cars before for refusal to pay fare. This question he answered in the negative. Whereupon he was asked if he had not been put off the Northern Pacific railroad cars for nonpayment of fare. Upon objection of the plaintiff, the court refused to allow him to answer, and it is claimed that in so doing it committed error. A large number of cases have been cited to show that it is competent to prove that one has been guilty of a certain offense by proof of the commission of other offenses of the same nature. But in our opinion none of these cases are applicable to the question here presented. The fact that plaintiff had had trouble about the payment of his fare upon a railroad train would bear so remotely upon the question as to his attempting to beat the street car out of a five-cent fare that it was properly excluded from the consideration of the jury. The ruling of the court, which allowed the defendant to attempt to show that the plaintiff had had trouble about the payment of fare upon street cars, was as favorable to the defendant as it could ask.

The conductor, having testified that he collected fare on the side of the car upon which the plaintiff was sitting up to and including that of a woman sitting next to him before he left that side to collect fares upon the other, and that, when he returned to the side from which he first collected fares, he sought to collect the fare of the plaintiff, was asked by defendant's counsel a question which sought to elicit from the witness a statement

as to the reasons why he was sure he had left off collecting, upon the side of the car upon which the plaintiff sat, with the woman who sat next to him. The objection of plaintiff to this question was sustained, and it is claimed that, in sustaining it, the court committed error. In determining as to the correctness of this ruling, it must be remembered that the question was put by defendant to its own witness, that he had testified positively to the fact that plaintiff had not paid his fare, and that he had left off collecting upon that side with the woman sitting next to plaintiff. This being so, it was not competent for defendant to bolster up the testimony of its own witness by asking for the reasons which had led him to come to the conclusions to which he had testified. It might have been competent for the plaintiff, in cross-examination, to have gone into this question; but, until this was done, the testimony, when offered upon the part of the defendant, was properly excluded.

It will not be necessary to notice in detail the exceptions to the instructions, for the reason that such exceptions are founded largely upon questions going to the measure of damages, which will be hereinafter considered. It will be sufficient to say that, in view of the measure of damages as to which, under the evidence, we think the jury should have been instructed, the instructions sufficiently and correctly stated the law of the case. It appeared, from the uncontradicted testimony, that the plaintiff had several other tickets, one of which he could have used in payment of his fare, and thus have prevented his ejection for not paying; and it is earnestly contended on the part of the defendant that, under the well-settled rule that it is the duty of one who has been deprived of a contract right to reduce the damages flowing from the violation of the contract as much as possible, it was the duty of the plaintiff to have used one of the tickets in his possession, by doing which he would have reduced the damages growing out of the wrongful act of the conductor to the sum represented by the value of the ticket. The general rule contended for by the defendant is unquestioned, and it may be conceded that thereunder the defendant would only have been liable in such an amount of damages as was necessarily imposed upon the plaintiff by its wrongful action, if such wrongful action had not been committed by it under circumstances which showed a disregard for the rights of the plaintiff. If no evidence had been introduced tending to show that there had been a want of care and investigation on the part of the conductor before he acted upon the claim that plaintiff had not paid his fare, there might be reason for the application of the rule contended for, though many of the cases hold that such rule is not applicable to a contract of carriage by a common carrier with a passenger. But there was evidence sufficient to go to the jury to show that

there had been such a disregard of the rights of the plaintiff as to deprive the defendant of the benefit of this rule, even if it applied to cases of this kind. The undisputed proof showed that, with the delay of a few minutes, the conductor could have made an investigation which would have definitely determined whether or not the plaintiff had paid his fare; and, in view of the plaintiff's claim that he had paid it, which claim was supported by the statements of at least two of his fellow passengers, good faith required that such investigation should have been made before making the definite charge that plaintiff was attempting to beat his way over the road, and enforcing such charge by his expulsion from the car. In view of the action of the conductor, the plaintiff was placed in such a position that it was not his duty to use another ticket, and thus tacitly admit that he had been guilty of trying to beat the company, as claimed by the conductor. This being so, the instructions as to the measure of damages were what they should have been, and the evidence was such that the verdict for \$100 was not excessive. The judgment will be affirmed.

DUNBAR, SCOTT, ANDERS, and GORDON, JJ., concur.

(15 Wash. 652)

**TITLOW v. CASCADE OATMEAL CO.**  
et al.

(Supreme Court of Washington. Nov. 30, 1896.)

**FRAUDULENT CONVEYANCE—OBJECTIONS NOT  
RAISED BELOW.**

1. In an action to set aside an alleged fraudulent conveyance, a motion for judgment on the pleading, on the ground of insufficiency of the allegations of fraud, is properly denied, where the objections raised relate more to the form than to the substance thereof.

2. Where, in an action by a receiver, he testifies that he was such receiver without objection, defendant, on appeal, cannot question its competency, and urge that the order appointing him should be introduced.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by A. R. Titlow, as receiver of the Tacoma Trust & Savings Bank and of the Bank of Tacoma, against the Cascade Oatmeal Company and others. Judgment for plaintiff. N. C. Richards, administrator of David C. Humphreys, appeals. Affirmed.

Richard Saxe Jones, for appellant. Boyle & Richardson, for respondent.

SCOTT, J. This action was brought to set aside an alleged fraudulent transfer of a mortgage given by the Cascade Oatmeal Company to the Tacoma Trust & Savings Bank, and assigned by the bank to appellant, Richards, as administrator of the estate of David C. Humphreys. A decree was rendered in favor of the plaintiff, and said administrator has appealed.

It is first contended that the court erred in refusing to grant the appellant's motion for a judgment on the pleadings, on the ground of the insufficiency of the allegations of fraud. The objections raised relate more to the form than the substance of the allegations, and, as the case was fully tried upon that issue, technical questions not now affecting the merits will not be regarded.

It is next contended that the court erred in refusing to grant the appellant's motion to dismiss the cause, on the ground that there was no proof of the plaintiff's authority to sue; but it appears that the plaintiff testified that he was receiver of the Tacoma Trust & Savings Bank, and of the Bank of Tacoma; and this testimony was given without any objection, and the appellant will not now be heard to question its competency, and to urge that the order appointing him should have been introduced in evidence. As receiver, the plaintiff, *prima facie*, had authority to bring the action, under section 331, vol. 2, of the Code; and as the action was brought, and prosecuted to judgment, in the court which had appointed him receiver, it was clearly under the control of the court. There was no counter-showing as to the authority of the receiver to bring suit.

The appellant most strongly contends that the case should be decided otherwise on the merits; but, after considering the arguments of counsel, and examining the evidence, we are of the opinion that the findings of the court are well supported, and entitle the plaintiff to the relief given. Affirmed.

DUNBAR and ANDERS, JJ., concur.

(15 Wash. 598)

**STATE v. HENDERSON.**

(Supreme Court of Washington. Nov. 23, 1896.)

**INDICTMENT—SALE OF IMITATION BUTTER.**

A complaint for violation of Act March 11, 1895, § 5, which prohibits the sale of oleaginous substance colored in imitation of butter, and not made from unadulterated milk or cream, alleging that "defendant did \* \* \* sell \* \* \* two pounds of an oleaginous substance compounded and colored in imitation of yellow butter produced from pure milk or the cream from the same, and such oleaginous substance and compound not having been produced directly and wholly, at the time of the manufacture thereof, free from coloration or ingredient that caused it to resemble yellow butter produced from unadulterated milk," does not sufficiently allege that the substance sold was not produced from unadulterated milk or cream.

Appeal from superior court, King county; T. J. Humes, Judge.

William J. Henderson was convicted of a crime, and appeals. Reversed.

Charles E. Patterson and Fred H. Peterson, for appellant. A. W. Hastie and W. W. Wilshire, for the State.

HOYT, C. J. Appellant was convicted of a violation of the provisions of section 5 of the act of March 11, 1895. This section makes

it unlawful for any person to sell any fat, oil, or oleaginous substance, or compound thereof, not produced at the time of manufacture from unadulterated milk or cream from the same, with or without harmless coloring matter, which shall be in imitation of yellow butter produced from pure, unadulterated milk or the cream from the same. The charging part of the complaint, upon which the defendant was convicted, was that "said defendant did unlawfully sell and deliver to one John Huffman, for twenty-five cents in lawful money, one roll containing two pounds of an oleaginous substance compounded and colored in imitation of yellow butter produced from pure, unadulterated milk or the cream from the same, and said oleaginous substance and compound not having been produced directly and wholly, at the time of the manufacture thereof, free from coloration or ingredient that caused it to resemble yellow butter produced from unadulterated milk or the cream from the same." It is claimed by appellant that this complaint fails to state the necessary facts to constitute a crime under the section of the statute above referred to. That it is necessary that the complaint should show that the oleaginous matter had been produced or colored so as to imitate yellow butter manufactured from pure, unadulterated milk or the cream from the same, and that said oleaginous substance was not produced at the time of its manufacture from unadulterated milk or the cream from the same, is clear from the language of the section. Are these facts charged in the complaint above set out? The first one undoubtedly is, but we are unable to find that the second necessary element has been stated as a fact in the complaint, or that any words have been used from which such fact must necessarily be inferred. If the word "produced," where it last appears, had been omitted from the complaint, it might be inferred that it was intended to state, as a fact, that the oleaginous substance and compound was not produced from unadulterated milk or the cream from the same; but, with that word in the situation in which it is found, it is not made to appear that such was the intention of the pleader. In fact, a contrary intention is made fairly to appear. The use of such word connects what follows, "from unadulterated milk or the cream from the same," directly with the "yellow butter produced from pure, unadulterated milk or the cream from the same," above stated in the complaint, and is but a repetition of what had been before stated, and more nearly refers to the real butter of which the substance sold was an imitation than to the substance itself; and for that reason there is no statement in the complaint that the imitation was not produced from unadulterated milk or the cream from the same. But, as we have seen, one of the necessary elements of the crime was that the oleaginous substance sold should not be produced from pure, unadulterated milk or the

cream from the same; hence, the complaint failed to charge one of the facts necessary to constitute the crime. It is therefore insufficient to sustain a conviction, especially as it was timely moved against in the lower court. This conclusion makes it unnecessary for us to discuss the other questions raised by the appeal. The judgment and sentence will be reversed, and the cause remanded, with instructions to dismiss the proceeding.

DUNBAR, ANDERS, GORDON, and SCOTT, JJ., concur.

(15 Wash. 643)

R. WALLACE & SONS MANUF'G CO. v. SHARICK et al.

(Supreme Court of Washington. Nov. 28, 1896.)

ATTACHMENT—LEVY AND LIEN—PRIORITIES.

2 Hill's Code, § 298, provides that, where there are several attachments against the same defendants, they shall be executed in the order in which they were received by the sheriff. *Held*, that where a writ of attachment is placed in the hands of a deputy sheriff, and levied on property after execution has been placed in the hands of the sheriff, but before any levy of the latter has been made, the lien under the attachment has priority over the lien under the execution.

Appeal from superior court, Pierce county; J. C. Stallcup, Judge.

Action in attachment by the R. Wallace & Sons Manufacturing Company, a corporation, against I. J. Sharick, in which a levy was made on certain property of the defendant, after which a receiver was appointed by agreement of the parties. Prior to the levy of the attachment, an execution was issued on a judgment in favor of the Empire Jewelry Company, a corporation, against defendant, and placed in the hands of the sheriff, but no levy had been made thereunder. The property was afterwards sold by the receiver, and converted into cash. The Empire Jewelry Company filed a petition asking the court to give priority to its writ in the distribution of the proceeds of the sale. From a judgment denying such petition, and an order of distribution giving priority to such writ of attachment and others, the Empire Jewelry Company appeals. *Affirmed*.

White, Munday & Fulton and Sapp & Lysons, for appellant. Murray & Christian, for respondent.

DUNBAR, J. A writ of execution had issued on a judgment in favor of the appellant against I. J. Sharick, the defendant in this action, and had been placed in the hands of the sheriff. No levy had been made under this writ. Subsequent to the issuance of the execution, the respondent sued out a writ of attachment, which was placed in the hands of the deputy sheriff for levy. The goods in dispute were discovered by the respondent, and pointed out to the deputy sheriff, with instructions to levy upon the same, and were



levied upon by virtue of the writ of attachment. While the property was thus held, before any sale had been made, a receiver was appointed for said property, under stipulation of all the parties that the said property should be surrendered by the sheriff to the receiver with the express reservation and understanding that no writ or lien of any party thereto should thereby be impaired or prejudiced in any manner, but that the lien secured upon said property should continue on said property, or attach to the proceeds of said property, in like manner as if it had remained in the possession of, and had been converted into cash by, the sheriff. Thereafter, under direction of the court, the property was sold by the receiver, and converted into cash. The appellant petitioned the court to give priority to its writ in the distribution of the proceeds. This petition was denied, and a final order of distribution made, giving priority to the writs of attachment which had come into the sheriff's hands subsequent to the issuance of the execution, one of said writs being the writ of the respondent in this case.

The only error assigned is the refusal of the court to give priority, in the distribution of the proceeds, to appellant's writ of execution; so that the question presented is, did the writ of execution have priority over the writs of attachment under which the property was levied upon? We think the court did not err in overruling the appellant's petition. This case falls squarely within the rule announced in *Meacham Arms Co. v. Strong*, *Hackett & Co.*, 8 Wash. T. 65, 13 Pac. 245, and is in no way affected by the decision in *Wunsch v. McGraw*, 4 Wash. 72, 29 Pac. 832. It is admitted by the appellant that, in a case of this kind, its remedy would be against the sheriff if the writs had taken their usual and ordinary course, but that its remedy against the sheriff would not be by wrongful levy of the writs, but by reason of the improper distribution of the proceeds of the property (citing *Freem. Ex'ns*, § 193); and that, inasmuch as the distribution of the proceeds in this case was a matter to be decided by the court, and not by the sheriff, its remedy against the officer would fail. We think the appellant has mistaken the force of the case cited by *Freeman*, *supra*, and that the rule would apply only to cases where liens had been established by prior levies. But, however that may be, the duty of the sheriff is prescribed by statute in this state, and section 298<sup>1</sup> provides that, where there are several attachments against the same defendant, they shall be executed in the order in which they were received by the sheriff; so that the breach of duty by the sheriff occurred, if it occurred at all, prior to the possession of the property by the court through the receiver, and he would be liable, if liable at all, for not levying the writs in the order in which they were

received. It might well be that a writ of execution might be placed in the hands of the sheriff with instructions not to serve it, as it has been in many cases; or it might be that the sheriff might demand an indemnifying bond before he would feel justified in levying upon property, and, in such event, the refusal of a judgment creditor to furnish such indemnity could not prevent the attaching of the lien of some subsequent judgment creditor. Under the pleadings in this case, and taking the averments of the answer to the petition to be true,—as we must from the fact that there is no statement of facts accompanying this case, and the court must be presumed to have acted in accordance with the testimony,—we are unable to conclude that the court erred in denying appellant's petition. Affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

(15 Wash. 608)

### LUCE v. LUCE.

(Supreme Court of Washington. Nov. 24, 1896.)  
DIVORCE—ALLEGATION AND PROOF OF RESIDENCE  
—SUFFICIENCY OF EVIDENCE.

1. The complaint in an action for divorce should show affirmatively that, when the action was commenced, plaintiff had been a resident of the state for a year; but, when such allegation is made, and is sustained by the proof, the fact that an amended complaint alleges only that plaintiff has been a resident for more than a year when it is filed is not a fatal defect on demurrer. *Gordon, J.*, dissenting.

2. A person coming into the state does not become a resident until he forms a definite intention to locate therein.

3. Evidence, in general terms, that a wife used abusive language towards her husband is not sufficient ground for a divorce, where it also appears that the husband was equally regardless of her feelings.

Appeal from superior court, Snohomish county; John O. Denney, Judge.

Action for divorce by James Luce against Lella B. Luce. Judgment for plaintiff, and defendant appeals. Reversed.

Coleman & Fogarty, for appellant. Geo. E. Banks, for respondent.

HOYT, C. J. Respondent has filed a motion to dismiss the appeal, but it raises no jurisdictional question, and was not set out in his brief. It must, therefore, be denied.

The action was brought to obtain a divorce. It was tried upon an amended complaint, in which the only allegation as to the residence of the plaintiff in the state was "that for one year last past, and more, immediately preceding the filing of his amended complaint herein, he has been a resident of the state of Washington, and now is an actual resident of the county of Snohomish, and has been for more than eight months last past."

Defendant's first contention is that, since it does not appear, from this allegation, that plaintiff had been a resident of the state for

<sup>1</sup> 2 Hill's Code.

one year or more before the commencement of the suit, the complaint did not state a cause of action, in that it failed to show jurisdiction over the subject-matter. That the complaint in an action for divorce should show affirmatively that the plaintiff has been a resident of the state for more than a year before the action was commenced is undoubtedly true; and, if nothing further had appeared in the pleadings, taken as a whole, than the allegation above referred to, the contention of the appellant would have to be sustained. But the original complaint filed in the action contained a sufficient allegation as to the residence of the plaintiff, and in view of that fact we should not be disposed to reverse the decree, by reason of the insufficiency of the allegation upon that subject in the amended complaint, if, from the proof, it satisfactorily appeared that in fact the plaintiff had been and was a resident as alleged in the original complaint. We have, therefore, examined the proof upon that subject. This examination not only fails to satisfy us as to the truth of the allegation contained in the original complaint, but, on the contrary, has compelled us to come to the conclusion that the allegation in the amended complaint was as favorable to the plaintiff as the facts would warrant, and that in the original complaint was not true. The action was commenced in January, 1895, and plaintiff's own testimony failed to show that he became a resident of the state before June, 1894. More than that, the evidence given by him affirmatively showed that he was not a resident of the state of Washington until about June, 1894. He testified that he left the East for the purpose of finding a new location in which to do business; that he came to the state of Washington in January or February, 1894, and stopped at the cities of Seattle and Tacoma; that thereafter he went to the state of California, in further pursuit of the object which induced him to leave the East; that he returned to the state of Washington, and went into business in the city of Everett about the month of June, 1894. This testimony satisfies us that he was not a resident of the state of Washington until his return thereto from the state of California, when he located in business at the city of Everett. It might be inferred, from this testimony, that plaintiff lost his residence in the East when he left there, but even this does not clearly appear. And there is nothing therein which tends to show that he had any intention as to any definite location until he reached Everett upon his return from California. This being so, the plaintiff failed to prove a fact necessary to entitle him to any relief.

We have, however, looked further into the testimony, and are satisfied that it was not sufficient to warrant the court in granting a divorce; even if the jurisdictional fact as to residence had sufficiently appeared. No abuse by the defendant was shown, except in the use of abusive language, and this was only

testified to by the plaintiff and his sons in the most general terms; and the testimony of the plaintiff himself showed that he had not had more regard for the feelings of the defendant than she had for his. The decree will be reversed, and the cause remanded, with instructions to dismiss the action.

SCOTT and ANDERS, JJ., concur.

DUNBAR, J. I concur in the result.

GORDON, J. I concur in the result, but not upon the grounds stated in the opinion of the majority. The appellant (defendant below) demurred to the amended complaint upon the ground that the court had no jurisdiction of the subject-matter of the action, and upon the further ground that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and exception reserved. I concur in the view of the majority that "the complaint in an action for divorce should show affirmatively that the plaintiff has been a resident of the state for more than one year before the action is commenced," and am therefore of the opinion that the demurrer should have been sustained. The decision of the lower court upon the demurrer could not have been predicated upon proofs which had not then been taken. The only question involved was the sufficiency of the amended complaint, and it seems to me novel doctrine to hold that, in determining a question of that character, resort may be had to an original pleading, or to the evidence subsequently admitted upon the trial. 2 Hill's Code, § 222, provides that, when any pleading is amended before trial, it shall be done by filing a new pleading, and "such amended pleading shall be complete in itself without reference to the original or any preceding amended one"; and this I understand to be the general rule in Code states. Upon its face the complaint was demurrable, and, a demurrer having been seasonably interposed, it should have been sustained. Not sustaining it was reversible error, which was not waived by any subsequent proceedings upon the part of the appellant.

(15 Wash. 636)

FROELIC v. MORSE et al.

(Supreme Court of Washington. Nov. 28, 1896.)

TRESPASS—EVIDENCE.

In trespass by the lessee of a building torn down and removed by defendants in plaintiff's absence, and from which defendants removed plaintiff's effects, it was not error to admit testimony relating to the value of the building and contents.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action of trespass by Augusta Froelic against D. W. Morse and C. W. Thompson to recover damages sustained by plaintiff by reason of the removal of a building by defendants

of which plaintiff was the lessee, and the removal of plaintiff's effects from such building. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Geo. C. Hatch, for appellants. Trumbull & Trumbull, for respondent.

**PER CURIAM.** Subdivision 1 of rule 8 of this court (40 Pac. x.) is as follows: "Briefs shall be printed throughout in plain, clear type, and shall contain a clear statement of the case so far as deemed material by the party, with reference to the pages of the transcript for verification." Appellants' brief in this case is entirely innocent of any such references, and the errors assigned should in reality not be investigated by the court, but, inasmuch as the record is small, we have looked into it. Under the pleadings in this case and proof adduced there could have been no other result than a judgment for plaintiff. The only question was the amount of damages. We think the court did not err in permitting respondent and witness Byrne to testify in relation to the value of the buildings and contents thereof. Of course, the plaintiff could recover only the market value of the property, but it was the market value that the witnesses were testifying to, and we think the record shows that they were plainly competent to testify to that fact. The other objections to testimony admitted we think are equally without foundation, and, finding no error in the instructions of the court, the judgment will be affirmed.

(15 Wash. 678)

#### KAHALEY v. HALEY et al.

(Supreme Court of Washington. Nov. 30, 1896.)

##### LIABILITY OF BAILEE—STOCK—CONVERSION.

1. Stock was deposited with a gratuitous bailee, on condition that it should be delivered to the purchaser on payment of notes deposited with the stock. The purchaser resold a portion of the stock, for which the second purchaser paid in part, the bailee agreeing to deliver it to him when the balance was paid. Eight months afterwards, the original purchaser gave an order directing the bailee to deliver to H. "all" stock deposited in his name, which order was accepted by the bailee, who had forgotten the sale to the second purchaser. Before the stock was delivered to H., the second purchaser tendered the balance due. *Held*, that the bailee was not authorized to deliver the stock to H.

2. Wrongful delivery of stock deposited with a bailee, and the cancellation of the old and reissue of a new certificate, constitute a conversion.

Hoyt, C. J., dissenting.

Appeal from superior court, King county; R. Osborn, Judge.

Action by John L. Kahaley against John Haley and another. From a judgment for plaintiff, defendant Edward O. Graves appeals. Affirmed.

Bausman, Kelleher & Emory, for appellant. Thos. A. Gamble, for appellee Kahaley. Stratton, Lewis & Gilman, for appellee Haley.

**SCOTT, J.** This action was brought to recover the value of ten shares of stock in the Haley Grocery Company, which it was claimed the defendant Graves had wrongfully delivered to one Hill. Said stock had been deposited with Graves as bailee, under the following agreement:

"Seattle, Washington, January 30, 1892. E. O. Graves, Esq., Seattle, Wash.—Dear Sir: We deposit herewith the following papers: 1st. The two notes of Joseph B. Hill, for \$2,515.35 each; one due on or before one year after date, the other on or before two years after date. 2nd. Two notes of John Haley, exactly similar to the preceding. 3rd. Forty-five shares of the capital stock of the Haley Grocery Company, originally issued to James H. Glenn, and by him indorsed to Joseph B. Hill. 4th. Forty-five similar shares, indorsed by J. H. Glenn to John Haley. The papers are left with you, with the following mutual agreement and understanding: Messrs. Hill and Haley have purchased each the shares mentioned, respectively, and have paid J. H. Glenn, by their respective notes. The shares are not to be delivered up to the purchasers until the notes are paid, nor are the notes to be removed or negotiated by the payee during the period which they run. On the payment of these notes, which can be done at any time before or after maturity, you will please deliver to the purchasers, respectively, their shares, and each of the purchasers shall have a right to a separate release on the payment of his individual notes. [Signed] J. H. Glenn. Joseph B. Hill. John Haley.

"Witness: Fred Bausman.

"I assent to hold the aforesaid papers on the above terms. [Signed] E. O. Graves."

The shares in question were included in the certificate for the 45 shares, indorsed by Glenn to Haley. Haley negotiated a sale of the 10 shares to the plaintiff, Kahaley; and on February 2, 1892, Haley, Graves, and Kahaley met at Graves' office, Graves being present, and stated the terms of the sale to him, whereupon Kahaley paid to Graves \$1,000, which was indorsed upon the notes given by Haley to Glenn, which were held by Graves, and for which the stock was pledged as security. The amount paid did not represent the whole purchase price. The plaintiff contends that the balance remaining unpaid was only the sum of \$30, while Graves contends that it was something more than that; but, as the jury found for the plaintiff, it must be considered that this question of fact was determined in the plaintiff's favor.

It is conceded that the balance was not to be paid until the certificate for the 45 shares had been surrendered, and 2 new certificates taken, 1 for the 10 shares to Kahaley, whereupon it was to be turned over to Kahaley upon his paying the balance of the price remaining unpaid. It is conceded that nothing further was done by any of the parties until late in the month of October, when Haley

gave Hill an order upon Graves, in the following language: "You are hereby authorized to deliver to Joseph B. Hill all shares of stock of Haley Grocery Company in my name, and deposited with you as collateral for the payment of my note or notes to J. H. Glenn, upon the payment by said Hill of whatever may be due said Glenn upon said notes, or when, for any other reason, said stock may be released as collateral. John Haley." Graves accepted this order in writing, but did not then deliver to Hill the certificate of the shares. On November 15th, Kahaley tendered to Graves the balance of \$30, and demanded the 10 shares of stock sold him as aforesaid, which Graves refused to deliver to him, and thereafter delivered to Hill. Hill caused the certificate to be canceled, and a new one issued to him for the whole 45 shares, whereupon the plaintiff brought this action, and obtained a judgment in his favor against Graves, and Graves has appealed. It is conceded that Graves was only a gratuitous bailee, and it is not claimed that there was any fraud upon his part in said matter, but only that he delivered the certificate aforesaid to Hill under a mistaken idea of his duty.

The first errors alleged are based upon the refusal of the court to grant a nonsuit, and to peremptorily instruct the jury to find a verdict in favor of appellant, on the ground of insufficiency of the evidence. It is based upon two propositions. One was that the plaintiff had no such ownership in the shares of stock in question as would entitle him to maintain the action, and the second was that there had been no conversion of the stock. We are of the opinion that the facts testified to show a sale of the stock from Haley to Kahaley; that Graves consented thereto, agreed to hold the stock for Kahaley thereafter, and to deliver the same to him, first procuring the cancellation of the original certificate, and the issuance of another one for the ten shares to Kahaley upon his paying the balance of the purchase price. *Beardsley v. Beardsley*, 138 U. S. 262, 11 Sup. Ct. 318. Graves' contention is that he was bound to deliver the stock to Hill by the acceptance of the written order prior to the tender of the balance by Kahaley, and that, at the time he accepted said order, he had forgotten about the agreement relating to the sale of the ten shares to Kahaley. Kahaley, as well as Graves, seems to have been somewhat negligent in the matter, in allowing it to run for so long a time after the agreement aforesaid was entered into; and, had Graves delivered the certificate for the shares to Hill prior to the tender of the balance due to him by Kahaley, there might be ground for holding that Kahaley was not entitled to recover of Graves for the shares purchased by him. But it will be observed that the order given subsequently by Haley to Hill, which Graves accepted, did not mention any particular number of shares, but directed him

to deliver all shares of stock of the Haley Grocery Company, in Haley's name, then deposited with Graves as collateral, as aforesaid. At the time this order was given, it does not appear that Haley knew that Graves still held the 10 shares which had been negotiated to Kahaley, if that were material. We think the fair purport of that order authorized the delivery of only 35 of the shares indorsed by Glenn to Haley, and that Graves' acceptance of that order bound him to deliver only that number of shares.

There is some contention that at the time Hill presented this order, and Graves accepted it, Hill paid to Graves the value of the whole 45 shares; but be this as it may, if such payment was made upon a misunderstanding of the amount of shares then held by Graves for Haley, steps could have been taken, if necessary, to have the excess returned to Hill by Graves when he was reminded of the true state of affairs; and he received such notice at the time of the tender to him by Kahaley of the balance of the purchase price remaining unpaid, and he had the stock in his possession at that time. In any event, Kahaley was not concerned with the amount paid by Hill to Haley, or to Graves for him, for the stock. The surrender of the certificate for the stock by Graves to Hill, and the cancellation of it, and the issuance of a new certificate to Hill, amounted, under the authorities, to a conversion of the stock, and there was no error in the matters stated. 1 Cook, Stocks & S. § 576.

It is next contended that the court erred in allowing Haley and Kahaley to testify to their understanding as to whether the transactions had between them and Glenn, in the presence of Graves, as aforesaid, amounted to a sale of the stock; but we fail to see anything material in this. Both parties had testified directly that the stock was sold, and their further testimony that they intended, the one to sell it, and the other to purchase it, could add nothing to this.

It is next contended that the court erred in sustaining an objection to a question by appellant to Hill asking him how he paid for the stock in question. We think that this was immaterial.

The next errors complained of are in relation to the instructions which were requested by the appellant, and which the court refused to give; but these were all based upon the appellant's contention of the insufficiency of the evidence to support a sale of the stock by Haley to Kahaley, and a conversion of it thereafter, and have been disposed of in what has previously been said.

The case seems to have been properly submitted to the jury, and the verdict and judgment in favor of the plaintiff are affirmed.

DUNBAR, ANDERS, and GORDON, JJ., concur. HOYT, C. J., dissents.

(15 Wash. 646)

POTVIN et al. v. WICKERSHAM et al.

(Supreme Court of Washington. Nov. 30, 1896.)

**MECHANIC'S LIEN—RIGHT TO PERSONAL ACTION—EXEMPTIONS.**

1. Under 1 Hill's Code, § 1676, providing that the obtaining of a mechanic's lien shall not affect the right of material men to maintain a personal action for the goods sold, one furnishing material who has obtained a lien can sue the contractor for the materials furnished.

2. Under 1 Hill's Code, § 1675, exempting materials for a building from seizure under attachment or execution unless on a claim for the purchase money, where materials have been gotten out for a building, and all of little value, except for the purpose for which they were designed, they are exempt from an execution in favor of the architect of the building for his services.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by F. S. Potvin and others against A. Wickersham and others. Judgment for plaintiffs, and defendants Wickersham and Van De Vanter appeal. Affirmed.

Charles E. Shepard, for appellants. Blaine & De Vries, for respondents.

SCOTT, J. This is an appeal from an order granting a motion for an injunctive order, and continuing a restraining order previously issued, based upon substantially the following facts: The Denny Hotel Company were constructing an hotel in the city of Seattle. The respondent Potvin was the contractor for the erection of the building. Huttig Bros. Manufacturing Company furnished certain materials for the buildings, which were then upon the ground, ready to be used; and the respondents Dexter, Horton & Co., by virtue of an arrangement with the contractor, were entitled to be subrogated to his rights. Work on the hotel had been suspended for a considerable length of time, in consequence of litigation affecting it, one suit being by the contractor to enforce a lien against the building. The appellant Wickersham was the architect of the building, and had obtained a judgment for his claim, and levied it upon the materials furnished for the building by Huttig Bros. Manufacturing Company, and the orders aforesaid restrained him and the sheriff from proceeding to sell the property.

The appellants' contention is based upon two grounds, the first of which is that the hotel company was the sole owner of the materials, and that none of the plaintiffs had any title thereto. In support of this, it is contended that, although the material in question was ordered or purchased by Potvin, he did so as agent for the hotel company, and that the hotel company became the owner thereof, especially in view of the fact that Huttig Bros. Manufacturing Company had sought and obtained a lien against the building therefor. This lien claim, however, had not been paid. It seems to us that this contention cannot be maintained, for the lien given to material men by the statute in such

cases is a cumulative remedy; and it is provided (1 Hill's Code, § 1676) that it should not be construed to impair or affect the right of material men to maintain a personal action against the person liable therefor; and Huttig Bros. Manufacturing Company could maintain an action against Potvin, the contractor, for the price of these materials furnished to him, notwithstanding the fact that they had a right to, and had sought to enforce, a lien against the building therefor. It appears that the materials in question had been gotten out especially for the building, and were of little value except for the purposes for which they were designed. The statute (section 1675) exempts materials from seizure under attachment or execution so long as they are in good faith designed to be used in the construction of the building, unless it be upon a claim for the purchase money; and one ground of contention in this case was that the materials were intended to be used in the completion of the building, and whether this was to be done by the hotel company or by the one succeeding to its rights upon the determination of the litigation pending is immaterial; nor would the fact that this litigation had been pending for a number of years affect that question, or necessarily require a finding that there was no intention to use the materials in the completion of the building. This was a question of fact, to be determined upon the proofs; and, after an examination of the proofs submitted, we think the court was warranted in finding that the materials were in good faith intended to be applied to the completion of the building. Affirmed.

ANDERS, DUNBAR, and GORDON, JJ., concur.

(15 Wash. 634)

GOODFELLOW v. LE MAY et al.

(Supreme Court of Washington. Nov. 30, 1896.)

**GIFT TO WIFE—DEBTS CHARGED ON WIFE'S SEPARATE ESTATE.**

1. Where, for the purpose of making provision for his wife, a husband reconveyed certain land to his grantor, who then deeded the same to the wife, "to be held to her separate use," the validity of the gift cannot be questioned by one who became a creditor of the husband several years thereafter, though the wife was not present when the deed was executed, nor consulted about the transaction.

2. The separate property of the wife is not liable for community debts contracted by the husband.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by Margaret E. F. A. Goodfellow against W. H. Le May and others to restrain the sale of certain land on execution. There was a judgment for plaintiff, and defendants appeal. Affirmed.

J. T. Ronald, for appellants. Strudwick & Peters, for respondent.

**SCOTT, J.** The appellants recovered a judgment against one Baxter and one Goodfellow, who was the husband of the respondent. An execution was issued upon the judgment, and levied upon certain lands as the community property of respondent and her husband, and this action was brought to restrain the sale of said lands on the ground of their being the separate property of the respondent. The judgment having been rendered in her favor, this appeal was taken.

There seems to be no contention over the facts in the case. It appears that the lands had been purchased by the respondent's husband of one Leary, and a deed taken in the husband's name; and that in January, 1885, for the purpose of making a gift of said lands to his wife, the husband redeeded the same to Leary, and Leary deeded them to the respondent, the deed reciting that the lands were "to be held to her separate use." It is contended that the husband's testimony as to his purpose in causing the lands in question to be conveyed to his wife, to the effect that he desired to make provision for her and the family against possible reverses, shows that the same was not intended as a gift to her; but this, if material, could not control as against the expressed intention of the deed. Nor would the fact that the wife was not present when the deed was executed, and was not consulted with regard to the transaction, affect it; for the deed was made and accepted by her several years before the debt to the appellants was contracted. Consequently, they could not be heard to question it. But, aside from this, there was no proof of any fraudulent purpose or intention upon the part of the husband or his wife as against any one. We think the law, as applied to the conceded facts, clearly shows that the respondent was entitled to the relief given her.

The appellants have asked us to re-examine the question as to the liability of the separate property of the wife for community debts. We have done so to the extent of considering the argument advanced thereon by the appellants, and are satisfied with the position heretofore taken by us. It is not contended that the debt was contracted for expenses of the family or for the education of the children, so as to be chargeable to her separate property under section 1414 of the General Statutes. Affirmed.

**HOYT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.**

(15 Wash. 594)

**GILBERT HUNT MANUF'G CO. v. WHEELER et al.**

(Supreme Court of Washington. Nov. 23, 1896.)

**ASSIGNMENT FOR BENEFIT OF CREDITORS—CHATTEL MORTGAGES—FORECLOSURE.**

Where the chattel mortgage empowers the mortgagee to take possession of the mortgaged chattels, it is error, on an assignment by the mort-

gagor for the benefit of creditors, to dismiss a suit by the mortgagee to foreclose, leave to bring which the court had granted. Hoyt, C. J., dissenting.

Appeal from superior court, Garfield county; R. F. Sturdevant, Judge.

Action by the Gilbert Hunt Manufacturing Company against John R. Wheeler and another, as assignee of John R. Wheeler, an insolvent debtor. From a judgment dismissing the action, plaintiff appeals. Reversed.

M. F. Gose, Thos. H. Brents, and Wellington Clark, for appellant. Ben F. Tweedy, for respondents.

**SCOTT, J.** Plaintiff brought this action to foreclose a chattel mortgage. Subsequent to the making of the mortgage, the mortgagor made an assignment for the benefit of his creditors to the respondent Brooks, which assignment proceeding was pending in the court where the action to foreclose the mortgage was brought. Prior to the bringing of the action, the plaintiff petitioned said court (setting up its mortgage and the pendency of said assignment proceeding) for leave to bring said action to foreclose, and leave of court was duly obtained, and the action instituted. Thereafter the assignee appeared in said suit, and moved to dismiss the same on the ground of the pendency of said assignment; and the motion was granted, and the cause dismissed, whereupon plaintiff appealed.

It is contended by the respondents that the action of the court in dismissing the foreclosure suit was based upon the case of *Quinby v. Slipper*, 7 Wash. 475, 35 Pac. 116, and that this court held in that case that all claims against the insolvent must be presented and prosecuted in such proceeding. But we do not so view the decision there rendered. That was an action to foreclose a mechanic's lien, which was instituted without asking or obtaining leave of court so to do. While we have held that an assignment transfers all of the property of the insolvent debtor to the jurisdiction of the court, regardless of whether it is mentioned or described in the deed of assignment, we have also held that the assignment only passes the interest of the assignor in his property, and that it is subject to all valid liens existing thereon. *Blier v. Blurock*, 9 Wash. 63, 36 Pac. 975. It appears in this case that the mortgagor had covenanted in said mortgage, in case of default therein, or in case the property mortgaged was molested or interfered with, or if the mortgagee should deem himself insecure, that the mortgagee should be entitled to take immediate possession of the property, and to foreclose the mortgage, etc. A mortgagee of chattels might be willing to accept such security with a condition of the kind mentioned regarding possession, and might be unwilling to accept it without such condition, or if it was understood that the law required in case of foreclosure, where

the mortgagor had made an assignment, that the foreclosure must await the determination of the insolvency proceeding, and the possession of the property meanwhile be held by the assignee therein. The right of possession pending a foreclosure suit might be a valuable right. It might be that a mortgagee would be in a situation to take care of the property, pending a proceeding to foreclose, much more cheaply and advantageously than the assignee in the insolvency proceeding could care for it, and the mortgage security preserved to that extent.

It is contended that the contractual right to take possession and foreclose, as contained in the mortgage, would authorize the mortgagee to proceed without presenting his claim, and obtaining permission to prosecute it independently. But that question is not involved in this case. We see no reason why the substantial rights of the mortgagee cannot be fully protected in the insolvency proceeding. If the validity of the mortgage is not contested, a sale of the property can be directed to take place without waiting for the termination of such proceedings, and the proceeds applied in satisfaction of the mortgage debt. Or, in case the debt or the validity of the mortgage is disputed, that matter could be determined in such proceedings, independently of the other matters involved in the assignment, and a sale then had. But in this instance the court made no such order, but, after a presentation of the petition, authorized the institution of the action to foreclose; and we are of the opinion that the court had authority to do this, and that it was error, after the institution of such suit, and the incurring of costs, to dismiss the same, for the reason stated, even though the withholding or granting of leave to sue was a matter addressed to the discretion of the court. Reversed and remanded for further proceedings.

ANDERS, GORDON, and DUNBAR, JJ.,  
concur. HOYT, C. J., dissents.

(15 Wash. 605)

PENN MUT. LIFE INS. CO. v. FIFE et al.  
(Supreme Court of Washington. Nov. 24, 1896.)  
ASSIGNMENT FOR BENEFIT OF CREDITORS—LEAVE  
TO FORECLOSE MORTGAGE—DISCRE-  
TION OF COURT.

An order made in proceedings on a general assignment for the benefit of creditors, granting leave to a creditor who has not filed his claim for allowance to bring a separate action against the assignee for the foreclosure of a mortgage securing it, on a portion of the assigned property, is within the discretion of the court. Hoyt, C. J., dissenting.

Appeal from superior court, Pierce county;  
W. H. Pritchard, Judge.

Action by the Penn Mutual Life Insurance Company against William H. Fife, Harriet A. Fife, Zephaniah J. Hatch, assignee, and others, for the foreclosure of a mortgage. Judg-

ment for plaintiff, and the above-named defendants appeal. Affirmed.

Parsons, Corell & Parsons, for appellants.  
Doolittle & Fogg and Charles O. Bates, for respondent.

DUNBAR, J. This action was brought upon a promissory note given by the defendants William H. Fife and Harriet A. Fife, his wife, to the plaintiff (respondent here), secured by a mortgage upon real property, for the foreclosure of the mortgage. Subsequent to the execution of the mortgage, Fife and wife assigned all their property for the benefit of creditors; one of the appellants, Zephaniah J. Hatch, being appointed by the court assignee of the estate. Notice to all the creditors was duly made and published by the assignee, and, subsequent to the assignment, the respondent appeared in the assignment proceeding, which was No. 11,826 in the superior court, and filed a petition for leave to sue the assignee and foreclose his mortgage. Leave was granted by the court, and this action was accordingly brought. Judgment of foreclosure was pronounced, and from such judgment an appeal is taken here.

The judgment is simply a judgment of foreclosure, without any personal judgment. It is contended by the appellants that the court acted without jurisdiction in granting leave to foreclose the mortgage by a separate suit, and many cases are cited from this court to sustain the view that the respondent's remedy was exclusively in the assignment case. We do not think that the cases cited are in point, as in none of them had the mortgagee obtained the leave of the court to sue. In fact, in *Quinby v. Slipper*, 7 Wash. 475, 35 Pac. 116, it was especially stated by this court that nothing could be done by any person in reference to property held by the court, looking to the enforcement of any lien against it, without the leave of the court first obtained. *Shoe Co. v. Adams*, 5 Wash. 333, 32 Pac. 92, was where there was an attempt to seize property in the possession of an assignee by writ of attachment. The lien in that case was sought to be established by the attachment itself,—a very different proposition from the one at bar. Probably, the case which comes nearest to sustaining appellants' theory is *Meeker v. Sprague*, 5 Wash. 242, 31 Pac. 628. That was a case where the mortgagee made application to the court for permission to sue the receiver, which permission was refused, and from which order of refusal an appeal was taken to this court. There it was held that where a court has, in a suit in equity, regularly acquired full jurisdiction, and has appointed a receiver for the corporation, the refusal of the court to allow a mortgagee of the corporation to institute foreclosure proceedings in a separate suit against the receiver is not an abuse of the discretion vested in the court. It is true that it was stated in the opinion in that case that

the court did only what it should have done when it refused to allow another suit in equity to be instituted; but that case was based on the theory that such application was a matter addressed to the sound discretion of the court, and would not be disturbed unless it was found that such discretion was abused. "Under these circumstances," said the court, "it is clear to us that the application thus made by appellant was addressed to the sound discretion of the court in which it was presented. This is so clear from the authorities cited that we do not think it necessary to argue the question, especially as we do not understand the appellant seriously to dispute the proposition." We do not desire to extend the restrictions on the rights of mortgagees to foreclose mortgages in the ordinary manner provided by law beyond the rule announced in that case; and if, as we held there, the application was a matter submitted to the discretion of the court in that case, the judgment of the court could not be collaterally attacked in the manner attempted here. This case also falls squarely under the rule announced by this court in *Manufacturing Co. v. Wheeler* (decided Nov. 23, 1896) 47 Pac. 26. It is true, in that case the question of the right of possession, provided for in the mortgage, which was a chattel mortgage, is somewhat discussed in the opinion; but, outside of that, the rule announced is in harmony with respondent's contention. The judgment will be affirmed.

SCOTT, ANDERS, and GORDON, JJ., concur. HOYT, C. J., dissents.

(15 Wash. 693)

#### DUTCHER v. HOWARD.

(Supreme Court of Washington. Nov. 30, 1896.)

WITNESS — RE-EXAMINATION — MATTER BROUGHT OUT ON CROSS-EXAMINATION.

Where, after inadmissible testimony, brought out on direct examination, is excluded, the witness is cross-examined in regard thereto, the witness, on re-examination, may be examined as to such testimony. Hoyt, C. J., dissenting.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by J. W. Dutcher against Henry C. Howard. From a judgment for plaintiff, defendant appeals. Reversed.

Million & Houser, for appellant. Sinclair & Smith and George A. Joiner, for respondent.

DUNBAR, J. This is an action brought by appellant against respondent for damages, in the sum of \$10,000, alleged to have been sustained by appellant by reason of certain wrongful acts of respondent in alienating the affections of appellant's wife, thereby causing appellant to be deprived of the comforting society of said wife, and causing his domestic relations to be broken up and destroyed, etc.

The answer was a denial of the acts, and the cause proceeded to trial before a jury. At the close of plaintiff's testimony defendant moved for a nonsuit, on the ground of a total failure of proof, which motion was granted by the court. During the trial one Mrs. M. J. Larson testified on behalf of the plaintiff, and in her examination in chief she testified, over respondent's objection, to certain acts and transactions which had taken place between respondent and appellant's wife. This testimony was based upon what appellant's wife had told witness with reference to these matters. At the close of the examination in chief of this witness, counsel for the respondent moved to strike out all the testimony as to what was told witness by Mrs. Dutcher, the appellant's wife, which motion was granted by the court. Thereupon, on cross-examination, counsel for the respondent proceeded to examine witness with reference to the same matters which had been eliminated from the case by the ruling of the court on respondent's motion. On the redirect examination the counsel for the appellant again went into the testimony called out by the respondent, carrying on the same line of inquiry on recross-examination that had been carried on by the cross-examination of the respondent. At the close of this witness' testimony respondent's counsel moved that all the testimony concerning the confession made to the witness, Mrs. Larson, as testified to by her, be stricken from the record. This motion was granted by the court, and the granting of said motion is assigned as error here.

We are satisfied, from the testimony in this case, that if the testimony of Mrs. Larson were allowed to stand, there was sufficient testimony to have been submitted to the jury, and the court would not have been warranted in granting a motion for nonsuit. It is contended by the respondent that the error alleged by the appellant is not based upon the facts in the case; that the record shows that the witness was not examined as to what Mrs. Dutcher said to the witness; and that no part of the cross-examination was directed towards ascertaining what Mrs. Dutcher said or confessed, whether wholly or in part. But we have examined the testimony thoroughly, and are convinced that the record bears out the statement made by the appellant. The counsel chose to examine the witness as to facts which were not admissible in evidence, and under all the authorities, and for the best of reasons, we think the other party had a right to re-examine as to the evidence elicited by the cross-examination. For this error in striking out testimony which, if admitted, would have been sufficient to have sustained a verdict, the judgment will be reversed, with instructions to overrule the motion for a nonsuit.

ANDERS and GORDON, JJ., concur. HOYT, C. J., dissents.



(15 Wash. 687)

HENDRICKS et al. v. EDMISTON et al.

(Supreme Court of Washington. Nov. 30, 1896.)

NOTICE OF APPEAL — SUFFICIENCY OF SERVICE —  
DEED — CONDITIONAL DELIVERY —  
WAIVER—ESTOPPEL.

1. Due service of a notice of an appeal on an attorney is sufficient service on all the parties for whom he appeared, if the notice was directed to all of them.

2. A condition that a deed shall become effective when the title is approved by the grantee's attorney is for the grantee's benefit, and is waived by him when he places the deed on record.

3. A person to whom land is conveyed merely for the purpose of clothing him with apparent title thereto, so that it will not be affected by certain proceedings against the grantor, and who consents to a subsequent conveyance of the same tract by his grantor to a third person, is estopped from questioning the latter's title.

Appeal from superior court, King county;  
J. W. Langley, Judge.

Action by Bessie Hendricks and another against J. K. Edmiston and others to foreclose the rights of defendants under a certain bond for a deed. From a decree for defendants, plaintiffs appeal. Affirmed.

C. W. Corliss, C. S. Preston, and Fred H. Peterson, for appellants. Hastings & Stedman, for respondent Hastings. Burke, Shepard & McGilvra and Herbert W. Huntley, for respondent Chase Nat. Bank. Hendrick & Peters, for respondent Security, etc., Co.

HOYT, C. J. Respondents have moved to dismiss. Their motion is founded upon the alleged fact that all of the parties who appeared in the action were not served with notice of appeal. It appears, however, that the parties who it is claimed were not served appeared in the action by the same attorneys as other parties, and that notice of appeal, directed to all of the parties who appeared, was duly served upon such attorneys. This was sufficient. Motion denied.

Prior to 1890, Seymour Wetmore was the owner of the property described in plaintiffs' complaint. Thereafter he executed a bond in which he bound himself to convey said property to one J. K. Edmiston, upon the performance by him of the conditions set out in the bond. To foreclose the rights of said Edmiston and those holding under him under this bond, this action was brought by the plaintiffs, who claimed to have acquired the legal title to the property by a warranty deed from said Seymour Wetmore to plaintiff Bessie Hendricks. Upon the answers of the defendants, and the reply thereto by the plaintiffs, material issues were raised as to the effect of the deed from Seymour Wetmore to Bessie Hendricks, and as to whether or not the conditions of the bond for a deed had been complied with by said Edmiston, and the property deeded to him by said Wetmore. Other questions incidental to these were also raised, but the findings of the trial court in reference thereto were so

fully supported by the testimony that it is not necessary to say more than that such findings must be taken as true for the purpose of determining the rights of the parties. As to these two main questions of fact, the trial court found that the deed from Wetmore to Bessie Hendricks, under which plaintiffs claim, was executed without consideration and for an illegal purpose. It also found that Edmiston had complied with the conditions of the bond, and that, upon such compliance, Wetmore had made such a conveyance as to vest in him the full legal title to the property. Upon the latter question the undisputed proof showed that there had been an arrangement entered into between Wetmore and Edmiston, in which it was agreed that Edmiston should make certain promissory notes to Wetmore; that said notes should be accepted in full payment of the amount then due upon the bond; that, by reason of such payment, Wetmore was to comply with the requirements of the bond, and convey the legal title to the property to Edmiston. There was also evidence tending to show that this arrangement had been fully carried out by the delivery of the notes to Wetmore, and of the necessary conveyance to Edmiston. This evidence was contradicted by that introduced on the part of the plaintiffs, which tended to show that the arrangement was not completed; that the notes and deed were placed in escrow, and had never been delivered. Three witnesses offered by the plaintiffs testified to facts which tended to show that the papers were, at the time of their execution, placed in escrow, so as not to take effect until certain conditions had been complied with; but their testimony did not agree as to the conditions upon which the instruments were to become operative. One of them testified to facts tending to show that they were not to be effective until some arrangement had been made as to the title of the plaintiff Bessie Hendricks. The others testified to facts tending to show that they were to be effective when the title conveyed by the deed to Edmiston had been approved by his attorney. And the court was justified in finding the latter condition to have been the one agreed upon; and, if it was, the condition was solely for the benefit of Edmiston, and could be waived by him, and was waived when he took the deed and placed it upon record. Taking all the evidence into consideration, the trial court rightfully found that the transaction in question was fully completed, and that the title which Wetmore had in the property at the date of the transaction thereby became vested in Edmiston.

This brings us to a consideration of the claim of title of the plaintiffs under the deed from Wetmore to plaintiff Bessie Hendricks. It is conceded that this deed was executed and placed on record before the date of the transaction which resulted in the deed from Wetmore to Edmiston. If it conveyed title which the plaintiffs were in a situation to as-

sert against that conveyed by the deed to Edmiston, Wetmore, at the date of the latter deed, had nothing to convey, and the plaintiffs, at the date of the commencement of the action, were the owners of the property. The deed to plaintiff Bessie Hendricks covered other property than that the title to which is involved in this action; and the testimony tended to show that the deed was first made out for the purpose of conveying only such other property, and that, after it had been so made out, it was changed to cover the property in question, for the purpose of placing the apparent title thereto in the plaintiff Bessie Hendricks, so that it would not be affected by certain proceedings against Wetmore, and not for the purpose of vesting the title in the grantee for her own benefit. The testimony upon this question was not as full as it might have been, but, when the circumstances are taken into consideration, that of the plaintiff Bessie Hendricks alone was sufficient to warrant the court in finding as it did upon this question. Her testimony as to the transactions immediately connected with the execution of the deed, taken in connection with what was proven as to her conduct at the time of the alleged settlement of the bond matter between Wetmore and Edmiston, sufficiently showed that she took title to the property in question, not for her own benefit, but to preserve it for Wetmore. The practically undisputed testimony as to the transactions connected with such settlement was that the plaintiff J. K. Hendricks, who was the husband of the plaintiff Bessie Hendricks, was fully authorized to act for her in everything connected with the transaction; that he fully understood the terms and conditions of this settlement; that he was consulted with about it, and actively participated therein; that he accepted a portion of the proceeds of such settlement. Such testimony established, beyond question, the fact that the plaintiff J. K. Hendricks had such connection with all the transactions which resulted in the conveyance of the title by Wetmore to Edmiston that he could not be heard to question the title thus conveyed; and his wife, for whom he was acting, was also bound by what was then done.

But it is not necessary to conclude her to hold that she was bound by the action of her husband, for the reason that there was testimony which directly connected her with the transaction. The largest of the notes which were given by Edmiston to Wetmore was, by said Wetmore, indorsed to her, and by her own hand indorsed in blank. It also appeared that this note was deposited in bank as the property of J. K. Hendricks and Bessie Hendricks, and that certain payments thereon were made to J. K. Hendricks. These facts, when taken in connection with the other circumstances proven, were sufficient to show that Bessie Hendricks, as well as J. K. Hendricks, was an active party to the

transaction which culminated in the conveyance of the title by Wetmore to Edmiston. But it is contended on the part of the appellants that, even if she was, she is not thereby prevented from asserting title to the property, for the reason that Edmiston, at the time of the transaction, knew that the property had been conveyed by Wetmore to her. If she had had any real interest in the title conveyed to her by Wetmore, it might be true that she would not be estopped from asserting it by reason of her consent to the conveyance to Edmiston; but, in view of the fact that she had no beneficial title, it is but fair to presume that all of the parties acted upon the fact, which was then known to them, that Wetmore was the real owner of the property; and, if they did so act, none of them are now in a position to deny that a conveyance by him passed a good title.

A careful examination of the entire record satisfies us that the findings of fact by the trial court were justified by the evidence, and that such findings justified the legal conclusions founded thereon. The decree will be affirmed.

SCOTT and ANDERS, JJ., concur.

GORDON, J., did not sit.

(15 Wash. 613)

#### In re KOHLER'S ESTATE.

BRINKER v. PEASLEY et al.

(Supreme Court of Washington. Nov. 25, 1896.)

#### EXECUTORS—LIABILITY FOR MONEY DEPOSITED IN BANK.

An executor is not liable for money deposited to the trust account, in good faith, in a solvent bank of good repute, which afterwards becomes insolvent.

Appeal from superior court, King county; T. J. Humes, Judge.

Separate petitions,—one by Lena R. Peasley, for an order requiring William H. Brinker, executor of the estate of Hugo A. Kohler, deceased, to pay her in full the proceeds of a certain life insurance policy issued on the life of deceased; and one by G. H. Emerson, for an order requiring such executor to pay a debt due petitioner in full, with interest, to which the executor filed an answer and amended answer, together with a statement of his account. From a judgment sustaining a demurrer to the answer and amended answer, and granting the relief asked by the petitioners, the executor appeals. Reversed.

Relfe & McCutcheon and Isaac D. McCutcheon, for appellant. Elder & Harger, for respondent Lena R. Peasley. Sidney Moor Heath, for respondent Emerson.

GORDON, J. Appellant is the executor of the estate of Hugo A. Kohler, deceased. As such executor, he received on March 28, 1893, a sum of money amounting to upward of \$3,-

000, the proceeds of certain insurance upon the life of the testator; and on the same day he deposited in the Washington Savings Bank of Seattle the sum of \$2,500, taking certificates of deposit therefor, payable to himself, as such executor, with interest at 6 per cent. per annum. Subsequently, the bank suspended, and passed into the hands of a receiver, whose certificates for said sum of \$2,500 the appellant, as executor, holds in lieu of cash, and for which sum he sought in the lower court to be allowed credit on his account. The lower court having disallowed his claim in this respect, the cause comes here upon appeal.

Respondents contend that the executor is not authorized by law to invest the funds of an estate in his hands pending settlement of the estate; that it is his duty to retain in his hands the money thus received, until it can be applied and distributed in the order and mode prescribed by law. It is conceded that, in making the deposit in question, the executor acted in good faith, and that the bank was then solvent, and of good repute. In *Fairchild v. Hedges*, 44 Pac. 125, this court held that a county treasurer was liable for the funds of the county deposited by him in a bank which afterwards became insolvent. Counsel for the treasurer in that case cited numerous cases, in which it had been held that executors, administrators, and guardians were not liable under such circumstances; and, in referring to the line of authorities thus relied upon, this court said: "The distinction is very clear between the liability and duty of one receiving moneys as a guardian, for the benefit of a private individual, and the liability imposed by statute and by express undertaking upon a public officer, as in the case at bar. As to the former, he is merely the trustee or agent of the private parties interested in the money, and no greater or higher responsibility should be imposed upon him than would be imposed upon any agent or trustee." *People v. Faulkner*, 107 N. Y. 488, 14 N. E. 415." It is true that this court was not called upon in that case to decide the question involved in the present case, but it is, nevertheless, true that we recognized that a distinction existed between the liability of a public officer dealing with public moneys and that of an executor or guardian who deals with the funds of individuals, and this recognition was not simply mere dictum. The uniform holding of courts has been that executors, administrators, and guardians are bound by no greater or higher responsibility than that which is imposed upon any agent or trustee; and, where such a one in good faith deposits money in a bank of good repute to the trust account, he ought not to be held liable for its loss in consequence of the failure of the bank. *Jacobus v. Jacobus*, 37 N. J. Eq. 17; *Twitty v. Houser*, 7 S. C. 153; *Cox v. Roome*, 38 N. J. Eq. 259; *Norwood v. Harness*, 98 Ind. 134; *In re Law's Estate* (Pa.) 22 Atl. 831; *People v. Faulkner*,

107 N. Y. 488, 14 N. E. 415; *Moore v. Eure*, 101 N. C. 11, 7 S. E. 471; *People v. Walsen* (Colo. Sup.) 28 Pac. 1119; *Ex parte Jones*, 4 Cranch, C. C. 185, Fed. Cas. No. 7,443; *Pom. Eq. Jur.* § 1007; *Schouler, Ex'rs*, § 313; 2 *Woerner, Adm'n*, p. 711; 3 *Redf. Wills*, 394; 1 *Perry, Trusts*, § 443. While many of the courts from whose decisions we have cited hold public officers, such as state, county, and township treasurers, to be absolutely liable for all public money received by them, none of them (so far as we have been able to discover) have held that executors or trustees are bound by a similar obligation. We do not think the general rule is displaced by the statute in this state. Section 1052, vol. 2, of the Code, provides that an administrator (or executor) shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate, and, in the event of the sale of any portion of the estate for less than the appraisement, he shall not be responsible for any loss "if the sale has been justly made." The succeeding section (1053) provides that he shall not be "accountable for any debts due the estate if it shall appear that they remain uncollected without his fault." It further appears from the record that on March 28, 1893 (the day upon which he received the money), the appellant made an application to the superior court for an order directing him to invest the sum of \$2,500; and thereupon the court ordered him to deposit that amount in some secure bank in the city of Seattle, and the deposit in question was actually made on that day. Without deciding whether this order constituted in itself a sufficient justification, we think that appellant has not been guilty of any misfeasance or neglect, and that he should be credited on his account with the amount of the deposit. The judgment will be reversed, and the cause remanded for further proceedings in accordance with this opinion.

HOYT, C. J., and SCOTT, ANDERS, and DUNBAR, JJ., concur.

(15 Wash. 668)

STATE ex rel. AMSTERDAMSCH TRUSTEES KANTOOR v. SUPERIOR COURT OF SPOKANE COUNTY et al.

(Supreme Court of Washington. Nov. 30, 1896.)

PROHIBITION—POWER OF SUPREME COURT—WHO MAY APPLY—RECEIVER OF DE FACTO CORPORATION—VALIDITY OF APPOINTMENT.

1. Const. art. 4, § 4, providing that the supreme court shall have power to issue writs of prohibition, etc., and "all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction," cannot be construed as limiting the power of the court to issue writs of prohibition to such cases only where it is connected with the exercise of its appellate jurisdiction.

2. Code Proc. § 326, subds. 3, 5, authorizing the appointment of a receiver where it appears that the property, fund, etc., in controversy is in

danger of being lost or removed, or where a corporation has been dissolved, or is insolvent or is in danger of insolvency, or has forfeited its corporate rights, do not authorize the ex parte appointment of a receiver to take charge of the business and effects of an organization alleged to be exercising corporate rights without authority of law.

3. Such appointment can be made only after proceedings under Code Proc. §§ 688, 689, providing that, when any association or number of persons shall be found guilty of acting as a corporation without having been legally incorporated, judgment shall be entered dissolving the corporation, and a receiver may then be appointed to take charge of its property, and distribute the same among its creditors.

4. Under Laws 1895, p. 119, § 30, providing that writ of prohibition may issue "on the application of the person beneficially interested," an application for such writ, made by a corporation de facto which is beneficially interested, will not be refused on the ground that it is not a corporation de jure.

Application on the relation of the Amsterdamsch Trustees Kantoor for a writ of prohibition against the superior court of Spokane county and Norman Buck, judge. Writ granted.

Binkley, Taylor & McLaren and Graves, Wolf & Graves, for relator. Wm. H. Plummer, Samuel R. Stern, Cyrus Happy, and W. T. Birdsall, for respondents.

ANDERS, J. On September 5, 1896, the prosecuting attorney of Spokane county, upon his own relation, filed an information in the superior court of that county against Simon Oppenheimer and others, including the relator herein, alleging that the defendants were acting as a corporation within this state, under the name and style of the Northwestern Milling & Power Company, without being legally incorporated, and setting up certain facts showing that they had failed to comply with the law in relation to corporations, and had no right to act as a corporation within the state, and praying, among other things, for the appointment of a receiver of the property, effects, and assets held, or at any time claimed to be held, by said alleged corporation, with the usual powers of receivers in such cases. Upon the filing of the information, the court, pursuant to the prayer of the relator, appointed one Fowle as receiver of the property described therein. By the terms of the order, all persons in possession of any of said property were commanded to deliver the same to the receiver so appointed, "in fear of the pains and penalties attached to the contempt of this court, upon whatever pretense of authority, court, or judicial action such persons may claim the right to, or interest in, the premises; and any person or persons asserting any lien or claim to or interest therein are hereby remanded to this court herein for the assertion or protection of any alleged claim or rights in the premises." The relator herein, claiming to be in possession of certain of the property over which the receiver was appointed, and of which he was directed to take possession, and claiming to hold the same as a purchaser

at a judicial sale under a decree of the superior court of Spokane county, appeared specially by counsel, and suggested to the court that the order for a receiver was void and of no effect in so far as it directed the receiver to take possession of the property alleged in the information to have been transferred to the Northwestern Milling & Power Company by the Spokane Water Power Company on May 20, 1895, and thereafter, by said company, mortgaged to the relator herein, and by it purchased at a sale on foreclosure of said mortgage, for the reason that the relator was not a party to the suit in which the receiver was appointed, save by virtue of its being an alleged stockholder in said alleged corporation, and in this action could not plead and protect its rights as owner of said property, or be heard in respect thereto; that it was entitled to the possession thereof pending the time for redemption, under the laws of this state, and could not be divested thereof save by judicial proceedings instituted for that purpose; and that a receiver could not be appointed without notice. The court declined to vacate or modify the order appointing the receiver as requested, or in any manner whatsoever. The relator thereupon applied to this court, and obtained therefrom an alternative writ of prohibition directed to said superior court, and Hon. Norman Buck, judge thereof, commanding it and him to desist and refrain from any further proceedings in the matter of the appointment of said receiver, so far as it relates to the property described in the writ, or so far as the same relates to this relator, until the further order of this court, and to show cause before this court, at a specified time, why they should not be absolutely prohibited and restrained from further proceeding in said matter. Upon the return day of the writ, the respondent the superior judge appeared specially by counsel, and moved the court to vacate the alternative writ heretofore issued, and to dismiss this proceeding, on various grounds, the principal one of which is that this court is without jurisdiction herein.

It is earnestly contended on behalf of the respondent that, under the constitution and laws of this state, the superior court had exclusive jurisdiction of the action instituted therein by the prosecuting attorney, and was fully authorized to appoint a receiver therein, and that this court has no power or authority to interfere with or control the action of the superior court in respect thereto. That the superior court had jurisdiction of that action must be conceded, and, if it had authority to make the order complained of, the respondent's contention must prevail, even though this court has jurisdiction generally to issue writs of prohibition, for this court would under no circumstances undertake to interfere with lawful acts of a subordinate tribunal.

The first question for our determination is whether this court has jurisdiction of the

matter now before it. In section 4 of article 4 of the state constitution it is provided that "the supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars (\$200), unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. \* \* \* And in section 6 of the same article it is provided that "the superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to \$100, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law. \* \* \* The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court. \* \* \* Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. \* \* \* It thus appears that the jurisdiction of the supreme court and of the superior courts of this state is expressly defined by the constitution, and reference must therefore be had to that instrument in order to determine the question of jurisdiction in any particular case; and it will be observed that, by the terms of the constitution, both this court and the superior courts are empowered to issue writs of prohibition.

But it is claimed on behalf of the respondent that the supreme court can issue such writs only when necessary to the exercise of its appellate jurisdiction. This contention of the respondent seems to be based upon the assumption that the very language of the constitution, "all other writs," etc., clearly shows an intention to limit the power granted to this court in the preceding portion of the sentence—to issue writs of prohibition—to cases where such writs are necessary to the exercise of its appellate power. If that be true, the power granted to this court in that regard is of little or no practical value, for it is difficult to conceive a case in which it would be necessary to issue the writ solely for that purpose. Indeed, it has been held,

and not without reason, that the granting a writ of prohibition is not the exercise of appellate jurisdiction, nor in aid of such jurisdiction. *Mayor, etc., of Memphis v. Halsey*, 12 Helsk. 210; *High, Extr. Rem.* (2d Ed.) § 785a. But we do not think that the words referred to were intended to restrict or limit the power to issue the writs specifically mentioned, but rather to confer upon the supreme court the additional power to issue all other writs, whatever they may be, which may be necessary to the complete exercise of its appellate and revisory jurisdiction.

Under a provision of the constitution of California, relating to prohibition, which the framers of our constitution substantially copied, the supreme court of that state, so far as we have been able to ascertain, has always held that it had the power, by prohibition, to restrain the superior courts from proceeding in matters over which they have no jurisdiction, as well as to prevent them from proceeding in excess of their jurisdiction; and the decisions of that court construing this provision of the constitution are especially entitled to the favorable consideration of this court. In fact, it may, and probably should, be presumed that the construction placed upon the provision of the constitution now under consideration by that court was adopted by the framers of our own constitution. *Black, Interp. Laws*, p. 32. Section 4 of article 6 of the constitution of California, after defining the powers of the supreme court, proceeds as follows: "The court shall have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." *Deering's Pol. Code*, tit. "Constitution." Under that provision, and a statute relating to the office of prohibition similar to ours, the supreme court seems never to have hesitated to prohibit the superior courts from proceeding without, or in excess of, their jurisdiction. Among the numerous decisions of that court wherein this question is more or less discussed, we need cite only the following: *Maurer v. Mitchell*, 53 Cal. 289; *Cameron v. Kenfield*, 57 Cal. 550; *Farmers' Co-operative Union v. Thresher*, 62 Cal. 407; *Hobart v. Tillson*, 66 Cal. 210, 5 Pac. 83; *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121. The last of the above-cited cases is particularly instructive as to the question of the purpose and office of the writ of prohibition. Entertaining the same views as to the jurisdiction and power of this court with reference to the remedy of prohibition that are held by the supreme court of California, we have in numerous instances issued the writ where the object sought to be attained was the prevention of unauthorized acts on the part of the superior courts, and the practice of this court in that regard must now be deemed settled.

The objection to the jurisdiction of this court is not well taken. Nor do we think

that the alternative writ fails to state facts entitling the relator to relief. Some other objections to the writ are made by the respondent; but as they do not relate to the jurisdiction of this court, but refer to matters which might be cured by amendment, we will not now stop to consider them in detail, but will proceed to the consideration of the question whether the writ was properly issued in this instance.

The statute (Laws 1895, p. 119, §§ 29, 30) provides:

"Sec. 29. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

"Sec. 30. It may be issued by any court except police or justice's courts, to an inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested."

And the question, then, is whether or not the superior court, in appointing a receiver in the quo warranto proceeding, proceeded "without or in excess of its jurisdiction." If it did, it should be prohibited from taking any further action therein, and especially from enforcing the order complained of. As justifying the action of the superior court, the respondent relies on subdivisions 3 and 5 of section 326 of the Code of Procedure. But, in our opinion, those provisions are inapplicable here, for the reason that there is a special provision of the Code with reference to the appointment of receivers in actions like that in which this receiver was appointed, by which the courts should be governed. We refer to section 689, which is as follows: "If judgment be rendered against any corporation, or against any persons claiming to be a corporation, the court may cause the costs to be collected by executions against the persons claiming to be a corporation, or by attachment against the directors or other officers of the corporation, and shall restrain the corporation, appoint a receiver of its property and effects, take an account and make a distribution thereof among the creditors. The prosecuting attorney shall immediately institute proceedings for that purpose." And it would seem reasonably plain from this provision that the superior court had no right or power to appoint a receiver before trial and judgment in the action instituted on behalf of the state. The sole object of the action was to dissolve an alleged corporation, or at least to exclude the defendants from corporate rights and franchises; and no judgment could be rendered therein except that prescribed by section 688 of the Code. The state had no interest or right whatever in or to the property of the defendants, and the court

had no authority, under the general provisions of the statute referred to by the respondent, or by virtue of any supposed equity power vested in it, to take property from the possession of the defendants, or either of them, and place it in the hands and under the control of a receiver. After such a judgment has been rendered against the defendants as is provided for by section 688, proceedings may be instituted by the prosecuting attorney by virtue of section 689, in which it may be proper to appoint a receiver to take an account and distribute the property of the alleged corporation among its creditors, if any it may have; but, pending the action in the superior court, the defendants, so far as the state is concerned, have the same right to possess and manage their property that they had before the institution of the suit against them by the prosecuting attorney. "Property rights cannot be confiscated by the state" in such an action as is now being waged in the superior court. 2 Mor. Priv. Corp. (2d Ed.) § 1033. Nor, on the same principle, can such rights be suspended or interfered with except by express authority of law; and therefore the point made by the respondent that the superior court, at least, had power to appoint a receiver temporarily cannot be sustained.

In addition to the motion or demurrer which we have above considered, the learned superior judge filed an answer, in which he denies any knowledge or information sufficient to form a belief as to whether the relator is a foreign corporation, or as to whether it has complied with the laws of this state relating to foreign corporations, so as to be entitled to transact business in the state. He thus seeks to put in issue the corporate existence of the relator, and, having done so, claims—First, that, until the question thus raised is determined, the relator has no standing in this court; and, second, that this court cannot determine the question without prejudging a matter to be litigated in the action now pending in the superior court of Spokane county. Now, the only effect that issue could have upon the present proceeding would be to postpone its further consideration until after the trial in the superior court. It can neither discharge the alternative writ heretofore issued, nor impair its force or effect upon the defendants; and the only object of the writ is to prevent the further action of the court in the matter of the appointment of a receiver, during the pendency of the action now before the court. The question, therefore, according to our view of the law applicable to this particular case, is not so essential to the determination of this application as to require this court, in its discretion, to refer it to a jury, or even to await the rendition of judgment in the superior court, before proceeding further. Laws 1895, p. 118, § 21. The statute provides that the writ of prohibition is issued on the application of the person beneficially interested, and it seems plain to

us that the relator, whether it is a de jure or only a de facto corporation, is sufficiently interested to be entitled to the possession of its property until deprived of it by a proper proceeding in a court of competent jurisdiction.

Some other minor questions of fact are sought to be raised by the answer, but what we have already said completely disposes of them. As it appears to us that the relator is entitled to the benefit of the writ, and that it has no other plain, speedy, and adequate remedy in the ordinary course of law, it follows that the peremptory writ should issue, and it is so ordered.

HOYT, C. J., and SCOTT, J., concur.

(15 Wash. 625)

#### STATE v. ZETTLER.

(Supreme Court of Washington. Nov. 27, 1896.)

CRIMINAL LAW—APPEAL—GENERAL ASSIGNMENT OF ERROR—ERROR BASED ON INSUFFICIENCY OF EVIDENCE—RECORD—REVIEW—MISCONDUCT OF BAILIFF.

1. Insufficiency of the evidence will not be considered where the record fails to show that it contains all the material facts and proceedings in the case.

2. Error in refusing a new trial for insufficiency of the evidence will not be considered where the record fails to show that it contains all the material facts.

3. The fact that the bailiff informed the jury that, if they did not agree by 9 o'clock p. m., he would keep them locked up all night, is not ground for reversal of a conviction, where the statement was made merely to inform them that the court intended to go home at that time, and that, if they had not returned their verdict, they could not return it until the morning.

4. A general assignment that the court erred in instructions will not be considered where appellant does not, in his brief, specify the error complained of.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Rose Zettler was convicted of grand larceny, and appeals. Affirmed.

Von Tobel & Humphrey and Claypool, Cushman & Cushman, for appellant. G. W. H. Davis, for the State.

HOYT, C. J. The defendant was convicted of the crime of grand larceny, and from the judgment and sentence imposed has prosecuted this appeal.

Three errors are relied upon: (1) That the court erred in refusing to discharge the defendant at the close of the state's evidence; (2) that the court erred in refusing a new trial because of the insufficiency of the evidence; (3) that the court erred in refusing a new trial on the ground of the misconduct of the jury, and the bailiff having the same in charge.

The first two raise substantially the same question, and are founded entirely upon the alleged insufficiency of the evidence. But the record is not such that appellant can make available such alleged insufficiency. It does not purport to contain all of the evidence pro-

duced upon the trial. Nor does it appear from the certificate of the judge, or otherwise, that what is brought here contains all the material facts, matters, or proceedings.

The third allegation is founded upon the alleged fact that the bailiff informed the jury that, if they did not agree by 9 o'clock, he would keep them locked up all night. If it appeared that this statement was made for the purpose of inducing the jury to arrive at a speedy verdict, and that there was no other reason for making it, there might be ground for contending that it showed such improper action as to require the granting of a new trial. But it appeared that this statement was not made for the purpose of influencing the jury in their action; but to inform them that it was the intention of the court to go home at 9 o'clock; so that, if a verdict was not returned by that time, it could not be returned until morning, and for that reason the jury would necessarily be kept together during the night unless the verdict was returned before 9 o'clock.

There is another general allegation of error, to the effect that the court erred in giving its instructions to the jury; but there is no specification in the brief as to what the error complained of was, and without such specification the assignment is too indefinite to require notice. The judgment and sentence will be affirmed.

DUNBAR, ANDERS, SCOTT, and GORDON, JJ., concur.

(15 Wash. 637)

#### SNOHOMISH COUNTY v. RUFF et al.<sup>1</sup>

(Supreme Court of Washington. Nov. 28, 1896.)

NOTICE OF APPEAL—SERVICE—APPEALABLE ORDER—COUNTY AUDITOR'S BOND—BREACH.

1. Where part of the defendants to an action by a county against a county officer and the sureties on his official bond file answers, and then move to have allegations of the complaint stricken, notice of appeal by the county from an order sustaining the motion need not be served on defendants who have not filed answers, though they have served them on the county attorney.

2. An order striking from a complaint by a county against a county auditor and his sureties allegations setting up, as a ground of recovery, a breach of the bond by failure to account for moneys received by him as ex officio clerk of the board, affects a substantial right of plaintiff, and is appealable.

3. 1 Hill's Code, § 179, makes a county auditor ex officio clerk of the board of county commissioners, and section 181 makes it his duty as such clerk to perform all the duties required by law or order of the board. *Held*, that failure of a county auditor, required by the board to act as county purchasing agent, to account for moneys intrusted to him as such agent, constitutes a breach of his official bond, conditioned for the faithful performance of all duties required of him by law.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by the county of Snohomish against George C. Ruff and others. From an order

<sup>1</sup> For dissenting opinion, see 47 Pac. 441.

directing certain allegations stricken from the complaint, plaintiff appeals, and defendants move for dismissal. Motion denied, and order reversed.

J. T. Ronald, J. W. Heffner and A. W. Hawks, for appellant. Coleman & Hart, for respondents.

SCOTT, J. The respondent Ruff was the auditor of Snohomish county, and the other respondents were sureties on his official bond. The county brought an action on the bond, alleging, in substance, as one ground for recovery, that said auditor was ex officio clerk of the board of county commissioners, and was required by an order of the board to act as purchasing agent for the county, and that he had received money for that purpose, and had failed to account for \$1,818.71. The respondents moved to strike said allegations from the complaint, which motion was granted by the court, and the county has appealed therefrom. The respondents move to dismiss the appeal upon two grounds, one of which is that the notice of appeal was not served upon all of them.

It is conceded that service of the notice of appeal was made on the attorneys for all of the respondents who had filed answers in the action prior to the giving of such notice, which service was had on the 30th day of March, 1896. The motion to dismiss is based upon the fact that several of the defendants served an answer on the attorney for the county on the 3d day of July, 1895, but the same was not filed until April 6, 1896, after the notice of appeal had been given. We do not think, under the circumstances, that these defendants were entitled or required to be served with the notice of appeal. They did not contest the action, and had not appeared therein previous to the notice; and the mere fact that they came in, after the rendition of judgment and notice of appeal to this court, and filed an answer in said cause, although the same had been previously served on the attorney for the county, did not place them in a position requiring the plaintiff to serve them with the appeal notice.

It is next contended that it was not an appealable order; but this cannot be sustained, for it affected a substantial right, and determined the action as to the particular matter in issue, and was in effect a judgment against the plaintiff thereon. Motion denied.

It is next contended that the aforesaid matters were properly stricken from the complaint, on the ground that the sureties were not liable therefor; but this contention cannot be sustained, for the condition of the bond was that the auditor should faithfully perform all of the duties required of him by law, etc., and the law (1 Hill's Code, § 179) makes the auditor ex officio clerk of the board of county commissioners. Section 181 makes it his duty as such clerk to perform all of the duties required by law

or any rule or order of the board, and he was required by the order of the board to act as purchasing agent as aforesaid. Under the well-settled law, the statutes in force at the time relating to the duties of the auditor should be construed as a part of the bond, and it was therefore a condition of the bond that the auditor should faithfully perform all duties required of him by any rule or order of the board of county commissioners. It may be conceded, as far as this case is concerned, that the commissioners could require of him only such duties as were fairly connected with his position as auditor and as clerk of the board, and could not require of him something that was entirely foreign to his office and hold his bondsmen liable, for these matters were fairly within the scope of his duties; and we are of the opinion that the county is entitled to recover upon his official bond for any delinquencies therein. Reversed and remanded.

DUNBAR and ANDERS, JJ., concur.  
HOYT, C. J., dissents.

(15 Wash. 590)

JONES et al. v. WOLVERTON et al.  
(Supreme Court of Washington. Nov. 23, 1896.)

#### APPEARANCE—STIPULATION AS TO PLACE OF TRIAL.

1. A writing wherein two of the defendants stipulate with the attorneys of their co-defendant, and with plaintiffs' attorney, that the cause may be tried in another county, constitutes an appearance on the part of such defendants, within Laws 1893, p. 412, § 16, providing that a defendant appears in an action "when he \* \* \* makes any application for an order therein, or gives the plaintiff written notice of his appearance."

2. The objection that such stipulation should not be considered an appearance, because there is no proof of the genuineness of the signatures of said two defendants, cannot be raised by their co-defendant, who, by his attorney, joined in the stipulation.

Hoyt, C. J., dissenting.

Appeal from superior court, Douglas county; Wallace Mount, Judge.

Action by W. C. Jones and others against William M. Wolverton and others to foreclose a mortgage. From a judgment for plaintiffs, defendant Charles Russell appeals. Dismissed.

Blake & Post, for appellant. Graves, Wolf & Graves and Jones, Belt & Quinn, for respondents.

SCOTT, J. The plaintiffs brought this action to foreclose a real-estate mortgage, and from a judgment in their favor the defendant Russell has appealed. The respondents moved to dismiss the appeal, on the ground that the appeal notice was not served upon the defendants Wolverton. This is conceded by the appellant, but it is contended that said defendants were not entitled to notice, and the question to be determined is whether they had appeared in the action. The action



was commenced in the superior court of Douglas county, and it appears that said defendants joined in a stipulation with the attorneys for the plaintiffs and the attorneys for the defendant Russell, stipulating that the cause might be tried in Spokane county. Did this stipulation by them constitute an appearance in the action?

The statute (Laws 1893, p. 412, § 16) provides that "a defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance." It seems to us that, under the rule laid down by the majority of the court in the case of *Cornell University v. Denny Hotel Co.* of Seattle (recently decided) 46 Pac. 654, this stipulation constituted an appearance upon the part of the defendants Wolverton. It was a written notice of appearance in the action, of which the plaintiffs and defendant Russell had notice by joining therein. In order to constitute it a written notice of appearance, it was not necessary that the writing should recite that said defendants appeared. The fact of participating in the proceedings was an appearance. It was also, in effect, an application for an order, for the cause could not have been transferred without an order.

Some question is made about the validity of such an order, but this seems to us to be immaterial in considering the question of an appearance or an application for an order.

It is further contended by the appellant that the court should not consider said stipulation as an appearance, for the reason that it purports to be signed by the defendants Wolverton in person, and there was no proof of their signatures. Although the court will not take judicial notice of the signatures of parties, and there must ordinarily be proof of their genuineness, the appellant is not in a position to insist upon that objection raised here, for he joined in the stipulation, and thus, in effect, authenticated its genuineness. Under the authority of the case cited, the appeal must be dismissed.

DUNBAR, ANDERS, and GORDON, JJ., concur. HOYT, C. J., dissents.

(115 Cal. 266)

MURRAY v. MURRAY et al. (Sac. 43.)  
(Supreme Court of California. Dec. 11, 1896.)

HUSBAND AND WIFE—MAINTENANCE WITHOUT DIVORCE—FRAUDULENT CONVEYANCES—CONSTRUCTIVE SERVICE—RECEIVER—PLEADING—HARMLESS ERROR—PERSONAL JUDGMENT—RIGHTS OF GRANTEEES.

1. Where judgment is rendered on default, the findings, if made, do not constitute a part of the judgment roll (Code Civ. Proc. § 670), and the facts are to be looked for in the complaint and judgment. Such allegations of the complaint, however, as are necessary to support the judgment are deemed to have had confirmation in the evidence.

2. Under Civ. Code, § 137, which authorizes a deserted wife to sue the husband for the main-

tenance of herself and of her children, if any, the wife is so far his creditor as to be within Civ. Code, § 3439, which avoids conveyances made in fraud of creditors, and it avoids a conveyance made by the husband with the design to defeat the wife's right of maintenance.

3. It is immaterial that the transfer was made before marriage, where there had been a previous agreement of marriage, followed by cohabitation and pregnancy, which left the wife no alternative but to carry out the agreement.

4. In the wife's action for maintenance without divorce, under Civ. Code, § 137, where the purely legal remedies are inadequate, the action carries with it the right to have a receiver appointed, under the general provision for such an officer (Code Civ. Proc. § 564), in all cases "where receivers have been heretofore appointed by the usages of courts of equity."

5. The wife's claim for maintenance is within the general powers of a court of equity to grant, and is not dependent on the statute; and, since plaintiff's demand may be charged specifically upon the defendant's property, described in the complaint and sought to be subjected, the court has power to appoint a receiver at the beginning of the action.

6. In such case, where defendant is a nonresident, by means of the receiver's possession of the property, and the due publication of the summons, etc., the court acquires jurisdiction to subject the property seized to the satisfaction of its lawful judgment.

7. Where a complaint contains but one cause of action, that a detail of matters tending to show the extent, form, and nature of the relief to which the plaintiff is entitled is erroneously designated "a separate cause of action," does not affect the substantial rights of the parties; and, under Code Civ. Proc. § 475, the error must be disregarded.

8. In an action for maintenance without divorce, where the wife seeks to have set aside certain transfers of property alleged to be in fraud of her right of maintenance, the judgment cannot extend to a deed not mentioned in the complaint, or affect the rights of transferees who have not been made parties.

9. In such case, where defendant is a nonresident, and served constructively, the award to plaintiff is limited to the property within the court's control, and no obligation can be imposed on defendant personally.

10. In such case the court should declare precisely what part of the property is to continue in the hands of a receiver or otherwise subject to the satisfaction of the judgment, and the remainder, if any, should be wholly exempted from the effect of the judgment.

11. In an action for maintenance without divorce, a physician's bill, incurred by plaintiff during her illness, may be included in an award for plaintiff's maintenance.

Harrison and Temple, JJ., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by Agnes Murray against Owen Murray and James Murray for maintenance without divorce, and to set aside certain transfers of property. From a judgment in favor of plaintiff, defendants appeal. Modified and amended.

J. H. Daly and Sayle & Coldwell, for appellants. J. P. Meux and H. M. Johnston, for respondent.

BRITT, C. Plaintiff having been deserted by her husband, the defendant Owen Murray, she instituted this action against him for maintenance without divorce, and to set aside

certain transfers of property made by him to his brother, the defendant James Murray, which obstruct the enforcement of her right. Both defendants being absent from the state, —said James residing in Canada,—summons was served on them by publication and mailing, as prescribed by statute. They failed to appear, and plaintiff obtained judgment, from which defendants appeal.

In the printed transcript appears a paper entitled "Findings," and it is recited in the judgment that the court, after hearing the evidence, "made and filed its findings of fact and conclusions of law herein"; but, as there was no necessity for findings, and as in such a case findings, if made, do not constitute part of the judgment roll (Code Civ. Proc. § 670), we can look for the facts of the controversy only to the complaint and judgment. Such allegations of the complaint, however, as are necessary to support the judgment are deemed to have had confirmation in the evidence. It appears from the complaint that plaintiff and defendant Owen, residents of Fresno county, in this state, about August 1, 1893, agreed to intermarry, and at once assumed the relations of husband and wife, and she was got with child by him. On November 7th following they were lawfully married, and in March, 1894, he brought her to the city of San Francisco, where he abandoned her among strangers, and himself departed the state, leaving her in circumstances of miserable destitution. In October, 1893, after the said meretricious cohabitation had begun, said Owen was the owner of divers promissory notes, secured by mortgages of real estate, amounting in face value to near \$6,000, among which was a note and mortgage executed in his favor by one Briscoe for the sum of \$2,000, and another executed by one Crow for the sum of \$1,500. He also owned a sheriff's certificate of sale of certain land in the town of Fresno, and then had possession of such land. Without the knowledge of plaintiff, and with intent to defraud her of the right to subject said property to her claims for maintenance and support, about October 4, 1893, he assigned and transferred said notes and mortgages and said certificate of sale to his brother, said James Murray, who rendered no consideration for such assignment, but was "cognizant of said intent and purpose, and conspired with defendant Owen to get rid of his property in the manner aforesaid, in order to defraud the plaintiff out of the enjoyment and benefit of any portion thereof." At the same time said Owen received back from his brother a power of attorney authorizing him to manage said property for the latter. Acting thereunder, on February 7, 1894, he collected the money due on the note and mortgage of Crow, and released the mortgage, but kept the money for himself. A deed was made, subsequently to said assignments, conveying the land described in said certificate of sale to said James Murray, and about March, 1894, said Owen leased such

land, which had been occupied as the home of himself and plaintiff, to one Smith, who went into possession of the same. The said notes and mortgages, other than that released on February 7, 1894, are within the jurisdiction of the court, and said Owen has no other property within the state to the knowledge of plaintiff. It was further averred in the complaint that, unless a receiver be appointed to take charge of said securities and said land, the defendants would convey the land and remove the securities beyond the control of the court. The prayer was for maintenance and alimony, pendente lite and permanent; that the said transfers and conveyance be canceled and the said property adjudged to belong to defendant Owen; that a receiver be appointed to take charge of the same, etc. By its judgment, rendered November 22, 1894, the court in terms set aside the transfers and assignments described in the complaint (except that of the Crow mortgage), and declared the property which was the subject thereof to be the property of said Owen, and chargeable with the maintenance of plaintiff and their infant child. In like manner it declared to be fraudulent and void the said lease to Smith, and also a certain deed of real estate made by one Evans and one Mancourt to James Murray on February 14, 1894, and declared the land described therein to be the property of said Owen. It was further adjudged that plaintiff be permitted to occupy and use the premises in the town of Fresno formerly occupied by herself and her said husband, and that she be allowed, in addition, the sum of \$25 per month from December 1, 1894, the payment of the same to be a charge upon said premises, and also secured by a bond in the sum of \$1,500, which said Owen was required to execute with sureties; that, in default of such bond, the receiver previously appointed by the court (who by the admission of counsel and the recitals in the judgment appears, on the commencement of the action, to have taken possession of all the property involved) deposit the note and mortgage of said Briscoe in the hands of a person designated to receive the same "as security for the payment to plaintiff of said alimony"; that the receiver pay the sum of \$25 to certain physicians named for professional services rendered to plaintiff during illness; "that, when said several sums of money have been paid, and the further payment of alimony, \* \* \* properly secured as provided herein, the receiver is directed to deliver all of said property and effects remaining after said payment into the custody" whence he had taken it, which being done, the receiver shall be finally discharged.

1. It may be, as contended by appellants, that in virtue of our statute (Civ. Code, § 157), declaring that neither husband nor wife has any interest in the property of the other, the wife in this state, merely because of her conjugal relation, has no standing to attack a voluntary disposition of her husband's separate property, made either before or aft-

er marriage, and this for the apparently simple reason that the fact of marriage gives her no interest (*Smith v. Smith*, 12 Cal. 216; *Chandler v. Hollingsworth*, 3 Del. Ch. 99; *Dudley v. Dudley*, 76 Wis. 567, 45 N. W. 602; *Butler v. Butler*, 21 Kan. 525 et seq.); but that is not the question here. Admitting such to be the rule, the plaintiff is not affected by it. She is the deserted wife of defendant Owen, and by reason of his act of desertion is authorized to maintain the action. Civ. Code, § 137. To defeat its purpose he made the transfers of property to his brother. Every transfer of property made with intent to delay or defraud any creditor or other person of his demands is by the statute of Elizabeth, re-enacted in Civ. Code, § 3439, declared void as against all creditors of the debtor, etc. The wife, though not in strictness a creditor of the husband, is yet, as concerns her right to maintenance, so far within the protection of this statute that it avoids his transfers made with the design to defeat such right. *Green v. Adams*, 59 Vt. 609, 10 Atl. 742; *Tyler v. Tyler*, 126 Ill. 525, 537, 21 N. E. 616, and cases cited; *Stuart v. Stuart*, 123 Mass. 370; *Stew. Mar. & Div.* § 381. See *Lord v. Hough*, 43 Cal. 581. And, the circumstances of this case considered, in our judgment the fact that the marriage had not been solemnized at the time of the transfers to James Murray cannot prevent the application of the rule here. The plaintiff was in that condition that even knowledge of the fraudulent assignments would not have enabled her to exercise a fair option whether she would fulfill her engagement with Owen Murray. To her the alternative was marriage or the continued stain of concubinage and the bastardy of her offspring. In *Taylor v. Pugh*, 1 Hare, 608, the woman, before marriage, and without the knowledge of her intended husband, who had seduced her, executed a settlement of her property for her own benefit. After the marriage the husband filed a bill to set aside the settlement as in fraud of his marital rights. The court denied the relief, the vice chancellor, Sir James Wigram, saying: "The husband, by bringing the intended wife to his house, and inducing her to cohabit with him before the marriage, deprived her of the power to protect herself, and thereby precluded himself from telling this court with any effect that his wife has committed a fraud upon him because she has taken the precaution to have her property secured for herself and her children." Conversely, in this instance, the husband has no equity to say that the assignments, which would have been undeniably a fraud against the plaintiff if made after marriage, shall be treated as innocent because made before that event, when by his conduct marriage had become to her inevitable.

2. By section 140, Civ. Code, the court in an action such as this, or for divorce, may require the husband to give reasonable security for providing maintenance, and may enforce

the same by appointing a receiver. This court has said recently that the only authority for the appointment of a receiver in a divorce suit is to be found in that section. *Petaluma Sav. Bank v. Superior Court of City and County of San Francisco*, 44 Pac. 179. If this be true, also, of an action for maintenance without divorce, it would seem that the language of the section is yet sufficient to justify the appointment of the receiver made in this case at the commencement of the suit. *Carey v. Carey*, 2 Daly, 424. But, assuming that the statute does not reach so far, still, in our opinion, the action is, by reason of the inadequacy of purely legal remedies, so much a subject of equitable cognizance that it carries with it the right to have a receiver appointed, under the general provision for such an officer in all cases "where receivers have been heretofore appointed by the usages of courts of equity." Civ. Code, § 564. That the relief sought is within the general powers of a court of equity to grant, and is not dependent upon statute, has been decided by this court, and the principle has found quite general acceptance. *Galland v. Galland*, 38 Cal. 265; *Story, Eq. Jur.* 1423a; *Hanscom v. Hanscom* (Colo. App.) 39 Pac. 885, and cases cited; *Tolman v. Tolman*, 1 App. Cas. D. C. 299. "The wife's claim to alimony is an equitable demand against the husband, and there can be no doubt of her right to attack for fraud any transfers of property made by him with intent to defeat her claim, and that such fraudulent grantees may properly be made defendants to the suit for alimony." *Hinds v. Hinds*, 80 Ala. 225. The wife having such a demand, and her position being assimilated to that of a creditor of her husband (*Feigley v. Feigley*, 7 Md. 537; *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. 616; *Livermore v. Boutelle*, 11 Gray, 217; *Green v. Adams*, 59 Vt. 609, 10 Atl. 742), it would appear that a receiver in aid of the enforcement of the demand should be appointed, when the occasion arises, for reasons like to those on which a creditor seeking to avoid fraudulent conveyances of a debtor is permitted to employ the same instrumentality. The rule in equity is that a receiver may be appointed before answer, provided the plaintiff can satisfy the court that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve the same from loss. *Bloodgood v. Clark*, 4 Paige, 574; *High, Rec.* § 105, and cases cited. As shown, the plaintiff here has a demand enforceable in equity, and it may be charged specifically upon the property described in the complaint. *Robinson v. Robinson*, 79 Cal. 511, 21 Pac. 1095; Civ. Code, 137, 140, 141; *Plumb v. Bateman*, 2 App. Cas. D. C. 170, 171; *Hanscom v. Hanscom* (Colo. App.) 39 Pac. 885. It seems necessarily to follow that the court had power to appoint the receiver at the beginning of the action. Of course, such a power should be very cautiously exercised,

but there is nothing in the present record to show that the court was indiscreet in that behalf.

3. We have dwelt somewhat upon the matter of the receivership because of the influence of that proceeding on the question of the jurisdiction of the court to render any judgment at all. Service of summons by publication, or other form of substituted service of process for notifying an absentee or nonresident defendant of an action against him, is allowed to be effectual "where, in connection with process against the person for commencing the action, property within the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein." *Pennoyer v. Neff*, 95 U. S. 733; *Brown v. Campbell*, 100 Cal. 641, 35 Pac. 433. Perhaps the jurisdiction in this case is maintainable on the ground that the judgment is sought as a means of affecting an interest in the property described in the complaint. However that may be, we have no doubt that, by means of the receiver's possession of the property, and the due publication, etc., of the summons, the court acquired jurisdiction to subject the property seized to the satisfaction of its lawful judgment. According to the common experience of mankind, the owner of property keeps some oversight of it, wherever situated, and will probably be apprised of the seizure thereof, and so warned of the purpose of the seizure. To accomplish this object, the taking of property into the possession of a receiver is at least as well adapted as the similar taking by process of attachment; and it is common practice to apply property which has been attached in the course of an action in personam against a nonresident to the satisfaction of the judgment obtained, although no personal service of summons has been effected. Attachment is not the only means by which the court may acquire control of the property of the absentee defendant, so as to impress the action, as to such property, with the jurisdictional characteristics of a proceeding in rem. Several recent cases illustrate our conclusion. Most of them relate to the effect of legislation, such as sections 412, 749, Code Civ. Proc.; *Hanscom v. Hanscom* (Colo. App.) 39 Pac. 885; *Thurston v. Thurston*, 58 Minn. 279, 287, 59 N. W. 1017, 1019; *Corson v. Shoemaker*, 55 Minn. 306, 57 N. W. 134; *Bennett v. Fenton*, 41 Fed. 233; *Single v. Manufacturing Co.*, 55 Fed. 553; *Miller v. Jones*, 67 Hun, 281, 22 N. Y. Supp. 86; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557; *Plumb v. Bateman*, 2 App. Cas. D. C. 156, 171; *Bragg v. Gaynor*, 85 Wis. 470, 55 N. W. 919. The case last cited was a creditors' bill to reach certain debts evidenced by notes and mortgages executed by residents of the state to Gaynor and by him assigned in fraud of Bragg, a judgment creditor. Both Gaynor and the fraudulent assignee were nonresidents, were served with process out of the

state, and failed to appear. The court held that such debts were "property within the state," within the meaning of a statute like, in this particular, to section 412 of our Code of Civil Procedure, as amended in 1893, and that the service of an injunction on the mortgagors, who were made defendants, restraining them from paying to the nonresident creditor, brought the debts under the control of the court, so that its judgment avoiding the assignment, and appointing a receiver to collect the debts and apply the proceeds to the payment of Bragg's demand against Gaynor, was valid. We see no essential difference, as concerns the question of jurisdiction, between that case and the present.

4. It is contended that a portion of the complaint, introduced with the words, "For a separate and second cause of action, plaintiff avers," etc., and which contains virtually all the allegations of the pleading relating to the fraudulent transfers from Owen to James Murray, is insufficient as a statement of a cause of action, in that it fails to allege the husband's failure to provide for the wife's support. The complaint is loosely drawn, but we think it apparent that it contains but one cause of action, and that the portion thereof to which appellants point this objection is not a real attempt to state a second transaction, intended as an independent ground for plaintiff's suit, but is only a detail of matters tending to show the extent, form, and nature of the relief to which she is entitled upon her single cause of action, viz. her husband's desertion and his failure to maintain her, and that the words designating it "a separate cause of action" should be disregarded, as an error which does not affect the substantial right of the parties. Code Civ. Proc. § 475.

5. It was error to cancel the deed made by Evans and Mancourt to James Murray. It is not mentioned in the complaint, and, for anything appearing, Owen Murray had no interest in it. So the lease to Smith should not have been canceled. Smith was not made a party to the action. He had a right to an opportunity for a hearing, however fraudulent may have been the contract of lease. We think, also, that the court had no power to require said Owen to execute a bond in favor of plaintiff conditioned for the payment of the alimony allowed to her. No obligation upon him personally can be imposed by the judgment (*De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345), and the power of the court to secure the award to plaintiff is limited to the property within its control. The court should not have disturbed the transfers to James Murray any further than the exigencies of the decree in favor of plaintiff required. Any property not needed for securing the maintenance allowed to her, and which can be restored to the person from whom the receiver took it, as provided in the judgment, is that much which, as between defendants, belongs to James Murray. The court should have declared precisely what part

of the property was to continue in the hands of a receiver, or otherwise subjected to the satisfaction of the judgment, and the remainder, if any, should have been wholly exempted from the effect of the judgment.

So far as the facts are disclosed by the record, we see no error in the direction that the receiver pay a physician's bill incurred by plaintiff. It must be assumed that this was found to be part of the necessary maintenance of plaintiff, which was the very purpose for which the funds were in the hands of the receiver. See *Fox v. Mining Co.*, 108 Cal. 475, 41 Pac. 328; *Robinson v. Robinson*, 79 Cal. 511, 21 Pac. 1095. If this were an action for divorce as well as maintenance, we should say that the difficulties attending a continuing allowance under the circumstances are such that it would be better to award the plaintiff absolutely a gross sum, or part of the property in question, as in *Robinson v. Robinson*, just cited; but as, possibly, the cohabitation of the parties may be resumed, we think the cause should be remanded, with instructions to the court below to modify and amend the judgment in the particulars wherein we have shown it to be erroneous, and, as so modified and amended, it should stand affirmed.

We concur: SEARLS, C.; HAYNES, C.

BEATTY, O. J., and GAROUTTE, VAN FLEET, and MCFARLAND, JJ. For the reasons given in the foregoing opinion, the cause is remanded, and the court below is instructed to modify and amend its judgment in the particulars wherein it is shown by said opinion to be erroneous, and, as so modified and amended, it will stand affirmed.

We dissent: HARRISON, J.; TEMPLE, J.

(114 Cal. 554)

PEOPLE v. BARNEY. (Cr. 135.)

Supreme Court of California. Oct. 20, 1896.)

CRIMINAL LAW—APPEAL—HARMLESS ERROR—RAPE  
—EVIDENCE—EXPERT TESTIMONY  
—INSTRUCTIONS.

1. Error in the admission of evidence is cured by an order striking out the same and an instruction that it should be totally disregarded.

2. In a prosecution for an assault on rape, the prosecution may show that the injured person made complaint of the injury while it was recent.

3. A person, though not a medical expert, may testify as to whether, at the time of her examination of the child on whom the alleged attempt to rape was committed, there was any hymen.

4. In a prosecution for assault on rape, it is not error to refuse to instruct as to the danger attending such cases of convicting an innocent person.

5. It is not error to refuse an instruction where its substance is subsequently substantially given.

6. In a prosecution for an attempt to rape, defendant, if he wishes the attention of the jury called to the lesser offense of simple assault, must request an instruction therefor.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county; W. O. Minor, Judge.

F. L. Barney was convicted of an attempt to commit rape, and appeals. Affirmed.

G. A. Whitby, A. B. Shoemaker, and F. S. O'Donnell, for appellant. Atty. Gen. Fitzgerald, for the People.

BELCHER, C. The defendant was charged with the crime of an attempt to commit rape upon a female child of the age of about seven years. He was convicted of the offense charged, and has appealed from the judgment entered against him, and from the orders of the court denying his motions in arrest of judgment and for a new trial. The appellant contends that the court erred in several of its rulings upon the admission of evidence, and in refusing to give to the jury certain instructions asked by him, and in modifying and giving as modified certain other instructions.

1. There was no prejudicial error in admitting the testimony of the complaining child, Irene Boone. The court afterwards ordered all of her evidence stricken out, and expressly charged the jury to totally disregard it. The jury must be presumed to have obeyed the instruction of the court, and, therefore, if it was error to admit the testimony, the error was cured by the order and instruction.

2. There was no error in overruling defendant's objection to the question propounded to Mrs. Boone, the child's mother, as to whether, shortly after the date of the alleged offense, the child made any complaint to her about any injuries she had received from defendant. The objection was that the testimony was hearsay,—no part of the *res gestæ*. The court ruled: "I think she can testify as to whether the child complained of an assault having been made upon her, and stop there. The details of what the child stated I think is hearsay." Afterwards the court ordered all that portion of the direct testimony of the witness which connected the defendant with the alleged offense stricken out. In cases of this kind the prosecution is always permitted to prove that the injured party made complaint of the injury while it was recent. *People v. Mayes*, 66 Cal. 597, 6 Pac. 691; *People v. Snyder*, 75 Cal. 323, 17 Pac. 208.

3. There was no error in overruling the objection to the question propounded to Mrs. Boone as to what was the general health and appearance of the child for the two or three months before the alleged offense. The answer was, in fact, favorable to defendant, and could not have operated to his prejudice with the jury.

4. There was also no error in overruling the objection to the question propounded to Mrs. Draper as to whether, when she made an examination of the child on the Friday after the offense was alleged to have been committed, there was any hymen there. The objection was that the witness was not competent to testify in relation to a matter of this kind, that it was a matter connected with the anatomy of

a human being, and that, to be competent, a witness should possess the same intelligence and knowledge that a physician or professor of anatomy does. The witness testified that she thought she knew what the hymen is, and that, if it was what she thought it to be, it was not there. Certainly it cannot be necessary that a witness should be a physician or a skilled physiologist in order to be competent to testify as to the existence or nonexistence of any part of the human body, when the matter can be determined by ocular inspection.

5. The court refused to give instruction No. 4, asked by defendant, and in this refusal we see no error. The instruction stated no rule of law, but was simply argumentative as to the uncertainties and dangers attending this class of cases, in consequence of which "convictions will sometimes be wrongly had, and sometimes the guilty will go free." "In charging the jury the court must state to them all matters of law necessary for their information" (Pen. Code, § 1127); but it should not go further, and comment upon the facts.

6. The court also refused to give instruction No. 8, asked by defendant. That instruction stated the law correctly, but the rule declared in it was in substance again clearly repeated in instruction No. 9, which was given at the request of defendant. It was not, therefore, necessary that both instructions be given.

7. The court amended defendant's instruction No. 9 by adding thereto the following: "But, if you believe, from the evidence in the case, beyond a reasonable doubt, that at the time and place stated in the information the defendant attempted to have sexual intercourse with Irene Boone, and that she was at the time under fourteen years of age, you should find the defendant guilty." We see no error in this amendment. It stated the law correctly, and the fact that it was appended to another instruction was not prejudicial to defendant.

8. Defendant's instruction No. 10, as requested, was as follows: "You are instructed that that portion of the testimony of Mrs. Boone which connects the defendant with the alleged offense has been stricken from the record by the court, and you are instructed to entirely disregard the same," etc. The court amended the instruction by adding the word "direct" before the words "testimony of Mrs. Boone." This was proper, and without prejudice to defendant, as the only testimony of Mrs. Boone that was stricken from the record by the court was her direct testimony.

9. After acting upon all of the instructions requested by the prosecution and by the defendant, the court, of its own motion, gave to the jury, among others, the following instruction: "You understand, as I apprehend, gentlemen, that you can render but one of two verdicts, either guilty or not guilty. Of course, if you find him guilty, it will be guilty

of an attempt to commit rape." It is objected that the jury might have found the defendant guilty of a simple assault, and that the court erred in not so instructing. The objection is not well taken, for two reasons: (1) It clearly appears, from the evidence, that the defendant was either guilty of the offense charged, or not guilty at all. (2) If the defendant wanted the attention of the jury specifically called to the lesser offense of simple assault, he should have requested the court to do so, which he does not appear to have done. *People v. Franklin*, 70 Cal. 641, 11 Pac. 797; *People v. Guldice*, 73 Cal. 226, 15 Pac. 44.

We conclude that there was evidence sufficient to justify the verdict, and that no material error was committed by the court during the progress of the trial. The judgment and orders appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

(115 Cal. 184)

FOLEY v. CALIFORNIA HORSESHOE CO. (S. F. 349.)

(Supreme Court of California. Dec. 3, 1896.)

MASTER AND SERVANT—INJURY TO MINORS—CONTRIBUTORY NEGLIGENCE—FELLOW SERVANTS—ACTION BY INFANT—APPOINTMENT OF GUARDIAN AD LITEM—TAXATION OF COSTS—REVIEW ON APPEAL.

1. A boy, 14 years old, employed to operate a punching machine, is not, as a matter of law, guilty of contributory negligence in going behind the machine, at the direction of the assistant foreman, to adjust a bolt (a task which the boy had never before performed), though he knew that by reason of a defect in the belt the machine was liable to start at any moment.

2. The relation of fellow servant does not exist between an assistant foreman in a horseshoe shop and a boy operative who is under his control and subject to his orders, so as to relieve the master from liability to the boy for negligence of the assistant foreman.

3. Failure to appoint a guardian ad litem for an infant plaintiff will not render a judgment in his favor void.

4. Where an infant plaintiff's allegation of the appointment of a guardian ad litem is not sustained by the proof, the court may allow him, over defendant's objection, to file a new petition, and may then and there appoint a guardian ad litem, and order the trial to proceed.

5. The action of the trial court in the matter of taxing costs is not reviewable on appeal if the amount allowed was less than \$300.

6. Error of the clerk in entering a judgment for costs against defendant in the sum claimed in plaintiff's cost bill, before the determination of defendant's motion to tax costs, is cured by an order of court reducing the amount.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Patrick F. Foley, a minor, by his guardian ad litem, against the California Horseshoe Company, to recover for personal injuries. From a judgment for plaintiff, and

from an order denying a motion for a new trial, defendant appeals. Affirmed.

T. Z. Blakeman, for appellant. W. G. Burke and Sullivan & Sullivan, for respondent.

HENSHAW, J. This is an action for damages for personal injuries by a minor against his employer. Plaintiff recovered a judgment under the verdict of the jury, and defendant appeals from the judgment, and from the order denying its motion for a new trial. It also appeals from the order taxing costs, and denying its motion to vacate the judgment.

Plaintiff, at the time of the accident, was 14 years and 4 months old. He had been working in the shop of the defendant for 14 months, and for four months immediately preceding the accident he had been engaged in punching horseshoes with a punching machine. The complaint avers that plaintiff was employed by defendant to punch holes in horseshoes by means of a machine known as a "horseshoe punching machine"; that at all times during his employment he was in the performance of his duties in the factory under the control of and subject to the orders and directions of defendant's assistant foreman; that on the 17th of June he was ordered by said assistant foreman to adjust a portion of the machinery operating the said punching machine; that to adjust said machinery was a hazardous undertaking; that the hazard was well known to defendant and to the assistant foreman, but that plaintiff was unfamiliar with said machinery and the manner of adjusting the same, and was ignorant of the hazard. Plaintiff, in obedience to the order from the assistant foreman, was adjusting the portion of the machinery when the machinery, by reason of its defectiveness and the defective and unsecured condition of the belts and pulleys used in operating the same, was suddenly set in motion, whereby plaintiff's right arm was caught in the machinery, and crushed and mangled. Defendant claimed that the accident resulted from the plaintiff's own negligence, and from the negligence of plaintiff's fellow employé, the assistant foreman. The punching machine was moved by a belt. When it was desired to stop the machine, the belt was thrown from the tight pulley to a loose pulley. The belt was so defectively constructed that one end of it at the place of juncture projected. By constant striking upon this projecting end, the belt would work back from the loose pulley on to the tight pulley, and so set the machine in motion. This defect was known to the plaintiff, and had by him been reported to Rodifer, the assistant foreman, who told the boy "that would be all right; that would not hurt nothing." The shifter used in moving the belt from the fixed to the loose pulley was likewise defective, and its condition tended also to cause the belt to move back upon the fixed pulley without the intervention of an operative. Upon the day in question the boy's ma-

chine was at rest. A tap bolt, which had fallen out from the box holding the shaft wheels at the rear of the machine, was taken by Foley to Rodifer. Rodifer directed the boy to screw the bolt into its proper place. He did not know how to do the work, and Rodifer gave him directions. While obeying these directions, and standing behind the machine, inside the wheel, screwing on this tap bolt, the sleeve of his right arm became entangled with a small cogwheel, and, as the machine started while he was thus at work, his arm was drawn in and crushed.

It is, perhaps, proper to say that this statement presents the evidence in a light most favorable to plaintiff. Nevertheless it is a statement borne out by the evidence, and from their verdict it is the view which the jury must have accepted. From this statement appellant claims that it appears that plaintiff, by his own testimony, knew the special danger and risk which, because of the defective appliance, must have attended the working of the machine; and that, having this knowledge, and his injury having resulted from this known defect, he stood as an adult with respect to his master's liability for any injury arising from it, and 'cannot recover; that he undertook to screw the nut upon the machine while it was in the condition which he himself considered and testified to as dangerous. Where the ordinary and usual occupation of a minor is the running or management of a machine, or is some employment in and about it, and the minor is shown to have knowledge of the working of the machine, its dangers or its defects, and where it further appears that the minor is not of such tender years as to be unable to appreciate the nature of the dangers or defects, it is beyond question the rule, sanctioned by a long line of authority, that he takes upon himself, as will an adult under the same circumstances, the perils and risks of his employment; and that, if injured in the course thereof, he may not look to his employer for compensation. But there is a distinction which, as a matter of humanity as well as law, should be drawn between such cases and those where the minor is put to a task which, while within the range of his employment, is to him in his inexperience and youth unusual and strange; and it is a case of the latter kind which we are here called upon to consider. Had the accident to the boy occurred while he was engaged in the ordinary operation of his machine, it could be said without hesitation that, knowing the peculiar danger to which he might be exposed by its sudden starting, and knowing, as he did, that it was liable thus suddenly to start, he continued in his employment, taking upon himself the responsibility for any accident which might result therefrom. But the accident did not occur while he was engaged in his ordinary occupation at the machine. It occurred while he was engaged in the unusual task set him, that of

screwing on a fallen bolt. It is true that while engaged in this task he had still the knowledge that the machine was liable to start, but does this fact establish that for which appellant contends, viz. that he had assumed that particular risk while screwing on the nut, as he had assumed it generally in operating the machine? We think that, as a proposition of law, this cannot be said. Were the employé in this case an adult, the rule might well be different; but the very reason why an adult, under these circumstances, would be held to have taken the risk while screwing on the nut, serves to show the injustice and hardship which would result if it were sought to be applied to a minor. The question of the taking of a risk, the question of the assumption of responsibility in a given act, is determined as much upon the matter of judgment as upon the matter of knowledge. An adult employé, when the facts are known to him, is presumed in law to exercise the same judgment upon those facts as would the employer. The employer's duty is fulfilled, and he is not negligent, if he puts the employé in full possession of the facts, and makes him acquainted with the attendant dangers and risks. Therefore, if an adult employé engaged in operating the punching machine, and knowing that it was liable suddenly and unexpectedly to move, were told to screw on the misplaced nut, it might very properly be said that in the performance of this task his judgment of any increased risk or danger attending it would be as good as his employer's, and that, if he chose, under those circumstances, to undertake the work, the responsibility for any accident that might befall him therefrom would be upon him alone. The conduct of the child, however, is and should be viewed and measured by a different rule. Children are taught obedience. They are taught not to oppose their will and their judgment to those in authority over them; but, in addition to this, and more important than all, the judgment of the child is the last faculty developed. Knowledge he may have; facts he may acquire; but the ability to apply his knowledge, or to reason upon his facts, comes to him later in life. A child might be capable of understanding the construction, the use, and the danger of firearms; yet one would not for that reason feel justified, after due explanation, in giving them to him as playthings. The very accidents of childhood come from thoughtlessness and carelessness, which are but other words for absence of judgment. When sent out to labor, they are told by their parents or guardians to obey. In the factory or shop unquestioning obedience is expected and exacted. They must go where they are sent; they must do as they are told. It would be barbarous to hold them to the same accountability as is held the adult employé, who is an independent, free agent. Their conduct is to be judged in accordance with

the limited knowledge, experience, and judgment which they possess when called upon to act. And it must, from the nature of the case, be a question of fact for the jury, rather than of law for the court, to say whether or not, in the performance of a given task, the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability. This must necessarily give rise to a different rule from that so well established which measures the conduct of the adult by that which might be expected of the ordinarily prudent person placed in the same position. So here the child might well be expected to comprehend the likelihood of accident, and to know how to provide against it, when engaged in his usual employment in front of the machine. But when he is sent to the rear of it, and in among the wheels and mechanism, to perform a novel duty, we cannot say as matter of law that he entered upon its performance with a full appreciation of the increased dangers and risks, and with sufficient judgment to know how to avoid them. These matters, and the further question whether the minor duly exercised such judgment as he possessed, must, therefore, as a rule, be left as considerations of fact for the jury's determination; and it would be an exceptional case which would present them as unmixt questions of law for the determination of the court. In this case, it is true, the boy knew, when he was engaged in screwing on the nut, that the machine might start, but it does not appear that he knew or had judgment to appreciate any added risk which the particular task rendered him liable to. The ordinary care which a child of limited judgment and experience is called upon to exercise in a given act is not the same quantum of care which the adult would be called upon to display under the same circumstances. Each is required to use ordinary care, but the amount of care which the person of perfected intelligence and judgment must display is very different from the amount which the law in its humanity exacts of a minor. It is well said by the supreme court of appeals of West Virginia, in *Turner v. Railroad Co.*, 22 S. E. 89: "A minor cannot be expected to set up his opinion, however mature, against the judgment and experience of those maturer and older to whom he is given in charge, but he is taught the lesson of obedience from his cradle, and he is required to respect the commands and pay deference to the judgment of his elders, until legally emancipated at the age of twenty-one years. And it would be an extreme case in which a minor should be held guilty of contributory negligence in obeying the orders of his foreman, representing his master." We cannot say, therefore, as matter of law, either that the child with knowledge assumed the risks incident to the task, or that in performing the task he exercised less than the ordinary care required of him.



It is next claimed that plaintiff was injured because of the negligence of the fellow servant, Rodifer, and that for this reason plaintiff cannot recover. The case of *Fisk v. Railroad Co.*, 72 Cal. 38, 13 Pac. 144, is here relied upon; but in the *Fisk* Case the boy had been put to work in the tool room, and under the directions of the boss of that room. In excess of his authority, the boss of that room sent him into another part and department of the shops, there to work, and it was there the boy was injured. It is said: "He was a boss in the tool room, and as such we may fairly assume he was authorized to control and direct the manner in which the work of that room was to be performed, and all things relating to the order and proper conduct of his branch of the business. \* \* \* The employment to work in the tool shop was the subject-matter, and the control given to Snape and the directions to plaintiff to obey him must be construed with reference to and confined to such subject-matter." In the case at bar the plaintiff pleads and shows that in the performance of his duties in defendant's factory he was under the control of and subject to the orders and directions of defendant's assistant foreman, Rodifer. It was in pursuance of Rodifer's order, within the scope of his authority, that plaintiff was injured. In the case of *Mullin v. Horse-shoe Co.*, 105 Cal. 77, 38 Pac. 535, the machinist Brunig had general supervision of the boys, and gave them orders and instructions. He put the plaintiff to work as a press boy, and directed him generally about his work until he was injured. It was there held that Brunig was the representative of the employer, and not a mere fellow servant with the one who was injured. We will not say, under these circumstances, that, between Rodifer, in control of the work, and the boy subject to his orders, the relation of fellow servant existed so as to relieve the employer of liability.

Certain instructions given by the court at plaintiff's request are complained of. One will serve as an example for all. It is as follows: "The owners of dangerous machinery, who employ a minor and inexperienced person about it, unacquainted with its nature and use, are bound to take care that such person is duly instructed therein; and, if they either neglect this, or if express directions are given to use the machinery in a manner which must lead to danger, of which such person is not likely to be fully aware, they are liable for any injury sustained by such person in the use of the machinery in that manner. The law is not so unreasonable as to expect or require the same maturity of judgment, or the same degree of care or circumspection, in a child of tender years as in an adult." It is claimed that this instruction is erroneous in assuming as a fact that the machinery was dangerous; but it is spoken of as a dangerous machine, not because of the claimed defect in the belt and shifter,

but because, as a matter of common knowledge, any machine operated by a swiftly-moving belt, and containing as parts of its mechanism pulleys and cogs, and used for punching holes in iron, is in and of itself a dangerous machine. The proposition of law is unassailable.

The complaint averred the appointment of a guardian ad litem, and this averment was traversed by the answer. Upon the trial, when plaintiff undertook to make proof of such appointment, the court held the proof to be insufficient, and the appointment void, but permitted plaintiff, over the objection of defendant, to file a new petition, and then and there made its order appointing a guardian ad litem, and ordered the trial to proceed. This is not ground for reversal. The judgment for plaintiff, even without the appointment of a guardian ad litem, would not have been void (*Childs v. Lanterman*, 103 Cal. 387, 37 Pac. 382); and the practice adopted has been approved in *Re Cahill's Estate*, 74 Cal. 52, 15 Pac. 364.

Plaintiff filed a cost bill in the sum of \$314, and the clerk, without awaiting the determination of defendant's motion to tax costs, entered a judgment for the sum claimed. Defendant moved to vacate the judgment. The court disallowed \$22 of plaintiff's bill and allowed costs in the sum of \$292, and likewise ordered the amount of costs specified in the judgment to be reduced to this amount. The amount of costs allowed being less than \$300, the action of the trial court in the matter is not reviewable upon appeal. (*Fairbanks v. Lampkin*, 99 Cal. 429, 34 Pac. 101. The clerk's error in entering the judgment for costs was cured by the order of the court reducing the amount, and the refusal to vacate the judgment could have worked no injury to appellant. The judgment and order appealed from are affirmed, as is also the order of the court refusing to vacate the judgment. The appeal from the order taxing costs is dismissed.

We concur: McFARLAND, J.; TEMPLE, J.

(115 Cal. 89)  
SCOTT v. HOTCHKISS et al. (Sac. 91.)<sup>1</sup>  
(Supreme Court of California. Nov. 27, 1896.)  
MORTGAGE—RIGHT TO GROWING CROPS—RIGHTS  
OF TENANT—RECEIVER OF RENTS  
AND PROFITS.

1. A mortgage of real estate provided, in the case of foreclosure, for the appointment of a receiver of the rents and profits. Held that, in the absence of the affidavit required in mortgages of growing crops, such mortgage did not entitle the receiver to a crop growing on the land in possession of a tenant, but only so much thereof as was duly reserved for rent.

2. On an allegation that the security was insufficient, the court was authorized to appoint a receiver, in accordance with the stipulations of a mortgage, as against the claims of a purchaser without notice.

Department 2. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

<sup>1</sup> Rehearing denied.

Action by P. F. Scott against O. E. Hotchkiss and others. From a judgment for plaintiff, defendants appeal. Affirmed in part, and reversed in part.

White, Hughes & Seymour, for appellants.  
Holl & Dunn, for respondent.

TEMPLE, J. This action was brought to foreclose a mortgage executed by defendant Hotchkiss. The mortgage contains a provision that in case of default and the commencement of an action to foreclose, on the filing of a complaint in foreclosure, or at any time thereafter, "the court shall, if requested by the plaintiff, name some disinterested person as receiver, and shall authorize such person as receiver, to take possession of the mortgaged premises, and collect the rents and profits, and to apply them to the satisfaction of such judgment, and to sell said premises in the same manner as lands are sold upon execution, and to continue in possession of such premises, and to collect the rents and profits, until the premises are redeemed from such sale or until title is vested in the purchaser." The mortgage was not accompanied with an affidavit, as required in mortgages of growing crops, and was not recorded or indexed as a chattel mortgage. After the mortgage, Hotchkiss sold and conveyed the land to defendant Fountain, subject to the mortgage; but it was found that Fountain had no actual notice of the provision in the mortgage in regard to the appointment of a receiver. The mortgage was executed in 1891. In 1892, Millard entered upon the land, as tenant of the mortgagor, and continued in possession as such tenant up to the time of the commencement of this action, and the appointment of a receiver herein. Each year he has cultivated the land in wheat, barley, and hay, rendering as rental one-fourth the crop; delivering the same in the field, the grain in sacks, and the hay in bales. Millard had no actual knowledge of the mortgage until after he took the lease, and no knowledge of the provision in regard to a receiver until the commencement of this action. This action was commenced in February, 1895. As to the condition of things when a receiver was appointed, the court found as follows: "That there is growing upon said premises a crop of wheat and hay, as follows: Sixty acres of summer fallow, twenty acres of winter sown, and about one hundred acres of volunteer. That said crop was put in by the defendant Millard, and was, except twenty acres of winter sown, put in prior to December 1, 1894. That the defendant Millard furnished all of the necessary seed, labor, and teams used in putting in said crop. That it is customary in leasing farming lands, such as the mortgaged premises, in the vicinity of said premises, where they are leased for a share of the crop, to reserve one-fourth of all grain and hay grown on the premises as rental, the grain to be delivered in sacks, and the hay in bales, to the lessor, on the leased premises; the other three-fourths of the crop to be re-

tained by the tenant as compensation for the labor, seed, use of teams and machinery, and other necessary expenses incurred by him in producing the crop, excluding the harvesting, baling, sacking, and piling the same. In the production of such crop, the relative value of the use of the land to the value of the labor, seed, use of teams and machinery, and other necessary expenses of the tenant, is as one-fourth is to three-fourths; and, of the crops so growing on said premises, at least three-fourths thereof in value and quantity are the result of defendant Millard's industry and capital, except that the labor and expense incurred in harvesting, sacking, threshing, baling, and piling said entire crop would come out of said three-fourths." The appeals are separately taken. Millard claims three-fourths of the crop, contending that the right to rents and profits is all that is granted in the mortgage, and all that, according to equity, can be recovered by plaintiff. Fountain contends that this provision in the mortgage conferred no rights whatever, and that he (Fountain) is entitled to the rent reserved.

The general subject here under consideration was discussed in the late case of *Simpson v. Ferguson* (Cal.) 44 Pac. 484. It was there held that growing crops could be mortgaged only as provided in section 2955 et seq., Civ. Code. They are therefore not covered by an ordinary real-estate mortgage. While growing, they are real estate, and are included in the mortgage. But, if the mortgagor is in possession, he is entitled to the rents and profits, and to the crops if harvested before foreclosure, and the transfer of title thereby to a purchaser. In *Simpson v. Ferguson* the court quoted approvingly from *Sexton v. Breeze* (N. Y. App.) 32 N. E. 133. In that case, the mortgagor, subsequent to the mortgage, sold a growing crop of wheat, and then delivered possession of the land to the mortgagee. It was held that the mortgagee in possession took subject to the rights of the purchaser of the crop, and that the fact that the mortgagee was entitled to the rents and profits did not matter. He was not therefore entitled to the crop, which was in part the result of the labor of the mortgagor. Practically the same thing was decided in *West v. Conant*, 100 Cal. 231, 34 Pac. 705, and in *Freeman v. Campbell*, 109 Cal. 360, 42 Pac. 35. These cases clearly establish the proposition that the court erred in appointing a receiver to take possession of the crop as against the tenant. He is entitled to his share of the crop, which was wrongfully taken from him by the receiver.

The case of *Fountain* must be discussed on different lines. It has been held both here and in other states that the stipulation in the mortgage that a receiver may be appointed, and directed to take possession and collect the rents and profits, enlarges the rights of the mortgagee; at least, as against the mortgagor. Unless such a clause in a mortgage gives the mortgagee an interest in the growing crop, or in the rents and profits, I do not see how it can

affect the rights of others or authorize a court of equity to appoint a receiver. No stipulation can confer jurisdiction upon the court to appoint a receiver in a case where the court has no such authority given by law. It is not necessary to decide the matter in this case, however, because there is an averment that the security is insufficient. In such case the court is authorized to appoint a receiver (section 564, Code Civ. Proc.), and take and hold the rents and profits to secure the debt. See, also, *Montgomery v. Merrill*, 65 Cal. 432, 4 Pac. 414.

The purchaser from Hotchkiss is in no better position in regard to this matter than Hotchkiss would have been. It is to be noticed that it is expressly found that the rent reserved in the lease to Millard is fair and adequate, and represents the value of the use and occupation, as well as the actual rent of the land. The mortgagee, under the very terms of the mortgage, was not entitled to more than this. As to appellant Fountain, the judgment is affirmed, but as to defendant Millard the judgment is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

We concur: McFARLAND, J.; HENSHAW, J.

(115 Cal. 316)

FASSETT v. WISE et al. (Sac 9.)

(Supreme Court of California. Dec. 14, 1896.)

CHattel MORTGAGES—RECORDING—REMOVAL OF PROPERTY.

A mortgagor of chattels, after the execution of the mortgage, but before it was recorded, removed the property to another county. The mortgage was subsequently recorded in the original county, but not in the county to which the property was removed, until after an attachment had been levied thereon. *Held*, that under Civ. Code, §§ 2957, 2959, providing that a chattel mortgage shall be void as to creditors unless recorded in the county in which the mortgagor resided, and also the county in which the property is situated or to which it may be removed, the mortgage was inoperative as against the attaching creditor. *Garoutte and Van Fleet, J.J.*, dissenting.

In bank. Appeal from the superior court, Tulare county; William W. Cross, Judge.

Action by B. A. Fassett against John H. Wise and others. From a judgment for defendants, the plaintiff appeals. Affirmed.

Bradley & Farnsworth and Denson & De Haven, for appellant. E. O. Larkins and N. T. Clotfelter, for respondents.

TEMPLE, J. This case involves the right of defendants to seize under attachment against Nunes a certain flock of sheep. Nunes owned the sheep, but it is claimed that plaintiff had a chattel mortgage upon them, and the levy was made regardless of the alleged mortgage. Christy & Wise were creditors of Nunes, and the question is whether the mortgage was valid against creditors; and this depends upon the question whether it had been recorded as required by law. The mortgage

was executed on the 14th day of March, 1894, in Kings county, where the sheep then were, and where Nunes then resided. The property was removed to Tulare county April 3d following, the mortgage not yet having been recorded anywhere. The mortgage was recorded for the first time in Kings county on the 28th of the same month, at 4:30 p. m. At 5:30 p. m. of the same day the property was attached in Tulare county at the suit of defendants. On the 30th of the month—that is, two days after the attachment—the mortgage was recorded in Tulare county.

The Civil Code prescribes (section 2957) that the mortgage shall be void as to creditors unless recorded. Section 2959 reads as follows: "A mortgage of personal property must be recorded in the office of the county recorder of the county in which the mortgagor resided, and also of the county in which the property mortgaged is situated or to which it may be removed." In section 2965 it is provided that, in case property mortgaged shall thereafter be removed to another county, it shall be void as to creditors unless it is recorded in such county within 30 days after the removal or the mortgagee shall take possession, as provided in the next section. For the plaintiff it is contended that the provision in section 2959 that the mortgage must be recorded where the mortgagor resides, and where the property is situated, refers to the time of the execution of the mortgage, and that, if the mortgage is recorded in those places before there are intervening rights, it becomes operative as to the whole world, although, when recorded in the county where the property was situated at the time of the execution of the mortgage, the property had been removed to another county; that section 2965 then comes into effect, and the mortgagee has 30 days after the removal of the property within which to record the mortgage in the county to which the removal was made. I cannot agree altogether with this conclusion. I think the recordation directed in section 2959 is that required by section 2957 to render the mortgage operative at all as against creditors. On the other hand, section 2965 plainly speaks of a removal which has taken place after the mortgage has been recorded so as to be effective against creditors. The clause, therefore, "or to which it may be removed," cannot be helped out or explained by reference to section 2965. The recordation provided for in that clause must be one which may, with other acts, avail to make the mortgage operative as to creditors and others in the first instance. Section 2965 adds a sort of condition subsequent, which, if not complied with, may defeat the mortgage after it has been recorded so as to be operative as against creditors. I am inclined to agree with the construction to the extent of holding that "resides" and "is situated" refer to the time of the execution of the mortgage. That construction seems in accord with authority, so far as we have authority upon that subject, and is, I think, the natural import of the

language used. Jones, Chat. Mortg. § 267; Cobbey, Chat. Mortg. § 573; Ping. Chat. Mortg. § 362; Bank v. Weed, 89 Mich. 357, 50 N. W. 864. I think that it was intended that the mortgage should be recorded at once, and in such case it would be recorded where the mortgagor then resided, and where the property was then situated. But even if the mortgagee were to use due diligence in the recordation of his mortgage, still, if two records are required, both records cannot be made at once; and it has been elsewhere held that, even if not recorded at once, it is not void, but becomes operative, as against creditors and others, when it is recorded as required by law. It is not easy to give a definite meaning to the clause, "or to which it may be removed." It is evidently highly elliptical. Something must be supplied. If I am right in the position that it cannot refer to a removal after the mortgage has once been recorded so as to be in force as against creditors then, it must refer to a removal after the execution of the mortgage, but before it has been properly recorded. It means, I think, simply this: "Or, if the property has been removed to another county, then in the recorder's office of that county." That is to say, if the property has been removed to another county after the execution of the mortgage, and before it has been recorded in the county where the property was situated at the time of its execution, then it must be recorded in the county to which the property has been so removed; otherwise, it is void as to creditors and subsequent purchasers and incumbrancers in good faith. In this case the property had been removed to Tulare county before the mortgage was recorded in Kings county, and the mortgage had not been recorded in Tulare county at the time of the levy. It was, therefore, void as to creditors, and Christy & Wise, it is found, were creditors. It may be added that the property, during the whole time, remained in the possession of the mortgagor until the levy. The judgment is affirmed.

We concur: HARRISON, J.; HENSHAW, J.

VAN FLEET, J. I dissent. I agree with the construction of the statute contended for by plaintiff.

GAROUTTE, J. I dissent, and will hereafter express my views. [See 47 Pac. 1095.]

McFARLAND, J. I concur in the judgment of affirmance, and in most of the opinion of Mr. Justice TEMPLE. I do not think that a chattel mortgage which has never been recorded in the county where the property was situated at the time of the recordation is good against a creditor or subsequent purchaser. Surely, the latter is entitled to some reasonable opportunity of discovering whether or not there is a recorded mortgage on property which he contemplates buying or attaching.

Upon inquiry he learns that the property has for several weeks been in the county where it then is, and that there is no recorded mortgage in that county. Inquiring further, he finds that the property had, several weeks before, been brought from another county, where it had been continuously for several months previous to that time, and no mortgage had been recorded there. He thus learns that there has been no mortgage recorded in either county, and that there then could be no valid recordation except in the county where the property was then situated. Under these circumstances he could, in my opinion, safely proceed to purchase or attach. Section 2959 is no doubt somewhat obscure; but I think it is intended to provide for a case where the property is removed soon after the execution of the mortgage, and before its recordation, and to declare that then the recordation must be in the county to which it has been removed,—the county where the property is then situated. Under appellant's contention a mortgagee might refrain from recording his mortgage until long after the property had been removed to a distant county, and then, getting information of a proposed sale or attachment where the property then was, defeat it by suddenly recording his mortgage in the original county. I do not think that the statute gives countenance to such strategy.

(5 Cal. Unrep. 537)

WARREN v. CONNOR et al. (Sac. 121.)  
(Supreme Court of California. Dec. 15, 1896.)

#### ESTOPPEL IN PARS.

In an action against O. and her son for conversion of farming implements on a certain ranch, it appeared that C. and her husband sold such ranch, and all farming implements on it, to one H.; that afterwards H. sold all the personal property to plaintiff; that, before the sale to H., the son bought all the implements on the ranch, and farmed the land as a tenant; that H.'s foreman, in company with the agent of O. and husband, made an inventory of the implements on the ranch; that the son did not point them out; that before the transfer of the personal property the son told H.'s agent that the implements were his, and the agent knew he was using them; and that, at the time, defendants were living in one of the houses on the ranch, the son being a tenant of H. There was no claim that the son had in any manner misled H. as to the ownership of the implements. *Held*, that the son was not estopped from asserting his ownership as against H. or plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action of trover by M. J. Warren against Sarah J. Connor and W. W. Connor for the conversion of certain personal property, consisting principally of farming implements, tried to the court without a jury, in which there was a judgment for plaintiff. From an order denying their motion for a new trial, defendants appeal. Reversed.

Hiram W. Johnson, for appellants. Armstrong & Bruner and J. O. Ball, for respondent.

HAYNES, C. This appeal is by the defendants from an order denying their motion for a new trial. The action is in trover for the conversion of certain personal property, consisting principally of farming implements, of the alleged value of \$660. The cause was tried by the court without a jury, and the court found that the defendants had converted to their own use certain specified portions of the said property, of the value of \$594. The plaintiff claims title to the property in controversy through an alleged sale thereof by Thomas Hovenden to her. This property was upon a large ranch containing about 3,900 acres, which was formerly owned by George D. Connor and the defendant Sarah J. Connor, his wife. On December 23, 1890, said George D. Connor and Sarah J. Connor entered into a contract with said Hovenden to exchange said ranch for certain real estate owned by Hovenden. This contract provided that said Hovenden should have, in addition to the real estate, "one-fourth of all growing crops, and all the farming implements of every description now upon said premises, and also the McClellan and the Sanders barn, with all the hay, straw, etc., therein, for the sum or price of \$34 per acre." The first parties also agreed in and by said contract to sell to Hovenden "whatever hay is left in the home barn upon said premises for the sum or price of \$10 per ton; also, 160 head of cattle, more or less, now upon said premises, at the sum or price of \$15 each." On February 17, 1891, said George D. Connor and wife, by L. F. Ward, their attorney in fact, executed to Hovenden a bill of sale of the following described personal property, then on the ranch known as the "Connor Ranch," namely: "158 head of cattle, valued at \$15 each; 27 hogs of 219 pounds, 87 hogs of 100 pounds, 50 pigs, in all valued at \$700; 50 tons hay at \$10 each, valued at \$500; 70 sacks of wheat, 140 pounds, at 1¼ per pound, valued at \$122; also, all the farming implements and vehicles, including wagons, on said ranch on the 23rd day of December, 1890, together with one-fourth of all growing crops upon said ranch, but excepting therefrom one covered spring wagon and all buggies,—it being the intention of this instrument to carry into effect a certain agreement made by the above-named parties of the first part with the party of the second part, and dated the 23rd day of December, A. D. 1890." Mrs. M. J. Warren, the plaintiff in this action, claims title to the property in controversy under the following instrument: "San Francisco, October 19, 1891. Mrs. M. J. Warren bought of Thos. Hovenden all the personal property that Geo. D. Connor and Sarah J. Connor sold me on the Connor ranch, Sacramento county, California, saving and excepting what was delivered to late Mr. Arthur Bunster to my account. Received payment in full, ten dollars. I authorize the said Mrs. M. J. Warren, who now lives on the ranch, to take full

possession of the property as her own whenever she may find it. Thos. Hovenden." The defendant W. W. Connor claims to be the owner of all the property described in the findings, and, as to the hay, it is contended that Hovenden and his agent received all the hay mentioned in the contract and bill of sale above mentioned. In relation to his ownership of the farm implements in controversy, the defendant W. W. Connor testified, in substance: That, about 11 years before the trial, he and his two brothers, George T. and R. L. Connor, formed a co-partnership under the firm name of Connor Bros., and for about three years thereafter said co-partnership farmed a large part of the ranch. That, at the time they commenced farming, most of the implements then on the farm were old and nearly worn out. That the firm purchased farming implements with their own money, and in their own name, sufficient to run the place. This co-partnership continued for about three years, when the defendant W. W. Connor bought out the interest of his brothers, and he continued, to the time of the sale to Hovenden, to farm the land in the same manner as other tenants paying rent therefor. That said implements sued for were purchased in part by said co-partnership, and in part by said defendant after the dissolution of the partnership, and while he was farming the land on his own account. He specified the persons from whom he purchased all, or nearly all, of the implements included in the findings of the court, and as to these general facts there is no contradiction of his testimony.

It is contended, however, on behalf of the plaintiff, that the defendant W. W. Connor had seen the contract made by his father and mother with Hovenden in December, 1890, and also that he was present when the personal property was delivered over to Arthur Bunster, as the agent of Hovenden, and that he did not make any objection. But whatever farming implements were bought by Hovenden were bought in December, and their value was included in the price of the land, and there is no evidence that W. W. Connor, either by representations or conduct, misled him as to their ownership. Counsel for respondent is mistaken in saying that defendant W. W. Connor, on his cross-examination, "said he signed the agreement containing the clause, 'together with one-fourth of all the growing crops, and all farming implements, of whatsoever description, now upon said premises.'" At the follo cited by counsel, defendant was asked: "Q. You say you saw that agreement? A. I did." Besides, the contract itself was put in evidence, and it does not show such signature. The only evidence touching any signature by said defendant occurs in the testimony of Dalzell, who was Hovenden's foreman on the ranch, Bunster being the agent who received the cattle and hogs that were delivered in February. Dalzell stated that he (W. W. Connor) "put his

name to the signature of the whole transaction. I do not know where the paper is now that he signed. I took an inventory, at the time, of all the property that was turned over, and pointed out as the property of Mr. Hovenden." The witness gave no explanation as to what paper it was that was signed by defendant, nor for what purpose it was made. He produced a book upon the trial in which he had made an inventory of all the farming implements, but he did not state where they were, nor by whom, if by any one, they were shown to him; but in his affidavit made in reply to the affidavit of Mr. Ward, the attorney in fact of George D. and Sarah J. Connor, and which was read upon defendant's motion for a new trial, Dalzell said "that on the 13th day of February, 1891, this deponent was driven in a buggy by said L. F. Ward over the said Connor ranch, and that while he and said L. F. Ward were in said buggy, as aforesaid, this deponent noted down in his pocketbook the several agricultural implements lying in different places on said ranch, and made an inventory thereof." It may be fairly assumed that said inventory was the one produced on the trial, and the circumstances under which it was made shows not only that there was no gathering up of the implements and formal delivery thereof, but that the defendant W. W. Connor did not point out the implements to the witness. The said defendant further testified that, at the time the bill of sale was made, his father had upon the ranch a truck wagon, a mower, one or two single plows, two seed sowers, and a hay rake; that at the time the cattle and hogs were transferred, in February, there was nothing said about the farming implements; that prior to said transfer he had many conversations with Mr. Bunster about the ranch, and told him that the farming implements were his; and that Bunster knew that he was using them. The evidence that the farming implements in controversy were purchased by and were the property of the defendant W. W. Connor at the time the contract of sale was made with Hovenden by his father is uncontradicted. His father could not, by any contract he could make with Hovenden, vest in him any right or title thereto, and the question, therefore, is whether the defendant is estopped by his conduct from asserting his ownership as against Hovenden or his transferee. There is no pretense that the defendant W. W. Connor was present at the time the contract was made in December, or in any manner misled Hovenden as to the ownership of the farming implements. They were not sold as separate property, but were included in the price paid for the ranch, while all the other personal property was purchased by Hovenden, as distinct from the ranch, at certain specified prices, and that property was not delivered or paid for until the number and value of the cattle and hogs were ascertained, in February. It is true, the defendants were

still living in one of several houses upon the ranch, but W. W. Connor was there as the tenant of Hovenden of a portion of the land, cultivating the same upon shares, and using said implements; and Bunster, the agent of Hovenden, and the person to whom the other personal property was delivered, was told by the defendant, prior to the execution of the bill of sale, that the farming implements were his, and this testimony given by defendant is not contradicted. All the conversations with said defendant, testified to by the plaintiff and her son, occurred after plaintiff's purchase from Hovenden, and his alleged statements in those conversations, therefore, could not have influenced her purchase. We fail to find any evidence which would justify a finding that W. W. Connor was estopped by his conduct or declarations from asserting his ownership, either as against Hovenden or the plaintiff, as to the farming implements. As to the hay there was a direct conflict; but as the court did not find the value of the hay separately, but lumped the value of all the property, the judgment cannot be modified, and a new trial is therefore necessary.

In view of the conclusion above stated, it is not necessary to notice the affidavits of new evidence, and the counter affidavits filed thereto, further than to say that in our judgment they strengthened defendants' grounds for a new trial. It should be added, in view of a new trial, that the only ground of the alleged liability of the defendants is for a conversion of the property described in the complaint. We find in the record no evidence of a conversion by the defendant Sarah J. Connor; and if, upon another trial, a conversion should be shown to have been made by only one of the defendants, judgment should be rendered in favor of the other. The judgment and order appealed from should be reversed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

(115 Cal. 301)

THOMPSON et al. v. WOOD et al. (S. F. 386.)

(Supreme Court of California. Dec. 15, 1896.)  
EXECUTORS AND ADMINISTRATORS — RESIDENCE —  
PLACE OF SUIT—COSTS.

1. An executor, actually residing in another county, has no official residence in the county in which his testator resided and the will was probated, for the purposes of suit.

2. In an action against executors, a stipulation, on the part of plaintiffs, waiving their claim for costs against the executors personally, is inoperative, as against the provisions of the statute relating to costs as between the executors and the estate.

3. An executor is not a public officer, within the meaning of Code Civ. Proc. § 393, subd. 2, relating to the place of trial of actions against public officers.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Geneva S. Thompson and others against Harvey Wood and others, executors of the estate of Susan Scribner, deceased. From an order denying a motion for change of venue, defendants appeal. Reversed.

Reddick & Solinsky and Sullivan & Sullivan, for appellants. W. W. Foote, T. O. Coogan, and J. J. Lerman, for respondents.

TEMPLE, J. This is an appeal from an order refusing to grant a change of venue from the city and county of San Francisco to the county of Calaveras. The action is brought to obtain a money judgment against the defendants, as executors of the last will and testament of Susan Scribner, on account of moneys alleged to have been received by the testatrix in her lifetime. Susan Scribner was a resident of San Francisco at the time of her death. Her will was probated there, and her estate is now being administered there. Notice to creditors was there published, and in the notice a place is designated in San Francisco for the presentation of claims. The executors, defendants, however, all reside in Calaveras county, and made the motion for the change of venue to that county. The motion was made at the proper time and in the mode prescribed, and no counter motion was made that the case be retained for the convenience of witnesses, nor were any facts shown in reply except those above stated. The motion should have been granted, as the case made by appellants is clearly within the section alluded to.

The respondent makes two points in answer to appellants' claim:

1. He says that the official residence of the defendants is in San Francisco. The statute has not designated any official residence for executors, and they are not public officers within the meaning of subdivision 2 of section 393, Code Civ. Proc. It is said they are but representatives of the deceased. The executors are in a sense trustees, but not of the testatrix, who has no longer trustee or representative, but for the beneficiaries under the will and the heirs and creditors. No rule of law with which I am acquainted gives countenance to the idea that there is an official residence for an executor. In some states the venue of actions is specially declared to be where it would have been necessary to sue the deceased. We have no such law. At common law the executor was sued, in transitory actions, where he resided.

2. At the hearing the respondents waived their claim for costs against the executors personally, and agreed to look to the estate alone for them. In certain cases the executors may be held personally for costs. The plaintiffs have nothing to do with this, and cannot control the matter as between the estate and the executors. But this would

make no difference. It is the executors who must defend the action, and they are responsible for a proper defense.

In no one feature does the case resemble *Sayward v. Houghton*, 82 Cal. 629, 23 Pac. 120. There the bank had not only no interest, but there was no reason why it should appear in the action at all. Here the executors were the real defendants, and the persons who are inconvenienced by being compelled to defend in a county which is not that of their residence. It is a matter entirely of statutory control, and the meaning of the Code provisions cannot be mistaken. The order is reversed, and the cause remanded.

We concur: McFARLAND, J.; HENSHAW, J.

(5 Cal. Unrep. 543)

STEPHENS et al. v. HAMBLETON et al.  
(Sac. 165.)

(Supreme Court of California. Dec. 15, 1896.)

#### EJECTMENT—MOTION FOR NONSUIT.

In ejectment, defendant's motion for a nonsuit is properly denied where it appears that plaintiffs bought the property from its owner, and took a bond for deed, under which they entered into and held possession of the property, claiming title thereto for more than two years before defendants entered and ousted them.

Commissioners' decision. Department 1. Appeal from superior court, Yolo county; W. C. Van Fleet, Judge.

Action of ejectment by B. H. Stephens, administrator, etc., of P. H. White, deceased, and others, against J. W. Hambleton and others. From a judgment in favor of plaintiffs, and an order refusing a new trial, defendants appeal. Affirmed.

R. Clark, for appellants. F. E. Baker and Craig & Hawkins, for respondents.

BELCHER, C. This is an action of ejectment to recover possession of a strip of land, containing  $25\frac{1}{5}$  acres. It appears that plaintiffs and defendants own adjoining tracts of land in Yolo county, plaintiffs' tract lying north of defendants' tract. The strip in controversy extends along the dividing line of the said tracts from the east to the west side thereof, and is claimed by both parties. The question is as to the true location of this dividing line. The case was tried by the court without a jury, and the findings upon all the issues were in favor of the plaintiffs. The judgment was that the plaintiffs recover possession of the said strip of land, and damages, in the sum of \$475, sustained by plaintiffs by reason of the wrongful detention thereof. From this judgment, and an order refusing a new trial, defendants appeal.

1. The court did not err in denying defendants' motion for nonsuit. All of the deeds offered in evidence by plaintiffs were admitted without objection by defendants. Copies of

the deeds are not set out, but most, if not all, of them had been recorded, and, presumably, they were properly executed, acknowledged, and certified, so as to entitle them to record. The fact that plaintiffs bought the property from its owner, and took a bond for a deed, under which they entered into and held possession of the property, claiming title thereto, for more than two years before defendants entered and ousted them, was sufficient to enable them to maintain the action. Prior possession alone, as against a mere intruder, is sufficient to support an action of ejectment. *Potter v. Knowles*, 5 Cal. 88; *Leonard v. Flynn*, 89 Cal. 543, 23 Pac. 1099; *Shanahan v. Tomlinson*, 103 Cal. 89, 36 Pac. 1009.

2. It is claimed that the findings were not justified by the evidence. It is true the evidence was conflicting in many respects, but there was evidence sufficient, in our opinion, to justify all of the findings. The judgment cannot, therefore, be disturbed on this ground.

3. It is also claimed that the court erred in admitting certain evidence over the objection of defendants, and in refusing to strike out, on their motion, certain evidence given. In our opinion the record discloses no material error in any of the rulings complained of. Each of the said rulings appears to have been justified and proper. The damages awarded were authorized by the pleadings, evidence, and findings. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(115 Cal. 330)

MARSHALL et al. v. FARMERS' BANK OF FRESNO. (No. 18,448.)

(Supreme Court of California. Dec. 17, 1896.)

PURCHASE OF LANDS—NOTICE OF TRUST.

Under Pol. Code, § 3519, requiring the register to prepare a patent on surrender of the certificate of purchase by the person entitled to it, and to certify to the governor that the party named in the prepared patent is entitled to it, a purchaser from one to whom a patent is issued absolutely on such a certificate of the register is not chargeable with notice that the certificate of purchase had been transferred to the patentee merely as an attorney. 42 Pac. 418, affirmed.

In bank. For opinion in department, see 42 Pac. 418. Reversed.

PER CURIAM (BEATTY, C. J., not participating). Upon further consideration of this cause in bank, we adhere to the views expressed in the opinion filed in department 1 (42 Pac. 418), and, for the reasons therein given, the judgment and order denying defendant's motion for a new trial are reversed.

TEMPLE, J., being disqualified, did not participate in this decision.

(5 Cal. Unrep. 544)

BYXBEE v. DEWEY. (Sac. 85.)

(Supreme Court of California. Dec. 15, 1896.)

REPLEVIN—ANSWER—SUFFICIENCY OF DENIAL—SALE—CHANGE OF POSSESSION.

1. A complaint alleged that plaintiff was the owner and entitled to the possession of certain personal property taken by defendant. The answer denied that plaintiff was "the owner in possession and entitled to the possession" of the property, and alleged that defendant was, and had been for a long time, the owner and in the possession of the property. *Held*, that the affirmative averment was sufficient to negative the allegation that plaintiff was entitled to the possession.

2. Defendant purchased of a debtor a number of raisin trays in payment of a debt. The trays were not removed from the shed on the debtor's farm where they were stored, but defendant wrote his name on a large number of them, and kept a man continuously at the debtor's house to look after the trays. *Held*, that there was no such open and continuous change of possession as would render the alleged purchase valid as against execution creditors of the vendor.

McFarland, J., dissenting.

In bank. Appeal from superior court, Fresno county; Stanton L. Carter, Judge.

Action by J. O. Byxbee against Henry Dewey. From a judgment for defendant, plaintiff appeals. Reversed.

L. L. Cory, for appellant. W. D. Grady, for respondent.

PER CURIAM. The plaintiff brought this action to recover the possession or value of 11,000 raisin trays, more or less. The case was tried before a jury, and the verdict and judgment were in favor of defendant. The plaintiff moved for a new trial, which was denied, and has appealed from the judgment and order denying his motion.

Two propositions are relied upon and urged as grounds for a reversal. They are: (1) That the denials in defendant's answer were not sufficient to raise an issue as to plaintiff's right to recover possession of the property sued for; (2) that the purchase of the said property by defendant was not accompanied by an immediate delivery, and followed by an actual and continued possession thereof, as required by section 3440 of the Civil Code, and hence it was subject to seizure by a creditor of the seller. The complaint alleges that on the 24th day of June, 1893, the plaintiff was the owner and entitled to the possession of the personal property before mentioned, and that on said day the defendant, without the consent and against the will of the plaintiff, took said property from the possession of plaintiff and still retains the same. The answer "denies that heretofore, to wit, on or about the 24th day of June, 1893, plaintiff was the owner, in the possession, and entitled to the possession" of the personal property described in the complaint, and further "denies that heretofore, to wit, on or about the 24th day of June, 1893, the said defendant, without the consent of plaintiff and against his will, took the said trays from plaintiff's possession, and still withholds the same," and alleges "that



said trays were at said time, and for a long time prior thereto, the property of the defendant and in his possession." And it further alleges, in a separate answer, and by way of cross complaint, that on or about the 1st day of March, 1893, the defendant purchased the said trays from one William Applegarth, and thereupon took possession thereof, and ever since has been in the continuous possession of said property.

It is argued, for appellant, that the denials in the answer are conjunctively stated, and are therefore evasive and insufficient, and that, in effect, there is no denial of the averment that plaintiff was entitled to the possession of the property. The answer was not well drawn, but it must all be read together, and, when so read, we think it must be held sufficient. The affirmative averment that the trays were, and for a long time had been, the property of defendant, and in his possession, was sufficient to negative the averments of the complaint as to plaintiff's ownership and right of possession. "It is not essential that a traverse should be expressed in negative words. The averment in the answer of the contrary of what is alleged in the complaint has been held to be equivalent to a denial." *Perkins v. Brock*, 80 Cal. 320, 22 Pac. 194; *Miller v. Brigham*, 50 Cal. 615.

As to the second proposition, section 3440 of the Civil Code provides: "Every transfer of personal property \* \* \* is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession," etc. The rule declared by this section was not new in this state when the Codes were adopted. Substantially the same provision was found in the statute of frauds in 1860, when the case of *Stevens v. Irwin*, 15 Cal. 503, was decided. In that case the court, in construing the meaning of the statute, said: "The delivery must be made of the property. The vendee must take the actual possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous; not taken to be surrendered back again; not formal, but substantial. But it need not necessarily continue indefinitely, when it is bona fide and openly taken, and is kept for such a length of time as to give general advertisement to the status of the property and the claim to it by the vendee." And in *Caboon v. Marshall*, 25 Cal. 198, the court, speaking of the same statute, said: "What constitutes an actual change of the possession of personal property, as distinguished from

that which by mere intendment of law follows the transfer of title, is not of difficult solution. It is an open, visible change, manifested by such outward signs as render it evident that the possession of the vendor has wholly ceased." Since the above-mentioned decisions were rendered there have been numerous other decisions by this court to the same effect, and the rule is now firmly established that to constitute such a change of possession of personal property as will make the transfer valid against creditors of the vendor, there must be such a change of the apparent custody of the property as to indicate to the world that a change of ownership has taken place, and to put one dealing with the vendor with respect to the property upon inquiry as to its ownership.

The question, then, is, was there such a change of possession of the trays in controversy as was required to make a valid transfer thereof as against a creditor of the former owner? For the plaintiff it was proved that he purchased the trays on June 8, 1893, at a sale thereof made by the sheriff under and by virtue of a writ of execution issued on a judgment recovered by one Yancey against William Applegarth in the superior court of Fresno county, and that the trays were then stored in a dry house and shed situated on a place occupied by Applegarth, about six miles west of Fresno. For the defendant Mr. Applegarth testified: "I sold the trays as they laid in the shed and dry house to Henry Dewey on the 25th day of February. At the time of the sale I went with Mr. Dewey to the shed, and I said, 'There is your trays and your sweat boxes,' and that was, I presume, all the actual delivery that was made. I don't know that Mr. Dewey did anything after that in reference to the trays. He stayed in the shed awhile, but went back to the house. I do not know of anything else being done. I owed Mr. Dewey a debt, and he said he wanted a settlement, and I sold him the trays. At that time I did not expect to have any opportunity to use the trays. I did nothing with the trays after the sale. I put Mr. Dewey in charge of them when I sold them to him. After the sale his son Charles came there, and, as I understood, was in charge. He stayed there until the property was sold, and I had no more control of the property, and then he went away. The trays remained there just the same as they did before and up to the time of the execution, and Mr. Dewey never attempted to take any of them away. I never saw him attempt to take any of them away. A while after I sold them I noticed there was a writing on some of them. Some of them had 'H. Dewey,' and some of them 'H. Dewey's trays.' I live in the house on the place where the trays were. I cultivated and took care of a part of the place. Where the trays are there is no cultivation. I exercised the same acts of ownership over the place as I did before. I lived there the same as before. Mr. Dew-

ey's son came over there and did some work for me. He told me he was going to take charge of the trays. He ate and slept in my house, and was around the place generally during the day. He didn't stay near the trays any more than I did. There was nothing to indicate to anybody passing there that he was in possession of the trays any more than I was." The defendant testified that he lived in Riverdale, and was a vineyardist, and that he bought the trays of Mr. Applegarth in February, 1893. "They were in Mr. Applegarth's shed at the time I purchased them. After the purchase, in the first place, I marked them with a pencil,—wrote my name on the outside of them; and in a few days I sent a man over there to take possession of them. It was high water at our place, so that I could not haul them away. The road was all under water, and I sent a man over there, and he stayed there about a month. \* \* \* I had two different men there, and I was there most of the time. I continued to hold this property, and, when they were going to take them away, I went over and nailed them up. I was there when they came after them, and prevented it. I was prevented from hauling them away at the time I purchased them because there was high water in our district. There was two miles of water, and it was impassable for heavy teams pretty near from the time I bought these trays until after they were seized, so that I could not haul those trays away. \* \* \* I had my son there to watch and keep the trays. My son Charles went there first. He stayed there, probably a month, in possession of the trays after I purchased them. I then sent John Dewey, who was there the balance of the time. \* \* \* The trays at that time (when the bill of sale was made) were all piled up in the shed and outside of the shed. They were in the same position there, piled there, when the execution was levied as when the bill of sale was made. I had not removed any of them. I couldn't. There was no flood around the trays. They could have been moved from there, but that would have been a big expense. There was no difficulty about moving the trays, but cost a good deal of money. It would have cost to take them to Riverside. I would have to take them there. It was a question of flood. I was not going to move them four or five times and wear them out. \* \* \* These trays were stacked in the dry house, most of them inside, and about 400 outside. I marked them by writing my name on them in lead pencil,—'H. Dewey,'—200 or 300 of them; wrote on the edge of the trays. My son and I did that two or three days after the purchase." J. C. Dewey testified for defendant as follows: "I am acquainted with the trays. On the 2d of March I went with father, and he surrendered the note, and marked the trays

with the name of 'H. Dewey,'—marked about four hundred trays. There were two rows of trays in the shed. The front row was in view, and I should think we marked about every fourth or fifth tray with the name of 'H. Dewey,' and the same was true of the trays you could see in opening the doors. The ends of the trays presented themselves to view. One side there was not so many, but only the edges of the trays, and I think we marked those pretty thoroughly. I saw the note surrendered to William Applegarth. I was there off and on for a week or two. Father told me to just keep a lookout for the trays. My brother came about the 5th or 6th of April. I was there once, if not twice, when my brother was there continuously as keeper of the trays. \* \* \* I went away one day, and came back the next day, and I was there until the day before they were seized. I had some business to do up at Plainsburg, and when I came back I found I had left the day before they said the officer came and seized the stuff. \* \* \* I had an understanding with my father that I was there in charge of the trays, and I was there off and on until the day before they were seized. In reference to the trays, I watched them to see that no one touched or moved them off. \* \* \* The roads on the 2d of March were not bad, but the water was rising, and it raised afterwards. It was a week or ten days before the water got up. It then went over the road and washed it out. We could always go by a spring wagon. It was some time in June before we could haul loads. I was there to see after the trays, and saw that no one touched them. Mr. Applegarth lived there in the house. I lived in the house, too. I had control, and he didn't. I watched the trays, and saw that nobody tried to move them. A person passing along the road would not see me in charge. \* \* \* There was nothing to indicate to any one that there had been a sale or delivery of the trays, unless they came and asked about it. The writing on the trays would have indicated a change of possession, and that was the only difference there was after the sale and before. On March 1st the roads were good. The water was rising at the time."

The above was, in substance, all of the testimony bearing upon the question in hand, and it was not, as it seems to us, sufficient to justify the verdict. It did not show such an immediate delivery and subsequent actual and continued change of possession as is required by the statute to make a transfer of personal property valid against creditors of the vendor. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

McFARLAND, J. I dissent. I think that the judgment should be affirmed.

(115 Cal. 372)

Ex parte BOHEN. (Cr. 165.)

(Supreme Court of California. Dec. 17, 1896.)

## MUNICIPAL CORPORATIONS — CEMETERIES — PRESCRIBED DISTRICTS—VALIDITY OF ORDINANCE.

1. Where the burial of a human body within a prescribed district is prohibited by ordinance, and the sale or purchase of a lot therein for burial purposes is made a misdemeanor, such sale or purchase cannot be made the basis of a misdemeanor till the offense of such burial has been committed.

2. The ordinance of the city and county of San Francisco prohibiting the further purchase of lots for burial purposes within such city and county, also providing for further burials only in lots theretofore acquired by persons or associations for burial purposes, is invalid, because, so long as burials are permitted in a prescribed district, the privilege cannot be limited to one class of citizens, and denied to another class within the same district.

McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

Habeas corpus proceedings on the petition of one Bohen, to test the validity of an ordinance for whose violation he was convicted. Ordinance held invalid, and the prisoner discharged.

E. S. Pillsbury, for petitioner. Harry T. Creswell, for respondent.

HARRISON, J. The petitioner was convicted of violating an ordinance of the city and county of San Francisco, and has sued out a writ of habeas corpus for the purpose of testing the validity of the ordinance. The ordinance is as follows:

"Order No. 2950. Prohibiting the further purchase of lots for burial purposes within the city and county of San Francisco; also providing for further burials being made only in lots heretofore acquired by persons or associations for burial purposes.

"Whereas, the unlimited burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to the public health; and, whereas, the right of those persons or associations who have already purchased lots or plots for their own use or for the use of their families or members in the cemeteries in the city and county of San Francisco should be recognized: Now, therefore, the people of the city and county of San Francisco do ordain as follows:

"Section 1. It shall be unlawful, after the passage of this order, for any person, association or corporation to hereafter, within the limits of the city and county of San Francisco, purchase, acquire, sell, lease or in any other manner dispose of, or make available, any land situated therein for the purpose of interring any human body, or any portion of any human body. Nor shall any interment of any human body be made except in such lots or plots as may have been already purchased by persons, associations or corporations for their own use, or the use of their families or members; provided, the said lots

shall not be used for general interment purposes."

Section 2 makes a violation of the ordinance a misdemeanor, and prescribes the penalty therefor.

The Odd Fellows' Cemetery Association was incorporated in 1865, under the act of the legislature entitled "An act to authorize the incorporation of rural cemetery associations" (St. 1859, p. 281); and the petitioner is the president of the corporation, and the offense with which he is charged is that as such president he executed a deed of conveyance of a lot of land within the tract of the cemetery, that had been sold by the association, and thereby aided and abetted in the violation of the ordinance. The validity of the ordinance is maintained on behalf of the people, upon the right of the municipality, when authorized thereto by the legislature, to restrict or prohibit burials within its limits, or within certain districts therein, and is resisted upon the ground that in the present case such authority has not been conferred upon the municipality, and also that the ordinance under consideration is unreasonable, by reason of not being operative upon all citizens alike.

By the act of April 25, 1863 (St. 1863, p. 540), the board of supervisors of San Francisco have power by ordinance "to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases." It may be conceded that, under the authority thus given, the city of San Francisco could pass an ordinance prohibiting burials of the dead within certain portions of the city; but the power of the legislature to prohibit burials in the entire city, as well as the power of the city to pass ordinances therefor, are questions not presented for consideration in determining the validity or effect of the ordinance under which the petitioner was convicted. This ordinance does not prohibit burials within the city, or within any designated district of the city, nor does it prohibit burials within the cemetery of which the petitioner is president. On the contrary, there is, by the terms of the ordinance itself, an express sanction of the right of those who have purchased lots for the purposes of burial in any portion of the city, to continue to bury human bodies therein until the capacity of the lots is exhausted; and it appears in this case that in the Odd Fellows' Cemetery alone these lots will allow the interment of upward of 18,000 bodies, in addition to those already buried there, while the capacity of the unsold lots within the same cemetery is sufficient for only 3,600 bodies. There is no restriction in the ordinance upon the persons whose bodies may be buried within these lots that have been sold, except that the lots shall not be used for "general" interment purposes; and under section 613 of the Civil Code the owner of a lot may consent to the burial therein of one who had no interest in the lot. By

the terms of the ordinance, also, burials are permitted of any member of a corporation or association that has purchased a lot within either of the cemeteries of the city, irrespective of the size of the lot or the number of such members, so long as there shall be space within the lots for such burials. The effect of the ordinance is, therefore, in no respect to prohibit burials, but simply to limit the right to those who have been fortunate enough to secure a lot therefor before the passage of the ordinance. The fact that the "unlimited" burial of the dead within the city is "dangerous to life and detrimental to the public health" may be a sufficient reason for the enactment of an ordinance fixing a term after which such burials shall cease within certain portions of the city; but, while burials are permitted within a district, the privilege cannot be limited to one class of citizens, and denied to another class within the same district. The police power is to be exercised for the good of the entire public, and any restriction of the rights of the individual by virtue of this power must extend to all the individuals who might otherwise exercise the right. The owner of a lot within a cemetery, who has purchased it for the purpose of burial, holds the same subject to the right of the city to prohibit further burials within the cemetery (*Coates v. Mayor, etc.*, 7 Cow. 585), and has no greater right to use it for burials after such prohibition than has the cemetery association itself to subject its unsold lots to such use. The right to prohibit burials within a certain district rests upon the proposition that any burial within that district is injurious to the public health; but an ordinance permitting burials within that district to an extent greater in number than it prevents cannot be upheld as an exercise of the police power. An ordinance forbidding the burial of human bodies within the city, or upon any designated portion thereof, cannot be sustained, if such burial be permitted upon other lots similarly situated, any more than can an ordinance forbidding the conducting of a soap-boiling factory, or any other occupation which may, under certain circumstances, be deleterious to health; and the owner of lands cannot be restrained from selling them for the purpose of being used as a place of burial, or conducting a soap-boiling factory, or any other use which in the future may become deleterious to health, and for that reason be forbidden, but which is not forbidden at the time of the sale. In *Mayor, etc., v. Thorne*, 7 Paige, 261, the city of Hudson, under the power in its charter authorizing it to adopt regulations for the prevention of fires, had passed an ordinance forbidding the erection of any wooden or frame barn, stable, or hay press within certain limits in the city, except of certain dimensions, without permission of the common council, and a resolution by it that such building was not dangerous in causing fires. The defendants, without such permission, commenced the erection of a

building within the prohibited limits, which was to be occupied for storing and pressing hay, and a bill to restrain them from erecting the building was dismissed, the chancellor saying: "If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power, expressly given by their charter, to prevent the carrying on of such manufacture; but, as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business, and prohibit another, who has an equal right, from pursuing the same business. Neither have they the right to permit the dangerous manufacture to be carried on in buildings already erected, and to prohibit these defendants, whose building was destroyed by an incendiary, from rebuilding the same for the purpose of carrying on a manufacture which is permitted to others." In *Tugman v. City of Chicago*, 78 Ill. 405, the city of Chicago had passed an ordinance prohibiting the erection or operation, after January 1, 1872, of slaughterhouses within a designated portion of the city, "in any building not now used for such purpose." It was held by the court that the ordinance was invalid by reason of its discrimination between those owning and operating slaughterhouses prior to 1872, and those erecting and operating them after that date, upon the ground that an ordinance which would make an act done by one penal, and impose no penalty for the same act done under like circumstances by another, could not be sanctioned or sustained, because it would be unjust and unreasonable; saying: "If the health or comfort of the city require the prohibition of new slaughterhouses within a designated part of the city, the same reason would surely demand that old ones should be discontinued. If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business, would not only be unreasonable, and for that reason void, but its direct tendency would be to create a monopoly, which the law will not tolerate. The fact that certain persons were engaged in the business within the district designated in the ordinance, at the time of its adoption, gave them no right to monopolize the business; nor would such fact authorize the board of health to provide that such persons might continue the avocation, while others should be deprived of a like privilege, who should engage in the business at a later period. If the board of health had any power to adopt an ordinance on the subject, the ordinance, to be valid, should not discriminate in favor of any citizen. If it prohibited one from carrying on the business, that prohibition should extend to all, regardless of the time the business may have been commenced. A regulation of this character, to be binding upon the citizen, must

not only be general, but it should be uniform in its operation." In *City of Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791, the municipality had passed an ordinance for the purpose of regulating the speed of railroad trains, and dividing the city into two districts therefor,—the east district and the west district,—and providing that no train should be run within the limits of the east district at a greater speed than 10 miles per hour, making no restriction, however, upon the speed within the other district. It was shown that the route of the Chicago & Evanston Railroad was within the east district, and that of the Chicago & Northwestern Railroad in the west district, and it was held that the ordinance was unreasonable and invalid, for the reason that it constituted a special and unwarranted discrimination between two lawful and competing lines of railway; that as the line of each of the roads ran through a thickly settled portion of the city, with no appreciable difference of danger to those crossing the tracks of the two railways, there was no justification for the discrimination. See, also, *City of Chicago v. Rumpff*, 45 Ill. 90; *State v. Hinman*, 65 N. H. 103, 18 Atl. 194; *State v. Pennoyer*, 65 N. H. 113, 18 Atl. 878; *State v. Mahner*, 43 La. Ann. 496, 9 South. 480; *Dill. Mun. Corp.* § 322.

The ordinance in question forbids the purchase or sale of any parcel of land, if made for the purpose of doing an act thereon which is in itself not only not illegal or forbidden, but is by the same ordinance recognized as a legal act, and is permitted to others. Irrespective of the rule that the motive with which an act is done is not the subject of punishment unless the act itself is wrong, the act with which the petitioner is charged—the sale of a lot of land—was done in the exercise of one of the rights of an owner, and can be made an offense only in case such act contributed to the violation of law. The burial of a human body is the act sought to be prohibited; and, while it may be conceded that, if such prohibition had been made by a valid ordinance, the burial of a human body within the lot purchased therefor would have been an offense for which the petitioner might have been charged as an aider and abettor; yet, until the offense of such burial has been committed, the sale and purchase of the lot cannot be made the basis of a crime or misdemeanor.

As the ordinance, by its terms as well as by its operation, discriminates, in its operation, between individuals similarly situated, it is upon that ground unreasonable and invalid, and the petitioner should be discharged.

We concur: BEATTY, C. J.; VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.

McFARLAND, J. I dissent. If the future sale and purchase of lots for burial purposes cannot be prohibited unless all burials in lots already purchased are also prohibited, then

it is evident that there can be no gradual progress towards the extinguishment of the cemetery evil. But an ordinance which would absolutely and immediately prohibit any further burial within the city would be a sudden and abrupt measure that would result in great confusion and distress. No such ordinance is likely to be passed; and yet, without such an ordinance, it seems to me that, under the opinion of the majority of the court, the cemetery evil must be perpetual. The ordinance in question operates uniformly upon all of the class who come within its provisions. The petitioner would be in no better situation if the ordinance had absolutely prohibited all future burials. As long as sales and purchases of lots for burial purposes are allowed, the cemetery evil will be greatly magnified, and its suppression made correspondingly more difficult.

(115 Cal. 326)

WHELAN, Sheriff, v. SHAIN et al. (S. F. 497.)

(Supreme Court of California. Dec. 15, 1896.)

PARTNERSHIP—FIRM ASSETS—RIGHTS OF CREDITORS.

A judgment rendered in an action upon a note executed by the members of a partnership jointly, but as individuals, the proceeds of which were not used for partnership purposes, is not a lien upon the partnership assets, as against a subsequent judgment rendered upon a firm debt.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by R. I. Whelan, sheriff, to determine the rights of Joseph E. Shain and J. S. Reid as claimants of a fund arising from execution sale. From a judgment in favor of the defendant Reid, the defendant Shain appeals. Affirmed.

James Z. Sweeney, for appellant. Rodger Johnson, Nagle & Nagle, and Reddy, Campbell & Metson, for respondents.

BELCHER, C. On January 5, 1895, the defendant Joseph E. Shain commenced an action against William Binz and L. Martella upon their joint promissory note, signed, "Wm. Binz. L. Martella," and caused to be attached certain personal property belonging to a co-partnership of which they were the only members. On January 16, 1895, judgment was entered in the action that he "have and recover from L. Martella and William Binz, defendants," the sum of \$1,410.60, as prayed for. On January 8, 1895, the defendant J. S. Reid commenced an action against the same defendants as co-partners, doing business under the firm name of Binz & Martella, upon certain partnership obligations, and caused to be attached the same property that had been attached by Shain. On January 22, 1895, judgment was entered that he "have and recover from William Binz and Lawrence Martella, co-partners," the sum of \$986.48, as

prayed for. Under executions issued on both of the said judgments the plaintiff, Whelan, as sheriff, sold the said attached property for the sum of \$1,200, and, after deducting his proper fees and charges, there was left in his hands the sum of \$1,059. Shain and Reid each claimed and demanded of the plaintiff that the proceeds of the said sale be applied in satisfaction of his judgment, and the plaintiff, being uncertain as to how the money should be applied, commenced this action, setting forth the facts, and asking that the defendants be required to interplead and set up their respective rights to the money in his possession, and that the matter be determined by the court. And subsequently, with the consent of the parties and under an order of court, plaintiff paid the money into court. The defendants answered the complaint, each setting up his claim and right to the money as against his co-defendant. Upon the issues thus framed the case was tried, it being admitted, during the trial, that the property sold was the partnership property of Binz & Martella. The court found the facts and gave judgment in favor of defendant Reid, from which judgment and an order denying his motion for a new trial defendant Shain appeals.

The law is well settled in this state that partnership property must first be applied to the payment of partnership debts. "The debts of a partnership must be discharged from the joint property before any portion of it can be applied to the individual debts of the partners." *Chase v. Steel*, 9 Cal. 64. "The fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors who have not obtained judgment." *Conroy v. Woods*, 13 Cal. 626. "It has been repeatedly decided by this court that the creditors of a partnership are entitled to a preference over the creditors of the individual partners in the payment of their debts out of the partnership property, or moneys arising therefrom, without regard to the priority of attachment liens." *Bullock v. Hubbard*, 23 Cal. 501. And see, also, *Jones v. Parsons*, 25 Cal. 100; *Robinson v. Tevis*, 38 Cal. 611; *Furniture Co. v. Halsey*, 54 Cal. 315, and *Bank v. Mitchell*, 58 Cal. 42. In his answer Shain alleged, on his information and belief, in substance, that the note on which he obtained judgment was executed by Binz & Martella as co-partners, and was a partnership contract and obligation, and that the money received thereon from the payee was invested and used in and about the partnership business, and in furtherance of its objects. The court, however, found against him on this issue, to the effect that the said note was not executed by Binz & Martella as co-partners and was not a partnership obligation, and that the money obtained thereon was not invested or used in or about the said partnership business, or in furtherance of its objects, "but that the obligation to pay said sum was the obligation

of William Binz and L. Martella as individuals, and not otherwise." There was evidence tending to support this finding; but, if it were otherwise, under the law laid down in *Bank v. Mitchell*, supra, the result would not be changed. The court below was right, therefore, in adjudging that respondent Reid was entitled to have the said money first applied to the payment of his judgment. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(115 Cal. 279)

FOSTER v. SUPERIOR COURT OF CITY  
AND COUNTY OF SAN FRANCISCO. (S. F. 470.)

(Supreme Court of California. Dec. 14, 1896.)

APPEAL—EFFECT.

Code Civ. Proc. §§ 942-945, provide a mode by which the "execution" of the judgment or order appealed from may in certain cases be stayed until the determination of the appeal. Section 949 provides that, "in cases not provided for" in such sections, the perfecting of the appeal by giving the \$300 undertaking "stays proceedings in the court below upon the judgment or order appealed from," except in certain designated cases. *Held*, that where a judgment declared that S. was elected a director of a corporation instead of L., who was declared elected at a meeting held to elect directors, and enjoined the other directors from interfering with S. in the exercise of his office as director, a perfected appeal by such other directors from such judgment stayed all proceedings on the judgment, including the enforcement of the injunction, such case not being "provided for" in sections 942-945.

In bank. Writ of review to superior court of city and county of San Francisco; J. M. Seawell, Judge.

Application by A. W. Foster for the review of an order by the superior court of the city and county of San Francisco, adjudging the applicant guilty of a contempt in disobeying an injunction previously issued by such court. Order annulled.

W. S. Goodfellow, Garrett W. McEnerney, and Jesse W. Lillenthal, for petitioner. Page, McCutchen & Eels, for respondent.

HARRISON, J. At the annual election for directors of the San Francisco & North Pacific Railway Company, held in February, 1896, certain votes offered in favor of Sidney V. Smith, as one of the directors, were rejected by the chairman of the meeting, and, at the close of the election, Antoine Borel, J. B. Stetson, Andrew Markham, A. W. Foster, P. N. Lillenthal, George A. Newhall, and John L. Howard were declared by the chairman to have been chosen the directors for the year then next ensuing. Thereafter Smith, together with Borel, Stetson, and Howard, filed their application in the superior court of San

Francisco, under the provisions of section 315 of the Civil Code, setting forth their claim that the votes offered for Smith should have been counted, and that he, instead of Lillenthal, should have been declared elected as one of the directors. Upon the issues presented by the answer of the other directors to this application, the court held that Smith, and not Lillenthal, had been elected a director, with the others, and that he was entitled to exercise the office, and that Lillenthal should be excluded therefrom. Judgment was entered March 23, 1896, in accordance with these findings, and also enjoining the defendants from interfering with Smith in the exercise of his office as director. On the same day that this judgment was entered, an appeal therefrom to this court was taken and perfected by the defendants, and thereafter, at a meeting of the directors which had been called pursuant to the by-laws of the corporation, Smith sought to enter the room at which the meeting was to be held, but was excluded therefrom by Foster, who had been chosen the president of the board, and the meeting of directors was held without permitting him to be present. Upon an affidavit setting forth these facts, the superior court cited Foster before it to show cause why he should not be punished for contempt, and upon the hearing adjudged him guilty of contempt in thus preventing Smith from being present at the meeting of directors. Upon an application made to this court by Foster for a review of the last-named order, and that it be annulled upon the ground that upon the appeal from its judgment the superior court ceased to have jurisdiction for its enforcement, an alternative writ of review was issued to the superior court, and the foregoing facts are set forth in its return to the writ.

The effect of an appeal from the judgment, upon the judgment appealed from, is a matter of statutory regulation, and, as this effect is to be determined by a construction of the statutes under which the appeal is taken, the decisions in other states upon statutes differing from our own are not entitled to a controlling consideration. Sections 942-945, Code Civ. Proc., provide a mode by which the "execution" of the judgment or order appealed from may in certain cases be stayed until the determination of the appeal; and section 949, Code Civ. Proc. provides that, "in cases not provided for" in these sections, the perfecting of an appeal by giving the \$300 undertaking "stays proceedings in the court below upon the judgment or order appealed from," except in certain designated cases. As the present case is not provided for in any of the preceding sections, it follows that the appeal had the effect to stay all proceedings in the court below "upon the judgment." While the judgments or orders referred to in sections 942-945 are such as direct some act to be performed by the appellant, or require some process for their enforcement, the foregoing provision of section 949 includes not only judg-

ments of this character, but also those which are self-executing. To the extent that a self-executing judgment is effected in accordance with its terms, and requires no proceeding for its enforcement, an appeal therefrom does not impair this effect, except that, while the appeal is pending, it is not available as evidence of the facts adjudged. The provision in the section that the appeal stays all proceedings upon the judgment "in the court below" does not restrict its effect elsewhere. In *Dulin v. Coal Co.*, 98 Cal. 304, 33 Pac. 123, the court had decided that Dulin was elected a director instead of Clugston, and an appeal was taken from this judgment. After the appeal, Dulin was allowed by the other directors to take his seat in the board with them, and Clugston was excluded from their deliberations. Clugston thereupon sought from this court an order restraining Dulin from acting as director, upon the ground that the appeal had the effect to suspend his right so to do. In denying his application we held that, while the appeal had the effect to prevent the court from enforcing its judgment, it could not prevent the other directors from recognizing the judgment as a sufficient reason for considering that Dulin had been properly elected, and was entitled to a seat with them; that the only effect of the appeal was "to leave the parties in the same situation with reference to the rights involved in the action as they were in prior to the rendition of the judgment." We also said that "if, after such appeal, the court below seeks to enforce its judgment, this court will grant a special order or writ restraining its action"; and, again: "The appeal from the judgment suspends its force as a conclusive determination of the rights of the parties, but the stay of proceedings consequent upon the appeal is limited to the enforcement of the judgment itself, and does not destroy or impair its character." In *Welch v. Cook*, 7 How. Prac. 282, it was held, under similar provisions in the statute of that state, that the stay of proceedings effected by the appeal was limited to proceedings "in the court below," and did not include proceedings in another court, authorized by a statute of that state to be taken upon the rendition of such judgment.

The provision in section 949, by which an appeal does not stay proceedings upon the judgment "where it adjudges the defendant guilty of usurping or intruding into or unlawfully holding public office, civil or military, within this state," authorizes the construction that proceedings upon the judgment are stayed when it affirms the right of the plaintiff to any office which is not "public." A director in a private corporation cannot be said to hold a public office. This provision in the section is in harmony with section 806, Code Civ. Proc., and is applicable to such "public office" as may be involved in an action brought by the attorney general under the provision of section 803. The cases of *Jayne v. Drorbaugh*, 63 Iowa, 712, 17 N. W.

433, and *People v. Stephenson*, 98 Mich. 218, 57 N. W. 115, cited by the respondent, were decided under statutes similar to section 806; and it is stated in the opinion in *Fylpaa v. Brown Co.* (S. D.) 62 N. W. 962, that the statute of that state contained no provision staying the execution of the judgment. See, also, *State v. Woodson*, 128 Mo. 497, 31 S. W. 105; *Pennsylvania R. Co. v. National Docks & N. J. J. C. Ry. Co.* (N. J. Err. & App.) 35 Atl. 433. The action of the superior court in the present case was a proceeding "upon the judgment" from which the appeal had been taken, and was instituted for the purpose of enforcing a compliance therewith. By the judgment it was declared that Smith had been elected a director, and was entitled to exercise the office. It was by reason of the refusal of Foster and other directors to allow him to exercise this office that the proceedings now under review were taken by the superior court, and the action of that court was based upon Foster's disregard of the judgment. The injunction, in the judgment, against the interference with Smith's right to act as a director, was but ancillary to the judgment determining that he had such right, and was merely incidental thereto. Although preventive in form, it was in effect mandatory, as it required Foster and the other directors to recognize Smith as one of their number, and to refuse to recognize Lillenthal. As that portion of the judgment declaring that Smith was elected was suspended by the appeal, the injunctive portion of the judgment, being merely incidental thereto, was also suspended, and the power of the court to enforce any portion of its judgment by inflicting punishment for its violation was stayed. An enforcement of this portion of the judgment would operate to carry the decree into effect, and would change the relative positions of the parties from those existing at the time the decree was entered, and might render a reversal of the judgment entirely ineffectual. *Stewart v. Superior Court*, 100 Cal. 543, 35 Pac. 156, 563. "During the pendency of the appeal, the court below could do no act which did not look to the holding of the subject of the litigation just as it existed when the decree was rendered." *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333. The effect of the appeal from the judgment was "to leave the parties in the same situation, with reference to the rights involved in the action, as they were prior to the rendition of the judgment" (*Dullin v. Coal Co.*, supra); and the authority of the court, after the appeal, to punish Foster for preventing Smith from attending a meeting of the directors, was no greater than existed prior to the rendition of the judgment. If, however, the court could indirectly compel the recognition of Smith as a director, after its determination that he had been so elected was suspended by the appeal, it would exercise an authority in the proceeding after the judgment that it did not possess while the matter

was pending before it and undetermined. See *State Inv. & Ins. Co. v. Superior Court of City and County of San Francisco*, 101 Cal. 135, 35 Pac. 549. The order is annulled.

We concur: BEATTY, C. J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

(115 Cal. 285)

ILLINOIS TRUST & SAVINGS BANK v.  
PACIFIC RY. CO. et al. (No. 19,547.)

(Supreme Court of California. Dec. 14, 1896.)

RECEIVERS—PROCEEDINGS TO APPOINT—NECESSARY PARTIES—PRESUMPTIONS—COLLATERAL ATTACK—CORPORATIONS—AUTHORITY TO EXECUTE MORTGAGE—APPEAL—OBJECTIONS—PARTY AGGRIEVED.

1. The C. Street-Railway Company conveyed all its property to the P. Railway Company by a deed afterwards declared void. In the meantime, in an action against the P. Railway Company "and others," a receiver was appointed, who operated the road and issued receiver's certificates under order of the court. In an action to foreclose a mortgage on the property, these certificates were declared a first lien. *Held* that, in the absence of anything affirmatively showing the contrary, it would be presumed that the C. Railway Company, as rightful owner of the road, was a party defendant to the proceedings for the appointment of a receiver.

2. Where the court, under circumstances apparently authorizing such action, took possession of a street railway through a receiver, the certificates issued by such receiver under order of the court must be regarded as valid, even though there may have been a failure of jurisdiction as to the rightful owner of the road.

3. In the absence of evidence to the contrary, it will be presumed, in support of a judgment holding certain receiver's certificates valid, that there was shown everything necessary to authorize the court to order the issue of the certificates.

4. An order appointing a receiver cannot be collaterally attacked on the ground of failure of jurisdiction.

5. The complaint in an action to foreclose a mortgage executed by a street-railway company to secure its bonds alleged that the bonds were duly issued, and the mortgage duly executed by the corporation. *Held* that, in the absence of objection raised at the time, it could not be objected on appeal that it was not alleged that stockholders of the corporation had authorized the creation of the bonded debt or the execution of the mortgage.

6. In a proceeding to foreclose a mortgage upon a street railway, it was found, as a conclusion of law, that a half interest in a certain portion of the track was not subject to the lien of the mortgage, as it had been sold to another corporation. In the decree, however, such portion was not excepted from the foreclosure and sale. *Held*, that objection to the decree on that ground could be made only by the purchasers of such half interest, or one claiming under them.

7. On the foreclosure of a mortgage, a decree was entered fixing the priority of five lienholders. The property sold for only enough to satisfy the first two liens. *Held*, that the adjudication as to the relative rights of the holders of the fourth and fifth liens would not be reviewed on appeal.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the Illinois Trust & Savings Bank against the Pacific Railway Company, S. J. Hendy, and others, to foreclose a mortgage.



From a decree fixing the rights of the various lienholders, the representatives of the deceased defendant, Hendy, appeal. Affirmed.

W. H. H. Hart and Aylett R. Cotton, for appellants. John D. Pope, W. P. Gardner, E. Walker, and Hunsaker & Stevens, for respondent.

VAN FLEET, J. Plaintiff brought this action to foreclose a mortgage lien claimed by it upon certain street-railroad property belonging to the defendant the Los Angeles Cable Railway Company, and consisting of all the franchises, roadbeds, rolling stock, and other property, real and personal, owned by that company in the city of Los Angeles. On the 24th day of August, 1889, the defendant Pacific Railway Company, having acquired a majority of the capital stock of the said defendant Los Angeles Cable Railway Company, and being desirous of securing funds with which to meet certain unsecured obligations of the latter company, and to complete the construction of the system of roads projected by it, and also with a view to the ultimate purchase of all the property of said Los Angeles Cable Railway Company, made an issue of \$2,500,000 in bonds, and, as security for the payment of said bonds, executed to plaintiff, as trustee, a deed of trust intended as a mortgage, covering all the title the grantor then had, and all it might thereafter acquire, to all of the property above mentioned of said Los Angeles Cable Railway Company. Subsequently, on the 9th day of October, 1889, said Los Angeles Cable Railway Company made a deed to the Pacific Railway Company, intended and purporting to convey to the latter all of said property; and under this deed the possession of the property passed formally into the hands of said Pacific Railway Company. Thereafter, on July 18, 1890, some question having arisen as to the validity of the trust deed made by the last-named company to plaintiff, the said Los Angeles Cable Railway Company itself made to plaintiff a trust deed or mortgage confirmatory of that of the Pacific Railway Company, indorsing all of its provisions, and covering all of said property, as further security for the payment of said issue of bonds, in which last-mentioned deed the Pacific Railway Company united as a grantor. It is under these two trust deeds that plaintiff's lien was claimed, and under which, default having been made in the payment of the indebtedness thereby secured, a decree was asked for a sale of said property in satisfaction thereof.

Certain third persons claiming liens upon the mortgaged property were made defendants in the action. Of these William Alvord and Thomas Brown held a trust deed or mortgage, executed to them as trustees by the defendant Los Angeles Cable Railway Company, on September 15, 1887, given to se-

cure an issue of \$1,500,000 in bonds made by the latter company, and which mortgage had not been satisfied; M. L. Coenan and F. J. Coenan held a judgment lien upon the property under a judgment theretofore secured against the defendant the Los Angeles Cable Railway Company in the sum of \$18,376.81; and the estate of Joshua Hendy, deceased, held a lien of like character under a judgment theretofore recovered by it against the same company in the sum of \$23,017.12. J. F. Crank was also made a defendant. Prior to the commencement of this action, in another action commenced in the superior court of Los Angeles county by one E. W. Russell against the Pacific Railway Company and others, the property involved had been taken from the possession of the Pacific Railway Company, which was then holding and operating the same, and placed by order of the superior court in the hands of said Crank, a receiver appointed in that action; and Crank, while holding said property as such receiver, had, under the orders of that court, issued receiver's certificates, amounting to \$15,200, to secure funds required in its management. These certificates were outstanding and unliquidated at the commencement of this action. By its findings and decree the court below declared these certificates, so issued by Crank, with certain others issued by the receiver appointed in the present action, the first lien upon the property, and entitled to priority in payment; the mortgage claim of Alvord and Brown, trustees, amounting to \$1,323,353.35, with certain attorneys' and trustees' fees, the second lien, and entitled to be next paid; the confirmatory deed or mortgage of the Los Angeles Cable Railway Company to the plaintiff, given to secure the bonds of the Pacific Railway Company, the third lien, in the sum of \$1,677,106, together with certain attorneys' and trustees' fees; the judgment of the Coenans the fourth lien; and the judgment of the Hendy estate the fifth lien,—and directed the property to be sold, and the proceeds applied, after the payment of costs and expenses, etc., to the extinguishment of said several liens in the order named. The trust deed given by the Pacific Railway Company to plaintiff, and the deed of the Los Angeles Cable Railway Company to the Pacific Railway Company, purporting to convey said property to the latter, were held to be unauthorized and void; but the indebtedness created by the bonds of the Pacific Railway Company was held valid and subsisting, and it was adjudged that, should the proceeds of the sale of the mortgaged property prove insufficient to satisfy said last-named indebtedness, the plaintiff should have a judgment for the deficiency against the Pacific Railway Company. The only parties dissatisfied with the decree are the representatives of the estate of Hendy, deceased. They alone appeal, and their appeal is from the judgment upon the judgment roll; the sev-

eral objections urged being, it is claimed, such as arise upon the face of that record. Certain of these objections, if sustained, appellants contend, would result in preferring the lien of their judgment to other liens to which it was postponed, and these we will first notice.

1. It is contended that the court erred in declaring the \$15,200 in receiver's certificates issued by Crank in the case of Russell against the Pacific Railway Company et al. a lien upon the mortgaged property, and in directing its payment as a preferred claim over that of appellants, and that in this respect the findings do not sustain the judgment. This contention is based upon the fact that it was found by the court that the deed from the Los Angeles Cable Railway Company to the Pacific Railway Company, purporting to convey the mortgaged property, was void, and that the title never passed to the latter company. The argument of counsel is that, as the court was dealing with the property in that action as that of the Pacific Railway Company alone, while it was in fact the property of the Los Angeles Cable Railway Company, which latter, it is said, was not a party to that action, the court never had jurisdiction of the property, and consequently had no competent authority to authorize the creation of any obligations against it, which are binding upon the property, or valid as against the parties to the present action. But, in the first place, this argument is based upon an assumption of facts which the present record does not disclose. The finding upon which the decree rests in this respect is this: "While J. F. Crank was acting as receiver of the Pacific Railway Company, appointed in the case of E. W. Russell vs. Pacific Railway Company et al., and while he was operating the street-car lines mentioned in the second amended complaint herein as such receiver, and while D. K. Trask, the receiver appointed in this action, was in possession and operating said street-car lines as such receiver, orders of court were entered in said actions respectively authorizing and directing the issuance of receivers' certificates, and providing that said certificates should be a lien upon the property in the hands of said receivers, respectively, superior to the liens of the mortgages or trust deeds and judgments therein mentioned. The above-mentioned receivers' certificates which are now outstanding and unpaid are as follows." And then follows a statement of these certificates. This finding does not show, nor does it competently appear anywhere in this record, what the character of the action of Russell against the Pacific Railway Company et al. was, nor who all the parties thereto were; nor does it appear, except inferentially, that the property held by the receiver in that action was held and dealt with solely upon the theory that it was the property of the Pacific Railway Company. For all that appears, one of the very

questions in issue in that action may have been the title to this property; and not only the Los Angeles Cable Railway Company, the owner thereof, but these very appellants, may have been parties to that action. The action is simply referred to in the finding as entitled "E. W. Russell vs. Pacific Railway Company et al.," and makes no statement as to who the other parties to the suit were. In fact, there is nothing in this record to show that there was not before the court in that action everything in the way of subject-matter and parties requisite to give the court jurisdiction to bind the property and parties hereto. In the absence of anything showing the contrary, we will presume that such was the fact. Inferences are never to be indulged to defeat the judgment, but always in support of it; and, if we can imagine a state of facts not inconsistent with the record before us, which would have authorized the action of the court, those facts will be presumed to have existed. But, moreover, when a court, in a proper case, and under circumstances apparently authorizing such action, takes property into its possession through a receiver, which, as in this instance, is of a character to give the public a right to its continued operation and use, the court acquires a right and assumes the obligation of keeping such property in operation, and for that purpose is authorized to incur such expenses and create such obligations against the property as are necessary to keep the same in repair and pay operating expenses. And such expenses and obligations "are burdens necessarily on the property taken possession of; and this irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership." *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950; *Kneeland v. Machine Works*, 140 U. S. 592, 11 Sup. Ct. 857. In the absence of the evidence and everything in the findings to show the contrary, we must presume, in support of the judgment, that there was shown at the trial the existence of every fact in that case which would render proper the action of the court in authorizing the receiver to issue these certificates.

It is said that the court had no power to appoint a receiver in the case of Russell against the Pacific Railway Company et al.; but why it had not, counsel does not enlighten us. It is not denied that the superior court has jurisdiction to appoint receivers in proper cases, and, as above suggested, it nowhere appears in any cognizable form what the character of that action was; and the presumption to be indulged, therefore, is that it was one which authorized the appointment of the receiver. This is in the nature of a collateral attack upon the order appointing a receiver in that case (*Van Fleet*, Coll. Attack, § 3); and, as against such an attack, it is well settled that, if the jurisdiction of the court can in any event be upheld and its action validat-

ed, this will be done, even though the facts showing such jurisdiction are defectively stated, and inferences must be indulged in to support the judgment (Id. § 17).

2. It is contended that the cross complaint of Alvord and Brown, under which their mortgage was foreclosed and given priority as a lien over appellants' judgment, does not state facts sufficient to constitute a cause of action, in that it is not alleged therein that the stockholders of the Los Angeles Cable Railway Company authorized or consented to the creation of the bonded indebtedness which that mortgage was given to secure, or that they ever authorized the making of said mortgage. Of a number of answers made in the briefs of respondents to this objection, one, at least, we deem conclusive against appellants. There is a general allegation in the pleading, in substance, that these bonds were duly issued, and the mortgage in question duly executed, by the corporation. There was no demurrer interposed, but the parties apparently went to trial upon the assumption that the pleading was sufficient to raise the issue and authorize proof of the necessary facts; and it was so treated by the court below, since it was there found that "said Los Angeles Cable Railway Company, by a resolution duly adopted and passed by the unanimous concurrence of its board of directors, and by its stockholders duly assembled, authorized" to be issued the bonds in question, and the execution of the mortgage to secure the same. It is well settled that where the parties have proceeded to trial upon a pleading, without objection to its sufficiency to raise a particular issue, and evidence has been received as to the fact, and the issue found upon, the party whose duty it was to object will not be heard in this court to say that the finding is not within the issues. *King v. Davis*, 34 Cal. 100; *Horton v. Dominguez*, 68 Cal. 642, 10 Pac. 186; *Moore v. Campbell*, 72 Cal. 251, 13 Pac. 689; *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497. If, therefore, it be assumed that it was necessary to specifically allege the consent of the stockholders, it will now be presumed that the pleading was treated by the parties in the court below as alleging that fact. Moreover, we think the allegations of the pleading were sufficient in themselves to admit proof of the fact.

3. But one other point is made which we deem it essential to notice: The Los Angeles Consolidated Electric Railway Company was one of the defendants in the action, and set up in its answer that, while Crank was in possession of the property as receiver in the case of Russell against the Pacific Railway Company et al., this defendant applied to the court in that action for permission to use, jointly with the Pacific Railway Company, certain portions of the cable railway tracks, as provided in section 499 of the Civil Code; that it had paid to Crank, as such receiver, one-half the cost of the portions of the track

of which it desired to make joint use, and had received a conveyance of a one-half interest therein; and it prayed that its one-half of the portions of track acquired as aforesaid should be exempted from the operation of the judgment of foreclosure to be rendered in the action. There is in the findings no mention of the facts set forth in the answer of this defendant, but among the conclusions of law is found this declaration: "The undivided one-half of the tracks, ties, and appurtenances conveyed under orders of court by J. F. Crank, receiver, to the Los Angeles Consolidated Electric Railway Company [describing the property] is free from the incumbrance of the said mortgage or deed of trust of the Los Angeles Cable Railway Company to Alvord and Brown, trustees, mentioned in their cross complaint, and from any lien of the indenture marked 'Exhibit B,' all mentioned in the second amended complaint herein; and the said undivided one-half of all the said tracks, ties, and appurtenances is the absolute property of the said Los Angeles Consolidated Electric Railway Company, and free from incumbrance." In their opening brief, appellants treat this as being what it purports to be,—a mere conclusion of law,—and object to it as not only wholly unsupported by any finding of fact, but as being at variance with the finding that the Pacific Railway Company acquired no title to the mortgaged property by its deed from the Los Angeles Cable Railway Company; that it appearing from this last finding that the Los Angeles Cable Railway Company was the owner of the property at the time of the attempted sale of this interest by the receiver, and that such sale was made in a case to which the latter company was not a party, the sale was wholly void, and passed no title to the purchaser; that, consequently, the interest thus reserved from sale remained subject to the lien of appellants' judgment, and to sale in satisfaction thereof; and that in declaring it free from such lien, and withholding it from sale, the court below erred to appellants' injury. As to the objection that no title passed because the Los Angeles Cable Railway Company was not a party to the action, the same answer applies which is suggested in the point as to the receiver's certificates,—that it nowhere appears that said company was not a party to that action. But an inspection of the decree which was entered in this case shows that, notwithstanding the reservation thus made in the court's conclusions, all of the mortgaged property, including the interest thus declared to have passed to the Los Angeles Consolidated Electric Railway Company, was ordered to be sold thereunder in satisfaction of the liens established thereby; and, as will hereafter appear, all of said property, without the reservation of any part, was sold thereunder, and the proceeds applied in satisfaction of said liens as therein directed. It thus appears that, whatever might have been

the effect of this reservation had it been carried into the decree, the appellants have not in any wise been injured thereby. The decree gave them the benefit of everything to which they were entitled, and appellants have no cause of complaint. These considerations having been suggested in the briefs of respondents, appellants, in their reply brief, have changed front, and now take the ground that what they had theretofore regarded and treated as merely an erroneous conclusion of law was in truth a finding of fact; and that being such, and the decree not being in accord therewith, it must be held, to that extent, as unsupported by the findings. But if there is any merit in this new claim, the objection cannot avail the appellants. There is no want of support in the decree as to any fact affecting appellants' rights. If there is any error in the particular urged, the appellants have not been injured thereby, and hence it is not a ground of reversal at their instance. The only party injured would be the purchaser, the Los Angeles Consolidated Electric Railway Company, and they would seem to rest content.

4. Some further points are made by appellants, involving the rights of the plaintiff and of the Coenans to have their liens preferred to that of appellants. But appellants have rendered the consideration of these questions wholly immaterial. At the submission of the cause in this court, the appellants filed herein the following stipulation: "It is hereby stipulated and agreed that an order of sale was issued by the superior court upon the decree of foreclosure contained in the transcript in this case, and that the commissioner advertised and sold the property described in the decree, as required therein, on the 4th day of October, 1893, subject to the receiver's certificates; that the entire proceeds of the sale were applied by the commissioner to the payment of costs of suit, expenses of sale, allowances to trustees, Brown and Alvord, and attorneys for Alvord and Brown, trustees, and to the payment of the sum of money decreed to be due to the holders of the bonds secured by the trust deed to Alvord and Brown, trustees, and the sale produced no more than that amount; and that the commissioner made a report of the sale to the court, which was confirmed." The object of this stipulation is not stated, but its effect is to render the remaining objections mere moot questions, the determination of which would be of no material consequence to appellants. The entire property covered by the lien of appellants' judgment having been sold, and the proceeds absorbed in satisfaction of claims which, it has been determined, were prior in right to that of appellants, the latter are left no further interest in the controversy which we are called upon to consider. The judgment is affirmed.

We concur: HARRISON, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

(8 Colo. App. 435)

SMALL et al. v. FOLEY et al.<sup>1</sup>

(Court of Appeals of Colorado. Sept. 14, 1896.)

STATUTES—EFFECT OF REPEAL—MECHANICS' LIENS—SUFFICIENCY OF STATEMENT—BUILDING ON ADJOINING LOTS—APPORTIONMENT—STATEMENT OF CREDITS—REMOVAL OF MATERIALS BY OWNER—PRIORITY OF LIEN—ASSIGNMENT OF CLAIM—RIGHT OF SUBCONTRACTORS—NOTICE OF CLAIM.

1. Under the mechanic's lien law of 1893, which took effect July 2, 1893, and provided that the repeal of prior laws should not affect any existing right, either as to the remedy or otherwise, under the laws repealed, a mechanic's lien acquired under a contract made before July 2, 1893, the performance of which was begun before that date, was governed by the provisions of Mills' Ann. St. c. 77, div. 2, relating to mechanics' liens.

2. A statement of mechanic's lien acquired under a contract the performance of which was begun prior to July 2, 1893, but filed after that date, was sufficient if it conformed to the provisions of Mills' Ann. St. c. 77, div. 2.

3. In a proceeding to enforce a mechanic's lien under the provisions of Mills' Ann. St. c. 77, div. 2, where the material was furnished for, and the work done upon, two adjoining houses, erected under one contract, upon three adjoining lots, each house being situated partly on an outside lot, and partly on the middle lot, the three lots must be regarded as constituting but one tract of land, and subject to the whole lien, irrespective of the particular portion of the material or labor which went into each house.

4. It was not necessary that the statement of such lien should apportion the materials furnished and the labor done between the two houses, as required by the lien law of 1893.

5. The act of 1889, amending the mechanic's lien law of 1883 (Mills' Ann. St. c. 77, div. 2), providing that any one furnishing material for or labor upon any "building," etc., shall have a lien upon the land therefor, must not be construed as confining the word "building" to the singular number, but as applying also where several buildings are erected upon the same tract of land.

6. A statement of mechanic's lien, which included the claim of the lienor, and also the claims of others which had been assigned to him, the amount due on each claim being stated separately, is not rendered void for the reason that an aggregate credit is given; it being presumed, in the absence of evidence to the contrary, that the payment was made after the assignment, and applied by the creditor to the total debt.

7. Where material furnished for a house under contract is removed by the owner, and used upon another building, such removal will not defeat the contractor's right to a lien for the material upon the house for which it was originally furnished.

8. Under Mills' Ann. St. § 2885, providing that mechanics' liens shall have priority over any lien created prior thereto, but not recorded, and of which the lienor had no notice, a mechanic's lien claimed under a contract the performance of which was begun subsequent to the execution of a trust deed in the property, but before such deed was recorded, is entitled to priority.

9. Under Mills' Ann. St. § 2894, providing that any party claiming a lien may assign the same in writing, it is not necessary, in a proceeding by the assignee to enforce a mechanic's lien, that he should allege and prove that the assignment was in writing, unless the fact is denied.

10. Under the mechanic's lien law of 1893, taking effect July 2, 1893, providing that the repeal of former laws should not affect any existing rights, either as to the remedy or otherwise, a subcontractor whose claim to a mechanic's lien accrued prior to July 2, 1893, was entitled to file

<sup>1</sup> Rehearing denied December 14, 1896.

his statement of claim within 40 days after the completion of his subcontract, under Mills' Ann. St. § 2887, and not obliged to wait until the completion of the building, as required by the act of 1893.

11. The provision of the mechanic's lien law of 1893 requiring the lien claimant to give the owner 24 hours' notice of his intention to file a statement of lien is for the benefit of the owner only, and can be taken advantage of only by him.

Appeal from district court, Pueblo county.

Proceedings by T. H. Foley and L. Leonard, doing business as Foley & Leonard, and others, against A. B. Small and others, to enforce mechanics' liens. From a decree for claimants, defendants appeal. Modified.

Fred Betts, for appellants. William B. Vates, for appellees.

THOMSON, J. This litigation involves the validity of certain mechanics' liens, and the question of their priority to a trust deed. The appellees were severally claimants of mechanics' liens upon a piece of real estate of H. W. Rankin, in Pueblo county, on account of material furnished for, and work and labor performed in the construction of, buildings upon the land, by contract with Rankin. The appellant Small claimed a prior lien upon the property, by virtue of a deed of trust executed by Rankin to the appellant James, as trustee, to secure the payment to Small of an indebtedness owing to him by Rankin. Upon the final hearing, the court sustained the several liens of the appellees, adjudged them priority over the trust deed, and entered a decree accordingly. Small appealed from the judgment.

With a few exceptions, which we shall notice hereafter, the contracts under which the materials were furnished and the work done were made, and the furnishing of the materials and the performance of the work commenced, some time before July 2, 1893. The trust deed was executed on the 15th day of May, 1893, but was not filed for record with the recorder of the county until the 19th day of July, 1893. It appears that the parties furnishing the material and doing the work had no notice or knowledge of the existence of the trust deed at the time they severally commenced to furnish material and do work. At that time the mechanic's lien law of 1883, as amended by the act of 1889, was in force. See Mills' Ann. St. c. 77, div. 2. This law was repealed, and a new law enacted by the legislature, at its session in 1893, which went into effect on the 2d of July, 1893, and which provided that the repeal of the prior laws should not be construed to affect any existing right, either as to remedy or otherwise, under the laws repealed. Sess. Laws 1893, c. 117. The new law became effective before any of these claimants perfected their liens, by filing the lien statements required by law. Some reasons are given why we should hold these lien statements invalid, and other objections are urged to the decree, to all of which we shall give due consideration.

v. 47 p. no. 1—5

1. The requirements of the act of 1893 in relation to the contents of the lien statement, and the manner of perfecting the lien, differ materially from those of the preceding statutes; and it is contended that the method provided for perfecting the lien pertains entirely to the remedy; that the remedy is governed by the law in force at the time it is sought; and that, therefore, the lien statements in question, having been made after the act of 1893 became operative, should have conformed to the requirements of that act. These statements are lacking in some of the particulars demanded by the latter act, but they comply substantially with the amendment of 1889. In this connection, we shall not enter into any discussion of the effect generally of remedial legislation upon pre-existing rights, because, as we construe the statute of 1893, its provisions in relation to the contents of lien statements are not, and were not intended to be, applicable to contracts which were made, and liens which had their inception, prior to the time when it took effect. It does not confine itself to a mere change in the form of the statement, but, in providing what the statement shall contain, it makes material additions to what was theretofore required. It undertakes to regulate the terms and conditions of the original contracts under which materials are furnished and labor done. Section 2 says: "No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same, or any part thereof, be paid in advance of the commencement of the work; but the contract price shall, by the terms of the contract, be made payable in installments, or upon estimates, at specified times after the commencement of the work, or on the completion of the whole work; provided, that at least fifteen per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract." Having direct reference to these provisions, section 3 requires the lien claimant to set forth in his statement, among other things, the terms and conditions of his contract. The contract, the terms and conditions of which must be set forth, is the contract made in pursuance of the provisions of the act, and must be an express contract. The contract provided for is the first, and the filing of the statement the last, step in the acquirement of the lien; and the two are so connected by the language of the statute as to be simply different parts of one continuous proceeding.

The law in force when this act was passed did not attempt to regulate the manner in which contracts should be made. They might be either express or implied. If express, except, perhaps, the stipulated price for the work or material, they might contain no mention of terms or conditions; and an implied contract is without terms or conditions of any kind, except such as the law supplies. No reference to the contract under which the

work was done or materials furnished was required in the lien statement. A person doing work or furnishing material under an implied contract, or an express contract in which there were no specific terms or conditions, would find it impossible to comply with the requirements of the act of 1893 in the matter of his lien statement; and a forced resort to the provisions of that act for the purpose of perfecting his lien would involve a sacrifice of his rights. It seems manifest that the later statute was designed to operate only in futuro. The general tenor of the act leads to this conclusion; and, if more were wanting, the provision preserving existing rights, whether pertaining to the remedy or otherwise, convinces us beyond a doubt that, as to the proceedings necessary to perfect the lien, it was not the intention that the statute should have any retroactive effect. It is our opinion, therefore, that the lien statements in question, having been made and filed in conformity with the amendment of 1889, are valid, and the liens enforceable, unless there was a failure otherwise to comply with the law.

2. The materials were furnished for, and the work done upon, two houses, erected at the same time, upon three adjoining lots, each house being situated partly on an outside lot, and partly on the middle lot; and the evidence was that the contracts, severally, were entire and indivisible, embracing both houses, and that the material was used upon them indiscriminately. The lots were each 25 feet in width, and, as the houses were placed upon them without reference to their boundaries, we must regard the three lots as constituting one tract of land. The statute of 1893 permits the enforcement of a mechanic's lien against two or more buildings constructed by the same person or persons under the same contract, but requires that the materials furnished and work done shall be apportioned among the several buildings in proportion to the value of the materials and labor going into each of the buildings, and that a statement of the amount apportioned to each building shall be filed with the lien claim. There were no such apportionments, and, consequently, no such statements, in this case. It is contended that the lien statements are invalid by reason of the want of compliance in these respects with the law of 1893. As the materials were furnished, and the labor performed, under contracts entered into prior to the taking effect of this law, and with reference to the law then in force, which imposed no such duties or burdens upon the contractors, and as the furnishing of the materials and the performance of the labor commenced under the old law, we are of the opinion that in these particulars the proceedings were governed by the statute of 1883, as amended in 1889, and not by the act of 1893, and that, therefore, neither apportionment nor statement of apportionment was necessary.

But a question of more difficulty is involved in the fact that two separate houses were embraced in a single lien. The question is not very clearly raised by the assignment of errors, but it is the subject of argument, and we feel it incumbent upon us to dispose of it. Section 1 of the amendatory statute of 1889 provides as follows: "Whoever shall do any work or furnish any material by contract, express or implied, with the owner of any land, his agent or trustee, for the construction, enlargement, alteration or repair of any building or other structure upon such land, or in making any other improvements or in doing any other work upon such land, as stated in the following sections, shall have a lien upon such land, building, structure or other improvement for the amount and value of the work so done or material so furnished, to the extent of the interest or claim of such owner thereto at the time of the commencement to do such work or to furnish such material." The words "building" and "structure" are each used in the singular number, and a literal construction of the language, if we should look no further into the act, might confine the right to a lien to a single building or structure. But a lien is allowed, to the extent of the owner's interest, upon the land on which the building is located. The lien statement must contain a description of the land sufficient to identify it, but need not refer to the improvements. The form of the statement would be the same whether the lien is claimed on account of one house, or on account of several houses, erected on the same tract. In *Barnard v. McKenzie*, 4 Colo. 251, Judge Elbert said: "Notwithstanding the lien was unknown to the common law, and is purely the creature of the statute, in view of its equitable character we think the statute giving it should be liberally construed to advance its objects." See also, *Williams v. Canal Co.*, 13 Colo. 469, 22 Pac. 806.

We think it was the intention of the lawmakers to confine each lien, in so far as the land upon which it might operate is concerned, to a single tract; but when, under one contract, different buildings are erected upon the same piece of ground, the statute furnishes no insurmountable reason why the lien upon the ground should not embrace them. In such a case it would not violate any rule of construction to give the words "building" and "structure," as used in the statute, a plural signification; and as the statute is to be liberally construed, to the end that full effect may be given to its provisions, we think it the duty of courts to attach such meaning, singular or plural, to the words, as the circumstances of the particular case under consideration may require. While the language of the statute itself would lead us to this conclusion, our opinion is fortified and strengthened by very high authority. We extract the following from the opinion in the case of *Wall v. Robinson*, 115 Mass 429: "The statutes are designed to give

to the mechanic who, by his labor and skill, enhances the value of an estate, the security of a lien upon the estate, to the extent he has thus added to its value. They provide that any person to whom a debt is due for labor performed or furnished in the erection, alteration, or repair of any building or structure, by virtue of an agreement with or by consent of the owner, shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land on which the same is situated. In the case at bar the petitioners have performed labor upon several buildings, situated upon the same lot, under an entire contract, for an entire price. We think such a case is within the purpose of the statute and the intention of the legislature. The parties, by their contract, have connected the several buildings, and treated them as one estate. Under the contract, the labor performed upon each building creates a lien upon the whole lot, and therefore upon all the other buildings. Although it cannot be said with strict accuracy that the labor for which the lien attaches was all performed on each building affected by it, yet it was all performed on one estate; and to deny the lien would defeat the spirit of the statute by a too literal adherence to its letter." It will be observed that in the Massachusetts law, as in our own, the singular nouns "building" and "structure" were used. See, also, *Carr v. Hooper*, 48 Kan. 233, 29 Pac. 398; *St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546.

In the case before us the buildings were not upon a single lot, but they were so placed on three adjoining lots as to constitute the lots one parcel of land. The statute under which these statements were filed provides, further, that, in case a building shall occupy two or more lots or other subdivisions of land, such lots or subdivisions shall be deemed one lot for the purposes of the act, and that the same rule shall hold good in case of other improvements which are practically indivisible. Calling the word "building," "buildings," as we are authorized to do, we have exactly this case. The two buildings occupied three lots. Each house was situated on two lots,—one outside lot, and the same center lot,—so that there was no separate improvement upon any one of the lots; and a lien could not be acquired upon either of the houses independently, without taking a portion of the land which belonged to the other house. The improvements were indivisible, in this sense: that they could not be apportioned among the several lots. Separate liens upon the several lots would cut each of the houses in two, and would not afford to the parties interested the remedy which the statute was designed to give them. The three lots were therefore, for the purposes of the liens, one lot, and each lien properly embraced the three lots and both houses. *Batchelder v. Rand*, 117 Mass. 176; *Doolittle v. Plenz*, 16 Neb.

153, 20 N. W. 116; *Miller v. Shepard*, 50 Minn. 268, 52 N. W. 894.

Objection is specially made to the lien statement of the appellees *Foley & Leonard*. It embraced their own claim, for materials furnished directly by them, and also the claims of certain other parties, which, as alleged, had been assigned to them. It set forth the total amount due on each claim separately, but gave only the aggregate credit, which was \$10.49. It is urged, on the authority of *Hanna v. Bank*, 3 Colo. App. 28, 31 Pac. 1020, that the statement should have showed what amount should be credited on each separate claim, and that, by reason of the credits being aggregated, the statement was void. In that case, as in this, the statement embraced a number of claims which had been assigned to the lien claimant; but the several sums due were not given, and the whole were combined in one gross amount. For this reason, the statement was adjudged invalid. We adhere to that decision. We believe it to be correct, upon the facts. In this case, however, each separate indebtedness is set forth, and the statement before us is not open to the objection which was made to the other. But is this statement bad on its face, because, instead of dividing the credit among the several claims, it gives only a sum total? The statute requires a statement showing the total amount of the indebtedness, the credits thereon, if any, and the balance due the claimant. This language has reference to original claimants, and an assignee must proceed upon each assigned claim, exactly as his assignor must have proceeded if there had been no assignment. But a statement need not mention credits if there are none, and an omission of credit is equivalent to a statement that the claim is not entitled to a credit. If no payments were made upon any of the claims until after the assignment, the holders had the right to make such application of the amount paid as they should see fit, unless they were otherwise directed; and if, instead of dividing it among the several claims, they applied it in reduction of the gross amount, they merely exercised a right which the law gives them. The statement does not, and it need not, show when the payment of \$10.49 was made, and the evidence was equally silent on the subject. The statement, therefore, amounts to this: that, prior to the assignment, there were no credits; that the amount for which credit was given was paid afterwards; and that, upon its payment, *Foley & Leonard* exercised their privilege of applying it upon the sum total of the indebtedness. We do not find in this objection to the lien statement in question any reason for reversing the judgment.

One of *Foley & Leonard's* assignors was the *Holmes Hardware Company*. It appears that of the hardware furnished by them for the houses, after it had been delivered at the proper places, \$35 worth was removed by *Mr. Rankin* to another house, and was not ac-



tually used in these houses. So far as appears, this material was removed by Rankin without the knowledge of the hardware company. Counsel say it was error to include this amount in the decree. The statute gives to any person who, by contract with the owner, shall furnish any material for the construction of any building, a lien upon the building and the land it occupies. He is not required to see that it actually goes into the building. If, by contract, he furnishes it for the building, whether it is used there or not, he is entitled to the lien. This is what the statute says, and we cannot, by construction, distort its language into something else. The statute further provides that the lien shall relate back to the time of the commencement to do work or to furnish materials, and that it shall have priority over any and every lien subsequently intervening, or which may have been created prior thereto, but which was not then recorded, and of which the lienor had no notice. Therefore, in adjudging these liens prior to that of the appellants' trust deed, the court simply followed the letter of the statute.

We shall now proceed to the consideration of objections specially made to certain of the lien claims. Foley & Leonard and the Colorado Hammer Brick Company were joined as plaintiffs, and the Miller Creek Land & Lumber Company and other lien claimants were, together with the appellants, made defendants. Counsel for appellants is in error in assuming that Foley & Leonard claimed as assignee of the brick company. Although Foley & Leonard and the brick company joined in the complaint, their claims were distinct, and each was seeking the enforcement of an independent lien. Foley & Leonard and some of the defendants who were asserting liens were assignees of claims for materials furnished for, and work done in the construction of, the buildings. In some cases the assignment was made of the simple claim, and the assignee embraced the claim in his own lien statement. In other cases the assignor first perfected his lien by making and filing his statement, and then assigned the perfected lien. To these assigned claims the objection is made that it was not pleaded or proven that the assignments were in writing. The act of 1883, as amended in 1889, provided that any party claiming a lien might assign, in writing, his claim and lien to any other claimant or person, who should thereupon have all the rights and remedies of the assignor; that the assignment might be made before or after the filing of the statement; and that, when made before, the claim assigned might be included in the lien statement of the assignee. As the right to a mechanic's lien exists only by virtue of the statute, a substantial compliance with the statutory provisions is essential to the validity of such a lien. In order, therefore, to enable the assignor to assert a lien in virtue of an assigned claim, the assignment must be in writing.

Concerning each of these assigned claims, the allegation of the complaint or cross complaint setting it forth is, simply, that it was assigned to the complaining party; and it is contended that this allegation is not sufficient, because, as the statute requires the assignment to be in writing, it should affirmatively appear in the complaint that it was in writing. The allegation of assignment is not denied by the appellants in their answer, and the fact of assignment is therefore admitted. If the assignment was sufficiently pleaded, the admission dispensed with the necessity of proof on the subject. By the terms of the statute, the claims or liens could not be assigned, except in writing, so as to enable the assignee to enforce them against the property. For the purposes of this proceeding, if they were not assigned in writing, they were not assigned at all. We think the word "assigned," as contained in the allegation, should be held to include everything necessary to a valid assignment. If the assignment had been denied, the allegation could have been supported only by a written assignment; but the failure to deny admits the assignment, and, as the assignment could exist only in writing, it admits a written assignment. In the case of contracts or promises void by the statute of frauds unless in writing, it has been held that it is sufficient to allege the agreement generally, without specifically averring that it was in writing. *Mullaly v. Holden*, 123 Mass. 583; *Elting v. Vanderlyn*, 4 Johns. 237; *Piercy v. Adams*, 22 Ga. 109; *Cross v. Everts*, 28 Tex. 523. The two classes of cases may not be strictly analogous, and the authorities are not cited as being absolutely conclusive of the question raised in this case; but we think, for the reasons which we have given, that the allegation of assignment was sufficient, and that the admission that the assignment was made as alleged is an admission that it conformed to the requirements of the statute.

It is objected to a number of the lien claims embraced in this suit that the statements were prematurely filed, it being contended that the provision of the act of 1893 respecting the time within which lien statements shall be filed is purely remedial, and that, therefore, in filing such statements after the act took effect, notwithstanding the liens attached before, parties must conform to its provisions. No very clear distinction is made in argument between the statutory duties in this respect of original contractors and those of subcontractors, and the objections urged apparently apply to all alike. But, as to the time within which the lien statement of an original contractor must be filed, there is no substantial difference between the act of 1883 and that of 1893. The former provided that, in the case of an original contractor, the statement should be filed within 60 days after the time when the last work should be done or the last material furnished, and that the statement of a subcontractor should be filed within 40 days after



the doing of the last work, or the furnishing of the last materials. The act of 1893 requires the lien of an original contractor to be filed within 60 days after the completion of his contract, and that of every other person within 30 days after the completion of the building, improvements, or structure. In relation to original contractors the requirements are practically the same in both statutes. If the contractor's contract is completed, he has done the last work or furnished the last materials; and, if he has done the last work or furnished the last materials, his contract is completed. The effect of the language in each statute is the same. In the matter of filing their lien statements, the original contractors appear to have brought themselves within both statutes; and, in so far as the objection may be intended to apply to them, it is not tenable. In the case of subcontractors, however, the requirements of the two statutes are substantially different. The act of 1893 contains the additional provision that cessation from labor for 30 days upon any unfinished building or structure shall be deemed equivalent to completion for the purposes of the act. The lien statements of the subcontractors appear to have been filed before the completion of the buildings, and before cessation of labor upon them for 30 days; and, if they were bound in this respect to conform to the requirements of the act of 1893, counsel's position is correct, and the statements were prematurely filed.

The question, then, is: Was it compulsory upon the subcontractors, whose liens had attached before the act of 1893 took effect, but whose lien statements were filed afterwards, to proceed under the provisions of that act? The law, undoubtedly, is that the form of remedies may be changed by legislation, and that, when one form of remedy is replaced by another, the latter must be resorted to, unless its effect is to destroy or substantially impair pre-existing rights. The contracts of these parties were made, and their performance entered upon, with reference to the law in force at the time. Their liens accrued when they commenced to do the work or furnish the materials, and at that time certain rights attached, of which subsequent legislation could not deprive them. They had the right under the statute of 1883 (the law then in force) to perfect their liens, by filing their lien statements within 40 days after they had done their last work or furnished their last materials. Only by the filing of these statements could their liens become available. It certainly was not in the power of the legislature to deprive them entirely of the right to perfect their liens, and thus render the liens worthless; and if the legislature could not, by enactment, destroy the value of liens in existence, neither could it substantially diminish or impair their value. The act of 1893 compels subcontractors to postpone the filing of their statements until after the completion of the building or improvements, or until after the

cessation of work for 30 days. The completion of a building, without cessation of work, might require years after a subcontractor had finished his own contract; and the time when he would be able to enforce his claim would depend upon the motions—speedy or dilatory—of others. The right in respect to the perfecting and enforcement of his lien which he had when it accrued, and a right with reference to which he entered into his contract, would thus suffer serious impairment.

We do not intend, however, to rest our decision upon the constitutional inhibition against retrospective legislation. The validity of such legislation, where a new remedy is provided which involves an already existing right, is ably discussed by Mr. Justice Campbell in *Spangler v. Green*, 21 Colo. 505, 42 Pac. 674; and, in so far as the principle announced by him may be applicable in this case, we content ourselves with a reference to his opinion. We prefer to rely upon the language of the last section of the act of 1893, which provides that the repeal of the former enactments shall not be construed to affect any existing rights, either as to remedy or otherwise. From the prominence which is given to the word "remedy," we think it clear that the legislature intended that in so far as the new remedy placed a party contracting under the old law at a disadvantage, and imposed new burdens upon him, he should not be compelled to resort to it, but might proceed in accordance with the law in force when his rights accrued. The act of 1893 imposed disabilities upon him in the matter of the filing of his lien statement, which did not exist when he made his contract and entered upon its performance, and which, if they had existed, might have materially influenced the character and terms of his contract; and, if it was not the intention of the legislature that he might assert his rights unembarrassed by the new burdens and disabilities, there is no virtue in language.

Counsel for appellants cites us to the decision by this court in *Orman v. Railway Co.*, 5 Colo. App. 493, 39 Pac. 434, as supporting his contention that, after the act of 1893 became effective, the remedies which it provided must in all cases be pursued. Counsel seems to have seriously misunderstood that decision. No question of that kind was before the court. That suit was brought by an original contractor, and the only question for determination was whether the action was commenced in time. Referring to the time within which the statement should have been filed, the court incidentally remarked that, under the circumstances, it should have been filed under the provisions of the act of 1893; but the court held that the lien was filed in apt time, so that the question of time in relation to the lien was not in the case; and, in view of the fact that the act of 1893 impaired no right which an original contractor had under the old law in the matter of filing his statement, there is no inaccuracy in the expression. What was decided, and all that

was decided, was that the suit for the enforcement of the lien should have been brought within the time limited by the new law. The statute of 1883 required suit for the enforcement of the lien to be brought within six months after the statement was filed, while by the terms of the law of 1893 the action must be commenced within four months after the completion of the structure or improvement. In that case the construction was complete before the lien statement was filed. Prescribing the time within which suit must be brought pertains purely to the remedy. It affects no right connected with the contract, or growing out of it, and deprives the lien claimant of no benefit to which his contract or his lien entitles him. The legislature may shorten the time by which actions on existing contracts will be barred, provided it does not fix the limitation so as to cut off the right of action on demands against which the former statute had not run, or does not unreasonably shorten the time within which suit may be brought on such demands. With these limitations, such legislation, although retroactive, will be sustained. *Wade, Retro. Laws, §§ 12, 224.* We accordingly held, upon the facts of that case, that the plaintiff should have brought his action within the time limited by the act of 1893.

Each lien claimant is required by the new statute to give the owner written notice of his intention to file his statement at least 24 hours before it is filed. It is questionable whether this was done by some of the claimants, and it is urged that their failure was fatal to their liens. Under the law in force when their lien rights accrued, such notice was not required; and whether it was incumbent upon them, before they could secure a valid lien, to do something of this nature which was unnecessary when their liens attached, we need not now decide. As it is the owner to whom the notice must be given, it seems manifest that the provision was intended for his personal benefit. It might be of benefit to him to know that a lien upon his property would be filed within a specified time; he might pay the debt, and stop the proceeding; but notice to him would not be notice to others, and no perceptible benefit could be derived by them from notice to him of which they knew nothing. As only himself could be injured by the want of notice, it follows that he only could take advantage of its absence. But in this case the owner is not complaining. He made default, and we are unable to see how these appellants can be heard to say that he was not notified.

We come now to the exceptions to which we alluded in a former part of this opinion. C. S. Northway, C. D. Conrad, and W. M. Ramsay were subcontractors. Their several contracts were all made after the act of 1893 took effect. They, therefore, contracted with reference to its provisions, and, in securing their liens, were bound to follow the method which it provided. This they failed to do,

and, for that reason, their liens were invalid, and should have been rejected. The claim of Northway was \$12 for work, and \$1.10 for recording his lien statement; that of Conrad was \$12; and that of Ramsay \$10.60. Interest was allowed on these claims. It was erroneous to include them in the decree, but the error does not necessitate a remanding of the cause. In all other particulars, so far as we are able to see, the judgment is correct; and a new decree will be entered here, eliminating the invalid claims, but otherwise conforming substantially to the decree of the district court. Decree ordered accordingly.

(9 Colo. App. 1)

#### NICHOLS v. LANTZ.<sup>1</sup>

(Court of Appeals of Colorado. Nov. 9, 1896.)

##### IRRIGATION—WATER RIGHTS—ABANDONMENT.

An abandonment of an appropriation of water for irrigation by a locator on government land is shown by evidence that he quitclaimed his possessory right to the land without reservation of the water right, placing his grantee in possession of both, and that he left the state for three years, and claimed no interest in the water until after his return.

Error to district court, Garfield county.

Action by Newton Lantz against A. J. Nichols. From a decree for plaintiff, defendant brings error. Affirmed.

Henry T. Sale, for plaintiff in error. Edwd. T. Taylor, for defendant in error.

REED, P. J. The court would be warranted in refusing to consider this case for failure to file an abstract as required by the rules. What is called an abstract is, at best, but a partial, partisan index; and we are compelled to entirely disregard it, and resort to the record. What an abstract should contain, to assist the court, should readily be apparent to counsel,—a fair, clear, and unbiased synopsis of all that pertained to the trial; and, where a fact in evidence is relied upon, or a ruling or order of the court, the entire evidence pertaining, and the ruling of the court, should be incorporated. In order to economize labor and printing, it is false economy to print pages of worthless matter, useless to the court. The court is overwhelmed with business, and, without compliance with the rule and assistance from counsel, it becomes impossible to do the work. It is not only the duty of the appellant to present a proper transcript for the examination of the case, but of appellee to see that it is done, to protect the judgment obtained, and, if the abstract is insufficient, call the attention of the court to the fact, or supplement the abstract.

The controversy appears to be a suit in equity in regard to the water of a spring used for irrigating. On the 15th day of April, 1885, one Thomas Kelly settled on land which,

<sup>1</sup> Rehearing denied December 14, 1896.

prior to that time, was a part of the public domain. On the 9th day of June, 1885, Kelly filed upon the land under the pre-emption laws of the United States, and occupied it until November 9, 1889. The spring in controversy was about one and a half miles from the land. The water from the spring came down a gulch across the land and discharged into the Roaring Fork river. It is alleged: That on April 20, 1885, Kelly located the water of the spring, and commenced the construction of a ditch to convey the water to his land. That Kelly prosecuted the work with diligence, and diverted and appropriated all the water. On the 11th of May, 1889, by a decree of the district court, Kelly's right to the water in controversy was established, and he decreed to be the sole owner of the water and the ditch. That he had the sole and exclusive use of the water until November 11, 1889, except as stated hereafter. That on November 3, 1889, Kelly sold and transferred his possessory right to the land, and also to the water right, to one M. H. Brennan, who never occupied, but appears to have bought for the benefit and use of his brother, Eugene Brennan. The rights of Kelly to the land were conveyed to M. H. Brennan by quitclaim deed. That a conveyance of the water right was not embraced in the deed, it having been deemed unnecessary. That, after such sale of his possessory right, Kelly delivered possession of land and water, and shortly after left the state, remaining away three years. Eugene Brennan occupied the property, and used the water, and on the 13th day of May, 1890, filed a pre-emption claim upon the land purchased of Kelly, and on the 5th of September following entered and acquired title. That during his entire occupancy he had the sole use and control of all the water, and that his right was undisputed, except by the grantor, Kelly, as stated hereafter. In the fall of 1889 M. W. Brennan died. On October 1, 1889, Eugene Brennan sold and conveyed the land to Newton Lantz, defendant in error, and also by deed conveyed to Lantz the Kelly ditch and his right to water from the spring. That Lantz had the sole, undisputed, and unquestioned use of all the water until the 16th of May, 1893. Lantz also claimed title to the water through deed from Joseph and John Smith, about the 10th day of May, 1893, who took title from one Vance, who claimed to have appropriated the water in 1884. Plaintiff, Nichols, erected a dam in the gulch to convey the water onto a tract of unoccupied government land, and diverted the water, afterwards occupied the land, and continued the diversion of water, and threatened to continue to divert and use the water. That on November 1, 1892, plaintiff, Nichols, purchased from Kelly the water right in question, Kelly claiming to be the owner and to have never parted with the title. This suit was brought by defendant in error to establish title to the water and restrain the diversion. Decree for defendant,

Lantz, and a writ of error to this court. Many other collateral facts might be stated in regard to the supposed rights of parties, etc., but in my view of the case are unimportant. I think the statement sufficient for a proper understanding of the case.

The spring was on unoccupied government land. The ditch dug by Kelly to convey water to his holding was over land of the same kind. Kelly was the occupant of the land, and had filed upon it some years before, but never acquired a title. He sold and by quitclaim deed conveyed to M. H. Brennan his possessory right and improvements, and relinquished all right to acquire a title. The water right was not embraced in the deed. The undisputed evidence establishes the fact that the purchase from Kelly embraced the water right and the ditch, and possession was given to Brennan by Kelly at the time possession of the land changed. The witness Dinkle, who drew the deed from Kelly to Brennan, testified to the sale and purchase of the water right, and that it was not embraced in the deed because he advised that it was unnecessary. I do not deem it necessary to decide whether or not a deed was necessary to pass the right to the water from Kelly to Brennan, or whether the entire right passed by change of possession. Nor do I deem it necessary to determine, the deed from Kelly having been made to M. W. Brennan, whether Eugene Brennan legally succeeded to the rights of M. W. Brennan. Eugene Brennan took the possession of both land and water, retained it, acquired the title to the land from the government, and sold and conveyed it and the ditch and water right to Lantz. If there was any question in regard to the rights of Eugene, as against his deceased brother, M. W. Brennan, they were rights which must have been asserted by the heirs of the latter, and in which plaintiff, Nichols, had no interest; and, no matter what the equities of the heirs were, he could not avail himself of them to establish a title. Kelly, for a cash consideration of \$500, on November 3, 1889, sold all his possessory rights to land and water, and delivered the possession. There was no reservation of the water right. He left the country for three years, leaving the Brennans in the actual possession and use of the water as owners. During that time he asserted no claim. Late in the year 1892 Kelly returned. Not having conveyed the water right to Brennan by deed, he was advised that he still had it, and he made a sale and conveyance for \$75. That the water right was embraced in the sale to the Brennans, and that they possessed, occupied, and used it until the sale to Lantz, and he afterwards, is placed beyond question by the evidence. That Kelly, after investing the Brennans with his possessory title and possession, abandoned the property, is clearly established. "Abandonment is a matter of intention, and operates instantaneously. Where a miner gives up his claim, and goes away without any intention of re-

possessing it, an abandonment takes place, and it is open to location by the first comer. No subsequent sale by the former locator after other rights have intervened will convey any right or title." *Derry v. Ross*, 5 Colo. 295; *Dorr v. Hammond*, 7 Colo. 79, 1 Pac. 693; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901; *Nichols v. McIntosh*, 19 Colo. 22, 34 Pac. 278. "Abandonment" is defined to be "the relinquishment or surrender of rights or property by one person to another." *Bouv. Law Dict.* "Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect." *Webst. Dict.* "To constitute an abandonment, there must be the concurrence of the intention to abandon, and the actual relinquishment of the property." *Judson v. Malloy*, 40 Cal. 299. "Abandonment of land is, necessarily, a question of intention; but that intention may be gathered from all the acts of the party alleged to have abandoned." *Davis v. Perley*, 30 Cal. 630. Tested by the definitions and legal decisions, the fact of the abandonment is clearly established by the evidence; the intention and actual abandonment following such intention. After his return in November, 1892, Kelly was estopped to assert title, and could convey no title, by deed or otherwise. He had nothing to convey, and plaintiff in error took nothing by the conveyance. Having purchased with full knowledge of all the facts, his claim does not appeal very strongly to a court of equity. The decree of the district court will be affirmed. Affirmed.

(8 Colo. App. 527)

#### MUELLER v. KELLY.

(Court of Appeals of Colorado. Nov. 9, 1896.)

APPEAL BOND—ACTION AGAINST SURETY—DEFENSES—INVALIDITY OF JUDGMENT AND ORDER OF APPEAL—LATENESS OF FILING—ESTOPPEL.

1. A surety on an appeal bond, in an action on the bond, after dismissal of the appeal for non-prosecution, cannot urge that the bond is void because the judgment and order granting the appeal were void for want of jurisdiction.

2. Where defendants procure a stipulation from plaintiff allowing them to file their appeal bond after the time fixed for filing it has expired, and, in pursuance thereof, file the appeal bond, and enjoy all the benefits thereby conferred, a surety on the bond is estopped from alleging in an action on the bond that it is void, because not filed within the time fixed by court.

Error to district court, Pueblo county.

Action by Heinrich Mueller against Thomas Kelly, as surety on an appeal bond. From a judgment for defendant, plaintiff brings error. Reversed.

A. W. Lennard, for plaintiff in error. Arrington & McAllney, for defendant in error.

THOMSON, J. The complaint sets forth that on the 23d day of June, 1892, the plaintiff, Heinrich Mueller, recovered judgment in the district court of Pueblo county against Carl Roth & Co. for \$823.71; that Roth & Co. prayed an appeal from the judgment to this

court, and, for the purpose of perfecting their appeal, executed and filed an appeal bond in the penal sum of \$1,648, with the defendant Thomas Kelly as surety, conditioned for the due prosecution of the appeal, and for the payment of the judgment, costs, interest, and damages rendered and to be rendered against them, in case the judgment should be affirmed in the appellate court, which bond was duly approved by the clerk of the district court; that the appeal was afterwards dismissed by this court, for failure in its prosecution on the part of Roth & Co.; and that execution was duly issued on the judgment against Roth & Co., and returned nulla bona. The complaint concludes with a prayer for judgment for the amount of the original judgment, interest, and costs. The defendant Kelly answered, alleging that the suit of Mueller against Roth & Co. was brought and tried in the district court of Pueblo county, and that upon the trial the jury returned a verdict in favor of Mueller, and against Roth & Co., for \$823.71; that Roth & Co. thereupon filed in the cause a motion for a new trial; that afterwards the parties to the suit, by their attorneys, appeared at Colorado Springs, before John E. Campbell, the judge of another district, and after stipulating that the motion should be heard before that judge at that place, and that any judgment rendered upon the motion might be communicated to the clerk of the Pueblo district court, and by him entered at Pueblo, as the judgment of that court, and that all irregularities occurring in the matter of the motion and its hearing should be waived, submitted the motion to Judge Campbell for judgment; that Judge Campbell, having heard the arguments of counsel, and taken the questions submitted under advisement, denied the motion; that, upon motion of the plaintiff, the court ordered that judgment be entered in accordance with the verdict, which was done accordingly; that Roth & Co. duly excepted to the judgment, and prayed an appeal to this court, which was granted, upon condition that they execute an appeal bond within 30 days, to be approved by the clerk of the proper court; that the order granting the appeal was made on the 22d day of June, 1892; that the appeal bond was not filed within 30 days, and that the time for filing it was not extended by any order of the court or judge; that afterwards, on the 10th day of August, 1892, the parties to the cause, by their respective attorneys, agreed and stipulated, in writing, that Roth & Co. should have until and including the 15th day of August, 1892, in which to file the bond; and that the stipulation was nugatory, and the bond filed in pursuance of it void. The replication states, among other things, that the duly qualified and acting judge of the Pueblo district court was J. E. Elwell, and that, at his request, Judge Campbell held court for him, and presided at the trial of the case between Mueller and Roth & Co. Upon the filing of the replication, the defendant

moved the court for judgment on the pleadings. The motion was sustained, and final judgment given against the plaintiff, who brings the case here by writ of error.

The argument in behalf of the defendant is—First, that the judgment, having been rendered out of the district in which the cause was pending, was void, as was also, for the same reason, the order granting the appeal, and that, therefore, all subsequent proceedings in the cause, including the appeal bond sued on, were likewise void; and, second, that, as the appeal bond was not filed within the time fixed by the court, the appellate court acquired no jurisdiction of the appeal, notwithstanding the stipulation; that there was, therefore, no appeal, and the bond was a nullity.

1. It is not necessary for us to pass upon the question of the validity of the judgment appealed from. Appeals are allowed in all cases where the judgment is final, and amounts to the sum of \$100 exclusive of costs, or relates to a franchise or freehold. Civ. Code, § 388. While it is true that a judgment which is absolutely void is open to collateral attack, and its character may be shown in any proceeding in which it is offered in evidence, yet it is also true that a party against whom a judgment is rendered which he regards as void may, if he so desires, seek to relieve himself from it by appeal, and its validity may be tested in the appellate court. To effect the appeal, he must give an appeal bond; and, to protect his sureties from liability upon the bond, he must prosecute his appeal with effect, or pay the judgment appealed from. The validity of the bond does not depend upon the validity of the judgment.

2. The appeal bond was not filed within the time limited by the court, and we can readily agree with counsel in their observations upon the statutory character of appeals, and the steps necessary to give the appellate court jurisdiction, without accepting the conclusions which they reach upon the particular facts of this case. The effect of an appeal bond is to stay proceedings upon the judgment until the appeal is disposed of. At the solicitation of Roth & Co., a stipulation was procured from the adverse party, permitting them to file their appeal bond after the time allowed had expired. In pursuance of the stipulation, the bond was filed and approved. It must have been filed for the purpose of staying proceedings upon the judgment. It could have been filed for no other purpose. And the defendant, when he signed the bond as surety, is presumed to have known the object it was intended to accomplish. It seems to have efficiently served the purpose for which it was designed; and after the full benefit of the stipulation, and of the bond executed in pursuance of it, has been taken and appropriated, it is too late to question the validity of the bond. *Abbott v. Williams*, 15 Colo. 512, 25 Pac. 450.

No objection, either to the judgment or the

bond, was taken during the pendency of the appeal. The appeal was dismissed solely because of the failure in its prosecution, and the dismissal was made without prejudice to another appeal or writ of error; but no appeal or supersedeas was taken or allowed within 30 days after the dismissal. The dismissal was therefore equivalent to an affirmation of the judgment. Civ. Code, § 397; *McMichael v. Groves*, 14 Colo. 540, 23 Pac. 1006; *Shannon v. Dodge*, 18 Colo. 164, 32 Pac. 61; *Wilson v. Welch* (Colo. App.) 46 Pac. 106. The judgment against Roth & Co., having been thus affirmed on appeal, must be held to be a valid judgment; and, the judgment having been brought into this court by means of the bond, for that reason, also, the validity of the bond cannot now be inquired into. Let the judgment be reversed. Reversed.

ROCK SPRINGS NAT. BANK v. LUMAN.  
(Supreme Court of Wyoming. April 27, 1896.)

COSTS ON APPEAL—RECORD—BILL OF EXCEPTIONS.

1. Where a judgment is affirmed as to two-thirds of the amount recovered, on condition that appellee file a remittitur for the other one-third, the costs on appeal will be apportioned between the parties,—two-thirds against appellant, and one-third against appellee.

2. The amount paid for a transcript of the testimony, incorporated in the record filed in the supreme court, is a part of the costs to be taxed on appeal, but not the expense of preparing a bill of exceptions.

Action by Abner Luman against the Rock Springs National Bank. From a judgment for plaintiff, defendant brought error, and the judgment was affirmed on condition that defendant in error file a remittitur for a part of the amount recovered. Plaintiff in error moves for taxation of costs.

For prior reports, see 38 Pac. 678, and 42 Pac. 874.

On Motion for Taxation of Costs.

POTTER, J. Counsel for plaintiff in error files a motion asking that the clerk be instructed to tax as costs against the defendant in error the amount paid to the clerk of this court as docket fee, \$19.50 paid by plaintiff in error to the official stenographer of the Third judicial district for one copy of the transcript of the testimony in the case incorporated in the record, and the further sum of \$13 paid to the said stenographer for one copy of the transcript of testimony incorporated in the bill of exceptions, which bill is on file in the office of the clerk of the district court. In this case the judgment of the district court was found to be excessive, and was ordered to be reversed, and a new trial granted, unless the defendant in error should file a remittitur for about one-third of the amount of the judgment; and, in case such remittitur should be filed, the judgment was then ordered to be affirmed for the remainder. The statute provides that, when

a judgment is reversed in part and affirmed in part, the appellate court may apportion the costs in such manner as it shall deem equitable. Rev. St. § 3145. The expense of preparing the record for this court is clearly a part of the costs to be taxed in this court. The expense of preparing the bill of exceptions constitutes no part of the costs in the case in this court. It appears, from the motion, that \$19.50 was paid for the transcript of the testimony which was incorporated into and became a part of the record filed in this court. It would have been more regular for the clerk of court, who certifies to the record, to have also certified the expense thereof, which could then have been regularly taxed as costs; but counsel showing, by affidavit, that this amount was expended in and about the preparation of the record, we are not inclined to be technical in this respect. The amount of the fees accruing in the clerk's office is, of course, part of the costs of the case in this court. The clerk will be ordered to tax as costs the amount accruing to his office, as shown by the appearance docket, and the additional sum of \$19.50 as costs of the record, and to apportion said costs, two-thirds against the plaintiff in error, and one-third thereof against the defendant in error. If defendant in error fails to file a remittitur in the court below, and a new trial of the case is for that reason required, in pursuance of the judgment of this court, leave will be granted to the plaintiff in error to file a motion for retaxation.

GROESBECK, C. J., and CONAWAY, J., concur.

(14 Utah, 215)

JONES v. NEW YORK LIFE INS. CO.

(Supreme Court of Utah. Dec. 11, 1896.)

ORDER—WHEN FINAL AND APPEALABLE—TIME OF TAKING APPEAL—VACATING JUDGMENT.

1. An insurance company, sued upon a policy which it had given, admitted liability, but alleged that two persons made conflicting claims to the amount due, and the court, upon a hearing, required them to interplead, and upon a deposit of the amount with the clerk made an order discharging the company from further liability. *Held*, that the order was final as to the company, and therefore appealable.

2. An appeal from an order made upon a hearing discharging the defendant, not having been taken within 60 days after notice of it, authorizes the presumption that such facts were proven, as without which the decision could not have been made, as the evidence in the bill of exceptions cannot be considered.

3. A motion to vacate a final judgment comes too late after the term has expired, and after the time within which a motion for a new trial can be made, and it should be denied.

(Syllabus by the Court.)

Appeal from district court, First district; W. H. Hart, Judge.

Action by Ricy H. Jones against the New York Life Insurance Company. From various orders entered, and from the judgment, plaintiff appeals. Affirmed.

R. H. Jones, for appellant. Frank Pierce, for respondent.

ZANE, C. J. The plaintiff brought this action upon an insurance policy executed by the defendant on the life of the late Lewis H. Jones, to recover \$1,500 and interest, and he alleged that the policy had been assigned to him by the insured shortly before his death. The defendant filed a pleading designated an answer and interpleader duly verified. The answer admitted the material allegations of the complaint, except that it denied the assignment, and defendant's liability for interest and costs. It alleged by way of interpleader that one B. H. Jones claimed to be the administrator of the estate of Lewis H. Jones, and that he claimed as such administrator the money due on the policy; that plaintiff also claimed the money; and that defendant was ignorant of the rights of the respective claimants, and denied collusion with either of them, and offered to bring the money into court, and deliver it to such person as the court might designate; and upon such delivery the defendant asked the court to discharge it from liability. The plaintiff moved the court to strike out the answer on the ground that it was sham and irrelevant, and for judgment for plaintiff, and for such other order as might be just, and for costs, and cited the defendant into court. The court fixed the 4th day of March, 1895, for the hearing. On that day the parties appeared, and the court, after reciting that the cause came on regularly for hearing upon the motion of the plaintiff to strike out the answer from the files, and for judgment on the pleadings; that defendant's answer was duly verified, and was sufficient in law; ordered the same treated as an affidavit; and found, further, that B. H. Jones, as administrator of the estate of Lewis H. Jones, claimed the money sued for; and that the plaintiff, as administrator of the estate of the deceased, also claimed it; and that such claims were without collusion; and that defendant asked that such claimants be substituted, and that the case was a proper one for substitution. The court denied the motion for judgment on the pleadings, and ordered further that B. H. Jones, as administrator of the estate of L. H. Jones, and Ricy H. Jones, as administrator of the same estate, be substituted as parties defendants, and that defendant, the insurance company, on depositing with the clerk of the court \$1,555 principal, and the interest thereon and costs to date, within 10 days, should be dismissed from the case, and discharged from further liability. The denial in the answer of liability for interest and costs was waived by defendant. This entire order was excepted to and assigned as error. An appeal from this same order was before the supreme court of the late territory, and that court, after considering it, held that the appeal was not from that part of the order dis-

charging the defendant, the insurance company, and that the part of the order allowing the parties to interplead, and overruling the motion to strike the answer from the files, was not appealable, and dismissed the appeal.

Whatever may be said as to whether the other parts of the order were final or not appealable, that part dismissing the defendant from the action, and discharging it from further liability, was final as to the defendant, and the rights of the plaintiff against it, and therefore appealable. But this appeal was taken more than 11 months after that judgment was rendered and notice to plaintiff. That being so, we cannot examine the bill of exceptions, and determine therefrom the facts mentioned in the order or essential to it. Subdivision 1, § 3635, Comp. Laws Utah 1888, giving the right of appeal from final judgments or district courts in actions or special proceedings, declares that "an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment." The judgment having been rendered by a court of record and of general jurisdiction, it will be presumed that those facts, without proof of which the judgment could not have been rendered, were proven.

The plaintiff also appealed from the order of the court overruling his motion to vacate the judgment dismissing the defendant from the action, and discharging him from further liability to either party. It also appears that this motion to vacate was made after the term at which judgment was rendered, and after two other terms had intervened. The motion could not be regarded as an application for a new trial, because it came too late. The order sought to be vacated was not void, and it was rendered upon a hearing. It was not a judgment upon default. It was a judgment the court intended to enter after a hearing, and the court had jurisdiction of the subject-matter and of the parties.

On the hearing the court received the answer and interpleader as an affidavit, as appears from the order. This was not error, as the answer and interpleader were duly verified, and they contained the facts required to be stated in the affidavit required by section 3188, Id. The answer that accompanied the interpleader admitted the liability of the defendant, but denied the assignment to plaintiff; and the interpleader stated that plaintiff and B. H. Jones, as administrators of the estate of L. H. Jones, respectively claimed the money sued for. There being no denial of defendant's liability, we are disposed to hold that it was not error to file it with the affidavit, or as a part of it.

Other exceptions were taken, and appear in the record, and are assigned as error; but

upon consideration of them we are of opinion that they should not be sustained. We find no reversible error in the record. Orders appealed from are affirmed.

BARTCH and MINER, JJ., concur.

(14 Utah, 242)

EVERETT et al. v. BRIGHAM et al.

(Supreme Court of Utah. Dec. 11, 1896.)

SALE—DELIVERY—CONTINUOUS POSSESSION.

1. A vendor delivered to plaintiffs enough wool at 9 cents per pound to pay a debt of \$505, which he owed them, and they moved it a considerable distance, to the opposite end of the shed, and stored it; and afterwards the vendor, upon an agreement with the plaintiffs, employed a man who owed him to haul the wool to the station, to be shipped in plaintiffs' names. *Held*, that this was prima facie evidence of sale, delivery, and continuous possession, and that the court erred in instructing the jury to find for defendants on the ground that there was no evidence of actual delivery and continuous possession.

2. Under section 2837, Comp. Laws 1888, a sale of goods must be accompanied with delivery within a reasonable time, and followed by an actual and continuous change of possession. The change of possession must be actual, not constructive, or merely colorable; and it must be continuous, not merely a delivery and surrender back.

3. After a sale and delivery of the goods, the vendee may appoint the vendor his trustee to hold them, or his agent or employé to hold or dispose of them.

(Syllabus by the Court.)

Appeal from district court, First district; H. W. Smith, Judge.

Action by George A. Everett and others against Nat M. Brigham and others. Judgment for defendants, and plaintiffs appeal. Reversed.

This action was brought by the plaintiffs against the defendants to recover damages in consequence of the alleged wrongful taking and conversion of 7,000 pounds of wool of the value of \$700. Defendants filed an answer, in which they alleged the wool belonged to one J. T. Stewart, and that it was seized and converted under an execution against him upon a judgment for \$642.85 in favor of defendant J. C. Taylor, and that the other defendants were officers who executed the writ. It appears from the evidence upon the trial of the case before the court and jury that the plaintiffs had performed labor for Stewart in herding a large flock of sheep under an agreement that they were to be paid in wool, and that he owed them \$505; that the wool was sacked, and enough of it at the market price (9 cents per pound) turned over to them by Stewart to amount to that sum; that they moved the sacks about 100 feet, to the other end of the shed, and piled them up by themselves; that Stewart went home to Kanab, and the plaintiff Wallace, acting for the other plaintiffs, remained at the sheds a day, and then went back to the flock. It appears further that Stewart agreed with plaintiffs that Mr. Jolly, who was indebted to him, should

haul the wool to Salina,—the railroad station,—and that it should be shipped from there in Wallace's name, for the plaintiffs, to the Eastern market. While the wool was in Jolly's wagon on the way to Salina, it was seized at the request of Taylor by the officers on the execution in his favor. Upon the foregoing facts, on motion of the defendants the court instructed the jury to return a verdict for the defendants on the ground that there was not sufficient proof of delivery, to which instruction the plaintiffs at the time excepted. The jury having returned a verdict for defendants, the court entered a judgment thereon against the plaintiffs, from which judgment the plaintiffs have taken this appeal, and they assign the instruction of the court and the judgment thereon as error.

Samuel A. King, for appellant. Thurman & Wedgwood, for respondents.

ZANE, C. J., after making the foregoing statement of the case, delivered the opinion of the court.

The fact that the vendor, Stewart, sacked the wool, and separated it from the rest, and actually gave the plaintiffs possession of it at its market price, and that they moved it a hundred feet, and piled it up by itself, certainly was evidence of actual delivery. Their possession appears to have been continuous afterwards. There was no evidence that these acts were not in good faith,—that they were merely colorable. It certainly was for the jury to determine whether the possession was actual or colorable merely, and whether it was continuous. Section 2837, Comp. Laws Utah 1888, relating to such sales, is as follows: "Every sale made by a vendor of goods or chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by a delivery within a reasonable time, and be followed by an actual and continued change of the possession of the thing sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or assignor, or subsequent purchasers in good faith." This section requires the sale to be accompanied with delivery within a reasonable time, and followed by an actual and continued change of possession, or with an understanding to that effect. The change of possession must be actual, not merely constructive or colorable. And the possession must be continuous in the purchaser, not merely a delivery and surrender back. The possession may be delivered by an agent or employé of the vendor and received by such employé or agent, and such agent or employé may continue to hold the property for his principal. After such possession, the vendee may appoint the vendor to hold the property for him as his trustee or agent, or he may make him his employé. Such appointment or employment must be in good faith. Such appointment or employment may be regarded as a suspicious circumstance, and may be consid-

ered by the jury, with all the other evidence, in determining whether the possession was taken and held in good faith. While the arrangement between Stewart and the plaintiffs for the transportation of the wool by Jolly may be a suspicious circumstance, it should not have been regarded as conclusive evidence of fraud. The jury should have been permitted to consider it with all the other competent, relevant, and material evidence. *Godchaux v. Mulford*, 26 Cal. 316; *Wilson v. Hooper*, 38 Am. Dec. 366; *Stevens v. Irwin*, 15 Cal. 503; *Farr v. Swigart* (Utah) 44 Pac. 711. We are of the opinion that the court erred in charging the jury to find the issues for the defendants. Judgment reversed, and cause remanded.

BARTCH and MINER, JJ., concur.

(14 Utah, 255)

STEVENS v. STEPHENS et al.

(Supreme Court of Utah. Oct. 15, 1896.)

BURDEN OF PROOF—INSTRUCTION TO JURY.

Where, in an action upon an account, the defendant, in his answer, sets up affirmative matter upon which he relies to release himself from the plaintiff's claim, the burden is upon him to establish his defense; and in such case it is error for the court to charge the jury that the burden of proof is upon the plaintiff, without stating to them the position which the defendant occupies respecting the proof.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by Sidney Stevens against W. J. Stephens and S. C. Stephens, doing business under the firm name of Stephens Bros. Verdict for defendants, and plaintiff appeals. Reversed.

L. R. Rhodes, for appellant. E. M. Allison, Jr., for respondents.

BARTCH, J. This is an action upon an account for goods sold and delivered. At the trial the jury returned a verdict of "No cause of action," and this appeal is from an order denying a motion for a new trial. It is alleged in the complaint, substantially, that the defendants are co-partners doing business under the firm name of Stephens Bros., and are indebted to the plaintiff in the sum of \$2,277.65, balance due upon an account for goods, wares, and merchandise sold to them at their special instance and request, at Ogden City, between May 1 and September 5, 1892, and that the same became due and payable on the last named day. The answer denies specifically all the allegations of the complaint, and then, in substance, alleges affirmatively that, when goods in question were bought, the plaintiff and the defendants were directors in four corporations, the plaintiff having also been president of three of them, and that the defendants were the active business managers of said corporations; that as such managing agents they ordered the goods in question for said corporations; that at the time the plaintiff furnished said goods he knew they were being furnished for the corporations, and furnished them with



the intent to aid them; and that no part of them was received by the defendants or ordered by them, except as such agents and managers. At the trial, counsel for the plaintiff requested the court to rule that under the pleadings the burden of proof was on the defendants, but the court held that the burden of proof was on the plaintiff, and so instructed the jury. This action on the part of the court is set out as one of the causes of complaint. It is quite clear that both counsel and court were in error. As an abstract proposition of law, the statement of the court to the jury that "the burden of proof is upon the plaintiff, and he must establish, by a preponderance of the evidence, the material allegations of his complaint," is doubtless correct; but we are apprehensive that, under the pleadings, its application in this case, without stating the position which the defendants occupied respecting the onus probandi, was not only erroneous, but misleading to the jury as to the proper mode of determining the question at issue. The plaintiff was bound to make out a prima facie case, but he was not bound to prove, in the first instance, that the defendants were not acting as agents when they ordered the goods. The mere fact that agency was set up in the answer raised no presumption that such a relation actually existed. Agency was made the basis to defeat the plaintiff's claim, and therefore it was incumbent upon the defendants to establish it by affirmative proof. If, in a court of justice, one undertakes to make out a case against another, or, by affirmative defense, to release himself from the claim of another, the burden is on him to furnish the proof to make good his contention. Whart. Ev. §§ 356, 357. In the case at bar the onus was on the plaintiff to prove his case substantially as alleged. Then, when this was done, it was incumbent upon the defendants, in order to release themselves from the plaintiff's claim to show that the goods were ordered by them as managing agents for the corporations, and sold by the plaintiff with the understanding that they were being purchased by the corporations, as alleged in the answer. The court having failed to instruct the jury properly on the question of the burden of proof, the cause must be reversed, and, this being so, we do not deem it necessary to discuss the questions upon the evidence raised in the course of the trial. The cause is reversed and remanded, with directions to the court below to set aside the order appealed from, and grant a new trial.

ZANE, C. J., and MINER, J., concur.

(14 Utah, 282)

BUTTE v. PLEASANT VALLEY COAL CO.

(Supreme Court of Utah. Dec. 10, 1896.)

**INJURY TO MINER — CONTRIBUTORY NEGLIGENCE.**

1. A miner cannot recover damages from his employer for an injury in consequence of a defective car track, which it was his duty to repair, in a room in which he was working.

2. Nor can he recover damages for an injury in consequence of a defect in a track in his room, which it was his duty to report to the manager of the mine, or other person over him, when he did not report.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Merritt, Judge.

Action by John Butte against the Pleasant Valley Coal Company. From an order directing a nonsuit, plaintiff appeals. Affirmed.

Powers, Straup & Lippman, for appellant. Bennett, Harkness, Howat & Bradley, for respondent.

ZANE, C. J. This action was instituted by the plaintiff to recover compensation for an injury caused, as alleged, by the negligence of the defendant in constructing and maintaining a defective and dangerous track, to be used in the prosecuting of his work while in the employ of the defendant as a miner. It is alleged that the rails rested on defective ties, and that they were not fastened with a sufficient number of spikes, because of which a car operated by plaintiff fell from the rails and struck the plaintiff's back, causing the injury complained of. On the trial of the cause the plaintiff testified that, in the prosecution of his work, he would move the car up near the face of the room, and, when loaded, the driver, by means of a mule, would move the cars upon a track out of the mine; that, on the occasion of the injury, he loaded his car, standing near a post, which he wished to make more secure, and with the assistance of a miner from another room he attempted to push it about two feet out of his way, when a wheel dropped between the rails; that he did not look at the time to ascertain the cause, nor did he examine the track before the injury; that they were at the end of the car, lifting, when his assistant turned around to see if the wheel was on the rail, and the car turned over, and struck him on the back. The plaintiff testified, further, that it was the duty of the miners to lay the track in the room, and keep it in repair, when the company furnished material to repair it with; that plaintiff had been mining in the room two days and a half; that the track had been laid by another miner, who had been at work in the room before plaintiff commenced. In that case he stated it was his duty to report defects to the foreman, but he made no such report. There was other testimony to the effect that there were no spikes to repair with at the time, except as they were taken from ties not in use. Such is the evidence given by the plaintiff, and it stands in the record uncontradicted. Undoubtedly, the track was insecure at the place of the injury; but it was plaintiff's duty to repair it, or, as he says, to give notice to the foreman or manager of the want of repair. As to the existence of these facts, there is no room for doubt. When the plaintiff rested, defendant's counsel moved for a nonsuit, which the court granted after argument by counsel of the respective parties. To this judgment plain-

tiff excepted, and prosecuted this appeal, and assigns the judgment as error.

While the defendant may have been guilty of negligence that contributed to the injury complained of, it is clear that the plaintiff's negligence also contributed to the same injury. As to plaintiff's want of reasonable care, the evidence leaves no room for doubt or a difference among fair-minded men. The jury should be permitted to find as to the existence of any essential fact as to which there may be a substantial conflict in the evidence; but when there is no evidence of the existence of a fact essential to a recovery, or when the evidence establishes a fact fatal to a recovery, with such certainty as to leave no reasonable doubt in the minds of fair men, the court should grant a motion for a nonsuit, or, if the case is submitted to the jury, instruct a verdict for the defendant. *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125. We find no error in this record. The judgment is affirmed.

BARTCH and MINER, JJ., concur.

(14 Utah, 293)

#### STATE v. BATES.

(Supreme Court of Utah. Dec. 10, 1896.)

CONSTITUTIONAL LAW—MURDER—TRIAL BY EIGHT JURORS—PRIVILEGES AND IMMUNITIES—EX POST FACTO LAWS.

1. The description of the offense in the indictment included murder in the first degree, as well as in the second; but the crime was characterized as murder in the second degree, and the record showed that the defendant was actually tried for and convicted of that offense. *Held*, a trial by eight jurors did not violate section 10 of article 1 of the state constitution, nor did such trial by eight jurors violate section 7 of the same article, which declares that "no person shall be deprived of life, liberty, or property without due process of law."

2. Section 10 of article 1 of the constitution of Utah, which declares that "in courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors," is not in conflict with article 6 of the amended constitution of the United States, wherein it says that "in all criminal prosecutions the accused shall enjoy the right to \* \* \* a trial by an impartial jury of the state and district wherein the crime shall have been committed." The last article does not apply to trials under state laws.

3. Nor is section 10 of the state constitution repugnant to the first section of the fourteenth amendment of the federal constitution. The first clause of that section makes all persons born or naturalized in the United States, and subject to its jurisdiction, citizens of the United States, and of the state wherein they reside; and the second clause, which declares that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, has no application to jury trials under state laws in state courts. It does not refer to the privileges or immunities of the individual as a citizen of the state; it refers to the privileges and immunities of the individual as a citizen of the United States.

4. Nor does section 10 of the state constitution conflict with the third provision of section 1 of article 14 of the federal constitution, which declares that no state shall "deprive any person of

life, liberty, or property without due process of law." That provision left the power with the people of the state, by a constitutional provision, to reduce the number of jurors for the trial of a cause in the state courts from 12 to 8.

5. The defendant was tried by 8 jurors on April 7, 1896, upon an indictment charging him with murder in the second degree, and convicted. The offense was committed on the 22d day of September, 1895, and the provision of the state constitution reducing the number of jurors from 12 to 8 took effect on January 4, 1896. *Held*, that the change did not deprive the defendant of a substantial right, and that the constitutional provision making the change was not *ex post facto* and void.

(Syllabus by the Court.)

Appeal from district court, Third district; John A. Street, Judge.

George Bates was convicted of murder, and appeals. Affirmed.

Powers, Straup & Lipman, for appellant. A. C. Bishop, Atty. Gen., and Benner X. Smith, for the State.

ZANE, C. J. The defendant was tried upon an indictment charging him with the murder of the late John Nordquist, by feloniously, and with malice aforethought, striking him upon the head with a wooden pole. In the indictment the grand jury expressly characterized the crime as murder in the second degree. Upon the trial, the petit jury found the defendant guilty of murder in the second degree. The court overruled a motion for a new trial, and sentenced him to confinement in the state prison for the term of 10 years. From the order overruling the motion for a new trial, and from the sentence, the case is before this court on appeal.

The trial was by a jury of 8 men, to which the defendant objected at the time, and demanded 12, and excepted to the denial of his objection and demand, and now assigns it as error. Section 10 of article 1 of the constitution of the state of Utah declares that "in capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded." The punishment of murder in the second degree is imprisonment at hard labor in the penitentiary, "for not less than ten years, and which imprisonment may be extended to life." Laws 1890, p. 94. While the description of the offense included murder in the first degree, as well as murder in the second degree, the grand jury characterized the crime as murder in the second degree, and thereby expressed an intent to accuse the defendant of that offense, and not with a capital crime. The defendant was tried for murder in the second degree, as the rulings of the court and its charge to the jury show, and he was convicted of and sentenced for that crime. Therefore the

crime was within the second clause of the above section.

But the defendant insists that section 7 of the same article, which says that "no person shall be deprived of life, liberty or property, without due process of law," secured him the right to be tried by 12 persons. To hold that the authors of the state constitution intended by the use of the phrase "due process of law" to require a jury of 12 jurors in all cases would be to say, in effect, that they intended to create a repugnancy in that instrument. The rules of construction of constitutional law, as well as statute law, require that both sections shall be allowed to stand, and effect be given to each. We are of the opinion that they can stand together, and that no conflict was intended.

The defendant also claims that section 10, *supra*, conflicts with the constitution of the United States, and that it is void for that reason. Article 6 of the amendment to that instrument declares that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. \* \* \* This amendment applies to the United States government, not to the states. Limitations imposed on the powers of government by the constitution of the United States are upon that government alone, unless the states are mentioned. "The states may, if they choose, provide for the trial of all offenses against the states, as well as for the trial of civil cases in the state courts, without the intervention of a jury, or by some different jury from that known to the common law." *Cooley, Const. Lim. (8th Ed.) pp. 29, 30; Twitchell v. Com., 7 Wall. 321; Edwards v. Elliott, 21 Wall. 532.*

Defendant's counsel also insists that section 10, *supra*, conflicts with section 1 of the fourteenth amendment to the constitution of the United States, as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The first clause of the section makes all persons born or naturalized in the United States, and subject to the jurisdiction thereof, citizens of the United States, and of the state wherein they reside. Citizenship of the United States is distinguished from citizenship of the state. All persons of the description mentioned are clothed with two distinct citizenships,—they are citizens of the United States, and of the state wherein they reside. As to the second clause of the section, it may be said that the privileges and immunities of an individual as a citizen of the United States go with him

and protect him in any state, and, under treaties and the law of nations, into foreign lands and distant climes. But his privileges and immunities as a citizen of the state abroad depend upon courtesy and comity. The provision did not define or create those rights termed the "privileges" and "immunities" of citizens of the state. The power to do so is among those reserved to the people, to be exercised by the states, according to the will of its people, expressed in constitutions and laws. This provision does not limit the power of the state as to the establishment of courts or other tribunals, or as to the modes of procedure in them. It has no application to jury trials in state courts. *Slaughter-House Cases, 16 Wall. 36.*

It is further insisted that section 10 of the state constitution is within the limitation imposed by the third clause of section 1, above quoted, which declares that no state shall "deprive any person of life, liberty, or property without due process of law"; that this language entitled a person on trial charged with a crime against a state law to a common-law jury,—12 jurors. We have seen that article 6 of the amendments mentioned, guarantying a jury trial in criminal cases, does not mention the number of jurors necessary to constitute a jury; nor does it apply to trials in state courts. "Due process of law" is a general expression, and is equivalent to "law of the land." It permits the deprivation of life, liberty, or property according to law, not otherwise. It shields such rights from arbitrary power. Due process of law in a case like this requires a law describing the offense. The offense must be described in an accusation. The accused must be given his day in court. His trial must proceed according to established procedure, consisting of rules of pleading and practice. The admission of evidence for and against him must be according to established rules, and he must be convicted by the judgment of a competent court, and the punishment authorized by law. The definition of the offense, and the authority for every step in the trial, must be found in the law of the land. Nothing essential can emanate from arbitrary power. The rights of the defendant and the duty of the court are equally under the finger of the law. But the law defining crime, the rules of evidence, or the procedure, may be changed by competent authority, constitutional authority, or common law. It will not be denied that the common law requiring 12 jurors can be changed by the people of the United States by amending their constitution. And the question is: Have they, by the constitutional provision under consideration, prohibited the people of the state from reducing the number of jurors from 12 to 8? Have they, in using the phrase "due process of law," deprived the people of the state of Utah of the power to reduce the number of jurors in the trial of a felony to 8? They have assumed to do so, and we

must presume that they believed the jury they provided most suitable, and best calculated, under existing and probable conditions, to discharge the duties of a jury. The purpose of the provision relied upon was to secure the rights to life, liberty, and property, and the benefits of just laws. If a jury of 8 men is as likely to ascertain the truth as 12, that number secures the end. There can be no magic in the number 12, though hallowed by time. Intelligence, impartiality, and integrity are the qualities that will enable and influence jurors to ascertain and declare the truth. Such a result does not depend upon any particular number. Legal process must submit to reform, in the light of experience and advancing intelligence. True principles must endure, but the methods, modes, and means of securing their application to human conduct, human rights and duties,—the social system,—will change with development and progress and more complicated conditions. We are of the opinion that the people of the state had the power, in the constitution, to abolish the common-law jury, or to change it as they have done in the section of their constitution above quoted.

In *Walker v. Sauvinet*, 92 U. S. 90, the court said: "A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden by the fourteenth amendment to abridge. A state cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee v. Improvement Co.*, 18 How. 280. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land,—that is to say, with the constitution and laws of the United States made in pursuance thereof,—or with any treaty made under the authority of the United States." *Ordronaux*, Const. Llm. p. 261; *Hurtado v. California*, 110 U. S. 517, 4 Sup. Ct. 292.

The defendant was convicted of an offense committed on the 22d day of September, 1895, and section 10 of article 1 of the constitution of Utah went into effect on the 4th day of January, 1896; and it is also urged that it is an *ex post facto* law, and of no effect as to that offense. The defendant was tried on April 7, 1896; and the question is: Did the reduction of the number of jurors from 12 to 8, on the 4th of January, after the offense was committed, deprive the defendant of a substantial right? The law defining the offense, imposing the punishment, or the rules of evidence, was not changed. The tribunal for the trial was altered. Whether the al-

teration was prejudicial to the defendant cannot be known. We cannot infer that the jury who tried the case did not understand the evidence and the charge of the court, and impartially decide; that they did not reach as correct a verdict as 12 jurors would have reached. The law in force at the time of the trial threw around the defendant all the substantial protection that the law at the time of the commission of the offense did. The change complained of related to an instrumentality employed in the pursuit of the remedy. To investigate the evidence, the law employed a jury. We are of the opinion that the provision of the state constitution complained of was not *ex post facto*, and inapplicable to the offense charged against the defendant.

Judge Cooley, in his work on *Constitutional Limitations* (8th Ed. pp. 326, 327), lays down the law in these words: "But, so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when the facts arose. The legislature may abolish courts, and create new ones, and it may prescribe altogether different modes of procedure, in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as, doubtless, would be any similar statute, calculated merely to improve the remedy, and, in its operation, working no injustice to the defendant, and depriving him of no substantial right." In his work on *Statutory Construction* (section 469), Judge Sutherland says: "Acts for transferring criminal cases to another court, or providing a new tribunal, or giving a new jurisdiction, to try offenses already committed, do not abridge any right, and are not *ex post facto*. When the offense was committed, the jury was, by statute, judge of the law. This act was repealed before the trial. Such change, as applied to that case, was held not *ex post facto*. Nor are treaties which provide for surrender of persons charged with previous offenses; nor statutes giving additional challenges to the government; statutes reducing the defendant's peremptory challenges, or modifying the grounds of challenge for cause; statutes authorizing amendments to indictments; statutes regulating the framing of indictments, with a view to exclude redun-

dancies, and reduce them to essential allegations; statutes to generally facilitate the routine of procedure, and preclude defendants from taking advantage of mere technicalities, which do not prejudice them. Where there has been a legal conviction, but an erroneous judgment thereon, which resulted, according to the law, in a discharge of the convict on reversal of the judgment, a law enacted subsequent to the commission of the crime, that, on such a reversal, the court in which the conviction was had should, on return of the record, pass such sentence thereon as the appellate court should direct, was not an *ex post facto* law." *Marion v. State*, 20 Neb. 233. 29 N. W. 911; *Gut v. State*, 9 Wall. 35; *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570; *Calder v. Bull*, 3 Dall. 386.

Upon examination of the record, we find no error in the ruling of the court admitting evidence objected to by the defendant, or in the portions of the charge excepted to. We do not deem it necessary to particularly examine in this opinion such alleged errors. We find no errors against the defendant in this record. Therefore the judgment of the court below is affirmed.

BARTCH and MINER, JJ., concur.

(14 Utah, 232)

STEVENS et al. v. SOUTH OGDEN LAND, BUILDING & IMPROVEMENT CO. et al.

(Supreme Court of Utah, Dec. 9, 1896.)

CORPORATIONS—OFFICERS—ACTION FOR FRAUD—PARTIES—RECEIVERS.

1. When the same persons, officers of several corporations, form a fraudulent design to use the property and credit of such corporations for their own advantage, to the injury of the other stockholders, and do fraudulent acts in carrying out such design, all the parties affected by such acts are proper parties to a complaint based upon such fraudulent design. The persons perpetrating the fraud, and all others whose gains or losses are traceable thereto, are proper parties to an action based upon fraud.

2. When a fraudulent conspiracy is the common point of litigation, the conspirators and all persons affected by the fraud are proper parties to a suit based upon it.

3. When the business of corporations is mismanaged, and their property is misappropriated by their officers, and such mismanagement and misappropriation is likely to continue, courts of equity will appoint receivers for them.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by Sidney Stevens and others against the South Ogden Land, Building & Improvement Company and others, to set aside conveyances and for the appointment of a receiver. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

L. R. Rhodes, for appellants. Evans & Rogers and A. G. Horn, for respondents.

ZANE, C. J. The court below having sustained a demurrer to the complaint, and plain-

tiffs having failed to amend, the court entered a judgment dismissing the action, from which the plaintiffs have taken this appeal.

The complaint contains numerous allegations, among which are the following: That the South Ogden Land, Building & Improvement Company was incorporated on the 18th day of April, 1892, with authority to buy and sell real estate, build roads, parks, hotels, railways, boulevards, pleasure resorts, and do a general contracting and building business, to construct water ditches, canals, aqueducts, reservoirs, and lay and construct water works, and to build power dams for propelling machinery, and everything necessarily incident to the transaction of such business; that the business was required to be conducted according to the articles of incorporation, and its by-laws; that the number of shares in the company were 5,000, of which Sidney Stevens subscribed for 1,646 shares, Sidney O. and Frank J. Stevens 10 shares each, Solomon C. and William J. Stephens 1,666 shares each, and David Kay 2 shares; that the capital stock of the corporation consisted of numerous lots and tracts of real estate, described in the complaint; that it was further provided that Sidney Stevens, William J. Stephens, Solomon C. Stephens, Sidney O. Stevens, Frank J. Stevens, and David Kay should be directors until the first Monday in May, 1893, and until the election and qualification of their successors; that Sidney Stevens should be president, Sidney O. Stevens secretary, Frank J. Stevens treasurer, and William J. Stephens vice president. It was further alleged that the South Ogden Mercantile Company, on the same day, was also incorporated; that the object of this incorporation was a wholesale and retail mercantile business, and the acquisition of such land as might be essential to the business; that the capital stock of the corporation was divided into 250 shares, of which Sidney Stevens subscribed for 73½ shares, Frank J. and Sidney O. Stevens 5 shares each, William J. and Solomon G. Stephens 83½ shares each; that the officers of the corporation consisted of five directors, president, vice president, secretary, and treasurer; that, until the meeting of the stockholders on the first Wednesday in May, 1893, and the election and qualification of officers thereto, the board of directors should be Sidney Stevens, Solomon C. and W. J. Stephens, and Frank J. and Sidney O. Stevens; that Sidney Stevens should be president, William J. Stephens vice president, Sidney O. Stevens secretary, and Frank J. Stevens treasurer; that the capital stock consisted of real estate, described in the complaint. The plaintiffs further alleged that the South Ogden Clay & Manufacturing Company was also incorporated on the same day; that the purpose of the corporation was the manufacture of brick, tiling, sewer pipe, pottery, the erection and operation of flouring mills, the manufacturing of tinware, the erection and operation of woolen mills, manufacture of wagons and other vehicles and farming implements, and the erection and operation of iron foundries, glass factories, and manufacture of

wooden wares; that the capital stock of this corporation was divided into 5,000 shares, of which Solomon C. and W. J. Stephens subscribed 1,666 shares each, Sidney O. Stevens 1,661 shares, and Frank J. and Sidney Stevens 2 shares each; that the officers of the corporation consisted of a board of five directors, a president, vice president, secretary, and treasurer; that, until the meeting of the stockholders on the first Tuesday in May, 1893, and the election and qualification of officers, the directors should be Solomon C. and William J. Stephens, and Sidney O., Frank J., and Sidney Stevens; that said Solomon C. Stephens should be president, Sidney Stevens vice president, Sidney O. Stevens secretary, and Frank J. Stevens treasurer; that the capital stock consisted of all the title and interest of William J. Stephens and Solomon C. Stephens to and in a certain option contract for certain lands described in the complaint. Plaintiffs also alleged that, in May, 1892, the South Ogden Water Company was incorporated, with authority to purchase water, to construct waterworks for South Ogden and a portion of Ogden City, and also to acquire and hold the necessary real and personal property, and to sell the same when necessary or desirable; that its capital stock was divided into 5,000 shares, of which Sidney Stevens subscribed for 1,646 shares, Solomon C. and William J. Stephens 1,666 shares each, Sidney O. and Frank J. Stevens 10 shares each, and David Kay 2 shares; that the capital stock of this corporation consisted of the right to the waters of certain creeks and reservoirs mentioned in the complaint. The plaintiffs further alleged that the four corporations named were organized to prosecute one enterprise, and that they were to be, in effect, subject to one management, and that their business became so intermingled and connected that it was necessary to make them all parties to the same action; that all of the subscribers still own their stock, with the exception of one share assigned to John J. Hill, and a few shares assigned to Paul Beus. Plaintiffs further allege that Sidney Stevens turned over to the South Ogden Mercantile Company, soon after its organization, in payment for his stock, a stock of goods of the value of \$14,000, and that he placed to the credit of the South Ogden Land, Building & Improvement Company \$10,000 in payment for stock issued; that, after the organization of said corporations, Solomon C. Stephens became general manager of the business of the South Ogden Clay & Manufacturing Company, and William J. Stephens of the South Ogden Land, Building & Improvement Company, and Sidney O. Stevens of the business and affairs of the South Ogden Mercantile Company; that Solomon C. Stephens and William J. Stephens represented to these plaintiffs that they were interested in a large number of building contracts in various parts of the city of Ogden, Park City, Heber City, and other places in Utah territory, and that such business had been entered into by them under the firm name of Stephens Bros., but that they would turn over to the South Ogden Land,

Building & Improvement Company all benefits arising from said contracts, and that the goods and trade connected with said building operations should go to the benefit of the South Ogden Mercantile Company, and that all pay which they were to receive for the construction of such buildings should be paid into the treasury of the said South Ogden Land, Building & Improvement Company, in consideration of certain credits, to which proposal plaintiffs agreed; that thereupon William J. and Solomon C. Stephens began to use, in such building operations, the \$10,000 of credit in favor of the South Ogden Land, Building & Improvement Company placed there by plaintiff Sidney Stevens, and also began to use the \$14,000 worth of goods and merchandise of the South Ogden Mercantile Company, and they also began to purchase, from various firms in Ogden City and the East, goods, wares, and merchandise, to be used by them in and about said building operations; that, about the 1st day of September, 1892, plaintiffs ascertained that William J. and Solomon C. Stephens had drawn the full amount of the \$10,000 placed to the credit of the South Ogden Land, Building & Improvement Company, and that they had incurred obligations against that company to the extent of about \$17,000, all of which, to the amount of about \$20,000, had been used by S. C. and W. J. Stephens in the execution of said contracts, and, in addition thereto, they drew from the stock of merchandise about \$10,000, and, besides this amount of about \$30,000, the said S. C. and W. J. Stephens had also contracted debts against the South Ogden Land, Building & Improvement Company to the amount of about \$17,000; that, upon their representations, the last-named company borrowed the sum of \$15,000, and gave mortgages to secure the same on all of the property of the four corporations; that the said S. C. and W. J. Stephens refused to turn over any part of the proceeds to said companies, or either of them, and by means of force and violence took possession of the offices of the companies, and ejected plaintiffs therefrom, and held the same. The plaintiffs further alleged, in their complaint, that said W. J. and S. C. Stephens have a majority of the stock in each of the four corporations; that they held elections of stockholders, and did not elect plaintiffs, or either of them; that the directors elected, intending to defraud plaintiffs, and to render their stock in the companies absolutely worthless, and for the purpose of transferring, in the end, all of the property of the said corporations to their own private use, entered upon the books of said corporations various false entries, by which said Solomon C. and William J. Stephens were credited with false and fictitious credits; that they caused to be recorded, on the records of Weber county, numerous mortgages and trust deeds, in favor of said S. C. and W. J. Stephens, on the property of said corporations, while they were indebted to the companies, and that they are still so indebted; that said mortgages and deeds of trust were given without any consideration, and

upon a fraudulent understanding and conspiracy between said directors; that the defendants have sold the property of the said companies, and the proceeds thereof have been converted to the use of S. C. and W. J. Stephens. The plaintiffs allege numerous other fraudulent designs and conspiracies of the defendants, to the injury of the plaintiffs, by means of which the four companies aforesaid have apparently been denuded and divested of their property, so that the purposes of their creation cannot longer be prosecuted and carried out. And, finally, the plaintiffs allege that, by means of the conspiracies and acts alleged in their complaint, they have been defrauded of \$36,000, and that they never received anything from their investments or said corporations, and, further, that the defendants refuse to consult with plaintiffs, or to pay any attention to their requests and demands, or to respect their rights. The plaintiffs prayed the court to appoint a receiver, with power to take possession of all the property, books, and accounts due or to become due to said corporations, and with authority to bring all necessary suits to obtain the possession of the books, property, and evidences of indebtedness belonging to them, and to set aside all fraudulent conveyances, and require accountings, and, generally, to take charge of and wind up the business thereof.

Defendants demurred to the plaintiffs' complaint on two principal grounds: (1) Because it was multifarious,—that distinct and independent matters were blended; (2) that there was a misjoinder of parties as co-defendants. The immediate object sought by the complaint was the appointment of a receiver for the four corporate defendants, and, ultimately, compensation for the loss caused by the mismanagement and fraud of the defendants in conducting the business, disposing of the property, and using the credit of the said corporate defendants. It appears from the complaint that all the other parties to the action were owners of stock issued by the respective corporations, and that they were organized and intended to be used as instrumentalities in the prosecution of a general design,—that it was believed the enterprises contemplated could be more successfully carried out by the four corporations than by a less number. It further appears that a fraudulent design and conspiracy of the defendants, who are natural persons, caused losses to the corporate defendants, as well as the plaintiffs; that the defendants perpetrating the fraud affected injuriously all the other parties; that the losses of the other parties are traceable to and centered in the fraud of the natural defendants. The plaintiffs base the right to the remedy they ask on that fraud.

Assuming the allegations of the complaint to be true, as we must for the purposes of the demurrer, the defendants William J. Stephens, Solomon C. Stephens, David Kay, John J. Hill, Paul Beus, and J. O. Stevens formed a fraudulent design, and entered into a con-

spiracy to use the property and credit of the corporations named for their own benefit, to the injury of the other parties; and, in prosecuting that purpose, they did a number of acts by which the interests and rights of the other parties were affected. Therefore, the parties doing the fraudulent acts, and all other persons, natural or legal, were proper parties to the action to investigate the entire fraud, and the transactions connected therewith, and to ascertain the respective rights and interests of the parties, that such orders and such a decree might be made as would secure the rights and interests of all those affected by the fraud; and this, though some of the defendants might have separate and distinct defenses. The ends of distributive justice manifested by this complaint call for a liberal application of the flexible principles of equity. The gist of the action, as set forth in the complaint, is the fraud and mismanagement of defendants William J. Stephens, Solomon C. Stephens, J. O. Stevens, David Kay, John J. Hill, and Paul Beus in controlling, disposing of, and appropriating the property of the corporations named, transacting their business, and using their credit, by which the rights and interests of all the other parties were affected. In this there is one common point of litigation. That being so, they were all proper parties; and, for the same or similar reasons, the complaint cannot be regarded as multifarious. *North v. Bradway*, 9 Minn. 183 (Gil. 169); *Donovan v. Dunning*, 69 Mo. 436; *Fellows v. Fellows*, 4 Cow. 682; *Bobb v. Bobb*, 76 Mo. 419; *Williams v. Bankhead*, 19 Wall. 563; *Phil. Code Pl. § 453*; *Cook, Stock, Stockh. & Corp. Law*, § 738; *Story, Eq. Pl. (9th Ed.) § 539*. It clearly appears, from the allegations of the complaint, that the natural persons named as defendants were directors and officers of the four corporations mentioned, and that they so mismanaged the business of the companies as to cause the plaintiffs, who were stockholders, great loss, and that they will sustain further loss unless a receiver is appointed. We are of the opinion that the order sustaining the demurrer and the judgment dismissing the action were erroneous. The judgment appealed from is reversed, and the cause is remanded, with directions to set aside the order sustaining the demurrer.

BARTON and MINER, JJ., concur.

(14 Utah, 265)

STEPHENS v. AMERICAN FIRE INS. CO.

(Supreme Court of Utah. Oct. 20, 1896.)

ACTION ON INSURANCE POLICY—PLEADING—SETTING FORTH INSTRUMENT IN FULL—DEMURRER.

1. Under our system, in a suit upon a written contract, it makes no difference whether a contract is set out in *hæc verba*, or whether it is annexed, and by proper reference made a part of the pleading. However, matters of substance, which are preliminary or collateral to the instrument, must be properly averred, so that the ulti-



mate facts for which it was incorporated will be clearly and distinctly presented; and, if the instrument should be defective or ambiguous, it is incumbent upon the pleader to place upon it some construction by proper allegation, or else a demurrer will lie.

2. This action was brought to recover upon a fire insurance policy. The complaint contains an allegation to the effect that between the 15th and 25th of December, 1895, the plaintiff furnished proof of loss. The dates mentioned in this allegation were within the time required by the terms of the policy to furnish such proof, the fire having occurred on the 15th of December, 1895. *Hadd*, that the allegation was sufficient for the purposes of a general demurrer.

Miner, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by Elizabeth J. Stephens against the American Fire Insurance Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Twomey & Twomey, for appellant. Evans & Rogers and A. G. Horn, for respondent.

**BARTCH, J.** This is a suit on a fire insurance policy to recover for loss occasioned by fire. The defendant interposed a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and judgment entered in favor of the plaintiff for \$938 and costs. This appeal was prosecuted from the order overruling the demurrer and from the judgment.

The complaint, after alleging the corporate existence of the defendant, avers that the plaintiff, at the time of its insurance and destruction by fire, was the owner of the property in question; that said property was situated on Washington avenue, in Ogden city, Utah Territory; that on the 30th of November, 1895, in consideration of the payment of a premium of \$17.50, the defendant, by its general agent, "made their policy of insurance in writing, which is hereto attached, and made a part of this complaint"; that on December 15, 1895, the insured property was greatly damaged, and in part destroyed, by fire, to the plaintiff's loss thereby in the sum of \$1,200; that between the 15th and 25th of December, 1895, the plaintiff furnished proof of the destruction and loss, and otherwise performed all of the conditions of said policy on her part; and that on February 28, 1896, defendant refused to pay such loss, and denied and disclaimed liability. Counsel for the appellant insist that the complaint, independent of the insurance policy, does not state a cause of action, and that, notwithstanding the express averment to that effect, the policy constitutes no part of the complaint, and cannot be considered in determining its sufficiency. It is not claimed that the policy is not a properly executed and valid instrument, and the objection therefore goes to the practice of pleading by setting forth such an instrument in full. It amounts to this: because, in effect, there can be no dif-

ference in setting out an instrument in *hæc verba* and in annexing it, and by proper reference making it a part of the pleading. Possibly, as a matter of arrangement and convenience, the former mode would be preferable, but in either case the instrument becomes a part of the pleading, and, if one of these methods is objectionable, equally so is the other. Whether, in a suit upon a contract, the making of the instrument a part of the complaint is the best practice, it is not necessary for us to discuss. Such practice appears to be recognized in this state by statute, as will appear from section 3235, Comp. Laws Utah 1888, which reads as follows: "When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified." This section is identical with section 447 of the California Code of Civil Procedure, and was doubtless borrowed from that state, and the supreme court of California has repeatedly recognized the same practice. *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327; *Ward v. Clay*, 82 Cal. 502, 23 Pac. 50, 227; *Whitby v. Rowell*, 82 Cal. 635, 23 Pac. 40, 382; *Johnson v. McDuffee*, 83 Cal. 30, 23 Pac. 214; *Emeric v. Tams*, 6 Cal. 156; *Hook v. White*, 36 Cal. 299. The same method is also distinctly recognized by Mr. Estee in his work on Pleadings under the Code. 1 Estee, Pl. § 735. See, also, *Budd v. Kramer*, 14 Kan. 85; *State v. School Dist. (Kan.)* 8 Pac. 208; *Prindle v. Caruthers*, 15 N. Y. 425; *Elbring v. Mullen (Idaho)* 38 Pac. 404. Under this practice, however, a party cannot plead matter of mere evidence. Nor will it relieve him from pleading by proper averment matters of substance which are preliminary or collateral to the instrument, and the instrument on which the action or defense is based must not be defective or ambiguous, but must clearly and distinctly present the ultimate facts for which it is incorporated into the pleading, and on which the pleader relies. If it does not so present such facts, or is defective or ambiguous, it is incumbent upon the pleader to place upon it some construction by proper allegation, or else a demurrer will lie.

It is also insisted by counsel for the appellant that there is no allegation that proof of loss was furnished, or notice given, pursuant to the requirement of the policy. If this contention were admitted to be well taken, it could not avail the appellant, because the complaint contains an averment to the effect that on the 28th day of February, 1896, the defendant company refused to pay the loss, and denied and disclaimed any liability; and where an insurance company disclaims liability under the policy, and refuses to pay, proof of loss is not necessary. In such case the loss becomes payable immediately upon such disclaimer and refusal, and proof of loss is waived. *West v. Insurance Soc.*, 10 Utah,



442, 37 Pac. 685; Danlher v. Grand Lodge, 10 Utah, 110, 37 Pac. 245. Many of the objections made to the complaint in this case cannot be considered on general demurrer. We are of the opinion the demurrer was properly overruled, and that the record contains no reversible error. The judgment is affirmed.

ZANE, C. J., concurs.

MINER, J. I cannot concur with my brethren in this case. The statute provides that "the complaint must contain a statement of facts constituting the cause of action in ordinary and concise language." Under section 3235, Comp. Laws Utah 1888, referred to, the genuineness and due execution of the written instrument only are deemed admitted. It was not intended by the legislature that this section should preclude the necessity of setting out in the complaint a statement of the facts constituting the plaintiff's cause of action in ordinary and concise language. Several matters of substance are lacking in the averments found in the complaint, which are sought to be supplied only by reference to the recitals found in the exhibit annexed to the complaint. As said in Lambert v. Haskell, 80 Cal. 613, 22 Pac. 328: "Matters of substance, which are preliminary or collateral to the instrument pleaded, cannot be supplied by recitals in the instrument annexed. All that is accomplished by setting forth an instrument in full is to allege its existence and character. It does not involve an assertion of the truth of preliminary or collateral matters recited in the instrument. Whatever may be the effect of such recitals as evidence, they cannot serve as allegations in pleading." In other words, the recitals in the exhibit annexed to the pleadings cannot take the place of, and be substituted for, the allegations required by the statute to be alleged in the complaint. "The use and purpose of an exhibit is to set forth in detail that which is alleged in more general terms, or to embody in the record such facts as will, in legal effect, amount to the facts as alleged in the complaint, or to aid the allegations in fixing more accurately and definitely their import; but not to supply the omission of allegations necessary to present a good cause of action." 4 Enc. Pl. & Prac. p. 610. I am aware of some decisions tending to sustain the view adopted by the court, but I do not think such a practice a proper one to be followed and adopted in this state to the extent indicated in the opinion of the court. Los Angeles v. Signoret, 50 Cal. 299; Lambert v. Haskell, 80 Cal. 613, 22 Pac. 327; Johnson v. Insurance Co. (Wyo.) 6 Pac. 729; Insurance Co. v. Kahn (Wyo.) 34 Pac. 895; Larimore v. Wells, 29 Ohio St. 13; Bayless v. Price (Ind. Sup.) 31 N. E. 88; Brooks v. Paddock, 6 Colo. 36; Morrill v. Trust Co., 46 Mo. App. 243; State v. Samuels, 28 Mo. App. 649; Hart v. Tolman, 1 Gilman, 1; C. Ault-

man & Co. v. Siglinger (N. D.) 50 N. W. 911; Guadalupe Co. v. Johnston (Tex. Civ. App.) 20 S. W. 833; Railroad Co. v. Parks, 32 Ark. 131; Gage v. Lewis, 68 Ill. 618; Oh Chow v. Hallett, Fed. Cas. No. 10,469; Flitch v. Cornell, Id. 4,834; 4 Enc. Pl. & Prac. 610; Miles v. Mays (Tex. App.) 16 S. W. 540; Hill v. Barrett, 14 B. Mon. 33.

On Petition for Rehearing.

(Nov. 11, 1896.)

BARTCH, J. In this case the point is now made in the appellant's petition for a rehearing on the question of proof of loss that the appellant company did not disclaim liability under the policy, and refuse payment, until after the time within which proof of loss should have been furnished under the contract. Even if this position be correct, it cannot avail the appellant, because it is alleged in the complaint that between the 15th and 25th of December, 1895, proof of loss was furnished. This was within the time required by the terms of the policy, and we think the allegation, as made in the complaint, was sufficient for the purposes of a general demurrer. The petition for a rehearing is denied.

ZANE, C. J., concurs.

MINER, J. I am of the opinion that a rehearing ought to be granted, based upon the errors assigned in the record.

(14 Utah, 286)

CULMER v. CLIFT et al.

(Supreme Court of Utah. Nov. 9, 1896.)

MECHANICS' LIENS—TIME FOR FILING—DESCRIPTION—ASSIGNMENT—ACTION TO ENFORCE—VARIANCE—DAMAGES—OBJECTIONS TO EVIDENCE.

1. Defendant Clift entered into a contract with Nink and others for the construction of a certain building. Plaintiff and others furnished materials for said building, and assignments of the claims arising under the mechanics' liens were made by the others to plaintiff, who brought this suit to foreclose them. Clift filed an answer, in which he set up payment of \$19,082, to the contractor Nink, the full contract price except \$2,727, which he held for the benefit of the contractor, subcontractors, and material men, as they might prove their right thereto. This answer was filed September, 1891; and on May 19, 1894, defendant Clift filed an amended supplemental answer, claiming that the contract had not been completed as agreed, and claimed damages in the sum of \$5,370, but did not waive or change any part of the original answer. Judgment and sale of the property were ordered to satisfy the several mechanics' liens, which were assigned to plaintiff, aggregating \$2,108.25.

2. Where the allegations of the complaint state that Culmer Bros., at the request of Clift and his architects C. & K., furnished materials, and the lien filed in proof states that the material furnished was in pursuance of a contract made by Culmer Bros. with B., C. & K., and N., who were the principal contractors employed by Clift, the variance is not such as to mislead the appellant, and therefore within sections 3252, 3253, Comp. Laws 1888, and section 14, p. 27, Sess. Laws 1890.

3. It was competent for the different parties having claims for material to assign (under section 28, c. 30, p. 31, Sess. Laws 1890) their claims to plaintiff, for the purposes of this suit.

4. The court properly deducted the amount (\$1,100) found due the defendant Clift as damages, and also properly added interest from the time of the date of the several liens; that being the time when the several sums should have been paid.

5. It is a uniform rule that general exceptions to the admission of evidence are unavailable to parties making them, either on motion for new trial or appeal. The particular grounds of the objections must be stated, so that the trial court may understand the nature of the objection before passing upon it.

6. It was not necessary to file liens before the completion of the contract, and the law was complied with if filed within 40 days after the materials were furnished and labor performed. *Morrison v. Carey-Lombard Co.*, 33 Pac. 238, 9 Utah, 70; *Lumber Co. v. Partridge*, 37 Pac. 572, 10 Utah, 322, construing the lien law of 1890.

7. The fact that the liens do not cover all the premises owned by Clift, upon which the buildings were erected, does not affect the validity of the liens filed.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; S. A. Merritt, Judge.

Action by George F. Culmer against Francis D. Clift and others. From a judgment for plaintiff, defendant Clift appeals. Affirmed.

Brown, Henderson & King, for appellant. Sutherland & Murphy and Andrew Howat, for respondent.

MINER, J. In 1890, defendant Clift entered into a contract with defendant Nink to furnish material and labor to rebuild the Gladstone Building, in Salt Lake City, under plans prepared by Carrol & Kern, his architects, and under their supervision. As the work progressed, changes were made in the plans, and additional contracts entered into. G. F. Culmer & Bros., the E. C. Coffin Hardware Company, Fred W. Gray, as material men and subcontractors, assigned their claims arising from mechanics' liens to the plaintiff, who brought suit to foreclose the same. F. D. Clift, the owner of the building, A. Nink, the principal contractor, Carrol & Kern, and A. Braun, subcontractors, being all the parties in interest, were made defendants, and all made default except Clift, the appellant, who answered. All the parties were before the court as witnesses. The defendant Clift took possession of the building after its completion, in December, 1890. This suit was commenced to foreclose the liens, May 5, 1891. In September, 1891, Clift filed an answer, alleging that, before notice of any lien or claim, he had paid the contractor Nink \$19,082.27, the full contract price, except \$2,727, which sum he then held for the benefit of the contractors, subcontractors, and material men, as they may prove their right thereto, which sum he was ready to pay over, as may be adjudged by the court. On May 19, 1894, defendant Clift filed his amended supplemental answer, claiming that the con-

tract had not been completed as agreed, and that he had lost rents, and was damaged thereby in the sum of \$5,370, which he desired to be offset as against the claims set up in the complaint, but did not waive or change any part of the original answer. The principal question in which the appellant was interested on the hearing in the court below was as to the amount of damages he was entitled to withhold as against Nink, the principal contractor. No personal decree was rendered against the defendant Clift, but findings were made, and judgment and sale of the property were ordered to satisfy these several mechanics' liens, which were assigned to the plaintiff, aggregating \$2,108.25, including interest. From this judgment, defendant Clift appealed to this court, in July, 1895.

The appellant's first contention is that there is a variance between the complaint and the proof as to the claim of Culmer Bros. The allegation in the complaint is that Culmer Bros., at the request of Clift and his architects, Carrol & Kern, furnished material, etc. The lien filed and in proof states that the material furnished and labor performed were in pursuance of a contract made by Culmer Bros. with Braun, Carrol & Kern, and A. Nink, who were the principal contractors employed by defendant Clift to construct the building. Certain proof was offered which tended to connect the defendant with the several contracts upon which liens were filed.

Section 3252, Comp. Laws Utah 1888, provides that "no variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Section 3253, *Id.*, provides that, "where the variance is not material as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs." Section 14, p. 27, Laws 1890, provides that "any informality in any such statement that shall not tend to mislead, shall not affect the validity thereof. No incorrect estimate in any such statement of the amount due or to become due, or of any probable value, shall affect the validity of any such statement, unless such incorrect estimate be made in bad faith. \* \* \*

The court found the facts according to the evidence, and it does not appear that the defendant was misled by the variance to his prejudice. He admitted in his answer that the sum of \$2,727 was still in his hands, belonging to the contractors, subcontractors, and material men, which he was willing to pay as directed by the court. There was a variance, however, between the allegations in the complaint and the proof, but not in its general scope and meaning, as shown by the pleading and proofs. Under the circumstances shown in this case, we do not consider the va-

riance pointed out by the appellant between the allegations and proof so material and important that it misled the defendant to his prejudice in maintaining his defense upon the merits. *Holman v. Pleasant Grove City*, 8 Utah, 78, 30 Pac. 72.

It is also contended that the several assignments of mechanics' liens were made to the plaintiff for the purpose of bringing suit, and that such assignments were improperly admitted in evidence. Section 28, c. 30, p. 31, Sess. Laws 1890, expressly authorizes such assignments, and provides that the purpose of enforcement of any mechanics' liens by action under this act shall be a sufficient consideration as to all other parties for the purpose of such action. Such assignments have been held good, under section 3160, Comp. Laws 1888. *Wines v. Railway Co.*, 9 Utah, 228, 33 Pac. 1042; *Pom. Rem. & Rem. Rights* (2d Ed.) § 132; *O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236.

The court found, upon conflicting evidence, that the damages set up by Clift in his amended answer did not amount to exceed the sum of \$1,100, and allowed that sum as damages to Mr. Clift, and fixed the amount of the several liens at \$1,653.45, with interest thereon from the date of the several liens. The testimony upon this subject was conflicting. The sum found as damages is supported by the testimony, and we see no good reason for disturbing the findings. The judgment simply covered the amount of the liens, and falls within the sum still remaining in the hands of the defendant Clift, after deducting the \$1,100 damages allowed him. The interest was properly added from the time of the date of the several liens, that being the time when the several sums should have been paid.

We think the description of the property set up in *Culmer Bros.* and Gray's intention to hold a lien, taken in connection with the testimony upon that subject, is sufficient, and could not have misled or prejudiced the defendant.

The verification of Mr. Gray's lien by P. L. Williams, in behalf of and as attorney for Mr. Gray, was sufficient. Section 10, p. 26, Sess. Laws 1890, provides that the abstract of indebtedness shall be verified by the claimant, or by some other person in his behalf.

The record shows that P. L. Williams was called, and testified that he received a letter or telegram from Mr. Gray, authorizing him to assign the Gray lien to plaintiff, and he assigned the same accordingly; such instructions were received in answer to a letter written by witness to Gray, in which witness was authorized to make the assignment suggested in his letter; that he had searched for the instructions in his office, where such matters were kept, but the same could not be found. Thereupon the following question was asked witness, and objection made thereto: "Q. To whom was the assignment to be made, as suggested in your letter? (Ques-

tion objected to. Objection overruled, and exception taken.) A. To G. F. Culmer." This ruling of the court is assigned as error. The objection did not point out the ground upon which it was made, and therefore does not merit consideration. The point of the objection should have been particularly stated, in order to entitle it to consideration. This is the uniform rule. General objections to the admission of evidence are unavailable to the party making them, either on motion for new trial or appeal. The particular grounds of the objection must be stated, so that the trial court may understand the nature of the objection before passing upon it. *Killer v. Kimbal*, 10 Cal. 268; *Frier v. Jackson*, 8 Johns. 496; *Camden v. Doremus*, 3 How. 515; 1 Greenl. Ev. § 421; *State v. Moore*, (Mo. Sup.) 22 S. W. 1086; *Railway Co. v. Henson*, 7 C. C. A. 349, 58 Fed. 531; *Crocker v. Carpenter* (Cal.) 33 Pac. 271; *U. S. v. Mc-Masters*, 4 Wall. 680; *Curry v. Bratney*, 29 Ind. 195.

The appellant contends that none of the liens were filed until after the completion of the contract, and therefore they did not attach. This contention is answered by sections 10, 11, c. 30, Sess. Laws 1890, and by the construction of the lien law by this court in the cases of *Morrison v. Carey-Lombard Co.*, 9 Utah, 70, 33 Pac. 238, and *Lumber Co. v. Partridge*, 10 Utah, 322, 37 Pac. 572, to which reference may be had. The liens were filed within 40 days after the materials were furnished and labor performed.

The fact that the liens do not cover all the premises owned by Mr. Clift, upon which the building was erected, does not affect the validity of the liens filed. Mr. Clift cannot be injured by a lien that does not cover as much of his property as it might have covered. The land and building described in the decree upon which the lien is created is the same land upon which materials were furnished and labor performed by the several lienholders.

Other matters are discussed by counsel, but we do not consider them of sufficient importance for further consideration. We find no reversible error in the record. The judgment and decree of the court below are affirmed, with costs.

ZANE, C. J., and BARTCH, J., concur.

(14 Utah, 258)

#### PEOPLE v. BURTLESEN.

(Supreme Court of Utah, Oct. 23, 1896.)

STATUTES—REPEAL—NUISANCE—INTENT—HARMLESS ERROR.

1. Comp. Laws Utah 1888, § 4566, which defines a public nuisance, and denounces the annoying, injuring, or endangering the comfort, health, repose, or safety of three or more persons as a public nuisance, was not impliedly repealed by sections 4, 5, c. 63, Sess. Laws 1892, amending section 2264, Comp. Laws Utah 1888, relating to "befouling waters," since section 4566 relates to and was intended to denounce and punish pub-

tic nuisances in general, and is applicable whenever a nuisance affects three or more persons, while sections 4, 5, of the act of 1892 relate only to, and were intended to denounce and punish, the befouling of waters of any stream used for domestic purposes by the inhabitants of any city, town, or village, and leave wholly unprotected all persons who are not such inhabitants, and since an act which might constitute a nuisance under the former law might not constitute an offense under the latter.

2. Where two statutes do not relate to the same subject, and are not enacted for the same purpose, they are not repugnant to each other.

3. A witness who was not an expert was permitted to state his opinion as to a certain subject, calling for expert testimony, but upon cross-examination modified his statement by limiting it to the facts of the case, and as the facts in all probability would have produced the same effect upon the jury, and the evidence outside of the objectionable statement was ample to warrant the jury in returning a verdict against the defendant, *held*, that while it was improper for the witness to state his opinion, it was not, under the circumstances, prejudicial error.

4. Where a party so uses his property as to annoy, injure, or endanger the comfort, repose, health, or safety of three or more persons, his acts are unlawful, and he is liable to prosecution under section 4566, Comp. Laws Utah 1888, even though he may be in pursuit of a lawful business, and conducting it in a reasonable and careful manner.

5. In determining the question of a nuisance under the statute, the motive or intent with which the act complained of was committed cannot be considered.

(Syllabus by the Court.)

Appeal from district court, First district; W. H. King, Judge.

Andreas Burtlesen was convicted of having committed a public nuisance, and appeals. Affirmed.

Samuel A. King, for appellant. A. C. Bishop, Atty. Gen. (Benner X. Smith, of counsel), for the People.

**BARTCH, J.** This is a criminal prosecution under section 4566, Comp. Laws Utah 1888, and the defendant was charged with having committed a public nuisance by unlawfully and willfully driving, herding, and keeping about 2,000 sheep in and upon a small stream, the water of which was used for culinary and domestic purposes by the inhabitants of the town of Annabella, in Sevier county, Utah, and by rendering the said water impure, and thereby endangering the comfort and health of three persons, named in the complaint, and divers other persons, residents of said town, and using the water for said purposes. Upon conviction, and sentence to pay a fine and costs, the defendant appealed to this court.

The statute above referred to, so far as material to this decision, reads as follows: "A public nuisance is a crime against the order and economy of the territory, and consists in unlawfully doing any act, or omitting to perform any duty, which act or omission, either: (1) Annoys, injures or endangers the comfort, health, repose or safety of three or more persons," etc. Counsel for the appellant contends that this section is in conflict with sections 4, 5, c. 63, Sess. Laws 1892, and is re-

pealed to the extent of such conflict, and that the court erred in refusing to instruct the jury, at the close of the prosecution's testimony, to return a verdict in favor of the defendant, there being no evidence nor any claim that he had violated any provisions of the act of 1892. If this contention be correct, then the former law is repealed by the later, and this by implication, because there are no words of repeal in the act. An implied repeal will not result unless the necessary operation and effect of the new law cannot be harmonized with the necessary operation and effect of the old, or unless it is clear that the legislature intended the new law to be a substitute for the old; but such intention will not be presumed. It must appear from the context. So, in case of repugnancy, which renders the statutes irreconcilable, the former in point of time will be repealed only to the extent of such repugnancy. Sections 4 and 5 of the act of 1892, which, it is insisted, repeal the statute under which this prosecution was instituted, amend section 2264, Comp. Laws Utah 1888, relating to "befouling waters," and were enacted as subdivisions thereto. Under section 4, it is made unlawful "to dip or wash sheep in any stream, or to construct or maintain or use any pool or dipping vat for dipping or washing sheep in such close proximity to any stream used by the inhabitants of any city, town or village, for domestic purposes, or to construct or maintain any corral, yard or vat, to be used for the purpose of shearing or dipping sheep, within seven miles of any city, town or village, where the refuse or filth from said corral or yard would naturally find its way into any stream of water used by the inhabitants of any city, town, or village, for domestic purposes." Under section 5 it is made unlawful "to establish and maintain any corral, camp or bedding place for the purpose of herding, holding or keeping any cattle, horses or sheep, within seven miles of any city, town or village, where the refuse or filth from said corral, camp or bedding place, will naturally find its way into any stream of water used by the inhabitants of any city, town or village for domestic purposes." It will be noticed that section 4 is limited to sheep, and denounces and forbids the washing, dipping, or shearing of them, and maintaining any corral for that purpose, along a stream at any point within seven miles of any city, town, or village, where the refuse will naturally find its way into the stream, the waters of which are being used for domestic purposes by the inhabitants of such town, city, or village. The same may be said of section 5, except that its operation is not limited to sheep alone, but includes cattle and horses. It will further be noticed that both of these sections apply only to the inhabitants of cities, towns, and villages, and leave wholly unprotected all persons who are not such inhabitants, but live in the more isolated portions of the state, and even the very acts prohibited may, for aught that appears

in the provisions of the sections, be committed with impunity without the seven-mile limit, no matter how great the nuisance may be which is thereby created. How can it be contended that an act with such limitations can repeal by implication a law general in its nature? Section 4566 relates to public nuisances in general, and is applicable whenever a nuisance affects three or more persons. The act of 1892 relates to the befouling of waters of any stream used for domestic purposes by the inhabitants of any city, town, or village. While an act which would constitute an offense under the later law might be a nuisance, still an act which might constitute a nuisance under the former law might not, and doubtless, in most cases, would not, constitute an offense under the later. It is quite clear that the act of 1892 was not intended as a substitute for section 4566, and two statutes are not repugnant to each other unless they relate to the same subject, and are enacted for the same purpose, which is not the case here. This question of a repeal by implication was considered in *Ex parte Gannett*, 11 Utah, 283, 30 Pac. 496, where the late territorial supreme court entertained similar views. We conclude that the act of 1892 is not in conflict with, and did not repeal, section 4566, and that this prosecution was properly instituted under that section.

Counsel for the appellant further insists that the court erred in permitting the witness Clark, after testifying that the water was filthy and impure, because of the sheep being driven across it, and allowed to water at the stream, to state that he knew the water was impure, because his little girl drank some of it, and it made her very sick, causing her to vomit, and be sick at the stomach. This was afterwards, on cross-examination, modified, by the witness stating that he was not sure that the drinking of the water caused the little girl to be sick, but that shortly after drinking it she complained of being sick. We do not think it was proper for the witness to state his opinion, because he was not an expert, but it was competent for him to state the facts connected with the occurrence, and as those facts would in all probability have produced the same effect upon the jury as the objectionable statement, and as the evidence, outside of such statement, was ample to show that the water had been rendered impure by the sheep, and to warrant the jury in returning a verdict against the defendant, we are of the opinion that its admission was not prejudicial error.

It is also contended that the court erred in not permitting the defendant to prove that at the time of the doing of the acts complained of he was on his way to the shearing pens in that vicinity, and on the usual route to the summer range; that the shearing pens were occupied, and that this compelled him to remain there three or four days, and await

his turn to shear the sheep. It appears that this evidence was offered to show that on the occasion in question the defendant was in pursuit of a lawful business, and was handling his property with usual and ordinary care, and not in an unreasonable and unwarrantable manner. This, however, was not the point at issue. The only question to be determined was whether or not a nuisance had been committed, and in determining this question the motive or intent with which the defendant did the act complained of could not be considered. If his acts created a nuisance, it is immaterial how innocent the intent was, or how cautiously and reasonably the business was conducted, or whether the business was lawful. These elements do not enter into the question of nuisance, and to allow them to be considered in such a case would be to unwarrantably limit the operation of the maxim, "*Sic utere tuo ut alienum non laedas.*" Therefore any evidence offered for the purpose of showing that these elements existed was inadmissible, and properly ruled out, because immaterial. If the defendant so used his property as to annoy, injure, or endanger the comfort, repose, health, or safety of three or more persons, then his acts were unlawful, and he was guilty of the charge preferred against him, under the statute, even though he was in the pursuit of a lawful business, and conducting it in a reasonable and careful manner. Every person must so use his own property as not to injure that of his neighbor, and therefore if, as in the case at bar, a person uses his own property in such a way as to cause an injury to another, he is liable. Sir William Blackstone, in his *Commentaries on the Laws of England* (3 Bl. Comm. c. 13), said: "If one erects a smelting house for lead so near the land of another that the vapour and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance. And by consequence it follows, that if one does any other act, in itself lawful, which, yet being done in that place necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do the act, where it will be less offensive." 16 Am. & Eng. Enc. Law, 930; *Frost v. Phosphate Co.*, 42 S. C. 402, 20 S. E. 280; *Moses v. State*, 58 Ind. 185; *Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900; *Seacord v. People*, 121 Ill. 623, 13 N. E. 194. Having determined that the evidence offered was inadmissible, and that its rejection was proper, it becomes unnecessary to discuss the questions raised by the defendant's requests to charge, which were based on the same theory of the law. We are of the opinion that there is no reversible error in the record. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

(14 Utah, 324)

**HENNEFER v. HAYS. BUNCE v. SAME.  
McLAUGHLIN v. SAME. CAMP-  
BELL v. SAME.**

(Supreme Court of Utah. Dec. 10, 1896.)

**PLEADING AND PROOF—FINDINGS—WITNESS—  
TRANSACTIONS WITH DECEDENT.**

1. It is error to grant a decree quieting plaintiff's title on proof of facts showing a right to specific performance simply.

2. Unless the findings embrace all the facts essential to the cause of action set up in the complaint, a decree for the plaintiff based thereon is erroneous.

3. A party to an action to establish his interest in the estate of a deceased person cannot testify, in his own behalf, to any conversation or transaction equally within his own knowledge and the knowledge of the person since deceased, when the opposite party sues or defends as heir of such deceased person.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; S. A. Merritt, Judge.

Actions by A. H. Hennefer, Rebecca A. Bunce, James McLaughlin, and Celia M. Campbell against Jennie E. Hays. The actions were tried together. From decree in favor of plaintiffs, defendant appeals. Reversed.

S. P. Armstrong, for appellant. Loofbourow & Kahn, S. W. Darke, and James M. Denny, for respondents.

**ZONE, C. J.** These four cases were tried before a referee. The parties stipulated before trial that they should be heard together, and that the evidence taken should be received in each, so far as competent, relevant, and material, and that the findings of fact and conclusions of law should be made a part of the record in each case. It appears from the record that the late Abraham Hays was, in the year 1886, the owner of a part of lot 2 in block 6, plat B of Salt Lake City survey, more accurately described in the record; that he died on the 14th day of December of that year; and that his wife, Sarah Hays, and five grandchildren, namely, A. H. Hennefer, William H. Hennefer, Rebecca A. Bunce, and Edward E. Hennefer, children of a deceased daughter, and Jennie E. Hays, defendant, daughter of a deceased son, survived him; and that the plaintiffs McLaughlin and Campbell obtained interests in the land from William H. Hennefer and Mrs. Bunce. The plaintiffs A. H. Hennefer and Rebecca A. Bunce allege in their complaints an unwritten, executory contract, between Abraham Hays and the four grandchildren first above named, and possession under the contract, and valuable improvements and performance on their part, and they pray the court to grant them specific performance; while the plaintiffs McLaughlin and Campbell base their cause of action on the statute of limitations simply, acquired, as alleged, by adverse possession and payment of taxes for seven years, and they asked the court to quiet their titles. The referee found the existence of

the verbal contract between Abraham Hays and the four grandchildren first named, and possession under and performance of it on their part. As to the allegations in the complaint of McLaughlin and Campbell, of possession and payment of taxes for seven years before action was brought, the referee found adverse possession for about three years and six months, and made no finding as to the payment of taxes. But he states, as a conclusion of law, that each of the plaintiffs is entitled to a decree quieting his title. So it appears that the referee found the existence of the facts set up to show a right to specific performance in the complaints of Hennefer and Bunce, but did not find adverse possession and payment of taxes, alleged in the complaints of McLaughlin and Campbell, to show their right to have their titles quieted. The referee found the facts stated in the two first complaints, but stated, as a conclusion of law, that all the plaintiffs were entitled to decrees according to the prayer of the two complaints containing the facts not found. Upon these findings, decrees were granted in the respective cases, quieting the titles of the respective parties; and a motion for a new trial in each case having been denied, and exceptions taken, the defendant appealed from such decrees and the orders overruling her motions for a new trial, and assigns said respective orders and decrees as error.

From this statement it is apparent that the findings were not responsive and applicable to the causes of action alleged in the complaints of James McLaughlin and Celia M. Campbell, and that the conclusions of law and the decrees were not responsive to the causes of action alleged in the complaints of A. H. Hennefer and Rebecca A. Bunce, and that the conclusions of law did not follow from the facts found. We therefore hold that the court below erred in the findings of fact as to the cases of McLaughlin and Campbell, and in stating its conclusions of law, and in the decrees and orders overruling defendant's motion for a new trial in the respective cases.

On the trial, A. H. Hennefer, a plaintiff, and one of the parties to the contract with Abraham Hays, deceased, of which the court was asked to decree specific performance against the defendant, was permitted to testify, against her objection. The testimony consisted of statements of the deceased, which, with the promises of the grandchildren above named, it is claimed, constituted the contract relied on. The defendant was an heir and a party, and the statements were equally within the knowledge of the witness, who was also a party, and the deceased ancestor. We are of the opinion that this testimony was inadmissible, under section 1, c. 31, p. 26, Laws Utah 1894, which declares that "a party to any civil action, suit, or proceeding, and any person directly interested in the event thereof, and any person from, through, or under whom such party or interested person derives

his interest or title or any part thereof, when the adverse party in such action, suit or proceeding claims or opposes, sues or defends as guardian of any insane or incompetent person, or as the executor or administrator, heir, legatee or devisee of any deceased person, or as guardian, or assignee or grantee, directly or remotely, of such heir, legatee or devisee as to any statement by, or transaction with, such deceased, insane or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent or deceased person, unless such witness be called to testify thereto by such adverse party, so claiming or opposing, suing or defending in such action, suit or proceeding." The case of *In re Atwood's Estate* (decided by this court at the last term) 45 Pac. 1036, we regard as decisive of this point.

For the reasons stated, the orders and decrees appealed from are reversed, and the court below is directed to grant a new trial, and to give the respective plaintiffs leave to amend their complaints.

BARTCH and MINER, JJ., concur.

(14 Utah, 328)

EMERY COUNTY v. BURRESEN et al.

(Supreme Court of Utah. Oct. 22, 1896.)

EXECUTION AGAINST A COUNTY — EXEMPTIONS —  
MANDAMUS—AUDITED CLAIM.

1. K. brought suit against Emery county for services, and obtained judgment before a justice of the peace, and afterwards levied execution on property of the county, and sold it. Emery county then commenced suit against K. and the sheriff for conversion of the property. *Held*, that a county is one of the political divisions of a state, and is clothed with certain political power of government of its local affairs.

2. Section 3419, Comp. Laws Utah 1888, giving a party in whose favor judgment is rendered a right to execution; and subdivision 10 of section 3429, exempting certain classes of property from execution against a county,—cannot be extended so as to include the right to levy an execution against the property of the county, state, or municipal organization, in the absence of a statute expressly granting such right in express terms.

3. Under section 199, p. 307, Comp. Laws Utah 1888, a judgment against a county, when duly filed, becomes an audited claim against said county; and plaintiff, in case of failure from lack of funds or refusal to pay the same, can resort to his writ of mandamus.

(Syllabus by the Court.)

Appeal from district court, Emery county; Jacob Johnson, Judge.

Action by Emery county against P. C. Burresen and others. Judgment for defendants, and plaintiff appeals. Reversed.

W. K. Reid and Thurman & Wedgwood, for appellant. J. W. N. Whitecotton, for respondents.

MINER, J. Killpack commenced suit in the justice's court against Emery county for \$6.75, claimed to be due him from the coun-

ty for fees as justice of the peace, which claim had been presented and disallowed by the county court, and \$25 attorney's fees for trying the case against the county, taxed as costs. Killpack recovered judgment, which, together with costs, amounted to \$52.50. Execution was issued by the justice against Emery county, which was levied by Burresen, the sheriff, upon property of the county, consisting of scrapers, plows, stray brands, etc., and sold the same to satisfy the execution. This action is brought by Emery county against the plaintiff Killpack, who brought the action; Burresen, the sheriff, who took the property; C. P. Anderson, the justice; and C. E. Kofford, the attorney, who advised the suit,—for conspiracy and unlawful conversion of the property of the county, claiming damages of \$324. The respondents justify upon the judgment and execution issued by the justice of the peace. The respondents obtained judgment, and for costs, in the district court, from which judgment the plaintiff Emery county appeals.

The question presented is whether the property of Emery county is liable to be levied upon and sold upon execution, in satisfaction of a judgment obtained against Emery county, one of the political divisions of the state. It appears that the claim, duly itemized, was presented to the county court for allowance before suit, and that it was wholly disallowed; that, after judgment, a certified copy thereof was filed with the county court. The respondents base their right to the issuance, levy, and sale by execution upon section 3419, Comp. Laws Utah 1888, which gives a party in whose favor judgment is rendered a right to a writ of execution for its enforcement, and upon subdivision 10, § 3429, *Id.*, which exempts certain specified classes of property belonging to the county, not included in the execution and sale, from execution. The nature, objects, and liabilities of political, municipal, or public corporations, like a county in a state, stand upon a different ground from private corporations. A county is one of the political divisions of the state, signifying a community, clothed with such extensive authority and political power as may be deemed necessary by the superior controlling power of the state for the proper government of its people residing within its borders, and for a proper administration of its local affairs. A county can raise revenue by taxation, make public improvements, and defray the expenses of the same by taxation, exercise certain specified judicial powers, and generally act within the authorized sphere created and abridged by the statute or constitution of the state. The power of taxation furnishes the means by which it may pay its debts and meet obligations necessarily incurred for the many purposes of its existence and welfare. The county has control of the county property to be used and disposed of to promote corporate purposes. It does not possess property liable

to execution in the same sense that an individual possesses it. Levying upon and selling the property or revenues of a county, or removing it, may work irreparable injury, and ruin its inhabitants.

We are unable to find, nor has our attention been called to, any statute in this state expressly giving authority to levy an execution, and sell property of the county for a debt. It is a general rule that the people or the sovereign are not bound by general words in a statute restrictive of a prerogative right, title, or interest, unless expressly named. *People v. Herkimer*, 4 Cow. 345; *Leonard v. City of Brooklyn*, 71 N. Y. 498; *City of Chicago v. Hasley*, 25 Ill. 486; *Sedg. St. Const.* p. 337. So, it has been held that, in rendering judgment against a city, it is error to award execution, or to levy it. *City of Morrison v. Hinkson*, 87 Ill. 588; *Klein v. New Orleans*, 99 U. S. 149. It has also been held by this court that the board of education is not liable to the process of garnishment for a salary due a teacher, and that the statute authorizing the garnishment of corporations only applies to private corporations. *Chamberlain v. Watters*, 10 Utah, 298, 37 Pac. 566; *Van Cott v. Pratt*, 11 Utah, 209, 39 Pac. 827.

Section 3419, Comp. Laws Utah 1888, giving a party in whose favor judgment is rendered a right to execution; and subdivision 10 of section 3429, exempting certain classes of property from execution against a county,—cannot be extended so as to include the right to levy an execution against the property of the county, state, or municipal organization, in the absence of a statute expressly granting such right in express terms. "The property of such public corporations, and the taxes levied and collected for public purposes, are a constituent part and a necessary ingredient of their public power, and are no more liable to seizure and sale than the whole power itself would be; and before we can assent to the proposition that a political corporation, clothed with so many powers and duties of government, so essential to be sustained by the exercise of their rights and privileges, cannot be secured in their property and means by which their functions can be properly exercised for the benefit of the citizen, we must see some positive act of the legislature authorizing the issuance of the writ." We cannot admit that any individual possesses such power under our laws as would enable him, in securing a private end, to put an end to the functions of a political organization, and thus disorganize and destroy the government. It is true that a county can sue and be sued, and the rights of a creditor are preserved under section 199, p. 307, 1 Comp. Laws Utah 1888, which provides as follows: "A claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor, at any time within six months after the final action of the court, but not afterwards; and if, in such action, judg-

ment is recovered for more than the court allowed, on presentation of a certified copy of the judgment, the court must allow and pay the same, together with the costs adjudged; but if no more is recovered than the court allowed, the court must pay the claim, but no more than was originally allowed." A judgment, when obtained against a county under this act, has the effect of an audited claim against the county. It is conclusive evidence that the county owes the money for which the judgment is obtained. The county court has, after judgment, no discretion to exercise as to the justice and legality of the demand. Nevertheless, it appears to be contemplated by the statute that, after judgment is obtained, it shall be presented to the county court, and placed among the audited demands against the county; and then it is made the duty of the county to allow and pay the claim, together with the costs adjudged. The payment of costs is contingent upon the amount recovered. It was evidently intended by the statute that, when a judgment was obtained, it should have the force and effect of an audited demand, and that the claim was no longer open to contest. The county court, after judgment, and after the filing of a certified copy thereof with it, has no longer any discretion in the premises. The claim then stands upon the same footing as all other claims and demands against the county, and is therefore subject to all the conditions and limitations applicable to other audited claims, and payment may be enforced in the same manner, and not otherwise. No execution can issue upon a judgment against the county. When the judgment is rendered, and a certified copy thereof is filed with the county court, it then becomes the duty of the county court to apply such funds in the treasury of the county as are not otherwise appropriated to its payment; or if there are no funds, and the county court possesses the necessary power to levy a tax for that purpose, and if it fails or refuses to apply the funds, or to exercise the power, the plaintiff can then resort to his writ of mandamus.

A similar question, under a similar statute, has been before the courts of California and other states, where the same conclusion is reached. *Alden v. Alameda Co.*, 43 Cal. 270; *Emeric v. Gilman*, 10 Cal. 404; *Sharp v. Contra Costa Co.*, 34 Cal. 285; *Gilman v. Contra Costa Co.*, 8 Cal. 52; *City of Chicago v. Hasley*, 25 Ill. 485 (595); *Leonard v. City of Brooklyn*, 71 N. Y. 498; *High, Extr. Rem.* § 232; *Taylor v. County Court*, 2 Utah, 405; *Dill. Mun. Corp.* § 100; *Klein v. New Orleans*, 99 U. S. 149; *Sedg. St. Const.* 337; *High, Extr. Rem.* § 232; *People v. Herkimer*, 4 Cow. 345.

Upon the grounds stated, the judgment of the court below is set aside and vacated, with costs, and a new trial ordered.

ZANE, C. J., and BARTCH, J., concur.



(5 Idaho, 122)

LOWE et al. v. LONG.

(Supreme Court of Idaho. Dec. 12, 1896.)

## APPEAL—GRANT OF NEW TRIAL—AMENDMENT ON TERMS.

1. Where the record does not show the grounds upon which a new trial was granted, and no error warranting a new trial is apparent from the record, the order granting a new trial will be reversed.

2. Where, during the progress of the trial, the defendant asks leave to amend his answer, and it is apparent that such amendment will entirely or materially change the issues, the granting of such leave is a matter of discretion with the trial court, and to the granting of which the court may impose terms.

(Syllabus by the Court.)

Appeal from district court, Lemhi county; D. W. Standrod, Judge.

Action by George A. Lowe and others against Owen Long. Verdict for plaintiffs. From an order granting a new trial, plaintiffs appeal. Reversed.

Reeves & Terrell and John A. Bagley, for appellants. F. J. Cowen and R. P. Quarles, for respondent.

HUSTON, J. This is an appeal from the order of the district court sustaining and allowing a motion for a new trial. The plaintiffs brought action to restrain defendant from entering and working certain mining ground claimed by plaintiffs. The complaint sets forth the claim of plaintiffs with sufficient certainty, and the answer admits the same, but denies that defendant has trespassed on the claim of plaintiffs. The only question, as appears from the record, that was material in the case, was as to the location of the plaintiffs' claim. Plaintiffs allege in their complaint that the Golden Crest claim extends from the point of discovery 1,500 feet in a northwesterly direction, and being 300 feet in width on each side of the vein, and this is supported by a copy of the original location notice. Defendant seeks to establish that the direction of plaintiffs' claim is not in a northwesterly direction from the point of discovery, but the evidence upon this issue is vastly in favor of the plaintiffs. The case was tried to a jury, who made special findings, all of which are in favor of plaintiffs, except the answer to the third question, which question was as follows, viz.: "Are the workings of the defendant upon the Gold Block mining claim within 300 feet of the center line of the Golden Crest mining claim, and are they within or without the boundary lines of the Golden Crest? Ans. Yes, to first part of question, and are unable to agree upon the second part or clause of said question." The lines and boundaries of the Golden Crest mining claim were admitted by the answer to be as set forth in the complaint, and, if the workings of defendant were within the lines so alleged and admitted, it is difficult to readily see what was the matter with the jury that they should be in

doubt as to the concluding portion of the question submitted to them. We think the case of the plaintiffs was clearly made out by the evidence, and warranted the judgment rendered.

It seems that after the commencement of the trial, and during its progress, the defendant asked leave to amend his answer, and it would seem that such amendment changed the issues completely. The court granted the request, however, upon terms, which terms the defendant declined to comply with, and this order of the court is alleged as error. This was a matter in the discretion of the trial court, and there is nothing in the record that would warrant us in concluding that there was an abuse of discretion on the part of the trial court in making such order. The specifications of error, as the same appear in the record, are so incongruous, and unsatisfactory as to be of little service. This is doubtless largely attributable to the fact that the statement as it comes to this court is that prepared by the respondent on his application for a new trial. The verdict would seem to be supported by the evidence, and the judgment upon the verdict was correct. We are not advised through the record as to what were the grounds upon which the motion for a new trial was granted. We must be controlled by the record presented to us, however distasteful it may be to overrule the decision of the lower court in a matter which is of necessity largely one of discretion. The order of the judge of the district court granting defendant's motion for a new trial is reversed, and the judgment reinstated, and held to be in full force and effect. Costs awarded to appellants.

MORGAN, C. J., and SULLIVAN, J., concur.

(5 Idaho, 126)

## DAVIS v. ADA COUNTY.

(Supreme Court of Idaho. Dec. 12, 1896.)

## NEGLECT—DAMAGES—CONSTRUCTION OF BRIDGE—LIABILITY OF COUNTY.

County is not liable for damages sustained by reason of negligence in construction and maintenance of bridges, unless made so by statute.

(Syllabus by the Court.)

Appeal from district court, Ada county; J. H. Richards, Judge.

Action by Thomas Davis against Ada county to recover damages for negligence in constructing and maintaining a bridge. Judgment for defendant. Plaintiff appeals. Affirmed.

George H. Stewart, for appellant. Hawley & Puckett and C. M. Hays, Dist. Atty., for respondent.

SULLIVAN, J. This is an action to recover damages for the negligent, improper, and unskillful construction and maintenance of a certain bridge and approach to the bridge across Boise river at Boise City, in Ada county, by

means of which it is alleged the waters of said river were diverted and changed into a new and narrow channel, insufficient in width to permit the water of said river to flow freely and without obstruction, and thereby forced said water over against the north bank of said river, and caused said bank to cut away and flow over the lands of the plaintiff, by reason of which 30 acres of plaintiff's land were washed away and destroyed. A claim for the damages thus alleged to have been sustained by the plaintiff was presented to the board of county commissioners of said Ada county for allowance, which claim was rejected by said board. Thereupon the plaintiff brought this action against Ada county. The case was tried to a jury, and at the close of plaintiff's evidence the defendant moved for a nonsuit, which motion was granted, and judgment of dismissal and for costs was duly entered. This appeal is from the judgment.

The motion for nonsuit was based upon several grounds, all of which appear in the transcript. It is conceded by both parties that the vital question is whether the county is liable to the plaintiff for the injury stated in the complaint, and proven upon the trial. The appellant contends, under various provisions of our constitution and statutes, that counties should be held liable for negligence in the construction and maintenance of highways and bridges to the same extent as cities, as they seem to be, substantially, placed on the same footing under the law. This view is sustained by some very respectable authority. Thompson, in his work on Negligence (volume 1, p. 618), referring to the case of *Hedges v. Madison Co.*, 6 Ill. 571, in which Shields, J., said, "All the cases assume the ground that there is no corporate fund provided for that purpose," says: "Where, therefore, counties are erected into corporations, provided with a corporate fund, or the power of raising it, and invested with the care of highways and bridges, the reason of the rule ceases, and the rule ought to fall with it. They should stand upon the same footing, in this regard, as chartered cities." In Elliott, Roads & S. p. 324, footnote 3, is found the following statement: "In discussing the subject of bridges, we have shown that the prevailing doctrine is opposed by many well-reasoned cases and by many eminent text writers." However, the decided weight of authority is that a county is not liable for a tort, unless expressly made so by statute. We have no such statutory provision. In section 963, 2 Dill. Mun. Corp., the following language is used: "According to the prevailing rule, counties are under no liability in respect of torts except as imposed (expressly or by implication) by statute. They are political divisions of the state, created for convenience, and are usually regarded not to be impliedly liable for damages suffered in consequence of neglect to repair a county road or bridge. Such a liability, unless declared by statute, is generally, but not universally, denied to exist." In section 999, 2 Dill. Mun.

Corp., the author groups the decisions upon the question under consideration as follows: "First. When neither chartered cities nor counties or other quasi corporations are held to an implied civil liability. Only a few states have adopted this extreme view of exempting cities from liability in this respect. Second. Where the reverse is held, and both chartered cities and counties are alike considered to be impliedly liable for their neglect of the duty in question. This doctrine prevails in a small number of states. Third. Where municipal corporations proper, such as chartered cities, are held to an implied civil liability for damages caused to travelers for defective and unsafe streets under their control, but denying that such liability attaches to counties or other quasi corporations as respects highways and bridges under their charge. This distinction has received judicial sanction in a large majority of states, where the legislation is silent in respect of corporate liability." It is also stated in Elliott, Roads & S. p. 40: "Most of the courts deny that there is any liability on the part of counties or townships," unless the liability is imposed by statute. See, also, *Worden v. Witt* (Idaho) 39 Pac. 1114; *Gorman v. Commissioners*, 1 Idaho, 655. We are not disposed to change the rule as accepted by the decided weight of authority upon the question under consideration. If it is desirable to have the rule changed, the legislature has ample authority to change it, and to make the county liable for negligence in the construction and maintenance of the public highways and bridges, where damage and injury are sustained by reasons of such negligence. Judgment affirmed. Costs awarded to respondent.

MORGAN, C. J., and HUSTON, J., concur.

(5 Idaho, 77)

# MORRISON v. AMERICAN DEVELOPING & MINING CO.

(Supreme Court of Idaho. Dec. 12, 1896.)

BREACH OF CONTRACT—DAMAGES—PLEADING—PROOF.

Held, that no damages were pleaded, and none proved, as to the stull contract.

(Syllabus by the Court.)

Appeal from district court, Lemhi county; D. W. Standrod, Judge.

Action by John Morrison against the American Developing & Mining Company. Judgment for plaintiff. Defendant appeals. Reversed.

Texas Angel and Redwine & Gough, for appellant. William H. Claggett, for respondent.

SULLIVAN, J. This action was brought to recover the sum of \$658.80, claimed to be due upon two contracts,—one for cutting and delivering 200,000 feet of logs at \$4.25 per 1,000, and one for cutting and delivering 400 stulls at 45 cents each. Both causes of action were set up in one count. The cause was tried by

the court and a jury, and verdict and judgment were in favor of the plaintiff. Defendant's motion for a new trial was denied. This appeal is from the order denying the motion for a new trial and from the judgment.

Several errors are assigned, one of which is that the evidence is insufficient to sustain the verdict. After a careful consideration of the evidence, we find that the evidence is sufficient to sustain the verdict and judgment on the log contract. It is also contended that the evidence is insufficient to justify the verdict of the jury on the stull contract, and under that head it is contended that the complaint contains no allegation of damages on the stull contract, and that the evidence fails to show that plaintiff sustained any damages or injury on account of that contract. Paragraphs 5 and 6 of the complaint contain the allegations touching said stull contract, and are as follows: "That plaintiff and defendant entered into a verbal contract, on or about the 7th day of October, 1894, whereby plaintiff was to deliver at the mine of said defendant 400 stulls, at the contract price of 45 cents each; and that said plaintiff cut said 400 stulls, and delivered 32 of said stulls at the mine of said defendant; and that said defendant then notified the plaintiff that said defendant did not want said stulls." "That the value of said stulls so delivered to the mine of said defendant is \$14.40; and that the amount of labor expended on the balance of said 400 stulls was \$110.40." Said allegations do not aver that plaintiff sustained any damages by reason of the defendant company refusing to accept said stulls. It simply alleges that the amount of labor expended on the balance of said 400 stulls (after deducting 32 stulls, which had been delivered to and accepted by defendant company) was \$110.40. For aught the record shows, plaintiff may have sold the 368 stulls for more than defendant company had agreed to pay for them. No damage for breach of the contract is pleaded, and no injury proved. Unless plaintiff shows that he has sustained injury by reason of the breach upon the part of defendant, he cannot recover. *Geiss v. Manufacturing Co.* (Kan. Sup.) 14 Pac. 463. The cause is remanded to the court below, with instructions to grant a new trial unless the plaintiff consents to a reduction of \$110.40 on said judgment; and, if such consent is given, the court is authorized to reduce said judgment in the sum of \$110.40. Costs awarded to appellant.

MORGAN, C. J., and HUSTON, J., concur.

(5 Idaho, 107)

IDAHO GOLD-MIN. CO. v. UNION MINING & MILLING CO. et al.

(Supreme Court of Idaho. Dec. 12, 1896.)

APPEAL—SUFFICIENCY OF EVIDENCE—OPTION CONTRACT—CONSTRUCTION—DEED—DESCRIPTION.

1. *Held*, that the findings of fact are not supported by the evidence.

2. In an option to purchase a mining claim, where time is of the essence of the contract, it is obligatory upon the would-be purchaser to perform the stipulations by him to be performed within the time specified in the contract. If he fails to do so, his option to purchase may be forfeited.

3. A deed conveying the Robinson mine and mill site, and containing also the following description: "Also, all machinery, engines, boilers, \* \* \* hereby conveying to said C. Jeff. Clark all of the property, real, personal, and mixed, belonging to said William C. Schutz, and located in said county of Bingham, Idaho,"—*held* sufficient to convey the Austin mining claim, owned by said Schutz, in said county, at the date of the execution of said deed.

(Syllabus by the Court.)

Appeal from district court, Bannock county; D. W. Standrod, Judge.

Action by the Idaho Gold-Mining Company against the Union Mining & Milling Company and others to determine the ownership and right to possession of the Austin and Robinson lode mining claims, situated in Mt. Pisgah mining district, Bingham county. Judgment for defendant company, and plaintiff appeals. Reversed.

C. C. Dey, W. H. Bramel, and S. C. Winters, for appellant. F. S. Dietrich, S. McDowall, and Lawrence P. Boyle, for respondents.

SULLIVAN, J. This suit involves the ownership and right to possession of the Austin and Robinson lode mining claims, and the improvements thereon, situated in the Mt. Pisgah mining district, Bingham county. The plaintiff corporation seeks to have its equity in said property declared superior to the claim of defendant corporation. The trial was had in the district court of Bannock county, and judgment was rendered and entered in favor of the defendant company. This appeal is from the order overruling the motion for a new trial, and from the judgment. Five errors are assigned, four of which go to the sufficiency of the evidence to sustain the findings of fact, and that the findings of fact, as a whole, are contrary to law. The fifth assignment is that the court erred in refusing the motion for a new trial.

The facts are substantially as follows: On August 16, 1894, E. E. Chalmers and others made a contract with the defendant corporation, the Union Mining & Milling Company, whereby said company was given an option to purchase said named mining claims and a certain stamp mill and other improvements. By the terms of said contract, the Union Mining & Milling Company agreed to commence active work on said mines as soon as practicable, and carry on said work in a miner-like manner, at its own expense, for the period of one year, and to keep all machinery, etc., in good order and repair, and to pay said Chalmers and his associates one-tenth of the certain proceeds of ores taken from said mines, immediately after selling the same, and to pay \$1,500, less royalty, in

90 days from the date of said contract, at the First National Bank of Ogden, Utah, and, further, pay to said Chalmers and associates \$4,500, less royalties, at said bank, on or before August 15, 1895; the entire consideration being \$6,000. Chalmers and his associates agreed in the same contract, on their part, to convey within one year, by warranty deed, to said corporation, said named mining claims, stamp mill, and other improvements thereon particularly described; also, to furnish an abstract of title to said mining claims, and to place a deed to said property in escrow in said bank within 90 days after the date of said contract, and before the payment of said \$1,500 should be made, with instructions to said bank to deliver the same to the said corporation upon the payment of \$6,000, less royalties paid by said corporation. It was mutually agreed between the parties that time was of the essence of said contract, and that if said corporation failed to pay royalties or payments when due, as set forth in said contract, such sum or sums as may have been paid, together with all improvements made by said corporation on said property, should be forfeited to and retained by the first parties. Within a day or two after making said contract, the Union Mining & Milling Company took possession of said property. It did some work, repairing the mill and buildings, and worked the mine and mill, as the evidence shows, "experimentally merely," until September 24, 1894. On September 24, 1894, the mill burned, and work was suspended so far as working the mine was concerned. A little work was done after the fire, in the way of taking iron, tools, and some gold out of the ruins, and in repairing the roof of the blacksmith shop. The mine was not worked, and no work towards the development of said mines was done. About the middle of October, 1894, the Union Mining & Milling Company sold the gold taken from said mines for over \$900, and no part of said sum was paid over to Chalmers and associates until some time after the appellant corporation had made a contract with Chalmers and his associates, for the purchase of said mines and improvements; of which contract the defendant company had notice. After the burning of the mill, the matter ran along until the 31st of October, 1894, without the respondent corporation proceeding to repair the mill or work the mines; and Chalmers and associates, believing that the Union Mining & Milling Company had, for those and other reasons, abandoned the property, gave one Wilson a contract for the purchase of the same, conditioned, however, upon the failure of the Union Mining & Milling Company in making the payment of said \$1,500, as by the terms of the first-mentioned contract it had agreed to do. On the 15th day of November, 1894, John A. Shettle, the manager of the Union Mining & Milling Company, called at the bank in Ogden, and asked of the cashier

if the deed was there. He was informed that it was not, and he replied that he was prepared to pay the \$1,500. No tender of the money was made further than the statement that he (Shettle) was prepared to pay the \$1,500. The evidence shows that the Union Mining & Milling Company was insolvent, and that Mr. Shettle borrowed \$1,500 for the purpose of making a conditional tender, agreeing to return the money to the lender the following day. It appears from the record that some correspondence had been had between Shettle and Chalmers in regard to the abstract of title which Chalmers and his associates were to and did furnish the Union Mining & Milling Company prior to the said 15th day of November, when it claimed that it was discovered that Chalmers and his associates did not have the legal title to the Austin mine. It appears that one William Chas. Schutz had been the owner of said Robinson and Austin mines; and on May 22, 1893, he executed a quitclaim deed to one C. Jeff. Clark, the grantor of Chalmers, and associates, conveying to said Clark the said Robinson mine, by naming it in said deed, which deed also contains the following clause: "And all the property, real, personal, and mixed, belonging to said Wm. C. Schutz, and located in said county of Bingham, Idaho." Under that clause, appellant contends the Austin mine was conveyed to said Clark, and, through Clark, Chalmers and associates derived title. At the date of said conveyance, Schutz was the owner of both the Robinson and Austin mines, and they were situated in Bingham county. On November 16, 1894, the installment of \$1,500 not having been deposited at said bank, Wilson paid Chalmers and associates \$300, the first payment under the contract of October 31st, and thereupon Chalmers gave to Wilson the following order: "Ogden, Utah, November 16th, 1894. To Frank A. Putnam, William M. Lacey, Gus Bostrom, and George Halverson—Gentlemen: The John A. Shettle contract for the purchase of our Cariboo property is forfeited. The first payment on the W. A. Wilson contract—entered into subject to the Shettle contract—has been made promptly, as agreed between Mr. Nickerson and us. Mr. Nickerson, representing W. A. Wilson, will be up there shortly, to continue work on the mines. Please, therefore, let him into possession at once. Yours, truly, E. E. Chalmers." The persons to whom said order was addressed were associates of Chalmers, and had signed the John A. Shettle contract, referred to in said order. On the 17th day of November, 1894, one Nickerson, acting for Wilson, presented the above order to Putnam (who had been at work for the Union Mining & Milling Company), and he gave Nickerson possession of said property for Wilson. Wilson began at once to reconstruct the mill and to make other improvements. The mill was completed about the 8th of January, 1895. On November 28,

1894, the Idaho Gold-Mining Company, the appellant, by and with the consent of said Wilson, made a contract with Chalmers and associates for the purchase of the property involved in this suit. Wilson thereafter assigned his contract to said corporation, and subsequent thereto all work done on said mines and in the construction of said mill was done by said company. The Union Mining & Milling Company had knowledge of the contracts made by Chalmers and associates with Wilson, and the Idaho Gold-Mining Company also knew of the work being done in the reconstruction of said mill and on said mines. Said first-named company did not resume work on said mines, or offer so to do. It stood by, and saw Wilson and the Idaho Gold-Mining Company reconstructing said mill, and making valuable improvements on said mines, at a cost of several thousand dollars, and not until the 8th day of February, 1895, did it serve notice on the Idaho Gold-Mining Company that it was the owner of said mines and improvements. It appears from the record that William O. Schutz, the grantor of said Clark, resided in St. Louis, Mo.; and that said Shettle, some time prior to the 23d day of November, 1894, communicated with him in regard to the Austin mine, and offered to purchase the same. Said Shettle, as manager of the Union Mining & Milling Company, procured a quitclaim deed from Schutz for said Austin mine, dated December 11, 1894; and between January 29, 1895, and March 27, 1895, he procured conveyances from Chalmers and his associates for said Robinson Mine. The cause was tried by the court, without a jury, and judgment was rendered and entered in favor of the defendant corporation, the Union Mining & Milling Company. A motion for a new trial was denied. This appeal is from the order denying a new trial, and the judgment.

Numerous errors are assigned, the principle of which is that the findings of fact are not supported by and contrary to the evidence. Finding of fact No. 3 is the first complained of. Said finding is as follows: "That immediately upon the execution of said contract, on said 16th day of August, as aforesaid, the Union Mining and Milling Company, by virtue of said contract, entered into possession of said property so described, and worked said mining claims, and operated said mill, until wrongfully ousted therefrom, on or about the 16th day of November, 1894, by one W. A. Wilson." There is no evidence to support that part of said finding. The mill was burned on the 24th of September, 1894, and there is not a scintilla of evidence showing that the Union Mining & Milling Company "worked said mining claims, and operated said mill," from that date until the 16th day of November, 1894. No work was done on the mines after the mill burned, and no effort made to repair the mill. The roof on the blacksmith shop was repaired, and some gold taken from the ruins of the mill, as well as some iron and

tools. But there is no evidence showing, or even tending to show, that the Union Mining & Milling Company, after the fire, attempted to comply with that provision of its contract, to wit, "to commence active work in, on, and about said mining property, and carry on said work in a miner-like manner for the period of one year." The evidence shows that Wilson took possession of said mining properties lawfully and peaceably, with the consent of the agent of the defendant company, who was also an owner with Chalmers in said property.

The fourth finding of fact is complained of as error. That finding contains, *inter alia*, the following: "That the defendant Union Mining and Milling Company, at all times after the making of said contract A, stood ready and was able and willing to perform its part of the said contract, and, at the date specified in said contract, stood ready and willing to pay the amount agreed upon in said contract to be paid to the said first parties." There is no evidence to show that defendant corporation "stood ready and was able and willing to perform its part of said contract." On the contrary, the evidence shows that said company was insolvent, had failed to pay royalties as per said contract it had agreed to do, and had quit work entirely on said mines at least a month prior to November 16, 1894. The contract required active work in said mines, and the only active work shown to have been done by the manager of the defendant company after the middle of October was in trying to get a deed to the Austin mine from one Schutz. Standing ready, able, and willing to do active work cannot be taken for doing active work, as it is not shown that they were prevented from so doing by Wilson or appellant company. If Shettle had made tender of the \$6,000 (the sum agreed to be paid for said mines) on the 16th day of November, 1894, and demanded a deed, then the case would have assumed a different aspect. But, according to his testimony, he had but \$1,500, the amount of the partial payment agreed to be paid 90 days after the execution of said contract, and on the exhibit of the abstract of title and deposit of deed. This offer, if it can be considered an offer to pay the \$1,500, did not release the Union Mining & Milling Company from its other covenants in said agreement. The active work "in, on, and about" said mining claims, as contemplated by the contract of August 16, 1894, ceased at the time the mill burned, and no effort was made to resume it. The failure to make the tender of the \$1,500 in good faith, the failure to pay the royalty until after the contract of October 31st had been entered into, and the payment and acceptance of \$300 from Wilson, the failure to keep in repair buildings and machinery, and the failure to prosecute the development of said mines, were violations of the obligations of said contract, dated August 16, 1894. And the forfeiture of the Union Mining & Milling Company's rights under said last-mentioned contract was declared when

Chalmers and his associates received the \$300 paid by Wilson and the order given by Chalmers placing Wilson in possession of said mining claims and property. The Union Mining & Milling Company had notice of such forfeiture. Chalmers and his associates were then powerless to set aside or annul said contract so long as Wilson and his assignee performed the work and other duties imposed by it. The contract of the Union Mining & Milling Company required it to continue active work upon said mines. As stated above, it ceased work when the mill burned, on September 24, 1893. A little work was done after the fire, in the way of saving the gold milled, picking out pieces of iron and tools from the ruins, and repairing the roof on the blacksmith shop. But defendant company ceased all work about the 15th of October. No forfeit was declared until November 16, 1893, after the payment of the installment of \$1,500 was due. While it is true that said \$1,500 was not due and payable until an abstract of title was presented, and deed exhibited and deposited, it devolved upon the Union Mining & Milling Company, if it desired to continue the contract in force, to make a tender, in good faith, of said \$1,500, and to continue active work in the development and improvement of said mines, neither of which was done. It appears that Chalmers and associates were willing to waive the failure to continue active work provided the \$1,500 were paid as stipulated. As it was not paid, a forfeiture was declared on November 16th, as above stated.

By the fifth finding of fact, the court finds that Chalmers and associates "were never able to, and never did, procure or tender or place in escrow" a deed to said mining claims, and did not furnish an abstract of title to said mining claims. The abstract of title and deed were to have been furnished by Chalmers and his associates within 90 days after the 16th of August, 1894, and prior to the payment of the installment of \$1,500, which defendant company agreed to pay. The record discloses, in fact, that an abstract of title was furnished in time, and objected to by defendant company's agent. That objection was not sufficient to relieve the defendant company from the performance of the obligations imposed on it by said contract. The payment of the installment of \$1,500 did not entitle the defendant to the possession of said deed and abstract of title, and the failure of Chalmers and associates to deposit the same within the time agreed did not relieve the defendant from making a tender of said \$1,500 in good faith, and otherwise performing its covenants in said contract. In *Kelsey v. Crowther*, 162 U. S. 404, 16 Sup. Ct. 808 (a case involving substantially the same principle as the case at bar), Mr. Justice Shiras, speaking for the court, said: "His failure to furnish the abstract might have justified the complainants in declaring themselves off from the contract, and might have formed a successful defense to an action for damages

brought by Crowther; but, if they wished to specifically enforce the contract, it was necessary for the complainants themselves to tender performance. \* \* \* And the rule is still more stringently applied in the case of an optional sale, like the present one, where time is of the essence of the contract, and where Crowther could not have enforced specific performance." In the case at bar the pretended tender was not made until the 15th day of November, 1894, which was 91 days after the 16th day of August, 1894. In fact, the defendant company wholly failed to perform the obligations imposed on it by the terms of said contract from and after about the middle of October, 1894. The defaults of the defendant company in failing to work the mines and to pay royalty excused Chalmers and associates from furnishing the abstract of title and placing deed in escrow. It appears that Chalmers and associates had not waived those defaults, but, perhaps, intended to do so if the installment of \$1,500 was paid or tendered in good faith by the 16th day of November, 1894. The tender or deposit of the money was not made, and Chalmers received \$300 from Wilson, and gave him possession of said mines and property. Time being of the essence of the contract, the defendant company was not entitled to further time to comply with the provisions thereof. *Settle v. Winters*, 2 Idaho, 199, 10 Pac. 216; *Waelerman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646. Mr. Chalmers states his reason for holding the contract of August 16th forfeited in his testimony as follows: "Mr. Shettle said he expected to make the money out of the mine with which to pay for it; and shortly after that the mill burned up, and he made no effort to replace it, ceased work upon the property, and apparently abandoned it. And he had taken out \$900 in gold, and never paid us the royalty which the contract calls for, and was making efforts to sell it; and that was the reason why the deed was not [deposited]." An abstract of title was furnished to Shettle, the manager of the Union Mining & Milling Company, which was not satisfactory to him. But the evidence shows that the defects in said abstract were within the power of Chalmers and associates to remedy, and required no further deed from Schutz, and only the recording of the deed from said Clark to Chalmers and his associates, which was recorded on December 5, 1894.

By the sixth finding of fact, the court found that after it was ascertained that Chalmers and associates had no title or claim or right to the Austin mining claim, and that the title was in William C. Schutz, defendant company was compelled, with a large outlay of money, to procure a deed to said mining claim. The evidence does not sustain this finding. The evidence shows that the title to said Austin mine was in C. Jeff. Clark, from whom Chalmers and associates had a deed conveying the Robinson and Austin mines, in escrow, at Soda Springs, at the time said pretended title

was procured by the Union Mining & Milling Company. It is shown that one William C. Schutz was the owner of said Robinson and Austin mining claims, and that on the 22d day of May, 1893, he conveyed to said C. Jeff. Clark the Robinson mining claim and mill site, naming them, and said deed contains the following, to wit: "Also, all the machinery, engines, boilers; \* \* \* hereby conveying to said C. Jeff. Clark all of the property, real, personal, and mixed, belonging to said William C. Schutz, and located in said county of Bingham, Idaho." The Union Mining & Milling Company contends that the title to the Austin mining claim did not pass by said deed to C. Jeff. Clark. We cannot sustain that contention. The clause in said deed, to wit, "hereby conveying to said C. Jeff. Clark all of the property, real, personal, and mixed, belonging to said William C. Schutz, and located in said county of Bingham, Idaho," conveyed to said Clark whatever title said Schutz had in and to said Austin mine. *Brown v. Warren*, 16 Nev. 228; *Lick v. O'Donnell*, 3 Cal. 59; *Pettigrew v. Dobbelaar*, 63 Cal. 396; *Frey v. Clifford*, 44 Cal. 335; 1 Greenl. Ev. (14th Ed.) § 297; *Bish. Cont.* § 376; *Land Co. v. Randell (Iowa)* 47 N. W. 905. Clark, having the title to both of said mining claims, conveyed the same, by deed dated September 27, 1893, to said Chalmers and associates. The deed was in escrow at Soda Springs, and was taken out by Chalmers, with the \$300 Wilson paid him on the 16th of November, upon the contract of October 31, 1893, and was duly recorded on the 5th day of December, 1894. The conveyance procured by the Union Mining & Milling Company from Schutz gave it no title to said mine, and the fact that it expended a large sum of money in procuring said conveyance is immaterial in this case.

By the seventh finding of fact, the court found that the Union Mining & Milling Company fully and faithfully performed and kept all of the requirements and obligations and agreements upon its part to be done or performed, etc. Conceding that the Union Mining & Milling Company had faithfully kept and performed its obligations in said contract up to November 15th, there is no evidence showing that any of the duties imposed by said contract were performed after that date. It did not work the mine. It did not account for royalties at the times agreed to. In fact, it did nothing. Mr. Shettle testified that he knew of the negotiations between Chalmers and Wilson as early as November 14, 1894. He also testified that his intention was, after the mill burned, to develop the mines, and expose a greater amount of ore before his company went to the expense of rebuilding the mill. Mr. Thomas testified that Shettler said that he would wait until they (the plaintiff company) got the mill up; then he would take it away from them, and run it. While it is true Shettle denied making that statement, as a matter of fact he did wait until

the mill was completed, and then took possession by writ of restitution. The Union Mining & Milling Company stood by, and let the plaintiff company expend several thousand dollars in the improvement and development of said property, and then did just what the evidence shows Shettle said he would do. By that finding, it is found that during the month of January, 1895, the defendant company procured deeds from Chalmers and his associates, conveying to defendant the title to the Robinson mine, and that this was to the satisfaction of Chalmers and associates. Those facts do not strengthen defendant company's case, as it had notice of the contract of Chalmers and associates with W. A. Wilson and the Idaho Gold-Mining Company; and Chalmers and his associates should not be permitted to violate their obligations in the last-mentioned contract, so long as Wilson and the Idaho Gold-Mining Company keep and perform theirs. The defendant company was not vigilant and active in asserting its pretended rights, and vigilance and good faith are required in this class of cases. *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646; *Durant v. Comegys (Idaho)* 28 Pac. 425.

By the eighth finding of fact, the court finds, among other things, that the defendant company was endeavoring to assert its rights to procure title under said contract, and that it had not abandoned and did not intend to abandon, said contract or said property. This finding is not sustained by the evidence. The defendant company's intentions are best shown by its acts. After the 16th of November, to the date that the work of rebuilding the mill was completed, and even later, down to February 8, 1895, no effort was made to regain possession of said mining properties, and no notice was served upon the Idaho Gold-Mining Company that the defendant company claimed any rights under the contract of August 16, 1894. The defendant company had full knowledge that the plaintiff company was making valuable improvements on said properties at a large outlay of money, and, instead of its actively working said mines or endeavoring to do so, it was running a race with Chalmers and associates to ascertain which party could first procure a quitclaim deed to the Austin mine from Schutz. The acts of defendant company clearly show that it had not only forfeited, but also abandoned, its rights under said contract of August 16, 1894, and was endeavoring to procure title to said Austin mine from a different source than through Chalmers and associates. That it did afterwards procure a conveyance from Chalmers and his associates to the Robinson mine, mill site, and other property is immaterial, as that company had notice of the contracts made by Chalmers and associates with Wilson.

The judgment of the court below is reversed, with instructions to enter judgment in favor of appellant in accordance with the pray-

er of the complaint. Costs awarded to the appellant.

MORGAN, C. J., and HUSTON, J., concur.

(23 Nev. 343)

STATE ex rel. KOPPE v. SECOND JUDICIAL DISTRICT COURT OF NEVADA. (No. 1,484.)

(Supreme Court of Nevada. Dec. 28, 1896.)

APPEAL FROM JUSTICE—NEW TRIAL.

After a verdict rendered in the district court upon the trial of a case appealed from a justice's court, the district court has jurisdiction, where a proper showing is made, to grant a new trial.

(Syllabus by Bigelow, C. J.)

Application by the state, on the relation of Gustave A. Koppe, for a writ of certiorari to A. E. Cheney, judge of the Second judicial district court for Washoe county. Writ denied.

Curler & Curler, for relator. T. E. Haydon, for respondent.

BIGELOW, C. J. The action of Haydon v. Koppe was appealed from the justice's court of Reno township to the district court, and upon a trial there, before a jury, the defendant obtained a verdict and judgment in his favor. Thereupon the plaintiff, in accordance with the provisions of the statute, moved for a new trial, which was regularly granted by the court. The relator (the defendant in said action) has applied for a writ of certiorari to set aside the order granting a new trial, upon the ground that in cases appealed from a justice's court the district court has no jurisdiction to grant a new trial. This contention is founded upon the language of section 3004, Gen. St., which directs that "all cases appealed to the district court shall be tried anew in said court, but said court may regulate by rule the practice in such cases in all respects not provided for by statute." The relator contends that in the trial of appealed cases the district court has only such jurisdiction as is specially conferred upon it by statute; that it has no common-law jurisdiction; and, as the right to try anew does not include the right to grant a new trial, no such power exists. We do not, however, feel justified in taking so restricted a view of the powers of the district courts. Nothing is said in the statutes as to what the procedure in appealed cases shall be, except that the court may regulate it by rule, which, so far as we know, has never been done, except in some few points immaterial to this question; but the legislature must have expected those courts to pursue the course they generally do pursue, and that is to try such cases in substantially the same manner that cases originally begun in the courts are tried. Believing this to be correct practice, we see no occasion to make an exception of the right to grant a new trial. Generally, the district courts have the power to grant new trials where a proper showing is made. The statute seems to make no restriction upon it. The provisions of article 2 of chapter 7 of the practice

act (1 Comp. Laws, p. 344), which treats of new trials, are in no wise limited to actions originally begun in the district courts. They are apparently applicable to all cases where there has been a trial and a decision by a jury, court, or referee. To hold that they do not apply to cases appealed from a justice's court would be to construe into the statute an exception that does not exist there now.

The case of Schuyler v. Mills, 28 N. J. Law, 137, relied upon by relator, is not in point, for the reason that the statute of New Jersey in force when that decision was rendered provided that "after the trial of an appeal in the court of common pleas no new trial shall be granted by the said court." The only question in that case was whether a nonsuit constituted a trial of the case. Having held that it did, there could, of course, under that statute, be no new trial. Application for the writ denied.

BONNIFIELD and BELKNAP, JJ., concur.

(31 Or. 589)

McCANN v. WETHERILL.

(Supreme Court of Oregon. Dec. 21, 1896.)

QUESTIONS OF FACT—REVIEW.

A judgment based wholly on findings of fact will be affirmed if they are supported by the evidence.

Appeal from circuit court, Josephine county; H. K. Hanna, Judge.

Action by Edward McCann against Alexander Wetherill. Judgment for defendant, and plaintiff appeals. Affirmed.

Francis Fitch and Willard Crawford, for appellant. Davis Brower, for respondent.

PER CURIAM. This is a suit brought to enjoin the defendant from obstructing or interfering with the flow of water in and through a certain ditch, by which a portion of the waters of Democrat gulch, in Jackson county, is carried onto the lands of plaintiff, and used by him for irrigating purposes. The plaintiff claims title, and the right to use 300 inches of the water flowing in the gulch, by adverse user of himself and grantors for more than fifteen years. The answer denies the facts alleged, and sets up as a defense that Democrat gulch is not, and never has been, a natural water course, but that all the water flowing therein was diverted from Althouse creek into said gulch, and appropriated for the purposes of irrigation, and for stock and domestic use, by defendant's grantors and predecessors in interest, more than 25 years ago, and has been continuously used by them for such purposes ever since, and that any use of said water by the plaintiff and his grantors was a permissive one only. The reply put in issue the allegations of the answer, and, upon the issues thus joined, a trial was had, resulting in a decree in favor of the defendant, from which the plaintiff appeals. The issues involved in the case are



wholly questions of fact, and it is sufficient for us to say that, after a painstaking examination of the evidence, we fully concur in the conclusions of the trial court; and the decree is therefore affirmed.

(30 Or. 226)

### RYAN v. RYAN.

(Supreme Court of Oregon. Dec. 21, 1896.)

#### DIVORCE—CRUELTY—EVIDENCE.

A divorce for cruel and inhuman treatment, and personal indignities rendering life burdensome, should be granted on evidence that defendant was frequently intoxicated, and was quarrelsome and violent; that at one time he kicked out a door panel, and that at another, while violently cursing his wife, he shot off a pistol several times; that he was in the habit, without provocation, of using vile and offensive language in her presence.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Elizabeth Ryan against A. G. Ryan for divorce. Judgment for plaintiff, and defendant appeals. Affirmed.

John M. Gearin and D. R. Murphy, for appellant. J. C. Moreland and R. W. Montague, for respondent.

**PER CURIAM.** This is a suit for divorce, based upon two grounds, viz. habitual gross drunkenness contracted since marriage, and cruelty and personal indignities rendering life burdensome. The court below found in favor of plaintiff upon both. We have examined the testimony with much care and attention, and have come to the conclusion the divorce should be granted. While it is thought the charge of habitual gross drunkenness has not been sustained, yet there can be no question but that the defendant has been beastly intoxicated at frequent intervals during late years, perhaps not elsewhere than at his home, and while in that condition was wantonly abusive of plaintiff, treated her harshly and cruelly, and in utter disregard of conjugal fellowship. But it is claimed that the acts charged and proven do not constitute cruel and inhuman treatment, or personal indignities rendering life burdensome, within the meaning of the statute. Personal violence against plaintiff may not have been directly threatened or imminent, yet she was not without reason for apprehending it. It was shown that the defendant, while intoxicated, was quarrelsome, and at times violent, and acted without reason and in utter disregard of consequences. At one time he kicked out the door panel; at another, while violently cursing her, shot off his pistol a number of times; and at another he followed her around while she was doing her housework, clapping his fist in his hand, and swearing that she did not have a relation that could stand up against him. During these and other times, without cause or provocation, he called her "a whore," and applied to her other offensive and opprobrious epithets, and used towards her language so vile and indecent that we refrain from repeating it here.

She says his demeanor rendered her nervous and sick, and that she could not live with him longer. We think that such treatment as is delineated in the evidence, considered in its entirety, is quite sufficient to make the plaintiff apprehensive of her personal safety, and is of a nature calculated to affect her mind, undermine her health, and thereby endanger her life, and hence is sufficient upon which to found a divorce. *Doolittle v. Doolittle*, 78 Iowa, 792, 43 N. W. 616, and *Day v. Day*, 84 Iowa, 221, 50 N. W. 979. There was no condonation, and the decree of the court below is therefore affirmed.

(30 Or. 247)

### DAY v. LARSEN.

(Supreme Court of Oregon. Dec. 21, 1896.)

#### ATTORNEY'S LIEN ON JUDGMENT—WHEN ACCRUES.

The lien on a judgment given by Hill's Ann. Laws, § 1044, to an attorney, for fees, "from the giving notice thereof to the party against whom the judgment or decree is given, and filing the original with the clerk," does not accrue if, prior to such notice and filing, the judgment defendant makes a bona fide settlement of the judgment with the creditor.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Joe Day against E. S. Larsen. There was a judgment for plaintiff, and, from an order vacating an order against the clerk of court to show cause why he should not enter satisfaction of the judgment, defendant appeals. Reversed.

Walter S. Perry, for appellant. M. J. McMahon, for respondent.

**BEAN, J.** This is a summary proceeding against the clerk of the trial court, to compel him to enter of record the satisfaction of a judgment. The facts are that on March 11, 1895, a judgment was rendered in a civil action in favor of plaintiff, and against the defendant, for the sum of \$138.20, besides costs and disbursements. This judgment was paid in full on the 15th of the same month, and the judgment creditor duly executed and acknowledged a certificate of satisfaction thereof in writing. After payment, but before the certificate was tendered to the clerk for filing, or any demand made upon him to enter satisfaction of the judgment, the attorneys of the plaintiff duly served and filed a notice of lien thereon for their compensation for prosecuting the action, and on account thereof the clerk refused to satisfy the judgment of record, which action was approved by the court.

It was claimed, in the court below, that the certificate of satisfaction was not executed until after the notice of the attorney's lien had been served and filed, and was dated back for the purpose of defrauding them out of their compensation. But this contention was not supported by the evidence, and therefore the only question in this case is, at what time does the lien of an attorney attach to a

judgment recovered by him as against the judgment debtor? And this question must be determined from the provisions of the statute. It is unnecessary to stop to inquire as to an attorney's rights in this regard at common law, for our statute covers the entire subject, gives the lien, and specifically points out when and upon what terms and conditions it shall attach, or, as put by Mr. Justice Elliott in a similar case, "the statute is now the source from which the lien is derived, and it can only exist as the statute creates it." *Alderman v. Nelson*, 111 Ind. 255, 12 N. E. 394.

By section 1044 of Hill's Annotated Laws it is provided that an attorney has a lien for his compensation to the extent the same may have been specially agreed on, "from the giving notice thereof to the party against whom the judgment or decree is given, and filing the original with the clerk where such judgment or decree is entered and docketed." These words carry their meaning plain upon their face, and fix, as the time when the lien shall attach as against the judgment debtor, the giving of notice to him, and filing the same with the clerk. The right to acquire the lien is a privilege of which the attorney may avail himself, by giving and filing the notice as required by the statute; but he has no lien or claim upon the judgment, as against the judgment debtor, prior to that time. As to him, the notice creates and originates the lien, and the statute specifically fixes the time from which it shall exist. He is a stranger to the contractual relations between the attorney and his client, and no right can be acquired against him under the statute before the prescribed notice is given. If, before that time, he makes a bona fide settlement of the judgment with the creditor, it is clear that there is nothing in existence to which the lien can attach, and any subsequent notice is therefore inoperative to create any liability against him. This is in harmony with the construction of analogous statutes in other states. *Henry v. Traynor*, 42 Minn. 234, 44 N. W. 11; *Elliott v. Atkins*, 26 Neb. 409, 42 N. W. 403; *Pirie v. Harkness*, 52 N. W. 581; *Smelting Co. v. Pless*, 9 Colo. 112, 10 Pac. 652.

It follows from what has been said that the order appealed from must be reversed, and this cause remanded to the court below, with directions to order the judgment in question to be satisfied of record.

(19 Mont. 1)

CLARK v. LINDSAY & CO., Limited.

(Supreme Court of Montana. Nov. 30, 1896.)

#### CONTRACTS—PERFORMANCE.

A contract to ship goods by way of a certain railroad on or before a specified day is complied with by putting the goods on board a car of such railroad on such day, though the car does not leave the station until some day following.

Appeal from district court, Lewis and Clarke county; Horace R. Buck, Judge.

Action by H. S. Clark against Lindsay & Co., Limited. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This action is brought to recover damages sustained by plaintiff's assignor, one Pendleton, because of the failure of Lindsay & Co. to receive a car load of eggs and dressed poultry sold by Pendleton to the defendant in February, 1892. It is alleged by plaintiff that on February 11, 1892, Pendleton sold and furnished to defendant 370 cases of eggs at the agreed price of 20 cents per dozen, amounting, in all, to \$2,220; that the said agreed price was for the eggs delivered on board the cars in Lawrence, Kan.; that thereafter, on February 13, 1892, in addition to the eggs sold, Pendleton sold and furnished to defendant a quantity of dressed turkeys, of the value, when delivered on board the cars at Lawrence, of \$142.04; that defendant requested that the poultry be shipped in the same car with the eggs, and that, under the contract, the eggs and poultry were to be shipped on or before February 15, 1892; that defendant was to pay the freight from Lawrence, Kan., to its place of business in Helena, and plaintiff's assignor was instructed by the defendant to ship via the Union Pacific Railway; that, according to the contract and direction of the defendant, Pendleton shipped the eggs and poultry on February 15, 1892, as directed, and notified the defendant of the shipment on said date; that on the arrival of the eggs and poultry at Helena about February 23, 1892, the defendant refused to unload them from the cars or pay for the same, or to have anything to do with the goods; that plaintiff was obliged to sell the same for the best prices he could get, and thereby sustained loss. The defendant denied the contract as alleged by plaintiff, and for further answer averred that about February 11, 1892, Pendleton and defendant entered into an agreement whereby Pendleton was to sell to defendant the eggs and poultry mentioned in the complaint, and at prices therein given; that by the terms of their contract it was expressly agreed that Pendleton should deliver the eggs and poultry free on board the cars on the Union Pacific Railway at Lawrence, Kan., in such time that the same could be shipped and leave Lawrence on or before February 15th, and that the time of shipment and departure of the eggs and poultry was a material part of the contract; but that Pendleton failed to load the merchandise on board the cars at Lawrence in time to permit the same to be shipped and depart from Lawrence on or before February 15, 1892, and that the said merchandise could not be shipped and depart from Lawrence before February 16th, and did not in fact leave until February 17th. The plaintiff, by replication, denied that Pendleton failed to put the merchandise on board the cars at Lawrence so that the same could be shipped and depart therefrom on or before

February 15, 1892, and alleged that it was loaded at Lawrence in time so that it could have been shipped and have departed from Lawrence on February 15, 1892, and alleged that the merchandise left Lawrence on February 16, 1892. The replication also denied that it was any part of the contract that Pendleton should cause the merchandise to depart from Lawrence on or before February 15, 1892. The case was tried to a jury, and a verdict returned in favor of plaintiff, assessing his damages in the sum of \$676.66. Judgment was entered on the verdict. Defendant moved for a new trial, which was denied. From the judgment, and the order overruling the motion for a new trial, the defendant appeals.

Henry C. Smith, for appellant. Smith & Word, for respondent.

HUNT, J. (after stating the facts). What was the contract entered into between the parties? If the respondent is correct, Pendleton did all he was obliged to do, when, on February 15th, he placed the merchandise involved, in good condition, on board the railroad cars at Lawrence, Kan., to be transported to Helena, Mont. But if appellant (defendant) is correct, although it admits that the contract entered into between it and Pendleton is the same as set forth by Pendleton, it nevertheless avers that it was agreed in and by said contract that the merchandise was to be delivered to the railroad company so that it could be shipped and leave Lawrence on or before February 15th, and that such shipment and departure were material parts of the contract. Without reviewing the evidence, it is sufficient to say that the plaintiff's version of the agreement is fully supported. When plaintiff's assignor agreed to ship the goods on or before February 15th, presumably he meant only to deliver the goods on that date to the carrier for transportation on a regular line of transportation between the point of shipment and destination. This was done. The signification of the word "shipment" is uniform. The Century Dictionary defines "shipment" as: "The act of despatching or shipping; especially the putting of goods or passengers on board ship for transportation by water. A quantity of goods delivered at one time for transportation, whether by sea or by land." Black, Law Dict. There was, therefore, no implied obligation on the part of the plaintiff's assignor to see that the merchandise left on the 15th. The argument of the appellant is very close to that advanced by defendants in the case of *Ledon v. Havemeyer* (N. Y. App.) 24 N. E. 297. It was there contended that the word "shipment" meant a clearance of the vessel, as well as putting the goods on board within the period allowed for shipment; but the court held otherwise, saying: "The words 'shipment' and 'shipped' are now used indifferently to express the idea of goods delivered to carriers for the purpose of being trans-

ported from one place to another, over land as well as water, and imply, with respect to carrying by land, a completed act, irrespective of the time or mode of transportation. *Caulkins v. Hellman*, 47 N. Y. 452; *Fisher v. Minot*, 10 Gray, 260; *Schmertz v. Dwyer*, 53 Pa. St. 335. \* \* \* We have been referred to no authorities supporting the defendants' contention, and we believe it to be contrary to the invariable meaning of the word, as defined by lexicographers, as understood by the mercantile community generally, or as laid down in the decisions of the courts." The court charged the jury in harmony with the law as above stated, and submitted to their determination all the evidence bearing upon the actual agreement between the parties. They were told that if they believed that the contract was, in effect, that the goods were to be shipped by Pendleton on or before February 15th, and that Pendleton placed the goods on board the cars of the Union Pacific Railway Company at Lawrence on the said 15th day of February, then they should find that Pendleton had complied with his part of the contract; but if they believed that the agreement was that Pendleton was to deliver the goods so that they could leave Lawrence on the 15th, and they were not delivered in time to let the cars go forward on that date, they should find for the defendant. They were further told that if, however, they believed Pendleton placed the goods on board the cars on the 15th, so that they could have left Lawrence on that day, then Pendleton complied with his contract, and the plaintiff could recover. Thus, the facts and the law applicable were fairly submitted to the jury, and their verdict for the plaintiff cannot now be disturbed. We may say, too, that the appellant in the case is in no position to complain, for, under the construction of the contract that it contends for, it could not recover, inasmuch as it clearly appears by the testimony that the car was loaded on the night of the 15th, at Lawrence, in time to have enabled the carrier to move it forward towards its destination; hence, if there was any negligence at all, it was on the part of the railroad company, and did not lie in a breach of plaintiff's contract with defendant. *Hutch. Carr.* § 89. There being no error in the record, the judgment and order will be affirmed. Affirmed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

(19 Mont. 6)

#### STATE v. O'BRIEN.

(Supreme Court of Montana. Nov. 30, 1896.)

##### CRIMINAL LAW—APPEAL BY STATE.

Under Pen. Code, § 1990, providing that an issue of fact arises on a plea of former conviction or acquittal, or on a plea of once in jeopardy, where one indicted for murder, after a judgment convicting him of manslaughter was reversed, pleaded an acquittal of murder in

the first and second degrees, and former jeopardy as to such offenses, and the state's attorney asked the court to take judicial notice of the proceedings on the former trial, and pass on the pleas of former acquittal and jeopardy, an order by the court sustaining the validity of such pleas, and ordering defendant to be held for trial for manslaughter, was not within Pen. Code, § 2273, subsec. 4, providing that the state may appeal from an order affecting the substantial rights of the state.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Edward J. O'Brien was convicted of manslaughter, and the judgment against him was reversed on appeal, and the cause remanded. 43 Pac. 1091, 44 Pac. 399. From a judgment holding valid the pleas of former acquittal and former jeopardy as to murder in the first and second degrees, the state appeals. Dismissed.

H. J. Haskell and James W. Freeman, for the State. Leslie & Downing, for respondent.

HUNT, J. The defendant was originally tried before the district court of Cascade county, under an information charging him with murder in the first degree. He was convicted of manslaughter, and appealed to this court. The judgment against him was reversed, and the cause remanded to be tried anew. State v. O'Brien, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399. When the cause came on again for trial in the district court, the defendant pleaded that he had already been acquitted of the charge of murder in the first and second degrees, and had also been placed in jeopardy for those offenses, because on his former trial he had been found guilty of manslaughter only. In reply to the pleas of former acquittal and former jeopardy, the state admitted that an information had been filed against the defendant, charging him with murder in the first degree; that defendant had been tried under such information, had been found guilty of manslaughter; and that judgment on said conviction had been entered against the defendant. The county attorney then asked the court to take judicial notice of the proceedings had on the former trial of the case, and to pass upon the pleas of former acquittal and jeopardy entered by the defendant, and to hold said pleas insufficient in law to constitute former acquittal of murder in the first and second degrees, or former jeopardy. No jury was impaneled. The court sustained the defendant's pleas as valid, and ordered the defendant to be held to await trial for the crime of manslaughter. The state, by the county attorney, excepted to the order of the court, and appeals from the order holding the pleas of former acquittal and jeopardy to be valid.

The defendant, by motion, questions the authority for the appeal from the order of the court. Section 2273, Pen. Code, provides as follows: "An appeal may be taken by the state: (1) From the judgment for the defendant on a demurrer to the indictment or in-

formation. (2) From an order granting a new trial. (3) From an order arresting judgment. (4) From an order made after judgment, affecting the substantial rights of the state. (5) From an order of the court directing the jury to find for the defendant." It is contended by the appellant that this case is brought within the terms of the fourth subdivision of the statute quoted, and that, when the court made an order to the effect that the defendant's plea of former acquittal was valid, it was equivalent to an order made after judgment, affecting the substantial rights of the state. But in our opinion the ruling of the court was not one made after judgment, because, when the former judgment of conviction of manslaughter was set aside by this court, the effect of the decision setting aside the judgment was to put the defendant in a position as if no such judgment ever had been rendered against him. He stood before the court, so far as he was affected by the pending charge of manslaughter (which point alone we are considering), in the same position as if no trial had been had. This is the express provision of section 2191 of the Penal Code. The ruling of the court only determined that the pleas of former acquittal and jeopardy constituted a defense to the charge of murder in the first and second degrees. Whether or not the defendant had actually been acquitted of the aforesaid charges of murder, and whether or not the said charges were the same offenses referred to in the information under which the defendant was to be tried again, and whether or not the defendant had once been in jeopardy under the charges of murder in the first and second degrees, necessarily, under the Statutes of Montana, involved issues of fact. Section 1900 provides as follows: "An issue of fact arises: (1) Upon a plea of not guilty. (2) Upon a plea of former conviction or acquittal of the same offense. (3) Upon a plea of once in jeopardy." It being clear, therefore, under the law, that the pleas of defendant raised issues of fact, the court was obliged to submit them to a jury. It may be that, by concessions of the defendant, the offering of evidence becomes merely the formal introduction of the record of the previous trial with the agreement that there is no difference in the two cases between the identity of the offense charged and the identity of the defendant; but the issues, nevertheless, are to go to a jury, under appropriate instructions by the court. Whart. Cr. Ev. § 593. Section 2143 of the Criminal Code, carrying out the law which declares that the pleas of former acquittal and jeopardy are issues of fact, specifies that the verdict shall be either "for the state" or "for the defendant." The question, therefore, if one at issue, cannot be finally determined without the finding by a jury. In People v. Kinsey, 51 Cal. 278, it was decided that the defendant is entitled to a verdict on a plea of former acquittal entered, and, until there is such a verdict, there can be no judgment of conviction. As we look at it, there was no

judgment in the case when this appeal was taken, and the issues remain still to be disposed of. The ruling of the district court was an interlocutory one, from which the state could not appeal. *State v. Pollard*, 83 N. C. 598. It follows that the principal and important question which the state seeks to have decided, namely, whether or not the defendant can be tried again for murder, is not before us, and cannot be considered. The appeal is dismissed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

(15 Wash. 654)

### JOSE v. LYNCH.

(Supreme Court of Washington. Nov. 30, 1896.)

#### PARTNERSHIP ACCOUNTING—DECREE.

In an action to dissolve a partnership, for the return to plaintiff of his personality, the use of which had been given to the firm, and for a receiver, plaintiff alleged that, under the contract, he furnished horses constituting a logging team, and defendant furnished \$1,500 to buy certain land; that the profits were to be shared equally. The answer alleged that plaintiff delivered the horses to defendant, to indemnify him against loss, because his wife and himself had become sureties on an appeal bond given by plaintiff in an action by a bank against him. *Held*, that the court, in its decree, had no power to order that defendant should satisfy the claim of the bank in 10 days, and, on payment thereof, should have the horses turned over to him as security, or that the receiver should satisfy such claim; the bank not being a party to the action, and defendant never having taken possession of the alleged pledged property.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Thomas Jose against B. E. Lynch for the dissolution of a partnership between plaintiff and defendant, for a receiver, and for the return to plaintiff of his individual personal property, the use of which had been given to the partnership for the logging of a certain tract of land. From the judgment, plaintiff appeals. Reversed.

Brady & Gay, for appellant.

DUNBAR, J. This action was brought by the plaintiff for the dissolution of the partnership between himself and defendant, for the return to the plaintiff of his own individual and personal property, the use of which he had given to the partnership for the logging of a certain tract of land, and for the appointment of a receiver. According to the allegations of the complaint, the plaintiff and defendant entered into a contract of co-partnership on the 1st day of June, 1894. By the terms of the contract, the plaintiff was to furnish horses and "rigging" necessary for the carrying on of the logging of a certain tract of land. Defendant was to furnish \$1,500 for the purchase of the timber, and they were to share equally the profits of the business. In accordance with the terms

of the agreement, the plaintiff did furnish three spans of horses, constituting a logging team. The defendant was the active manager of the business, but failed to render accounts to the plaintiff, and failed to recognize the rights of the plaintiff in said co-partnership. That portion of the answer necessary to be noticed here was to the effect that on the 2d day of May, 1894, the plaintiff procured defendant and his wife to become sureties for him upon a certain appeal bond; that, soon after the execution and filing of the said bond, the defendant discovered that the plaintiff was in embarrassed financial circumstances; and that, becoming alarmed for the safety of himself and wife as sureties upon said bond, he demanded of the plaintiff an indemnity against any loss or damage which he or his wife might sustain because of the said suretyship; and that, in response to said demand, plaintiff agreed to deliver to the defendant eight head of horses, as security to indemnify and save himself and wife harmless from such loss or damage which they might sustain by reason of their said suretyship. The plaintiff moved for the appointment of a receiver. Upon said motion, the court appointed a receiver to take charge of all the assets of the partnership, and also to take charge of the personal property of the plaintiff, the use of which the plaintiff had furnished to said co-partnership.

The court, in its findings of fact, found substantially the matters alleged in the complaint, viz.: The agreement as alleged; that, in accordance with the terms of the agreement, the plaintiff furnished the horses and such rigging used with teams necessary for the carrying on of said business, describing the three teams of horses furnished; the fact that the said horses were to be returned to the plaintiff upon the termination of the logging contract; that the defendant refused to recognize the rights of the plaintiff, contrary to the terms and conditions of their agreement; that the defendant attempted to appropriate to his own use certain debts due said co-partnership, and the fact that there was owing to the partnership from the defendant the sum of \$567.44; and, as a conclusion of law, decreed that the defendant should pay into said partnership said sum of \$567.44, and such additional sum, not to exceed \$1,500 (which was the amount advanced by the defendant for the purchase of the timber), as might be necessary to pay all the outstanding debts of the co-partnership, and all of the debts and expenses of the receiver of the said business; and that a decree be entered ordering the receiver to deliver back to their respective owners each and all of the personal property delivered by the said parties to the said co-partnership, the title to which remained in the said parties, except the three spans of horses, which said horses are to be held for the defendant, B. E. Lynch, until further order of the court, and to be delivered to him upon the payment

by him of the bond described in defendant's answer.

It is earnestly contended by the appellant that the amount found due by the court from the respondent was not the true amount due; but, from an investigation of the record, we think we would not be warranted in disturbing this finding. The court, however, made an order that the defendant, Lynch, have 10 days from January 11, 1896, within which to satisfy the claim of the Merchants' National Bank of Seattle (which was the judgment appealed from mentioned in the answer, and for the payment of which respondent had become surety), and that, upon the payment by Lynch of the claim of the Merchants' National Bank, thereupon the receiver should redeliver the horses above mentioned, to enable the respondent, Lynch, to resort thereto, and to the pledge thereof, to indemnify him respecting such loss or damage as he might sustain in the satisfaction of said claim. And it was further ordered that, if he failed within said period to satisfy said claim so as to entitle him to the redelivery of said property as aforesaid, then leave was granted to said Merchants' National Bank, or the receiver thereof, in whose possession the assets thereof then were, to take such action as to him should seem meet and proper to satisfy said claim, in whole or in part, out of the proceeds of the sale by him of said property (viz. the horses aforesaid), and to subject said property to the satisfaction thereof, in whole or in part. This order of the court, we think, was plainly erroneous, and could not be sustained by the facts as found by the court. The Merchants' National Bank is not a party to this action. This was an action of accounting between the appellant and respondent, and we think the court had no authority to make provision for the payment of an individual debt of one of the partners in this action. The order was probably made on the theory that the property had been pledged by the appellant to the respondent for the payment of this debt, and that, if the appellant were allowed to regain possession of it, the respondent would be left without a remedy. But, even with that view of the case, all the court, it seems to us, would have the power to do, would be to establish the lien of the respondent on this property, to be subjected by him as the law provides; but in no event could the court go so far as to order the property sold, and the proceeds applied to the payment of a judgment the parties to which are not parties to this action, and have not appeared therein in any manner. Especially is this true in view of the further finding of the court that this property was exempt from execution, or a finding of the facts which would constitute an exemption. Finding 12 is as follows: "That the plaintiff is a person engaged in the business of logging for his support and that of his family, and that the said three spans of horses, rigging, and other articles, the use of which the plaintiff turned

into the co-partnership of Lynch & Jose, is the only logging team owned by the plaintiff; and, by the use of the said three spans of horses as a logging team, the plaintiff must earn the support of himself and family." Neither do the findings of fact nor the testimony in this case show that a delivery of the pledge was ever made by the appellant to the respondent of these horses. The finding of the court in regard to that is as follows: "That, at the time of the execution and delivery of said bond, the plaintiff agreed to deliver to the defendant eight horses, as an indemnity to secure the defendant and his wife upon the bond against any loss or damage which they might sustain by reason of becoming sureties on said bond. That the said three spans of horses were delivered to the firm of Lynch & Jose on or subsequent to the 1st of June, A. D. 1894, and the said B. E. Lynch was managing the said co-partnership business, and, as such manager of the firm of Lynch & Jose, got possession of the said horses, and has since held the said horses in his possession, as a pledge to secure him upon the said bond." Now, if the horses were delivered to the firm of Lynch & Jose, they were not delivered to Lynch as a pledge, to secure him upon the bond; and, as long as he was acting in the capacity of manager for the co-partnership, the possession of the horses was in him as manager, and not as an individual. It seems to us plain that these horses never were delivered to respondent, Lynch; and that, not having been delivered, the appellant was entitled to them, under the exemption laws and under the other findings of fact in this case; and that the order of the court, both as to the turning of the said horses over to the respondent as an indemnity, and as to subjecting their proceeds to the payment of the judgment formerly obtained against Jose by the Merchants' National Bank, was wrong. The judgment will therefore be reversed, with instructions to modify the same as indicated by this opinion, and, as so modified, it will be affirmed; cost to appellant in this court.

SCOTT and ANDERS, JJ., concur.

(15 Wash. 621)

#### STATE v. WROTH.

(Supreme Court of Washington. Nov. 27, 1896.)

#### CRIMINAL LAW—APPEAL—MISCONDUCT OF JUDGE.

1. Affidavits and purported minutes of the clerk of the superior court cannot be received on appeal in a criminal case to show what occurred below.

2. Where a judge, after the jury has retired on its request, goes to the door of the jury room, and thereafter returns, and informs counsel that the jury, through its foreman, had requested a repetition of certain instructions, it constitutes such misconduct as justifies a reversal of the conviction.

Hoyt, C. J., dissenting.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

William Wroth was convicted of manslaughter, and appeals. Reversed.

Melvin G. Winstock, Allen & Headlee, and Frank B. Ingersoll, for appellant. J. W. Heffner and Arthur W. Hawks, for the State.

GORDON, J. Appellant was charged, in an information filed by the prosecuting attorney of Snohomish county, with the crime of murder in the first degree. He was found guilty of manslaughter, and sentenced to imprisonment in the penitentiary for the period of 10 years. Having moved for a new trial, his motion was denied, and he has appealed.

Upon the oral presentation of this cause, counsel for the appellant waived all assignments of error save one, which relates to the alleged misconduct of the presiding judge. Counsel for the appellant have sought to show, by affidavit and by purported minutes of the clerk of the superior court, that after the trial had closed, and the jury had retired for deliberation, they requested to see the judge, and thereupon the judge left the bench, and went into the jury room, and closed the door, and thereafter, returning to the court room, stated to counsel for the prosecution and defense that the jury desired to be further instructed upon the subject of reasonable doubt. The affidavits and minutes cannot be received or considered by this court for the purpose of showing what occurred below. The lower court declined to certify to the facts as claimed by the appellant, but certified an amended bill prepared by counsel for the state, and the bill so certified must be accepted by this court. It is therein stated that, at the close of the argument, "the jury were duly and regularly instructed by the court, and retired to deliberate on their verdict, in charge of the officer of the court; and soon thereafter the jury, through their bailiff, requested to see the judge, and the said judge, being the same judge who tried the cause, went to the jury room, and stood in the doorway, with the door to said jury room partly opened; that thereafter the said judge returned, and informed the counsel for the defendant and state that the jury, through its foreman, had requested that the said judge repeat to them the instruction given on reasonable doubt." It is contended by the appellant's counsel that this constituted such misconduct on the part of the trial judge as requires a reversal, and we think the contention must be sustained. In the discharge of his official duty, the place for the judge is on the bench. As to him, the law has closed the portals of the jury room, and he may not enter. The appellant was not obliged to follow the judge to the jury room in order to protect his legal rights, or to see that the jury was not influenced by the presence of the judge; and the state cannot be permitted to show what occurred between the judge and the jury at a place where the judge had no right to be, and in regard to which no official record could be made.

But learned counsel for the state insist that the judge said nothing to the jury, and hence his conduct could not have been prejudicial to the defendant. But the law does not subject parties litigant to the disadvantage of being required to accept the statement of even the judge as to what occurs between himself and the jury at a place where the judge has no right to be, and where litigants cannot be required to attend. It is the lawful right of a party to have his cause tried in open court, with opportunity to be present and heard in respect to everything transacted. It is his right to be present and attended by counsel whenever it is found necessary or desirable for the court to communicate with the jury, and he is not required to depend upon the memory or sense of fairness of the judge as to what occurs between the judge and jury at any time or place when he has no lawful right to be present. His right in this respect goes to the very substance of trial by jury. Aside from the rights of the parties, public policy will not sanction any departure from the rule which requires that all such communications shall be public, and in the presence of the parties or their counsel. In *Sargent v. Roberts*, 1 Pick. 337, a communication from the judge to the jury, which was in writing, and filed, so that there could be no question of its terms, and which was unobjectionable in substance, was yet, because of its being made out of court, and in the absence of the parties, held improper and illegal, and the reasons were thus stated by Chief Justice Parker: "No communication whatever ought to take place between the judge and the jury after the cause has been committed to them by the charge of the judge, unless in open court. \* \* \* The only sure way to prevent all jealousies and suspicions is to consider the judge as having no control whatever over the case except in open court, in presence of the parties and their counsel. The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice, and the convenience of jurors is of small consideration compared with this great object. \* \* \* It is better that everybody should suffer inconvenience than that a practice should be continued which is capable of abuse, or, at least, of being the ground of uneasiness and jealousy." In *Taylor v. Betsford*, 13 Johns. 487, the judge went into the room with the jury, at their request, to answer certain questions proposed by the jury. Of this conduct, the court say: "Whether the information given by the justice were material, or had any influence upon the verdict of the jury, is a matter which we will not inquire into." A like conclusion was reached by the court of appeals in *Bank v. Mix*, 51 N. Y. 558. In *Read v. City of Cambridge*, 124 Mass. 567, a like conclusion was reached, the court saying that "the court will not inquire whether the communication was, in fact, erroneous or prejudicial." The judg-

ment will be reversed, and a new trial awarded.

SCOTT, ANDERS, and DUNBAR, JJ., concur. HOYT, C. J., dissents.

(115 Cal. 380)

**J. I. CASE PLOW WORKS v. MONTGOMERY et al.** (No. 15,655.)

(Supreme Court of California. Dec. 17, 1896.)

**CORPORATIONS—ACTION TO ENFORCE STOCKHOLDER'S LIABILITY—COMPLAINT.**

In an action under Civ. Code, § 322, to enforce a stockholder's liability, a complaint alleging that on a certain day, while defendant was a stockholder, the corporation made and delivered to plaintiff its note (setting it out), is insufficient, since it does not necessarily show that defendant was a stockholder when the debt was incurred. *Wagon Co. v. Bull*, 40 Pac. 1077, 108 Cal. 1, followed.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the J. I. Case Plow Works against Charles Montgomery and others. The complaint was held insufficient, and plaintiff appeals. Affirmed.

Michael Mullany, William Grant, and Charles S. Cushing, for appellant. William H. Jordan, for respondents.

TEMPLE, J. This is an action against a stockholder to recover his proportionate share of a corporate debt under section 322, Civ. Code. It is alleged in the complaint that on a certain day the corporation made, executed, and delivered to plaintiff its certain promissory note, which is then set out at length. In no other way is corporate indebtedness averred. The complaint sufficiently shows the amount of subscribed capital stock and the amount of stock owned by defendant at the time the note was executed, and the only question involved on this appeal is whether this is a sufficient allegation that the indebtedness was incurred while the defendant was a stockholder. The question was suggested in *Tilden v. Gashwiler*, which was not reported, but was referred to in *Hunt v. Ward*, 99 Cal. 612, 34 Pac. 335, where Mr. Justice McFarland expressed some doubt upon the subject. It is again discussed in *Wagon Co. v. Bull*, 108 Cal. 1, 40 Pac. 1077, in which case the question was decided. It was there held that the complaint must show that the indebtedness was incurred while the defendant was a stockholder, and that the mere allegation that on a certain day, while the defendant was a stockholder, the corporation made its promissory note, does not show that fact. It is a question merely of pleading and evidence, and a rule, having once been declared, should be adhered to. Of course, the indebtedness might be incurred at the time of giving a note, or even by giving the note; but, if so, such fact should appear. I do not think it was correctly said in the opinion ren-

dered in the case last cited that the action was brought upon the promissory note. Setting out the promissory note did show the indebtedness of the corporation, and it is a proper method in which to show such indebtedness, and this was a material fact in the plaintiff's case. The trouble was, however, that the complaint did not show that the indebtedness was then for the first time incurred, nor when it was incurred. It, therefore, failed to show that it was incurred while defendant was a stockholder. I think if the allegation had been that on a certain day the corporation became indebted to plaintiff, and on that day executed its note, it would have been sufficient. The order is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.; HARRISON, J.; VAN FLEET, J.

(115 Cal. 247)

**GOLDEN CROSS MINING & MILLING CO. v. SPIERS et al.** (L. A. 271.)<sup>1</sup>

(Supreme Court of California. Dec. 9, 1896.)

**ACTION TO REMOVE TRUSTEES—VENUE.**

An action to remove trustees under a deed of mining property providing that they should work the mine and pay the proceeds to certain creditors of the grantor, on the ground of inefficiency and mismanagement, is not within Code Civ. Proc. § 392, providing that actions for the recovery of real property, or of an estate or interest therein, or for the determination of such right or interest, or for injuries to real property, shall be tried in the county in which the subject of the action is situated, but is included in "all other cases" which, by section 395, are made triable in the county in which defendants, or some of them, resided at the commencement of the action.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by the Golden Cross Mining & Milling Company against James Spiers and others to remove defendants from their office as trustees under a deed, and for other relief. From an order denying a motion by defendants for a change of venue, they appeal. Reversed.

Graves, O'Melveny & Shankland and A. Heyneman, for appellants. Gibson & Titus, Ben Goodrich, and Jefferson Chandler, for respondent.

HARRISON, J. The plaintiff executed to the defendants, January 4, 1896, a conveyance of certain real and personal property, consisting of mining ground, with the materials and implements for working the same, situated in the county of San Diego, in trust as security for the purpose of securing certain indebtedness, and with authority to develop and work the mines, and out of their proceeds, after paying the expenses of working and managing the same, to pay the creditors of the plaintiff in proportion to their respective claims. It was also provided in the instrument of conveyance that if, after

<sup>1</sup> Rehearing denied.



a fair trial and bona fide effort, it should, in the opinion of the defendants, become impracticable to operate said mining property according to the terms of the trust, except at a permanent loss, they might so declare, and thereupon make a peremptory sale of the same at public auction, and apply the proceeds in a certain manner specified in the instrument. The defendants entered into possession of the property, and, after working and developing the same for more than three months, on April 22, 1896, declared that it was impracticable to operate it according to the terms of the trust, except at a permanent loss, and thereupon advertised it for sale, in accordance with the provisions therefor, in the instrument under which it had been conveyed to them. The plaintiff thereupon commenced the present action against them in the superior court of the county of San Diego, alleging their insufficiency and mismanagement in operating the mining property; that by reason of their extravagance and waste great and unnecessary expense had been created by them during their management, and that the property itself had deteriorated in value; that the property is valuable, and by judicious management can be made to yield sufficient returns to pay all the indebtedness for which it was given as security; that the defendants have not given the property a fair trial, or made a bona fide effort to operate it profitably; and that the sale intended by them would be arbitrary, and in violation of their trust, and that its announcement has itself had the effect to injure the value of the property; and that by reason of their misconduct the plaintiff has been damaged in the sum of \$150,000. Judgment was prayed that the defendants be enjoined from selling the property, and that an account of their trust be taken by the court, and they be removed from said trust, and new trustees appointed, to execute the same, and that the plaintiff have judgment for damages against them in the sum of \$150,000. Of the defendants, four reside in Los Angeles and two in San Francisco, and at the time of their appearance in the action, upon proper showing therefor, moved the court that the place of trial be changed from the county of San Diego to the county of Los Angeles. The court denied their motion, and from this order the present appeal has been taken.

Section 392, Code Civ. Proc., enumerates as local actions which must be tried in the county in which the subject of the action, or some part thereof, is situated: "(1) For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property; (2) for partition of real property; (3) for the foreclosure of all liens and mortgages on real property." And section 393 requires that in "all other cases" (except those named in sections 393 and 394, which are inapplicable here) the action must be tried in the county in which the defend-

ants, or some of them, reside at the commencement of the action. The present action does not fall within either of the classes enumerated in section 392, but is eminently a personal action, in which the judgment sought is purely one in personam. The main object of the action, as appears by the allegations of the complaint and the judgment sought thereon, is the removal of the defendants as trustees, by reason of their inefficiency and mismanagement of the trust, and the appointment of other trustees in their stead. It is only when there is no existing trustee, or when all the trustees renounce, die, or are discharged, that the appointment of another trustee is to be made by the superior court of the county where the trust property, or some portion thereof, is situated. Civ. Code, § 2289. An action to remove a defendant from his position as trustee is personal, and one in which he has the right to have the cause tried in the county of his residence, as is any other personal action. The fact that the property held by him in trust is situated elsewhere does not deprive him of this right. See *Smith v. Davis*, 90 Cal. 25, 27 Pac. 26.

The injunction against the threatened sale by the defendants, and the prayer for an accounting, are but incidental to this relief, and are dependent thereon. Even if an injunction was the sole relief sought by the plaintiff, the action would still be personal, which the defendants would have the right to have tried in the county of their residence. The plaintiff does not allege that the defendants have caused any physical injury to the mining ground itself, but the damages for which it seeks a recovery are for the depreciation in the market value of the property consequent upon the misconduct of the defendants, and the loss resulting from their neglect and willful mismanagement, and their inefficiency in the execution of the trust. The order is reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

(115 Cal. 339)

McMENOMY v. WHITE et al. (S. F. 347.)  
(Supreme Court of California. Dec. 17, 1896.)

AGREED CASE—NECESSITY OF FINDINGS—MECHANICS' LIENS—FILING CONTRACT AND SPECIFICATIONS—LIABILITY ON CONTRACTOR'S BOND.

1. Where a cause is submitted on an agreed statement of facts, no findings of fact by the court are necessary.

2. Code Civ. Proc. § 1183, providing that a building contract shall be void if not filed with plans and specifications, and that in such case the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof, does not render the owner personally liable for labor done and materials furnished at the instance of the contractor, but the contractor is liable to a personal judgment in an action to foreclose a lien.

3. The sureties on a building contractor's bond, conditioned for his faithful performance of the

contract, and the delivery of the building, free from all liens that may be filed on account of any claim against the contractor, are liable on the bond, though the contract, as between the owner and the contractor, was void, under Code Civ. Proc. § 1183, for failure to file the plans and specifications forming part of the building contract.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by J. H. McMenomy against A. L. White and others. The cause was heard on an agreed statement of facts. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

William H. Jordan, for appellants. John H. Dickinson and Henry E. Monroe, for respondent.

BELCHER, C. This case was submitted to the court below upon an agreed statement of facts. From this statement it appears that on the 20th day of June, 1890, plaintiff and one L. C. Judkins entered into a written contract, by the terms of which Judkins agreed to construct for plaintiff, and to furnish all the materials and labor therefor, a frame dwelling house, in conformity with the plans and specifications for the same prepared by certain architects, and to deliver the house to plaintiff, free from all liens and charges, within 100 working days from the date of the contract. The contract price for the work was \$4,858, of which sum 75 per cent. was to be paid in installments as the work progressed, and the remaining 25 per cent. was to be paid 35 days after the final completion of the work. On the day the said contract was executed, there was written on the back thereof, and signed by the defendants, a bond or contract of guaranty, which reads as follows: "Bond. Know all men by these presents, that we, the undersigned, in consideration of value by us and each of us received, have, and we do hereby jointly and severally, become sureties and guarantors for the full and faithful performance on the part of L. C. Judkins, the contractor, of all the terms and conditions of the foregoing contract to be by him performed, and we do hereby jointly and severally guaranty the faithful performance of the above contract, and the delivery of the building therein described and contracted for, free from all liens that may be filed on account of any claim against the contractor in the above contract, not exceeding the sum of four thousand eight hundred and fifty-eight (\$4,858) dollars. Witness our hands and seals, this — day of June, 1890." After these papers had been signed, Judkins committed the matter of filing the contract in the office of the county recorder of the county where the property was situated to the plaintiff, and he filed the contract, but the plans and specifications were never attached to the contract, and were never filed. Judkins proceeded to construct the house, but it was not delivered to

or accepted by the plaintiff until February 19, 1891, the reason for such failure of delivery and acceptance being that the same was not finished. Plaintiff paid to Judkins, on account of the construction of the building, upon the certificates of the architects as the work progressed, sums of money aggregating \$2,750, and thereafter certain liens were filed for materials and labor furnished to the said building upon the order of Judkins. In due time actions were commenced to foreclose the liens, and all of the actions were consolidated, and tried together. In the complaints it was alleged that the contract between the plaintiff and Judkins was void, because the plans and specifications were not filed with it; and the court found the fact to be as alleged, and gave judgment foreclosing the liens for various sums in favor of the lien claimants. Plaintiff, by reason of Judkins' failure to keep his contract, and perform the work thereunder, and by reason of the liens filed and the suits brought thereon, was compelled to pay, and on January 9, 1894, did pay, in satisfaction of said liens, and the costs incident to their foreclosure, the sum of \$1,295.33 more than the contract price named in said contract. Subsequently the plaintiff commenced this action to recover from the defendants, upon the bond or contract of guaranty before set out, the sum so paid by him, with interest thereon from the time of payment. Upon the facts agreed upon, the court below gave judgment in favor of the plaintiff for the said sum of \$1,295.33, with interest thereon; and from that judgment, and an order denying defendants' motion for a new trial, this appeal is prosecuted.

1. The objections to certain findings upon the ground that they were not justified by the evidence cannot be sustained. As the case was submitted upon an agreed statement of the facts, no findings were necessary, the only question being as to what was the law applicable to those facts. *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364. Besides, the judgment was in accord with the facts stated as to the amount the plaintiff was entitled to recover, if entitled to recover at all.

2. It is true, the building contract was void because the plans and specifications were not filed, and the statute declares that "in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." Code Civ. Proc. § 1183. The owner, however, is not personally liable for labor done and materials furnished at the instance of the contractor, even though the contract be void, for the reason stated; the only remedy against the owner in such case being a foreclosure of the liens. But the contractor is personally liable for labor and materials so done and furnished at his instance, and he may be made a party defend-

ant in actions to foreclose the liens, and a personal judgment may be entered against him. *Lumber Co. v. Schmitt*, 74 Cal. 625, 16 Pac. 516; *Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, 20 Pac. 419; *Lumber Co. v. Gottschalk*, 81 Cal. 647, 22 Pac. 860; *Wood v. Transit Co.*, 107 Cal. 502, 40 Pac. 806.

3. As to whether, under the circumstances shown here, the defendants can be held liable on their contract of guaranty, is the principal question presented for decision. Without following the elaborate arguments of counsel, it is enough, in our opinion, to say that the case comes plainly within the rule of law declared in the cases of *Kiessig v. Allspaugh*, 91 Cal. 234, 27 Pac. 662; *Kiessig v. Allspaugh*, 99 Cal. 452, 34 Pac. 106 (decided by the court in bank); and *Blyth v. Robinson*, 104 Cal. 239, 37 Pac. 904. The law, as declared in the last-named case, is correctly stated in the syllabus as follows: "A bond given by a contractor to the owner of a building, the contract price of which exceeded one thousand dollars, guarantying the performance of all the conditions of the contract, and that the house to be constructed by the contractor should be delivered to the owner free from all liens that might arise from or be filed against the building on account of material or labor furnished by the contractor, and used in or about the structure, is valid and binding upon the sureties, notwithstanding the plans and specifications forming a part of the building contract were not filed with the county recorder." The cases cited are not, perhaps, in harmony with that of *Lumber Co. v. Neal*, 90 Cal. 213, 27 Pac. 192 (decided in department), but they are the latest decisions, and must control. We advise that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(115 Cal. 337)

PEOPLE v. TUCKER. (Cr. 178.)

(Supreme Court of California. Dec. 17, 1896.)

CRIMINAL LAW—VERDICT—NECESSARY FINDINGS.

Where defendant pleads "Not guilty," and "Once in jeopardy," a conviction will be set aside if the jury fail to find on the latter plea, unless the record shows that it was waived or withdrawn.

Department 2. Appeal from superior court, San Joaquin county.

E. N. Tucker was convicted of extortion, and appeals. Reversed.

W. R. Jacobs and J. G. Swinnerton, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. The defendant, E. N. Tucker, was indicted, tried, and convicted of the crime of extortion, in the county of San Joaquin, and sentenced to imprisonment in the state prison of the state of California at Folsom for the term of 2½ years. He appeals from the judgment. The plea of defendant Tucker to the indictment was: "(1) That he is not guilty of the offense charged. (2) That he has been once in jeopardy for the offense charged, to wit, on the 10th of January, 1896, in the superior court of the state of California in and for the county of San Joaquin, in department No. 1 of said superior court, before Hon. Joseph H. Budd, judge, and a jury, in the said superior court, held in the city of Stockton, said county and state." At the trial the jury, after listening to the testimony of witnesses, and after being instructed by the court, rendered the following verdict: "We, the jury in the above-entitled cause, find the defendant guilty of extortion, as charged in the indictment." There was no finding by the jury upon the plea of "once in jeopardy," and, so far as appears, there was no evidence introduced or offered in support of the plea; nor is there anything in the record to indicate that the defendant withdrew or waived the plea. When the defendant was called for judgment, he moved the court for a discharge from custody, and that the judgment be perpetually stayed, which motion was denied by the court, and judgment entered. Aside from the plea of guilty, which raises no issue of fact, there are three pleas to an indictment or information, any one or more of which a defendant may interpose in bar of the prosecution, viz.: (2) Not guilty; (3) a former judgment of conviction or acquittal of the offense charged; (4) once in jeopardy. Of these pleas, the defendant, as before stated, interposed those of "not guilty" and "once in jeopardy." He was entitled to have both these pleas passed upon by a jury before judgment could properly be pronounced in the case against him. In *People v. Kinsey*, 51 Cal. 278, the defendants entered a plea of not guilty and of former acquittal. The jury found the defendants guilty of manslaughter, but failed to find upon the issues made by the plea of former acquittal, and, judgment having been rendered against them, this court, on appeal, held that the defendants were entitled to a verdict on each plea, and that until there is such a verdict there can be no judgment of conviction. *People v. Helbing*, 59 Cal. 567, contained like pleas, was disposed of in like manner, and reversed for like cause. *People v. Fuqua*, 61 Cal. 377, was a similar case, and followed by like effect. To the argument of the attorney general that, in the absence of anything appearing to the contrary, the appellate court must presume, in support of the correctness of the judgment of the court below, that the defense was withdrawn or waived, this court held that, where the record failed to show

that the defendant withdrew or waived either plea, it would not be presumed that he did so. *People v. Hamberg*, 84 Cal. 468, 24 Pac. 298, and *People v. Eppinger*, 100 Cal. 294, 41 Pac. 1037, are of the same general tenor, and to the same effect. The judgment is reversed, and the cause remanded for a new trial.

(115 Cal. 421)

BUCHEL v. GRAY et al. (S. F. 341.)

(Supreme Court of California. Dec. 19, 1896.)

APPEAL—NEGLIGENCE—FINDING OF JURY—PLEADING.

1. The question of the negligence of a defendant and the contributory negligence of the plaintiff are peculiarly for a jury, and their finding thereon will not be disturbed where it finds reasonable support in the evidence.

2. In an action to recover damages for an injury to plaintiff's property, alleged to have resulted from the negligent blasting of rock by three defendants, a denial in the answer that defendants blasted any rock except from the private quarry owned by two of the defendants is not a denial that blasting was done by the third defendant.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Ernst Buchel against Gray Bros., the Artificial Stone Paving Company, and others. Judgment for plaintiff, from which, and from an order refusing a new trial, defendants appeal. Affirmed.

Fisher Ames, for appellants. F. J. Castelhun and J. C. Bates, for respondent.

TEMPLE, J. This action is for damages alleged to have been caused by negligent blasting of rock near plaintiff's house, by which a rock slide was caused, which destroyed plaintiff's house, and covered his lot with debris. A jury gave a verdict in favor of plaintiff for \$3,000, and defendant now appeals from the judgment, and from an order refusing a new trial. On the appeal but two points are made: (1) Plaintiff was guilty of negligence which contributed proximately to the injury; and (2) there was no evidence whatever to connect the corporate defendant with the alleged tort.

As has often been observed, the question of negligence is peculiarly for the jury. Even when the evidence is not conflicting, the verdict will not be disturbed if different conclusions can reasonably be drawn therefrom. Plaintiff's lot was on Vallejo street, 136 feet west from Sansome. North of his lot was a steep ridge of hard trap rock, some 200 feet high. Plaintiff's lot had been graded back to its full depth, and, as it was claimed, some 7 feet beyond his line. This grading had been done before plaintiff owned the lot, and before defendants owned the adjoining property upon which the ledge was situated. The rock beyond plaintiff's line had been removed by blasting, but there was no proof whatever as to who did it. Probably it was done by some one who formerly owned plaintiff's lot,

but this was not shown, and it may have been done by some one who had use for the material, but did not claim the lot, and did not convey to plaintiff. At all events, such was the condition of things when plaintiff bought, and also when defendants acquired their interest in the ledge. The defendants were blasting upon this ledge, some 150 feet away. The last blast, some two days before the rock slide, was a very heavy blast, and shook down large masses of rock at the time, and, as the jury found, caused the slide. Defendants contend that the removal of the rock at the base of the cliff destroyed the support, and caused the "overhang" of the cliff, and thus contributed directly and proximately to the accident. According to some of the witnesses, there had for a long time been a crevice or seam at the top of the ledge, and some 25 feet from the edge. This seam was found to be wider just after the heavy blast, and, of course, just before the fall. The idea is that this rift was caused by the removal of the support by excavating back of plaintiff's lot; that the accident could not have occurred but for this; and it is assumed that this was done by plaintiff's grantor. The evidence is, however, not clear that in the slide anything but the top of the ledge above the bulging wall came down. Whether the removal of the rock at the base back of plaintiff's lot contributed to the slide is not clear from the evidence. And it does not appear that plaintiff or his grantor were responsible for the excavation. I do not wish to be understood as conceding that, if it had so appeared, it could have been attributed to plaintiff as contributory negligence. The support was not removed by plaintiff, nor since the defendants became owners in the property. The judgment cannot be disturbed on the ground of contributory negligence.

There was an abundance of evidence to justify the jury in the conclusion that the slide was caused by the blasting. On this point the evidence is conflicting. As to the point that there is no evidence that the corporate defendant had any connection with the blasting, it is enough to say that in the answer all the defendants admit the blasting. The complaint charges: "That the said defendants have for one year last past been, and still are, engaged in cutting down said hill, and removing rock therefrom, by blasting and excavating. That said defendants prosecuted said work by cutting down said hill in the rear of plaintiff's said premises so carelessly and negligently that the blasts caused the walls and ceilings of the rooms of the house on the front of the said lot to crack, and plastering to become loose, whereby said house was damaged in the sum of \$2,000. That by reason of said defendants' carelessness and negligence in cutting down said hill as aforesaid, a large mass of rock became loose, and on the 16th day of January, 1894, fell upon plaintiff's rear house, and completely demolished the same, and all the

appurtenances thereto belonging." The only denial of these allegations contained in the answer is as follows: "Deny that defendants have been for one year last past, or for any other time, or that they still are, engaged in cutting down said or any hill, or in removing rock therefrom by blasting or excavation or otherwise, except from the private quarry of said defendants George F. Gray and Harry N. Gray. Deny that said defendants, or any of them, prosecuted said or any work of cutting down said or any hill in the rear of plaintiff's premises or otherwise, carelessly or negligently, or that the or any blasts caused the walls or ceilings of the rooms of the house on the front of said lot or elsewhere to crack, or the plastering to become loose, whereby said house, or any house, was damaged in the sum of \$2,000, or any other sum; and allege that the work of taking rock from their said quarry has at all times been conducted in a safe and lawful manner. Deny that by reason of the carelessness of said defendants, or any of them, in cutting down said or any hill, a large or any mass of rock became loose on the 16th day of January, 1894, or at any other time, or fell upon plaintiff's rear or any house, or completely or otherwise demolished the same, or at all, or any of the appurtenances thereto belonging. On the contrary, these defendants allege that the damages claimed by plaintiff to have been sustained by him, as set forth in his complaint, if any damages have been suffered by him, were caused and occasioned by his own negligence, which was the direct and immediate cause of said damages." It was shown by the testimony of both George F. and Harry N. Gray that the ledge upon which blasting was done, and part of which was precipitated upon the lot of plaintiff, was the private quarry of George F. Gray and Harry N. Gray. The judgment and order are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

(115 Cal. 345)

PETERS v. BOWMAN. (S. F. 203.)<sup>1</sup>  
(Supreme Court of California. Dec. 17, 1896.)  
NEGLECT—ACCUMULATION OF SURFACE WATER  
—DEATH OF TRESPASSING INFANT.

One who allows surface water to accumulate in a pond on his land, without fencing or inclosing the same, is not liable for the death of a trespassing infant who was drowned therein.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Henry Peters against C. E. Bowman. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Geo. D. Collins, for appellant. Myrick & Deering, for respondent.

McFARLAND, J. This action was brought by plaintiff to recover damages for the death

of his infant son, who was drowned in a pond of water upon a lot of land owned by the defendant, Bowman. The jury returned a verdict for the defendant, and the plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

The facts are practically undisputed, and may be stated briefly: Defendant owned the lot in question, and resided on it for several years prior to 1889. It was part of what is known as "Ashbury Heights," in San Francisco. The land sloped towards the west, and on the westerly side fronted on Ashbury street. It does not appear whether or not it was in a thickly-settled neighborhood. In its natural condition the surface water which came from the lot flowed off through a gully across Ashbury street (over which there was a small bridge), and emptied into a pond a couple of blocks away. At some time prior to 1889 the city of San Francisco graded Ashbury street, and threw up an embankment along the street and across the gully, and on the westerly side of said lot, to the height of eight or ten feet. This prevented the flow of surface water from the lot, and on this account defendant removed his residence, in 1889, to an adjoining county. From that time until 1894, when the boy was drowned, the surface water, being stopped by said embankment, would form during the rainy season a pond, which disappeared during the dry season. Defendant did nothing to create the pond, or to prevent the water from flowing away; and, so far as he is concerned, it may be considered as a natural pond. The lot was not inclosed by a fence or otherwise. After defendant removed his residence, he did not often visit the lot, and did not give permission to or invite anyone to go upon it; but children did visit it, and play upon the pond, and he must be presumed to have known that fact. He drove children away once, and a policeman did the same several times. The plaintiff knew of the existence of the pond, and knew that his son knew of it, and he "never told him not to go rafting on the pond." The son was over 11 years old, and was "a bright, active boy, an intelligent boy for 11 years, more so than the average boy of that age." He lived with his father, the plaintiff, on Castro street, "four or five blocks over the hills" southerly from the pond. He had been at the pond often before the day of the accident. He was allowed by his father to run on the streets. On February 16, 1894, he went with two other boys to the pond, and while floating on the pond on a rudely-constructed raft made of railroad ties, and when running along one of the timbers, he fell off, and was drowned. They went onto the pond from the southeasterly side,—the side furthest away from Ashbury street.

Upon these facts the verdict was right, and a verdict for plaintiff would have been unwarranted. The deceased boy was, at the time of the accident which caused his death, a trespasser on the land of defendant, and the

<sup>1</sup> For opinion on rehearing, see 47 Pac. 598.  
v.47p.no.2—8

general rule undoubtedly is that the owner of land is under no duty to keep his premises safe for trespassers. The rule has been applied, also, where there was an implied license. *Schmidt v. Bauer*, 80 Cal. 565, 22 Pac. 256. The exceptions to the general rule are instances where the owner maintains on his land something in the nature of a trap or other concealed danger, known to him, and as to which he has given no warning to others, and instances where there had been something in the nature of a wanton injury to a trespasser, as where the owner had set spring guns on his premises, by which the trespasser had been shot. There is, also, the instance of an excavation adjoining a public highway, into which a traveler on the highway, where he had the right to be, had accidentally fallen. There are other exceptions not necessary to be here mentioned. And the general rule applies to children as well as to adults, with some exceptions hereinafter noticed. "The rule is that, ordinarily, the owner of premises owes no duty of immunities to trespassers, though the latter be infants." Note on page 67 of *Whitt. Smith, Neg.* (2d Ed.) and cases there cited.

Plaintiff seeks to take this case out of the principle above stated by applying to it what is now known as the "Rule of the Turntable Cases." That rule, which is a marked exception to the general principle, has been approved in many of the states, and in others has been repudiated. It must be taken as approved in this state by the decisions of this court in *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 27 Pac. 666, and other cases cited by appellant. The rule originated in a case where a railroad company had erected on its land near a public way a turntable, and left it unlatched and unprotected, and young children, attracted by the turntable, went upon it to play, and started it in motion, whereby one of them was injured; and the rule, as thus applied, rested on the ground that the immature judgment of a young child could not well determine or provide against the danger of meddling with such machinery, and that therefore the railroad company was liable for legal negligence in erecting it and leaving it exposed, as an attraction to children and a temptation to them to intermeddle with it. See *Barrett v. Southern Pac. Co.*, supra, and cases cited on page 303, 91 Cal., and on page 667, 27 Pac. But the rule of the Turntable Cases is an exception to the general principle that the owner of land is under no legal duty to keep it in a safe condition for others than those whom he invites there, and that trespassers take the risk of injuries from ordinary visible causes; and it should not be carried beyond the class of cases to which it has been applied. And the cases to which the rule has been applied, so far as our attention has been called to them, are nearly all cases where the owner of land had erected on it dangerous machinery, the consequences of meddling with

which are not supposed to be fully comprehended by infant minds. It has also been applied to a few other cases, where the owner, by some affirmative act, has caused some artificial danger to exist on his premises, as in the case of *Bransom's Adm'r v. Labrot*, 81 Ky. 638, cited by appellant, where the defendants had "stacked a large quantity of lumber in one large and irregular pile, so negligently and badly done that, as the deceased, an infant, was playing near it, one of the timbers fell upon and killed him."

It is not contended by appellant that the rule of the Turntable Cases has ever been applied to facts like those in the case at bar. His contention is that the reasoning and philosophy of the rule ought to extend it to a case like the one at bar. But the same reasoning does not apply to both sets of cases. A body of water—either standing, as in ponds and lakes; or running, as in rivers and creeks; or ebbing and flowing, as on the shores of seas and bays—is a natural object, incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is an apparent open danger, the knowledge of which is common to all; and there is no just view, consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall. However, general reasoning on the subject is unnecessary, because adjudicated cases have determined the question adversely to appellant's contention. No case has been cited where damages have been successfully recovered for the death of a child drowned in a pond on private premises who had gone there without invitation, while it has been repeatedly held that in such a case no damages can be recovered. It was directly so held in *Klix v. Nieman*, 68 Wis. 271, 32 N. W. 223; in *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74; in *Hargreaves v. Deacon*, 25 Mich. 1; in *Gillespie v. McGowan*, 100 Pa. St. 144; and in the recent case of *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915. In the last-named case the complaint alleged that the plaintiff's infant son was drowned in a pond on defendant's land in the vicinity of a public school, and the other facts alleged were almost exactly the same as those alleged and proven in the case at bar; but the trial court sustained the demurrer to the complaint on the ground that it did not state a cause of action, and, on appeal, the supreme court of Nebraska affirmed the judgment. The court, in its opinion, after reciting the averments of the complaint, say: "The single question presented by the record is whether the owner of a vacant lot, upon which is situated a pond of water, or a dangerous excavation, is required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon said premises

not by his invitation, express or implied, but for the purpose of amusement, or from motives of curiosity. The authorities we find to be in substantial accord, and sustain the proposition that, independent of statute, no such liability exists." After citing authorities, and distinguishing the cases from those where injuries result from lawful use of sidewalks and streets near dangerous excavations, the court further say: "We are referred to a number of cases which, counsel argue, sustain the plaintiff's right to recover on the facts alleged, and which may be classified as follows: (1) Cases in which the owner of land has made or permitted a dangerous excavation, embankment, or the like, so near a public highway as to injure one in the rightful use thereof. \* \* \* (2) Cases in which the owner has negligently left exposed dangerous machinery likely to attract children and resulting in their injury. Illustrative of this class, which constitute a recognized exception to the rule, are the so-called 'Turntable Cases.' (3) Cases where the plaintiff was injured while upon the defendant's premises by invitation of the latter, and where the negligence consists in a failure to keep such premises in a reasonably safe condition. But in no case has a recovery been allowed on a state of facts substantially like those alleged in the petition under consideration. It follows that the judgment of the district court must be affirmed." It will be observed that the supreme court of Nebraska recognizes the rule of the Turntable Cases, and distinguishes the case under consideration from those cases; and this is an answer to the contention of appellant that the authorities cited by respondent are from courts in which the rule of the Turntable Cases was repudiated. That rule was also recognized in the two cases above cited from Missouri and Michigan.

It may be well to notice briefly one or two of the other cases in point. In *Klix v. Nieman*, supra, the plaintiff's son fell into a pond on defendant's land which had been caused by water collecting in an excavation, and was drowned. The case was very similar to the one at bar, and the supreme court of Wisconsin, in delivering its opinion, says, among other things, as follows: "So the single question presented is: Was it the duty of the defendant to fence or guard this hole or excavation on his lot (which it does not appear he made, or caused to be made), where surface water collected, in order to secure the safety of strangers, young or old, who might go upon or about the pond for play or curiosity? If the defendant was bound to so fence or guard the pond, upon what principle or ground does this obligation rest? There can be no liability unless it was his duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises, for the protection of persons going upon his land who had no right to go there. No such rule of law is laid down in the books,

and it would be unreasonable to so hold." In *Overholt v. Vieths*, supra, the eight year old son of plaintiff had fallen into a pond of water partly on defendant's land, which had been formed by water collecting in an excavation which had been made by quarrying several years before the accident. The plaintiff had a verdict for \$10, and the case was reversed. The court alluded to the cases which go upon the turntable doctrine, and said: "While the authorities above cited recognize the liability of the owner, if a child is injured by dangerous machinery, so situated and exposed that it will naturally attract children, who cannot be expected to comprehend the danger of its use, and takes no precaution to prevent access to it, and thereby impliedly invites children to it, they distinctly deny the liability of a lot owner under the facts disclosed in this case." The court also say that "the facts in evidence would have justified the court in directing a verdict for defendant." In *Hargreaves v. Deacon*, supra, a child had fallen into an uncovered cistern on defendants' land. The court in its opinion discussed at length the principles involved in the case, and, after noticing the decisions which declare the turntable doctrine, says: "We have examined the decisions with some care, and can find no support to any doctrine which would authorize a recovery in the case before us. We cannot help feeling much sympathy for the sad case of a child who was only following the natural and innocent curiosity of his age when he met with the accident which caused his death. But there is nothing to indicate any wanton or inhuman disposition in the defendants, and no illegality in the management of their business, and they have violated no right of the plaintiff or his intestate." In *Gillespie v. McGowan*, supra, plaintiff's son, eight years old, had fallen into a cistern on defendants' land which had been abandoned, but had once been used in connection with brick-making. The court, in delivering its opinion, among other things, say: "We are unable to see anything in this case to charge the defendants with negligence in not inclosing their lot or guarding the well. There was no concealed trap or deadfall, as in *Hydraulic Company v. Orr* [83 Pa. St. 332]. The well was open and visible to the eye. No one was likely to walk into it by day, and this accident did not occur at night. A boy playing upon its edge might fall in, just as he might in any pond or stream of water. In this respect the well was no more dangerous than the river front on both sides of the city, where boys of all ages congregate in large numbers for fishing and other amusement. Vacant brickyards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned. There are any quantities of surface where they may be injured. To compel the owners of such property either to inclose it or to fill up their ponds and level the surface, so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such

principle, even where the trespassers are children. We all know that boys of eight years indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is a part of the boy's nature to trespass, especially where there is tempting fruit; yet I have never heard that it was the duty of the owner of a tree to cut it down because a boy trespasser might possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity, if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents."

The foregoing are a few of the many authorities which are particularly applicable to the case at bar, and show that in a case like this there can be no recovery. Under these circumstances it is useless to consider the points raised by appellant on the instructions of the court on the subject of the contributory negligence of plaintiff and of the boy who was drowned. Under no view of the case could a verdict for the plaintiff be sustained. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(5 Cal. Unrep. 551)

**SKYM et al. v. WESKE CONSOLIDATED CO.** et al. (Sac. 167.)

(Supreme Court of California. Dec. 18, 1896.)

**MINING CONTRACT — LABORER'S LIEN — TIME OF SIGNING — EXECUTION OF CONTRACT — ATTORNEY'S FEES — CONFLICTING EVIDENCE.**

1. A contract for labor on a mine provided that the laborers should receive certain supplies in part payment, and that, after those supplies were paid for, the balance of income remaining should be divided pro rata to the extent of each laborer's wages at three dollars per day. In case of failure of profits, the personal property of the mine should be sold to pay the wages due. Held that, in the absence of anything to show a profit, an action would not lie to enforce a lien for wages unless it were alleged and proved that there had been a request for a sale of the personal property, and a refusal on the part of the owner.

2. The contract not being restricted in application to the labor performed after it was signed, the actual time of signing is immaterial.

3. The date when the contract purported to be signed by plaintiff is conclusive evidence that the labor performed after that date was done subject to its terms.

4. Evidence that a contract purporting to have been made by plaintiff was read to him, he being unable to read or write, with comments thereon representing that it meant something very different from its true meaning, and that thereupon he assented to it, and authorized his name to be signed thereto, is sufficient to justify a finding that plaintiff did not make the contract.

5. A judgment for attorney's fees in an amount in excess of that claimed in the complaint cannot be sustained.

6. A finding based on conflicting evidence will not be disturbed on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Placer county; J. E. Prewett, Judge.

Action by Archibald Skym and others against the Weske Consolidated Company, William Muir, and others. From a judgment for plaintiffs, defendant Muir appeals. Modified.

F. P. Tuttle and Pullen & Wallace, for appellant. John M. Fulweller and Ben P. Tabor, for respondents.

**HAYNES, C.** This action was brought by the plaintiffs to foreclose their several alleged liens for labor performed by them, respectively, upon the Weske Consolidated Placer Mine, of which all the defendants were alleged to be reputed owners, and that defendant Muir was the person in charge, and by whom they were employed. Muir answered, alleging that at all the times covered by the alleged claims of the several plaintiffs he was and is the sole owner of said mining property. He admitted the employment of the several plaintiffs, the length of time they had labored in the mine, and, except as to plaintiff Skym, the rate of wages agreed upon. He alleged, however, that the labor performed by the plaintiffs, respectively, was under a special agreement, a copy of which was attached to his answer, and which reads as follows:

"We, the undersigned, laborers of the Weske and Mattan claims, accept and subscribe to the following terms, to wit: (1) We agree to receive our board, tobacco, and clothes. (2) The balance due us to be received over and above expenses for supplies, etc., for working mine. (3) The provision bill and supplies for the mine to be paid first, and the balance over to be divided pro rata amongst us until such pro rata makes up our full quota of three dollars per day.

"If I, Wm. Muir, should fail to pay from proceeds hereinbefore referred, I, Wm. Muir, agree to co-operate with men in making sales of all personal property to make up said wages with the least possible cost.

"Wm. Muir."

This agreement was signed by plaintiff Skym under date of April 15, 1893, and by plaintiff Jones under date of December 21, 1893, but does not show that it was signed by plaintiff Bowen. This agreement was set out in the finding made by the court, and in relation to said agreement the court found that the defendant William Muir did not perform the conditions of said agreement, and thereafter, and before the 4th day of August, 1894, failed and refused at divers times to co-operate with the said Skym in making sales of personal property to pay the wages due to the said plaintiffs Skym and Jones, or to perform the other conditions of said agreement by him to be performed. No question was made as to the form or sufficiency of the said liens filed, and the court sustained the lien of plaintiff Bowen, who had not signed said agreement, and denied the liens of plaintiffs Skym and Jones, but gave personal judgment against defendant Muir for the amount found due said Skym and Jones, respectively, and entered judgment foreclosing the lien of plaintiff Bowen. Defendant



ant Muir moved for a new trial, his motion was denied, and this appeal is from the judgment and the order denying his said motion.

The only errors specified go to the sufficiency of the evidence to justify the findings, and to an alleged variance between the allegations of the complaint and the evidence. The genuineness and due execution of said agreement were not denied under oath, and were therefore admitted. Code Civ. Proc. § 448. It was also alleged in the answer that by mistake there was omitted from said agreement a provision to the effect that, in case any of the laborers quit work before they had been paid from the proceeds of the mine, they should forfeit all claim to compensation, and that by mistake the name of respondent Bowen was not subscribed to the contract; and a reformation of the contract is sought as to these alleged omissions. The court found against appellant in relation to these alleged mistakes and omissions, and, as the evidence was conflicting, that finding cannot now be disturbed. The allegations of the complaint in respect to the hiring of the plaintiffs, respectively, were that a contract was entered into with each of them, whereby it was mutually agreed and contracted that the defendants should hire said plaintiffs to work as miners in said mining claims at the agreed price of three dollars per day, payable in cash, gold coin, as fast as said labor was performed; that such hiring should continue as long as mutually agreeable; and that, in pursuance of said contract, said plaintiffs worked the number of days alleged. The findings of the court substantially followed the language of the complaint as to the agreement or terms of hiring, but inserted the words "except as modified as hereinafter stated," and in the next finding set out the said written agreement, a copy of which the defendant attached to his answer. The written agreement fixed the wages of the laborers who signed it (unless as to plaintiff Skym), and the mode or manner of payment, and the sources from which payment should be made. It is true, there is no clause declaring that, if the employes should quit before enough to pay them had been realized from the mine, they should forfeit all pay except that which they had received before quitting; and we may further assume that, after the profits of the mine and the proceeds of the personal property had been exhausted, appellant would be personally liable to those who signed the contract for any deficiency, since the rate of wages was fixed, and there was no provision by which any part of their wages should, in any contingency, be forfeited. But we think it equally clear that, as to those who signed said contract, no part of their compensation became due except that which they were to take in boarding, tobacco, and clothes, until it should be realized from the profits of the mine, and, if no profits, or insufficient profits, were realized, until a refusal on the part of Muir to apply the personal property or its proceeds to the

payment of their wages. If the plaintiffs Skym and Jones had set out this agreement in their complaint, it is evident they would not have stated a cause of action without alleging facts showing a breach of the contract by defendant Muir, since the mere statement of the amount earned, and that a certain balance was unpaid, would not show that such balance was due or payable when the action was commenced.

Whether, in view of the allegations of the complaint as to the terms of the contract under which the labor was performed, and the admission made by the plaintiffs by their failure to deny the genuineness and due execution of the written contract set out in the answer and the testimony relating thereto, there was a material variance between the allegations of the complaint and the evidence, as appellant contends, or whether it was a failure to prove the contract alleged by the plaintiffs, need not be determined. By whatever name it may be called, the result must be the same. It was realized by the court below that, as to the plaintiffs Skym and Jones, the written contract, if performed by Muir, must defeat their action; but the court found, as to each of said plaintiffs, that defendant Muir "did not perform the conditions of said agreement, and thereafter, and before the 4th day of August, 1894, failed and refused at divers times to co-operate with the said Skym in making sales of personal property to pay the wages due and owing to said Skym, or to perform the other conditions of said agreement by him to be performed, and on the 4th day of August, 1894, there was and became due and owing to plaintiff Skym on said contract of employment" the sum demanded. A similar finding was made as to plaintiff Jones. These findings are not sustained by the evidence. There is no evidence tending to show that anything was realized from the mine beyond the expenses, which, under the agreement, were to be first paid. Skym was foreman, and he testified that but little was taken out of the mine, and nowhere is there any evidence that any profit was realized, which, under the contract, was to be distributed to the men; nor is it shown that the enterprise was abandoned, nor that any request was ever made for the sale of the personal property, or that there was no personal property to be sold. It is therefore clear that as to the judgments in favor of Skym and Jones there must be a reversal. It may be that, upon the facts as they really exist, Skym and Jones may each be entitled to a personal judgment against defendant Muir. What is now decided as to them is that, upon the pleadings, and the evidence appearing in the record, neither of them is entitled to such judgment.

Some question is made as to when the written contract was signed. As to Skym and Jones, the dates attached to their signatures, whether the true dates at which their sig-

natures were written or not, is, in the absence of satisfactory evidence to the contrary, conclusive evidence that the labor performed after that date was done under its terms and conditions; and we also think that the time when the contract was actually signed is immaterial, for the reason that it was not limited to work done thereafter, and that it applied as well to compensation theretofore earned, and remaining unpaid, as to earnings which accrued thereafter.

In the absence of proper allegations and proof of mistake or omission in the written agreement touching the wages of plaintiff Skym, he is bound by the rate therein expressed. The facts affecting Bowen's judgment are different. His name was not signed to the contract. Concerning this agreement, Bowen testified: That he did not have an understanding with Muir that he was to get three dollars per day, that he was to furnish him with grub, clothing, and tobacco, and that he was to look for the balance of the three dollars per day from the mine itself. That Muir wanted him to sign this paper, and he asked him what he wanted him to sign that for, and he said, "Only to get my money;" that when they got down they would have plenty of money; that he meant from No. 3, which is a tunnel. That Muir said there was plenty in there, and it was coming out of the mine. He further testified that the agreement was read to him by Mr. Yarnold, and that he authorized Yarnold to sign it for him; that he could neither read nor write; that Yarnold told him "it was to work down in No. three, and get the water out, and we would have plenty of money,—all the money we wanted;" that he did not understand that he was to wait until the money came out of the mine. That Muir and Yarnold made these statements to Bowen is not disputed. It would appear from Bowen's testimony that the paper was read with running comments thereon, so that his assent to the contract and his direction to Yarnold to sign it for him were based, not upon the reading of the paper itself as it was in fact written, but were based upon the supposition that the paper contained and meant all that was said. We think the evidence was sufficient to justify the court in finding that Bowen did not make the contract set out in the answer of defendant, and in sustaining his lien. The court erred, however, in the allowance of \$250 as an attorney's fee for foreclosing his lien. The allegation in the complaint is that \$150 is a reasonable sum to be allowed for the foreclosure of Bowen's lien, and no more than that sum can be allowed.

As to plaintiffs Skym and Jones, the judgment and order appealed from should be reversed, with leave to amend their complaint; and, as to plaintiff Bowen, the judgment should be modified by reducing the allowance of attorney's fees for foreclosing the lien to \$150, and, as so modified, the judgment in his

favor, and the order denying a new trial as to his cause of action, should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed as to the plaintiffs Skym and Jones, with leave to amend their complaint; and, as to the plaintiff Bowen, the judgment is modified by reducing the allowance of attorney's fees for foreclosing the lien to \$150, and, as so modified, the judgment in his favor, and the order denying a new trial as to his cause of action, are affirmed

(115 Cal. 425)

BADOSTAIN v. GRAZIDE. (L. A. 137.)

(Supreme Court of California. Dec. 19, 1896.)

ASSAULT AND BATTERY—CIVIL ACTION—EVIDENCE  
—INSTRUCTIONS—MALICE—EXEMPLARY DAMAGES.

1. In a civil action for assault and battery, where it appeared that the altercation arose over defendant's right to charge plaintiff for the pasture of his horse, evidence as to the existence of any contract and its terms was inadmissible.

2. An instruction that, if the jury believed defendant committed the battery,—“that is, wrongfully used force and violence on the person of plaintiff, in a malicious manner; that is, a manner that showed he intended to vex, injure, or annoy him,” etc.,—they might give exemplary damages, was error, in that it ignores the question whether the assault was deliberate, or made in sudden heat of passion.

3. An instruction that, in cases of personal injuries for which a criminal prosecution might be brought, exemplary damages may be recovered in a civil action, is improper, as eliminating the question of mitigating circumstances.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by Bernabe Badostain against Francisco Grazide. From a judgment for plaintiff, defendant appeals. Reversed.

J. Brousseau, for appellant. J. B. Dunlap, for respondent.

BRITT, C. Plaintiff had a verdict and judgment for damages for an assault and battery committed on him by defendant. It was in evidence at the trial that plaintiff had been in the employ of defendant for a period of about eight months next before the said battery, during which time he had kept a horse on pasture at defendant's premises. On settlement of accounts, defendant deducted from the wages due him the sum of \$12, for pasturage of the horse. Plaintiff testified that, when he began work for defendant, he told the latter he wanted the horse pastured at his place, and defendant replied, "All right;" that he (plaintiff) did not expect to pay for pasturage; that he told defendant, when the latter proposed to make such deduction from his wages, that it was more than the horse

was worth; that thereupon defendant became enraged, and struck him in the face. On behalf of defendant, there was evidence that he gave to plaintiff an order or draft for the wages due him, less said charge for pasturage, which plaintiff accepted, but at the same time angrily applied to defendant an obscene and insulting epithet; that this occurred in the presence and hearing of defendant's wife and two young daughters; that the conversation between the parties was amicable until plaintiff addressed to defendant the said obscene language; and that the latter, being thus incensed, struck the blow described by plaintiff, and which occasioned the suit. On cross-examination of defendant by plaintiff's counsel, he stated that there had been no agreement to pasture plaintiff's horse without pay. In rebuttal, plaintiff testified that defendant had so promised when he went to work for him. All the evidence concerning the terms of the contract about pasturage was admitted over the objection, and exception of defendant. The court instructed the jury, among other matters, that if they believed from the evidence that defendant committed a battery,—“that is, wrongfully used force and violence upon the person of plaintiff, in a malicious manner; that is, in a manner that showed he intended to vex, injure, or annoy him,—and that plaintiff was injured and damaged thereby, then you, in fixing the damages, should not be confined to the actual damage sustained, but may give, in addition,” exemplary damages; also, that “in case of personal injuries, for which a criminal action might have been brought, exemplary damages may be recovered in a civil suit.”

The court erred in admitting evidence of the agreement relative to pasturing the horse,—a matter long past, and not requisite, as regards any proper purpose of this case, to the comprehension of things done and said at the time of the assault. The affair was an instance, not unprecedented, of the settlement of an account between parties, in which argument over some disputed item is followed by abuse and that by blows. In such a case the particulars and circumstances of the contract in which are involved the merits of the disputed charge, instead of being relevant and helpful in determining the liability of either party to the other for violence then inflicted, are more likely to be a confusing and misleading element in the inquiry. The jury are apt to conceive that one party or the other is wrong in his notion of his contractual rights, and to allow this conception to influence their verdict. If it be said that evidence of an agreement to pasture the horse without charge was admissible in the present case, in order to show the animus of the defendant, and justify the visitation of punitive damages on him, the answer is that, if he was in the wrong in demanding pay for the pasturage, his wrong lay in the breach of a contract, to be redressed by an action thereon, and not confounded with the breach of an ob-

ligation of wholly different nature, viz. to abstain from injury to the plaintiff's person. If plaintiff could rightfully give his version of the prior contract, defendant could with equal right produce proof that no such contract was made, or that it had been in some way discharged; “and thus the attention of the jury would be distracted with a multiplicity of questions and issues.” *Matthews v. Terry*, 10 Conn. 458. Compare *Lee v. Woolsey*, 19 Johns. 319; *Currier v. Swan*, 63 Me. 323; *Cushman v. Waddell*, *Baldw.* 57, *Fed. Cas. No.* 3,516.

There was error, also, in the instructions, which may have enhanced the verdict. To say that “if defendant wrongfully used force and violence upon the person of plaintiff, in a malicious manner,—that is, in a manner that showed he intended to vex, injure, or annoy him,”—then the jury, “in fixing the damages, should not be confined to the actual damage sustained,” but might give exemplary damages in addition thereto, was to say, in effect, that, if a battery was committed at all, the jury should award punitive damages; for it is hard to conceive of any battery intentionally committed which does not involve the intent on the part of the assailant to vex, injure, or annoy the person assailed. In cases like the present, “the law, in tenderness to human frailties, distinguishes between an act done deliberately and an act proceeding from sudden heat.” *Lee v. Woolsey*, 19 Johns. 321. As in a prosecution for homicide, when there is evidence tending to show that the killing was the consequence of a sudden quarrel or heat of passion, the jury may find that the offense was without malice, and therefore manslaughter only, so here they should have been instructed that the presence or absence of a malicious intent in the mind of defendant was a question of fact to be determined by them from the evidence; that they might allow punitive damages if they believed from the evidence that such intent existed; but that if the battery was the consequence of a sudden heat, resulting from provocation first offered by the plaintiff, and not of a design for his injury deliberately formed by defendant, and that the force used was not so disproportionate to the provocation as to repel the inference that it was induced thereby, then no exemplary damages should be included in their verdict. The cases tend to this conclusion. *Lee v. Woolsey*, *supra*; *Robison v. Rupert*, 23 Pa. St. 523; *Ward v. Blackwood*, 41 Ark. 295, 300; *Crosby v. Humphreys*, 59 Minn. 92, 96, 60 N. W. 843; *Kiff v. Youmans*, 86 N. Y. 324; *Childers v. Publishing Co.*, 105 Cal. 284, 291, 38 Pac. 903. Considerations similar to the preceding apply to the charge that “in case of personal injuries, for which a criminal prosecution might have been brought, exemplary damages may be recovered in a civil suit.” This was entirely too broad. Suppose two persons fight by mutual consent; each is punishable criminally; but neither may recover exemplary damages in a

suit against the other; so, even though they fight "with great spirit and brutality." *Shay v. Thompson*, 59 Wis. 540, 18 N. W. 473. Defendant here was liable criminally for the breach of public order, but whether he was liable to plaintiff in exemplary damages depended upon the strength and cogency of the mitigating circumstances in evidence tending in some measure to palliate such violation; and this was a matter for the jury. The judgment and order should be reversed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

(115 Cal. 404)

HUGHSON et al. v. CRANE. (No. 18,390.)  
(Supreme Court of California. Dec. 18, 1896.)

IRRIGATION DISTRICTS—SALE OF BONDS—APPLICATION OF PROCEEDS.

1. Irrigation Act, § 12, provides that, in case of a purchase of lands and other property necessary for the work, the directors may pay for the same with bonds issued under the act at their par value. Section 15 provides for the sale of such bonds after due notice, and on sealed proposals. *Held*, that the bonds can be disposed of only in one of the manners provided by such sections.

2. Irrigation Act, § 37, provides that the cost of property and the construction of the works shall be wholly paid out of the construction fund. *Held*, that the bonds provided for under the irrigation act can be applied to no other object than the construction fund.

3. Directors of an irrigation district cannot appropriate bonds issued for the construction of the works to the payment of salaries or expenditures incurred in regard to the management of the property.

4. Irrigation Act, § 22, authorizes the board of directors to levy assessments sufficient to raise the annual interest on the outstanding bonds. Plaintiff filed a bill to enjoin an assessment for such purpose, on the ground that the bonds to pay the interest on which the assessment was made were illegally issued. The bill did not definitely show that there were no outstanding bonds on which the district was liable, but alleged that the business of the district had been so conducted that the books did not show what bonds, if any, were legally issued. It alleged that, of the \$524,000 bonds outstanding \$150,000 were illegally issued; that the interest on the balance would amount to \$22,000; and that there were \$10,000 in the treasury for the payment thereof, and alleged an assessment of \$40,000. *Held* sufficient to justify an injunction against the levy of the assessment.

5. Where a bill to enjoin the levy of an assessment to pay interest on outstanding irrigation bonds shows that a large portion of the bonds were illegally issued, and that the exact amount of them cannot be shown, because of failure of officers of the district to keep a record of their acts, the rule requiring the payment of such portion of the assessment as is admitted to be just is inapplicable.

6. Where bonds are illegally issued by an irrigation district, one taking them is charged with knowledge of the powers of the officers of the district, and has no right of action upon the bonds if given in disregard of the statutory requirements.

7. To a bill to enjoin the collection of an assessment of an irrigation district levied to pay interest on outstanding bonds alleged to be il-

legally issued, neither the district nor the holders of the bonds are necessary parties.

In bank. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by Hughson and others against Crane. Judgment for defendant, and plaintiffs appeal. Reversed.

Eastin & Griffin, for appellants. P. J. Hazen, for respondent.

HARRISON, J. The plaintiffs brought this action to restrain the defendant, who is the collector of Turlock irrigation district, from selling certain lands belonging to them, in satisfaction of a delinquent assessment levied upon the real property in the district, for the purpose of paying the interest on the outstanding bonds of said district for the year 1893. It is not alleged that any of the steps required by the statute for making the levy of the assessment were omitted, but the complaint is based upon the ground that the assessment was unauthorized, by reason of the invalidity of the bonds for paying the interest on which the assessment purports to have been levied. The plaintiffs herein did not pay this assessment upon certain parcels of land described in the complaint, and, after the same became delinquent, the collector made the publication of the delinquent list, as required by the provisions of the irrigation act, with a notice that on a certain day he would sell the same at public auction, for the purpose of making the said assessments. The present action was thereupon commenced to restrain said sale, and a preliminary injunction therefor was granted. The defendant demurred to the complaint, and, his demurrer having been sustained, the injunction was dissolved, and judgment entered in favor of the defendant. From the order dissolving the injunction, and from the judgment in favor of the defendant, the plaintiffs have appealed.

The Turlock irrigation district was organized in 1887, and, shortly after its organization, an issue of bonds to the amount of \$600,000 was voted by the district. Subsequently, in the year 1892, the district voted an additional issue of \$600,000. In September, 1888, after the board of directors had declared its intention to sell its bonds to the amount of \$550,000, it accepted a written offer made to it by L. M. Hickman, in which he proposed to buy the said amount of bonds "at the price of ninety per cent. of the face value thereof," but was not to make payment therefor until he could sell the same at not less than that price. Said proposal contained also the following agreement: "I further offer and agree to pay to said district all sums I may receive for said bonds over and above said ninety per cent. and the cost and expenses of negotiating and making sale thereof. I further agree to use due diligence and all reasonable means to sell said bonds, and to sell the same for the best sum obtainable, but not to make any such sale without the consent of the

president of the board of directors of said district; and in case said board shall, by resolution, request the surrender of said bonds, then I agree to surrender the same to said district, on payment to me of all the costs and expenses theretofore incurred in the negotiation and sale thereof." Similar offers by Hickman subsequently made in reference to other portions of its bonds were accepted by the board; but it is alleged in the complaint that it was not intended thereby that he should take or pay for the said bonds, and that he did not, in fact, take or pay for any of said bonds. In December, 1891, the board of directors entered into an agreement with J. R. Wilbur, by which he was authorized, as the agent of the district, to sell the bonds of the district to the amount of \$252,500, at the rate of 90 per cent. of their par value; and it is alleged that under this agreement a large portion of the bonds of the district were disposed of through his agency, at the lowest price allowed by law, but without taking any of the proceedings for the sale thereof required by section 16 of the act. In 1891 the board of directors entered into a contract with R. W. Gorrill for the construction of a dam, which was to constitute a portion of the works of the district; and, for securing the payments to be made to him for the work that he should do under this contract, the following clause was inserted therein: "The district shall advertise for sale, as prescribed by law, sufficient bonds for such payments; and said first party (Gorrill) shall bid therefor, at least, ninety per cent. of the face value thereof; and, if no higher bids be received, such bonds shall be awarded to him, and he shall be credited in payment therefor the sum due him from the district, and the district shall be credited on such payment under this contract the sum so bid for such bonds." The board of directors did not, however, follow these terms of the contract, and did not advertise for the sale of any of its bonds, nor did Gorrill make or the board receive any proposal for the purchase of said bonds, nor did the board award any purchase of the bonds to Gorrill, but delivered to him bonds to the amount of \$150,000, in exchange for the amount due him upon the contract, and as a payment thereon, at the rate of 90 per cent. of their face value. It is also alleged in the complaint that bonds to the amount of a few thousand dollars were exchanged by the board with its officers for their salaries, and also in payment of certain obligations of the district. At the date of the assessment, October 3, 1893, the amount of bonds outstanding, including those legally as well as illegally disposed of by the board amounted to \$524,000; and, for the purpose of paying the interest thereon, the board levied an assessment of \$40,855.51. There was at that time in the treasury of the district, to the credit of the bond and interest fund, the sum of \$9,598, applicable to the payment of interest, and which, it is alleged, was more than

sufficient to pay the interest upon the bonds that had been legally issued.

Section 15 of the irrigation act provides that, after the organization of the district, the board of directors shall determine the amount of money necessary to be raised "for the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this act," and shall thereupon submit to the electors of the district, at a special election to be called for the purpose, the question whether the bonds of the district shall be issued "in the amount so determined." Section 16 of the act is as follows: "The board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise to fully carry out the objects and purposes of this act. Before making any sale the board shall, at a meeting, by resolution declare its intention to sell a specified amount of the bonds, and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given by publication thereof at least twenty days in a daily newspaper in each of the cities of San Francisco, Sacramento and Los Angeles, and in any other paper at their discretion. The notice shall state that sealed proposals will be received by the board at their office for the purchase of the bonds\* till the day and hour named in the resolution. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder, and may reject all bids; but said board shall in no event sell any of the said bonds for less than ninety per cent. of the face value thereof." By section 12 the board of directors is given authority to acquire, either by purchase or condemnation, all lands and waters and other property necessary for the construction and maintenance of the canals and works of the district; and it is provided that, "In case of purchase, the bonds of the district hereinafter provided for may be used at their par value in payment." These are the only provisions in the act for any disposition by the directors of the bonds of the district; and it follows that the only mode in which they can exercise their power of disposing of the bonds so that they may become valid obligations against the district is either to exchange them for property at their par value, or to sell them for money in the open market, under the restrictions and limitations given in section 16, at not less than 90 per cent. of their face value. The express provision giving to the board power to exchange them for certain property at their par value excludes the right of the board to exchange them for any other purpose, or to dispose of them in any other manner than by the sale authorized by section 16.

It is provided in section 37 that "the cost and expense of purchasing and acquiring property, and constructing the works and improvements herein provided for, shall be wholly paid out of the construction fund"; and the authority given to the board of directors in the subsequent portion of this section to levy special assessments for defraying the expenses of the organization of the district, and the payment of the salaries of the officers and employes, clearly indicates that the construction fund thus referred to consists of the moneys received from the sales of the bonds authorized by section 16, and that the disposition of the bonds is not only limited to providing for this construction fund, but that they can be applied to no other object. It was held in *Tregea v. Owens*, 94 Cal. 317, 29 Pac. 643, that the directors have no authority to levy an assessment for the payment of the expenditures authorized by section 37, without a previous approval of the voters of the district, at an election held for that purpose. Under the principles of that case, the directors have no authority to appropriate the bonds which the electors have voted to issue for the construction of the irrigation works, to the payment of salaries, or expenditures incurred in the management of the property. If, instead of selling the bonds, as directed by section 16, they could use them for these purposes, the provisions of section 41 would be futile; and, under an improvident or reckless board of directors, the bonds which had been voted for the purpose of raising "money" with which to construct a canal, might be frittered away in useless expenditures and salaries, and the district receive no benefit whatever.

The irrigation act is evidently framed upon the theory, and with the intention on the part of the legislature, that the affairs of the district shall be conducted upon a ready-money basis, and not upon credit; and, to enable the directors to carry out this purpose, provision is made for levying special assessments for the payments of salaries, wages, and expenses of management, and also for the sale of bonds by which to make the payments required upon the contracts for the construction of the works. This is clearly seen by the provision in section 16, authorizing the board to sell the bonds "from time to time in such quantities as may be necessary and most advantageous to raise money for the construction of said canals and works," coupled with the provision in section 36 that "the board may draw from time to time from the construction fund, and deposit in the county treasury of the county where the office of the board is situated, any sum in excess of the sum of twenty-five thousand dollars," and requiring the county treasurer to receive and be responsible for the disbursement of the same. The provision of section 15 requiring the directors to estimate and determine the amount of "money" necessary to be raised for the construction of the works,

and to submit to the electors of the district the question whether bonds shall be issued "in the amount so determined," clearly implies that the estimate is to be of the "amount of money" which may be received upon a sale of the bonds, at not less than 90 per cent. of their face value; that the cost of the works is to be estimated in money, and not in bonds, and is to be paid out of the construction fund created by the sale of the bonds. For the protection of the taxpayers, a limit is placed upon the rate at which the bonds may be sold,—90 per cent. of their face value; and, as a special assessment cannot be levied without their vote, they have control over the expenditures of the district. The wisdom of this provision is manifest, and is fully illustrated in the financial history of irrigation district bonds during the last few years,—a matter of which we can take judicial knowledge. If the construction of the works is to be paid for in money immediately upon their completion, or in installments as the work progresses, a contract for their construction can be obtained at a much less price than if payment is to be made in the obligations of the district whose value is constantly fluctuating.

The plaintiffs base their right to the relief sought in the complaint upon the grounds that, during the first 10 years after the issuing of the bonds, the board of directors have no authority, under the act, to levy a greater assessment in any one year than will be "sufficient to raise the annual interest on the outstanding bonds"; and that the greater portion, if not all, of the outstanding bonds of the district have been illegally issued, and were received, and are now held, by the persons to whom they were issued with such knowledge of their invalidity, by reason of having been illegally issued, that they do not constitute valid obligations of the district upon which any interest should be paid, or for whose payment the defendant is authorized to sell the lands of the plaintiffs. The plaintiffs do not show the amount of bonds which may have been legally disposed of by the board of directors, but allege that they are unable to state whether any have been legally disposed of. In support of this averment, they allege that neither the secretary nor the board of directors have kept any record of the bonds sold, their number, the date of sale, the price received, or the name of the purchaser, as required by section 15 of the act, and that the district has never had any such record; that, although they have endeavored to ascertain the number and amount of bonds sold by the district, they have, by reason of the omission to keep such record, failed to ascertain the same, and are unable to state said amount; and they contend that the failure of the proper officers to keep a bond register, as required by the act, relieves them from the necessity of showing with greater definiteness that any of the bonds have been sold or otherwise legally disposed

of, and that, even if it should be shown that a portion of the outstanding bonds are legal obligations of the district, the portion is so small that the assessment in question is so excessive of the requirements to pay the interest thereon as to be in itself illegal.

While the authority given to the board of directors by section 22 to levy an assessment sufficient to raise the annual interest on the outstanding bonds is limited to providing for the interest on the bonds that are outstanding at the time of the levy, it does not require that the amount of the assessment shall be the exact amount of that interest. The phrase "sufficient to raise" the annual interest is more elastic than would be the phrase "to the amount of" the annual interest, and must be held to authorize the board of directors to exercise a reasonable discretion in determining the amount to be levied. It is a matter of common experience that the entire levy of a tax or an assessment is very rarely paid as it matures, and the provision in the act for the sale of any real estate upon which the assessment is delinquent, and, if there be no other bidder, its purchase by the district, shows that it was in the mind of the legislature that the assessment might in some instances be not fully paid, and justifies the conclusion that it was not intended that the assessment should be the exact amount of the interest. The board of directors must be allowed to exercise a discretion in determining how great an assessment will be "sufficient to raise" the annual interest; and, unless it can be seen that they have abused this discretion, courts ought not to interfere with their action. If, however, the disparity between the amount of the assessment and the amount of the annual interest is so great as to make it appear that their action was improper, and not in the exercise of any discretion, so that the assessment is excessive, courts are authorized to prevent its enforcement. Although the levying of an assessment is an act of a legislative character, yet the board of directors is not clothed with the supremacy of the legislature in this respect, but is in the exercise of a delegated power, and subject to control by the judiciary if it steps beyond the limits of the power conferred upon it. As the assessment can be levied for the payment of only the interest upon the outstanding bonds, the property owner has the right to show that there are no outstanding bonds upon which there is interest to be paid, or that the amount of the assessment is not within any reasonable estimate of that interest.

The complaint contains a great deal of matter relative to the conduct of the directors in the management of the district which cannot be considered for the purpose of determining the validity of the assessment. For this purpose, the court could not look into the contract with Gorrill for building the dam, whether it was for an excessive price, or was properly let in accordance with the terms

of the statute. Neither is the validity of the election for the second issue of bonds a matter of consideration in this proceeding. Nor is it a ground for impeaching the assessment that former assessments for interest were in excess of the requirements for the interest on the bonds then outstanding, or that the moneys so raised had been misapplied by the directors. If, at the time of the levy of the present assessment, it was required for the payment of interest on the outstanding bonds of the district, the directors were authorized to levy it, and the property of the plaintiffs is liable for its proportion thereof. The complaint is far from being clear in all its averments, but a careful examination leads to the conclusion that it is sufficiently alleged therein that none of the outstanding bonds of the district were issued in conformity with the requirements of the statute, and that the persons to whom they were issued took them with such knowledge of their invalidity that they do not constitute enforceable obligations against the district, for which the property of the plaintiffs is liable. The averments of the complaint are sufficiently pointed to these defects against the liability of the plaintiffs' property, so that, if they are true, the plaintiffs would be entitled to the relief they seek.

The complaint does not definitely show that there are no bonds outstanding upon which the district is liable for the interest; and, although it is alleged in general terms that all of the outstanding bonds were illegally issued, the specific allegations of the circumstances under which they were severally disposed of do not cover all of the bonds which are outstanding; nor is it entirely clear and conclusive in respect to the amount of such bonds; but this lack of clearness and precise averment is due to the mode in which the business of the district has been conducted by the officers of the district, and the averments of the complaint in that respect are sufficient to exonerate the plaintiffs from the necessity of making their averments more precise. It is fairly to be inferred therefrom that, if any of the outstanding bonds were legally disposed of, their amount is so small that the assessment was excessive. At least, the averments of their illegality are sufficient to require the defendant to show that he is authorized to make the sale of their property. Deducting from the \$524,000, alleged to be the amount of the outstanding bonds, the \$150,000 thereof which are specifically shown to have been illegally delivered to Gorrill, and the amount of the other bonds of which specific averment is made, there remains only \$370,000 for which an assessment for interest could be levied. The interest on this amount at the rate of 6 per cent. per annum would be \$22,200, and, as there was nearly \$10,000 in the treasury applicable thereto, it must be held that the assessment of upward of \$40,000 was unauthorized. If the facts set forth in the complaint are true, they sufficiently justified the refusal of the



plaintiffs to pay the assessment, and call upon the defendant either to deny their existence, or to establish other facts which will give him the right to collect the assessment by a sale of the plaintiffs' lands.

As the inability of the plaintiffs to determine the amount of the bonds that have been legally disposed of results from the failure of the officers of the district to keep such a record of their disposal as is required by the act, by which the plaintiffs are exonerated from the necessity of making a definite allegation in this respect, the rule of equity which requires the payment of that portion of an assessment which is admitted to be just, as a condition of invoking the aid of equity, becomes inapplicable.

Whether a bona fide holder of any of the bonds thus illegally disposed of could enforce them against the district, or whether the district would be liable for the interest upon any of the bonds thus illegally disposed of, is not involved in this action. It is not shown by the complaint that any of the bonds are in the hands of a bona fide holder, and, in the absence of any averments to the contrary, it is to be assumed that Gorrill and the other persons to whom they were delivered still retain them. Neither is the right of Gorrill to a recovery against the district for the work done by him under his contract presented in this action. If the benefits received and enjoyed by the district under his performance of the contract give him an equitable right of recovery therefor, such right is independent of any liability of the district upon the bonds. If the bonds were issued to him in violation of the statute, they cannot in his hands be valid obligations against the district, even though they were taken in payment for his work. The law is well settled that one dealing with a municipal corporation is charged with a knowledge of all the limitations upon the power of its officers, and that he can have no right of action upon its written obligation if it was entered into in disregard of statutory requirements. Gorrill must be held to have taken the bonds with notice of their illegality by reason of the want of power in the board of directors to dispose of them in this manner, or without following the course prescribed in section 16 of the act.

It was not necessary to join the district as a party to the action. No relief is sought against it, nor is its presence necessary to a proper solution of the questions presented by the complaint. The plaintiffs are not seeking to set aside or vacate the assessment, or to prevent its enforcement, except as against their own lands, which constitute but a small fraction of the district; and the validity of the assessment is involved only incidentally, as it may be invoked by the defendant in support of his threatened action. The defendant is charged with threatening to do an act which will result in injury to the plaintiffs, under the color of an authority

which, it is alleged, he does not possess; and the plaintiffs are merely seeking to have him restrained from doing this act. The district can be represented only by its officers; and for the purpose of collecting the assessment, and therein defending the validity of the levy, the collector represents the district as fully as did the directors for the purpose of levying it. If, upon the coming in of his answer, the court shall be of the opinion that the presence of the district is essential to a complete determination of the controversy, it can order it to be brought in (Code Civ. Proc. § 389); but, upon the allegations in the complaint, its presence is not necessary to a determination of the rights of the plaintiffs as against the defendant. A demurrer for defect of parties defendant is generally but technical; and, unless the omitted party is indispensable to giving the relief sought, the court should not sustain such demurrer, but should order him to be brought in, if it shall be made to appear that his presence is proper for a determination of the entire controversy.

Neither was it necessary to make Gorrill or Hickman defendants herein. The transactions with Hickman did not have the effect to make him a purchaser of the bonds, but he thereby became merely the agent of the board for their sale; and whatever right of action Gorrill may have against the district, either upon his contract or upon the bonds received by him, will not be affected by the judgment herein.

The order dissolving the injunction and the judgment in favor of the defendant are reversed, and the court below is directed to overrule the demurrer to the complaint, with leave to the defendant to answer within such time as the court may direct.

We concur: VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

(119 Cal. 249)

# ALASKA IMP. CO. v. HIRSCH et al.

(S. F. 372).<sup>1</sup>

(Supreme Court of California. Dec. 17, 1896.)

INJUNCTION BOND—CONSTRUCTION—CONSIDERATION—ACTION ON—EFFECT OF APPEAL—PLEADING—PRESUMPTIONS—DAMAGES—ITEMIZED STATEMENT—COUNSEL FEES.

1. An injunction bond recited the commencement of the action, and the issuance of a preliminary restraining order, and an order requiring plaintiff to execute a bond which was given "in consideration of the premises and of the issuing of said restraining order," and bound the obligors to pay such damages as the respondent "may sustain by reason of said restraining order." *Held*, that the continuance of the restraining order was a sufficient consideration for the bond.

2. Under Code Civ. Proc. § 1049, providing that an action shall be deemed pending from its commencement until its final determination on appeal, or "until the time for appeal has passed unless the judgment is sooner satisfied," a satisfaction of the judgment makes it final, though the time for appeal has not yet expired:

<sup>1</sup> Rehearing granted.



so that a complaint in an action on an injunction bond which alleges the rendition of a final judgment against plaintiff in the injunction suit is not met by an answer, claiming that the action was premature, which alleges that the time for taking an appeal had not elapsed, but does not negative the satisfaction of the judgment.

3. A finding as to the aggregate damages sustained by breach of an injunction bond will not be disturbed on the ground that the damages were not itemized, in the absence of a request for a finding upon each item.

4. Counsel fees for services in defeating an order to show cause why a restraining order should not be granted pending suit cannot be allowed in a suit for damages for breach of the injunction bond, as damages sustained by reason of the previous existence of the restraining order.

5. Damages sustained by a defendant during three days which intervened between the issuance of an injunction and the giving of the bond in suit may be recovered, where the bond recites the commencement of the action, and the issuance of a preliminary restraining order and an order requiring a bond "on said restraining order," and the undertaking was made "in consideration of the premises and of the issuance of said restraining order," and was conditioned to pay such damages as might be sustained "by reason of said restraining order."

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the Alaska Improvement Company against Charles Hirsch and others on an injunction bond. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Modified.

J. H. Miller and Albert C. Alken, for appellants. Daniel Titus, for respondent.

HAYNES, C. Action upon an injunction bond. The plaintiff had findings and judgment in its favor, and this appeal is from the judgment and an order denying defendants' motion for a new trial. The action in which said bond was given was brought by the Alaska Packers' Association, a corporation, against the plaintiff herein, the Alaska Improvement Company, in the circuit court of the United States for the Ninth circuit, Northern district of California, the sole object of which was to obtain an injunction against the said Alaska Improvement Company, enjoining and restraining it from using a certain label and trademark, which the said Alaska Packers' Association claimed the exclusive right to use, and which it was alleged said Alaska Improvement Company was then using in its said business, and had placed upon about 5,000 cases of its salmon. Said suit was commenced on the 23d day of October, 1893, and upon filing the bill of complaint in said circuit court a temporary restraining order was granted, and an order made requiring the defendant therein, the Alaska Improvement Company, to show cause at a future day why an injunction should not be granted pending the litigation. Said restraining order and order to show cause were duly served upon the defendant in said suit the same day, and on the next day the defendant in said suit (the plaintiff in this action),

upon its motion, obtained an order from said court "requiring complainant to give a bond in the sum of \$10,000, conditioned for the payment to respondent of such damage as it may be awarded by reason of the issuance of said temporary restraining order, if the court should finally determine that complainant was not entitled thereto." The bond given in pursuance of said order, and upon which this action was brought, is as follows: "Whereas, the above-named complainant has heretofore commenced the above-entitled suit in the circuit court of the United States, Ninth circuit, Northern district of California, against the above-entitled respondent, and has applied for and obtained a preliminary restraining order in said suit against the said respondent, enjoining and restraining it from the commission of certain acts, as more particularly specified in the said restraining order; and whereas, thereafter, to wit, on October 24, 1893, said respondent applied to said court for an order requiring the complainant to make and execute to respondent an undertaking on said restraining order, conditioned as hereinafter specified; and whereas, said court has granted said motion, and fixed the amount of said undertaking in the sum of ten thousand dollars: Now, therefore, in consideration of the premises and of the issuing of said restraining order, we, the undersigned, residents of the state of California, do jointly and severally undertake, in the penal sum of ten thousand dollars, and promise, to the effect that said complainant will pay to the said respondent such damages, not exceeding the sum of ten thousand dollars, as said respondent may sustain by reason of said restraining order, if the said court shall finally decide that the said complainant was not entitled thereto."

The first point made by appellant is that the court failed to find upon material issues raised by the answer. The complaint alleged that "the said defendants undertook, upon consideration of the issuance of said injunction, and the continuation of the same," etc. The answer denied that the continuation of the restraining order was any part of the consideration. The court found, "that, upon the granting of said injunction by the circuit court, no bond of indemnity was required by the said court or the judge thereof, but on the day following, to wit, on the 24th day of October, 1893, on motion of the defendants in that action (the plaintiff in this), the circuit court ordered the said Alaska Packing Association to make and enter into the bond set out in plaintiff's complaint herein; that under and in pursuance of said order the said defendants in this action made, executed, and filed in said court and cause the bond set out in plaintiff's complaint." Whether the continuance of the restraining order was the consideration of the bond, in whole or in part, is a question of law to be determined from the order and the bond, the interpretation of which is within the province of the court. Even if it should be regarded as a conclusion of fact, the order and

the bond were the only competent evidence by which the consideration could be shown. The correctness of this conclusion is apparent from appellants' second and principal point, viz. that the only consideration for the making of the bond was the issuance of said restraining order; that, the restraining order having been issued and served, there was no consideration for the bond; and that the bond was not given in consideration of the continuance of said restraining order. It is conceded that a surety has a right to stand on the express terms of his contract, and that a past or executed consideration is not sufficient to support his promise. But we think that the recitals of the bond and the consideration expressed therein are sufficient. The bond recites the prior commencement of the action; that a preliminary restraining order had issued; that afterwards the respondent in said action applied to the court for an order requiring the complainant therein to make and execute "an undertaking on said restraining order, conditioned as hereinafter specified,"—and further recites that said motion was granted, and that the amount of the undertaking was fixed by the court, and the obligatory part of the undertaking in which the expressed consideration upon which it is made is as follows: "Now, therefore, in consideration of the premises and of the issuing of said restraining order, we, the undersigned," etc. It is thus apparent that the "issuing" of said restraining order is not the only consideration for the execution of the bond. The word "premises" expresses part of the consideration. The word "premises" means "that which is before; introduction; statements previously made." Bouv. Law Dict. In Rap. & L. Law Dict., the word "premises" is defined as follows: "In the primary sense of the word, 'premises' signifies that which has been before mentioned. Thus, after a recital of various facts in a deed, it frequently proceeds to recite that, in consideration of the premises (meaning the facts recited), the parties have agreed to the transaction embodied in the deed." The said recitals in said bond clearly show the previous issuance and present existence of said restraining order, and that the application for an undertaking was made in view of its existence, and therefore of its intended continuance. Besides, the obligatory part of the bond is not that the sureties therein will pay such damages as the defendants in that action might sustain by reason of its issuance simply, but their undertaking and promise is that they will pay to the "respondent such damages, not exceeding the sum of ten thousand dollars, as said respondent may sustain by reason of said restraining order."

It is said, however, that the circuit court had power, under section 718 of the Revised Statutes of the United States, to issue such restraining order without requiring any bond or security, and that the order requiring a bond did not provide that, upon a failure to give it, it should be dissolved; and

that, therefore, it must be assumed that the continuance of the restraining order did not depend upon the giving of the bond. It is quite true that the court might have rescinded its order requiring a bond to be given, or, upon the other hand, upon the failure to give it, might have discharged the restraining order. The only question in fact, however, is that the bond was given, and the restraining order remained in full force, so that all the benefit the complainant could derive from the restraining order was realized, and all the injury inflicted thereby upon the respondent therein was suffered. This case is broadly distinguishable from that of *Carter v. Mulrein*, 82 Cal. 167, 22 Pac. 1086, cited by appellant. In that case the order was that an injunction issue upon the filing of the bond. The writ was issued without the filing of the bond, and the bond then in controversy was dated and issued several days after the issuance of the writ. The bond in that case recited the order that, upon the filing of the bond, a writ of injunction should issue; and the consideration expressed in the bond was as follows: "That now, therefore, in consideration of the premises, and that said writ of injunction may issue, we undertake," etc. No writ was issued after the filing of the undertaking. It was held, as we think, rightly, that the bond was without consideration. The sureties there were not, as here, charged with notice that the injunction had already issued. A case much more nearly in point is that of *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327. In that case a preliminary injunction had been issued on an insufficient undertaking, and upon a motion to dissolve it was ordered that the injunction be dissolved unless a proper undertaking be given. In response to that order the undertaking was given, and the consideration expressed in the new bond is as follows: "Now, therefore, we, the undersigned, \* \* \* in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake, in the sum of ten thousand dollars, and promise to the effect that, in case said injunction shall issue, the said plaintiffs will pay," etc. The court said: "If the language had been 'in case said injunction shall be continued in force,' instead of 'shall issue,' there could have been no doubt. The question is, therefore, whether the words 'shall issue' can be construed to mean 'shall continue in force.' Now, we think that there might be cases in which the circumstances show that the two phrases were used as equivalent to each other." The execution of the bond is admitted by the defendants, and, as it recites the pendency of the suit and the previous issuance of the temporary restraining order, the defendants are conclusively charged with knowledge of those facts. *Pierce v. Whiting*, 63 Cal. 540. And not only so, but the very condition of the bond is that they will pay such damages "as said respondent may sustain by reason

of said restraining order," thus expressly admitting a liability for its continuance. The provision of the Civil Code (section 2836) that "a surety cannot be held beyond the express terms of his contract" must be read in connection with other provisions of the same Code. The next section (2837) is as follows: "In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts." Section 1636, Civ. Code, provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." So, "a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties." Civ. Code, § 1643. Interpreted by these rules, we think the bond is not open to appellants' objection that it was without consideration, but that it was given in compliance with the obvious purpose and intent of the order of the court.

Appellants further contend that this action was prematurely brought, inasmuch as the time for appeal from the judgment of the circuit court had not expired. The complaint alleged that a final judgment had been entered in that action. To this the defendants answered that it had not yet become final "in the sense contemplated by the said bond, for the reason that said judgment or decree, if ever made or entered at all, was not made or entered prior to the 20th day of July, 1894, and that, under and by virtue of the laws of the United States in that behalf made and provided, the complainant in that suit had the right to appeal to the circuit court of appeals of the United States from the said judgment and decree at any time within six months from said 20th day of July, 1894." In support of their said contention, appellants cite section 1049 of the Code of Civil Procedure, which reads as follows: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." We are not cited to any case where it has been held that an action upon an injunction bond will not lie until the time for appealing the case in which it was given has expired, nor have I found any case where that question has been directly raised. The cases upon injunction bonds are numerous, and all seem to assume that, when a final judgment has been entered by the court in the suit in which the bond was given, an action upon the bond may be brought. But we think it is not necessary here to decide that question. The answer only alleges that the time for taking an appeal had not elapsed, and does not allege that the judgment had not been satisfied, while, under the code provision relied upon by appellants, a satisfaction of the judgment makes it final,

though the time for appeal has not expired; and, if necessary to support the judgment against the sureties, we must assume, in the absence of allegation or proof to the contrary, that the judgment in the circuit court had been satisfied. That judgment was that the complainant take nothing by its action, and that the respondent recover its costs; and upon the trial of this case in the court below it was stipulated and agreed between the parties "that no damages of any kind were assessed or awarded to the defendant in that suit, except the costs of the court, which were awarded in the usual manner, and duly paid by the complainant." In the light of the fact that satisfaction of the judgment was not negatived in the answer, we must assume that it was satisfied at the date of its entry.

Appellants further contend that the items of damage, making up the aggregate of \$2,195, are not segregated or itemized in the finding (except as to counsel fees), and said finding is also attacked as not justified by the evidence. In the testimony of Mr. Madison the several items of damage and the amount of each are stated, aggregating a larger sum than that stated by the court in its finding, so that there was evidence tending to sustain the finding as to the total amount. We have, however, gone over the testimony of Mr. Madison as to each item enumerated by the witness, and think his evidence would have justified the court in finding a slightly larger sum (aside from attorneys' fees) than that for which judgment was rendered. We think the item of \$520, loss on salmon purchased, should not be wholly disallowed, as appellants claim, but that at least \$135 thereof might be properly allowed. Reducing that item as above, and excluding the item of interest (\$315) and the \$20 paid for transcript, our computation exceeds that of the court below by \$6.50 as to the damages, aside from attorneys' fees, which will be considered separately. It would have been convenient if the damages had been itemized, but we know of no rule requiring it, at least in the absence of a request for a finding upon each item.

The findings show that \$1,000 was allowed as attorneys' fees for services rendered in procuring a dissolution of the injunction. We think no part of this sum should have been included in the damages awarded the plaintiff. That sum was paid counsel, and it was all that was paid him for his services in the case. It is claimed, however, that no other services of value were rendered. There was no motion made to dissolve the preliminary restraining order. If the order to show cause why an injunction should not be granted pending the suit had not been accompanied by the restraining order, all the services that were in fact rendered upon the hearing of the order to show cause would have been necessarily performed in preventing the granting of that order, and in such case it is

well settled that attorneys' fees are not allowed. The restraining order, by its very terms, could only continue until the decision of the order to show cause, and a denial of an injunction pendente lite, upon the hearing of that order, necessarily terminated the existence of the restraining order. It is true, it had the effect of showing that the restraining order should not have been granted, and entitled the party enjoined to recover damages suffered during its continuance, and these have been properly allowed; but it does not follow that counsel fees for services in defeating the order to show cause can be allowed as damages sustained by reason of the previous existence of the restraining order, any more than attorneys' fees for services upon the final trial of the cause in preventing a perpetual injunction could be allowed as damages because the denial of a perpetual injunction necessarily dissolved an injunction granted pendente lite. The recent case of *Curtiss v. Bachman*, 110 Cal. 433, 42 Pac. 910, is conclusive of this question, and relieves us from its further discussion.

It is also contended that three days intervened between the issuing of the injunction and the giving of the bond; that much of the damage accrued during that time; and that the sureties are not liable therefor. We think the consideration stated in the recitals and conditions of the bond covered the whole time from the service to the dissolution of the restraining order; but, if it were otherwise, the defendant should have raised the question by objecting to plaintiff's evidence, which apparently covered the whole of said period, or have sought to segregate and exclude the portion of damages accruing before the bond was executed, or in some way raised the question in the court below. Besides, we do not find any specification of error which presents that question.

The judgment should be modified by deducting therefrom said sum of \$1,000, and, as so modified, the judgment and order appealed from should be affirmed; the appellant to recover the costs of this appeal.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified by deducting therefrom said sum of \$1,000, and, as so modified, the judgment and order appealed from are affirmed; the appellant to recover the costs of this appeal.

(115 Cal. 303)

PEOPLE v. MUHLNER. (Cr. 184.)  
(Supreme Court of California. Dec. 17, 1896.)  
HOMICIDE—NEW TRIAL—CONVICTION OF LESSER  
CRIME CONTRARY TO EVIDENCE.

Pen. Code, § 1404, which provides for the granting of a new trial on motion of a defendant for an omission or error prejudicial to him, does not authorize the granting of such motion on a conviction of manslaughter, under an in-

formation for murder, on the ground that the evidence established murder, and not manslaughter; the jury having the power (Id. § 1159) to convict of any crime necessarily included in the one charged, and the error, if any, not being prejudicial to defendant.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; A. L. Frick, Judge.

Louis A. Muhlner was convicted of manslaughter, and the people appeal from an order granting a motion for a new trial. Reversed.

Atty. Gen. Fitzgerald, for the People. C. G. Nagle, for respondent.

SEARLS, C. The defendant, Louis A. Muhlner, was informed against in the county of Alameda for the crime of murder, alleged to have been committed on the 12th day of August, 1895, by the unlawful and felonious killing of one Jennie Lewis, at the said county of Alameda. The defendant entered a plea of not guilty, and upon a trial he was found guilty of the crime of manslaughter. Thereafter, and before judgment, defendant moved for a new trial upon all the statutory grounds provided by section 1181 of the Penal Code, except the first and seventh; that is to say, the motion was not based upon the ground that the trial was had in the absence of the defendant, or upon the ground of newly-discovered evidence. The motion for a new trial, as appears by the order granting the same and from the bill of exceptions, was granted for the reasons shown by the following copy of said order: "Comes now the court, being fully advised in the law and the premises, and orders that the motion for a new trial may be granted solely upon the ground that the evidence in this case was sufficient to warrant the jury in believing beyond every reasonable doubt that the defendant did, at the time and place charged in the information, take the life of the deceased, and to warrant them in believing beyond and to the exclusion of all reasonable doubt that the act of killing upon his part was committed with malice, and that, therefore, the evidence was sufficient to warrant them in returning a verdict of guilty of murder. But that there was no evidence tending to show that such killing was not committed with malice, but, to the contrary, there was evidence showing beyond and to the exclusion of all reasonable doubt that such killing was committed with malice." The people appeal from the order granting a new trial, and urge that the court erred in granting said motion at the instance of defendant. A careful review of the record fails to convince us that there was any good cause for granting a new trial other than that assigned by the trial court as a reason thereof. Was the reason assigned sufficient to justify the order? We think not. Section 1159 of the Penal Code provides that: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that

with which he is charged," etc. The offense of manslaughter is necessarily included in the charge of murder, and the court very properly so instructed the jury, and advised them that in a certain state of the case they could find the defendant guilty of manslaughter. We agree with the court below that the evidence was quite sufficient to warrant a verdict of murder. It follows that the jury had a perfect right to bring in a verdict of manslaughter, if they thought the evidence warranted such verdict.

A verdict should not be set aside, and a new trial granted, on the motion of the defendant, except for some omission or error prejudicial to him. Pen. Code, § 1404. In the case at bar the verdict was set aside, and a new trial granted, on the ground that the verdict was too favorable to the defendant. The doctrine is well settled by this court that a defendant cannot complain where the determination of his case was more favorable to him than the evidence warranted. *People v. Barnhart*, 59 Cal. 381; *People v. Maroney*, 109 Cal. 277, 41 Pac. 1097; *People v. Lowen*, 109 Cal. 381, 42 Pac. 32; *People v. Jefferson*, 52 Cal. 452. In *People v. Barnhart*, 59 Cal. 381, where the defendant urged as ground for reversal that the jury found him guilty of burglary in the second degree, when the evidence showed beyond controversy burglary in the first degree, and there was no evidence whatever of second degree burglary, this court said: "But it is a sufficient answer to the objection taken on behalf of the defendant to say that he is not prejudiced by the error complained of. If the jury erred, the error was on the side of the defendant, and he cannot be permitted to urge in this court, as a reason for the reversal of the judgment of the court below, that the determination there was more favorable to him than the evidence warranted. \* \* \* 'The substantial rights of the defendant must have been injuriously affected by the error complained of to warrant our interference.'" "A verdict, contrary to instructions, for a less degree of the offense than the evidence proves, must be received and carried out. A new trial cannot be ordered." 2 *Bish. New Cr. Proc.* § 642; *Jordan v. State*, 22 Ga. 545, 559; *Barnett v. People*, 54 Ill. 325; *Com. v. McPike*, 3 Cush. 181; *Com. v. Walker*, 108 Mass. 309; *Com. v. Burke*, 14 Gray, 100; *Com. v. Smith*, 151 Mass. 491, 24 N. E. 677; *Fagg v. State*, 50 Ark. 506, 8 S. W. 829; *Allen v. State*, 37 Ark. 435; *Pratt v. State*, 51 Ark. 167, 10 S. W. 233. Many other cases might be cited, but these are deemed sufficient to show that a conviction of a lesser offense (necessarily involved in the indictment) than called for by the evidence is not cause for granting a new trial, or for reversal on appeal where such motion for new trial has been refused by the trial court. The verdict of guilty of manslaughter is the equivalent of a verdict of not guilty of the charge of murder, and he cannot be again tried upon that

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charge. *People v. Gordon*, 99 Cal. 227, 33 Pac. 901; *People v. Apgar*, 35 Cal. 389; *People v. Gilmore*, 4 Cal. 376. The defendant having been properly convicted of the crime of manslaughter, the granting of the motion for a new trial upon the grounds stated therein was erroneous, and the order should be reversed, and the court below directed to pronounce judgment against the defendant upon the verdict.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed, and the court below directed to pronounce judgment against the defendant upon the verdict.

(115 Cal. 394)

TURNER v. HEARST. (S. F. 335.)

(Supreme Court of California. Dec. 18, 1896.)

APPEAL—BILL OF EXCEPTIONS—LIBEL—EVIDENCE  
—DAMAGES—MENTAL SUFFERING—  
MALICE—RETRACTION.

1. A bill of exceptions, to be considered, must be settled by the judge who made the rulings excepted to; and where one judge settles the pleadings in a case, and a different one conducts the trial, to entitle a party to review the rulings of both, two bills of exceptions should be taken.

2. In an action by a practicing lawyer to recover damages for libel, where the article published was libelous per se, evidence offered by plaintiff to show his standing in his profession, and the extent of his practice, is admissible, to be considered on the question of general damages.

3. The mental suffering which may be considered as an element of damages in an action for libel must be such as the plaintiff naturally experiences as the direct, immediate, and proximate effect of the libel on his mind and feelings; and repetitions of the libel by others than the defendant, or comments made thereon, cannot be shown to enhance such damages.

4. Where defendant, the publisher of a newspaper, in an action for libel pleaded in extenuation and mitigation that plaintiff's name was used in the article complained of through a mistake of the reporter who prepared it, and offered evidence to prove the competency of the reporter, it was error to permit the plaintiff to show the subsequent discharge of the reporter by defendant, and the reason therefor.

5. On the question of malice it is competent for plaintiff to show that, in the publication of the libelous article in his newspaper, defendant relied entirely on a report taken from another paper, without verifying such report.

6. A defendant may give evidence of an apology or retraction in mitigation of damages, to be considered by the jury, though such apology or retraction was not made until after the commencement of the action, and not at the earliest opportunity thereafter.

7. No legal duty rests on the proprietor of a newspaper publishing a libelous article to make a retraction on learning that the statements made in the article are untrue.

Department 2. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action by John W. Turner against William R. Hearst for libel. Judgment for plaintiff, from which, and from an order denying a

motion for a new trial, defendant appeals. Reversed.

Garret W. McEnerney, for appellant. Clement, Cannon, Kline & Stradley, for respondent.

HENSHAW, J. Appeals from the judgment and from the order denying defendant a new trial. The action was for damages for libel. Defendant, in his newspaper, the San Francisco Examiner, on the 7th day of December, 1893, published what purported to be an account of difficulties existing between Lotta, an actress, and Turner, the plaintiff. In this account it was stated that Lotta had caused Turner's arrest upon a criminal charge, and that "the case was compromised, together with the settlement of several thousand dollars in notes given by the Plumas county lawyer to the actress." On the trial it appeared, and was undisputed, that the article in question was printed and published in the Examiner. It further appeared that the matters in the article set forth were true, saving that the charges by Lotta were directed against one John H. Thomas, and not against John W. Turner; that Turner was entirely innocent of any wrongdoing, and had in fact been the legal adviser of Lotta in her troubles with the said Thomas. The error in the Examiner's publication occurred in the following manner: The issue of the San Francisco Post of the day preceding the Examiner publication had contained an accurate statement of the facts. In this it was announced that John W. Turner had commenced an action against Lotta to recover moneys due for legal services rendered by him as her attorney in certain litigation which Lotta had with John H. Thomas; and in the narration of the causes which led to the litigation it was stated that Lotta had made serious charges against Thomas, to the effect that he had swindled her by false and fraudulent pretenses, and later had caused the arrest of Thomas in New York upon a criminal charge. The city editor of the Examiner gave to one of his reporters the article from the Evening Post, with instructions to "boil it down" for publication in the next issue. The reporter, in doing this late at night, and under a press of work, mistook the name John W. Turner for John H. Thomas, and made it appear, and it was so published, that the wrongful acts and criminal offenses mentioned had been committed by this plaintiff. Defendant, for answer, and by way of extenuation and mitigation, pleaded these facts, and pleaded also a reparation and apology, published in the paper upon the 4th day of February, 1894, in which a correct version of the matter is given, and the account closes with the following: "It will thus be seen that we have unintentionally done Mr. Turner a great injustice, but one which is likely to happen with the most carefully guarded attention to the news columns of a

busy morning paper. Such mistakes are always to be regretted, as is this, and call for ample and prompt explanations, which we are always prepared to make. In this case we should have been pleased to have set the matter—Mr. Turner and our own mistake—right at an earlier day, had the matter been sooner called to our attention." Certain denials of the answer were, upon plaintiff's motion, stricken out. The ruling and decision on motion to strike out were made by the Honorable C. W. Slack. The trial was had before the Honorable W. R. Daingerfield. The bill of exceptions on appeal from the judgment, which was also the statement used upon motion for a new trial, was presented to and settled by Judge Daingerfield.

Objection is here made to reviewing the order of Judge Slack in striking out portions of the defendant's answer, upon the ground that the bill containing the exception to this ruling and decision should have been presented to and settled by Judge Slack, who made the order. The objection is well taken. It is the duty of a litigant desiring to have a ruling or decision reviewed to present the bill of exceptions, embodying the matters excepted to, to the judge who made the ruling or decision, for settlement by him. *Cummings v. Conlan*, 66 Cal. 403, 5 Pac. 796, 903. That judge alone can know the facts upon which he exercised his judgment, and therefore he alone, under our system, can properly settle the bill. Appellant could have presented his bill of exceptions to Judge Slack either at the time of the ruling (*Code Civ. Proc.* § 649), or after the judgment (*Id.* § 650; *Tregambo v. Mining Co.*, 57 Cal. 501); but, whichever course he elected to pursue, it was still the judge who made the ruling who should have settled the bill. Under such circumstances, appellant may have two or more bills settled and properly presented for the consideration of this court.

It was not error for the court to allow proof of the extent of plaintiff's practice. Plaintiff was a lawyer, engaged in the practice of his profession. The words of the publication being admittedly libelous per se, and affecting plaintiff's standing in his profession, it was proper for the jury, in estimating the general damages to which plaintiff was thus entitled, to know his position and standing in society, and the nature and extent of his professional practice. General damages, in an action where the words are libelous per se, are such as compensate for the natural and probable consequences of the libel; and certainly a natural and probable consequence of such a charge against a lawyer would be to injure him in his professional standing and practice.

It is the rule in this state that mental suffering is an element of general damages in an action for libel. *Childers v. Publishing Co.*, 105 Cal. 284, 38 Pac. 903; *Taylor v. Hearst*, 107 Cal. 269, 40 Pac. 392. But the mental suffering is the suffering which plain-

plaintiff naturally experiences as the direct, immediate, and proximate effect upon his mind and feelings of the libel. In the case at bar, plaintiff was allowed, over objection, to give evidence of what clients had said to him about the publication, and what the reporters of the papers in Eureka, Humboldt county, had said to him about the publication, and what persons on the street said about it. He testified that he heard a remark "that, if that was the kind of a man I was, I wouldn't get much business in Eureka"; and another remark to the effect that "unquestionably it must be true, or the Examiner would not have risked such a publication." Respondent contends that this evidence was admissible—First, to show the mental suffering of the plaintiff; or, second, to show that the libelous words were understood, by those who read them, to refer to the plaintiff. But upon the first proposition it is well settled that the damages must be the direct result of the defendant's libel, and not of any mere repetition of it by others. It is a safe rule to declare that the compensation for injury to feelings should be limited to the natural effect of the libelous publication, as it comes to the knowledge of the plaintiff. It would be pernicious to permit evidence of this kind for the purpose of showing increased suffering. The evidence itself could not be met. There would be no way of testing the sincerity of the remarks, or of determining whether they were prompted in fact by the publication, or sprang from secret hostility or malice towards the plaintiff, in which case the aggravation to plaintiff's feelings would in no sense be chargeable upon defendant. As is said in *Burt v. Newspaper Co.*, 154 Mass. 238, 28 N. E. 1: "Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual."

Upon the second proposition,—that the evidence was admissible to prove that the libel was understood to refer to plaintiff,—it is sufficient to point out that there was no issue of this nature in the pleadings. That portion of defendant's answer seeking to join such issue had been eliminated, and, for reasons above given, the order is not here subject to review. Plaintiff cannot be allowed to have an issue raised by a pleading stricken out upon his own motion, and then justify the admission of evidence upon the ground that it is addressed to such an issue.

Defendant made proof of the competency of the reporter who committed the error, so full and satisfactory that further evidence upon the point was stopped by the court. To offset this, evidence was admitted on plaintiff's side to show why and when the reporter had left defendant's employment. Defendant having proved that he was not negligent

nor careless of the rights of others in the employment of the reporter, evidence of his discharge from employment subsequent to the libelous publication was erroneously admitted. It was, in its nature, similar to proof of precaution taken after an accident. *Sappenfield v. Railroad Co.*, 91 Cal. 62, 27 Pac. 590. The evidence could only have been admitted in disproof of his competency. It cannot be said that it worked defendant no injury.

As going to the question of malice, it is a general rule that the publication, and all the circumstances attending and surrounding it, may be given in evidence. It was, therefore, not error for the court to permit plaintiff to prove that the defendant, in publishing the article, relied entirely upon the publication in the *Evening Post* for his information, and did not verify the *Post* report. It would be evidence touching the question of negligence, or of careless disregard of the rights of others, notwithstanding the fact that in this instance the article published in the *Post* was correct. Gross negligence or carelessness of the rights of others is frequently equivalent in law to an intentional or malicious disregard of those rights. Whether or not the method adopted by the Examiner amounted to such disregard was a matter for the jury, under proper instruction by the court.

Defendant, after the commencement of the suit, made an offer to plaintiff to publish a retraction and apology, but this offer was conditioned upon a dismissal by plaintiff of his suit. Plaintiff having refused the offer, defendant, in the next Sunday edition of his paper, four days thereafter, published the retraction above quoted. This retraction having been published after action commenced, the court was inclined to hold upon the trial that proof of it was not admissible in evidence. Finally, however, counsel stipulated that it might be admitted and considered by the jury, and it was admitted, as well as the rebutting evidence of plaintiff concerning the conditional offer of publication above adverted to. In some jurisdictions, exemplary damages for libel are not permitted, and the recovery is strictly limited to compensatory damages. In some states, statute law has provided that a defendant who has made a retraction before the commencement of the action, or as soon thereafter as may be, may plead and prove the same in mitigation of damages. Such is the general effect of Lord Campbell's act (St. 6 & 7 Vict. 843). In the absence of any statutory provision upon the question, some courts have held that a public apology or retraction, made after the commencement of the action, cannot be proved in mitigation of damages; but the better and more liberal rule we take to be the one declared in *Newell, Defam.* § 84, that, aside from statutes, a defendant may give evidence of an apology or a retraction, in mitigation of damages, even though such apology or retraction was not



made at the earliest opportunity after the commencement of the action. *Smith v. Harrison*, 1 Fost. & F. 565. A tardy or reluctant or half-hearted withdrawal, or one which seems to have been made rather to escape liability than to repair the wrong, will avail a defendant little. Upon the other hand, when it is fully, promptly, and adequately made, it undoubtedly tends to decrease the amount of damages which, without it, plaintiff would have sustained, and must afford evidence upon the question of express malice, the presence of which alone justifies punitive damages.

Appellant complains of certain instructions given by the court upon the question of apology and retraction. One of these instructions is as follows: "When a newspaper is led into publishing unknowingly an untrue statement concerning an individual, it should not only retract when the truth is made known, but compensate the injured party for the injury already done. On being informed that the publication is false, the proprietors ought to publish a retraction promptly, fully, and sincere, if the publication is false, and ought to give as much prominence and publicity to the retraction as was given to the libelous matter." Of this instruction appellant says that it lays down to the jury, as a proposition of law, that it was the duty of defendant to publish a retraction; that no such duty was imposed upon him by law; that defendant was liable for compensatory damages for the publication of the libel, and, if there was express malice at the time of the publication, he was likewise subject to a judgment for punitive damages, but that there is no law for the proposition that any legal duty rested upon him to make a retraction. We think that this instruction, as well as others criticised by appellant, are justly open to complaint. There is unquestionably a moral duty upon every person to repair, so far as he may, the effect of a wrong done, whether that wrong was intentionally or unintentionally committed; but, if it can be said that there was a legal duty imposed upon the defendant to make retraction and apology, it would follow that, in any action for libel where retraction or apology had not been made, plaintiff would be entitled to an instruction to the effect that defendant, in failing to make such retraction, had failed to perform a legal duty. It was defendant's right to publish a retraction, and to have proof of that publication presented to the jury for their consideration in mitigation of damages. The defendant having availed himself of this, and having sought, in mitigation of damages, to prove the publication of an adequate retraction, it was proper for the court to instruct the jury that, when a defendant relies upon such retraction in mitigation of damages, to avail him it should appear that it was fully, fairly, and promptly made, and is such as an impartial person would consider reasonable and satisfactory under the circumstances of the case. The question of the sufficiency or insufficiency is pe-

culiarly a question of fact, and therefore peculiarly for the determination of the jury.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: TEMPLE, J.; MCFARLAND, J.

(115 Cal. 382)

WARREN v. CHANDOS et al. (S. F. 450.) (Supreme Court of California. Dec. 18, 1896.)

STREET IMPROVEMENTS—CONTRACT FOR GRADING—SUBSEQUENT CHANGE OF GRADE—INVALID ASSESSMENTS—NECESSITY FOR APPEAL TO BOARD OF SUPERVISORS.

1. Under Laws 1889, p. 157 (Street Improvement Act), declaring that before an improvement can be ordered a resolution of intention, describing the work, must be adopted and published, and that before awarding any contract a notice shall be given inviting proposals for the work, which shall be let to the lowest responsible bidder, after which the adjoining owners may elect to do the work themselves, etc., the act of the board of supervisors in so changing the official line, after a contract for grading to such line has been entered into between the superintendent of streets and the successful bidder, as to lessen the amount and the cost of the work, renders the contract inoperative, and invalidates the assessment.

2. The contract being inoperative, the assessment could not become valid by the failure of the property owners to appeal to the board of supervisors for a correction thereof.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by one Warren against Chandos and others on an assessment for grading a street. From a judgment for plaintiff, defendants appeal. Reversed.

Naphtaly, Friedenrich & Ackerman, for appellants. J. C. Bates, for appellee.

HARRISON, J. Action upon a street assessment. A contract for grading Kansas street, in San Francisco, for several blocks, to the official line and grade, was awarded to plaintiff's assignor, at the rate of 31 cents per cubic yard, and was entered into between him and the superintendent of streets September 22, 1891. After he had commenced work under the contract, viz. June 15, 1892, an order was passed by the board of supervisors changing the grade of that portion of Kansas street embraced in the contract, by which the same was lowered several feet. The grading to be done under this contract was a fill, so that by the change of grade the cost of doing the work and the assessment therefor were lessened. No further order or proceeding was had by the board of supervisors in reference to said grading, and the work therefor was completed by the contractor and his assignee to the official grade, as established by the order of June 15, 1892; and thereafter, June 16, 1893, the superintendent of streets made an assessment therefor, upon which the present action was brought. The plaintiff had judgment, and the defendants have appealed.

An underlying principle of the street im-



provement act is that the owners of the lands which are to be assessed for the expense of the improvement shall be informed in reference thereto before any order for the improvement can be made, and that they may themselves do the work that may be ordered. By section 3 of the act<sup>1</sup> they have an absolute veto for six months upon the work proposed by the city council; and section 5 provides that, after the contract has been awarded to the lowest bidder, the owners of three-fourths of the frontage may elect to take the work, and enter into a contract to do it at the price at which it has been awarded, and thus incur only the actual expense of the work. This necessarily presumes that they can know after the award, and before the contract is entered into with the successful bidder, the amount of work which is to be done, and have an opportunity to estimate its cost, in order to determine whether they will elect to do the work at the price at which it is awarded. In *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881, it was said: "The statute gives to the owners of the land to be assessed the right to take the contract at the price at which it was awarded to the successful bidder. This implies that the owners shall be definitely informed of the work which is to be done, and of the amount for which the assessment is to be made, in order that they may intelligently consider whether it will be to their advantage to take the contract." The rights of the owners in this respect are carefully protected in the statute. Before the improvement can be ordered, a resolution of intention "describing the work" must be adopted by the city council, and must then be posted and published, before jurisdiction to order it is acquired. Before the contract can be awarded, notice, "with specifications" inviting proposals for doing the work ordered, must also be posted and published, and the contract therefor is to be awarded to the lowest responsible bidder. The privilege is then given to the owners to do the work themselves at the price at which it was awarded, and thus be relieved from all burden except its actual cost. But if, after the contract has been awarded and entered into with the successful bidder, the character of the improvement can be changed, or the amount of work necessary for its completion increased or diminished, they are not only deprived of the benefit of a competition between bidders before the award, but they are also deprived of an opportunity to determine whether it would be to their advantage to enter into the contract themselves. In the present case it appears that the amount of work required for grading the street to the official line, which was fixed after the contract was awarded, was thereby reduced to such an extent as to materially affect the cost of the improvement. Whether the amount of the assessment was thereby increased or diminished is immaterial. The grading was awarded at a price per cubic yard, and the assessment was necessarily smaller by reason

of the change of grade; but, if proposals had been asked for grading the street to the line as changed, the contract might have resulted in a still smaller assessment. The price per cubic yard for filling the street would depend greatly upon the distance from which the material was brought, and the facility with which it could be obtained; and the cost per cubic yard might have been less for the diminished quantity required under the change of grade than when the original proposals were made, and it may be that the contract for that reason has yielded a greater profit, and resulted in a larger assessment, than would have been made if the work had originally been limited to that grade. The power of the supervisors to change the amount of work to be done under the contract after it had been entered into, and have an assessment based upon the contract so changed constitute a lien upon the lands fronting upon the work, cannot depend upon whether the cost of the work is increased or diminished. Proceedings for the improvement of streets are in invitum, and purely statutory, and afford no opportunity for invoking any of the principles of equity. The validity of the assessment depends upon the exercise of a statutory power, and the party seeking the right to enforce it must show that the power has been strictly pursued. In *Bolton v. Gilleran*, supra, it was held that a contract which gave to the superintendent of streets the power to increase or diminish the cost of the improvement, after the contract had been entered into, by requiring a greater or less amount of material for its completion, as he should determine, rendered the assessment invalid. The same result must follow a change by the board of supervisors of the amount of work to be done under the contract, and will render an assessment therefor invalid. It would not be contended that after the contract had been entered into the supervisors would have the power to directly agree with the contractor that his contract should be satisfactory required, or with a different material filed by a performance of only a portion of the work named in the contract, and what cannot be done directly cannot be affected by the indirect method of changing the line to which the street shall be graded. When the contract was entered into it provided, in substance, that Kansas street should be filled in to a line 10 feet above base, but the effect of the ordinance changing the official grade of the street was that the contract should be satisfied by filling it in to a line only 5 feet above base. It is sufficient to say that the board never acquired jurisdiction to order this improvement of the street, for the reason that such improvement was never described in the resolution of intention, nor was a contract for this improvement ever entered into.

It was not necessary for the defendants to appeal to the board of supervisors for a correction of the assessment. The board of supervisors had no authority, in the first instance, to order the street graded to any other line than the official line; and, after that line

<sup>1</sup> Laws 1889, p. 157.

had been changed, had no authority to require the contractor to grade the street to any other line than to the line of the official grade, as thus changed; and there was no "error" which could have been corrected on appeal. *Dougherty v. Hitchcock*, 35 Cal. 512; *Brock v. Luning*, 89 Cal. 316, 26 Pac. 972; *Manning v. Den*, 90 Cal. 610, 27 Pac. 435. By changing the line of the official grade, the jurisdiction to make the improvement which had been acquired under the original resolution of intention, or to proceed therewith, was lost, and the contract for doing the work ceased to be operative. The board of supervisors and the superintendent of streets are each only an agent of the municipality, with limited and defined powers; and the power conferred upon the municipality to improve its streets at the expense of the adjacent owners, although exercised through these agents, is, in effect, exercised by the municipality itself. The superintendent of streets is the ministerial officer to enter into the contract with the person to whom it is awarded, but the contract is entered into by him on behalf of the city, and the bond for its performance is to be executed to the city. The board of supervisors is the legislative body of the city, and is vested with a supervisory power over all improvements of streets and contracts therefor; and in the exercise of its legislative discretion and consideration for the public welfare it may at any time rescind a previous order for the improvement of a street, or order the street to be vacated, or its grade or width to be changed. The fact that a contract for the improvement of the street had been entered into would not deprive it of this power. The contractor might have a right of action against the city for whatever damage he should sustain from being in this way prevented from carrying out his contract, as in the case of any other breach of contract; but, after the contract had been thereby made of no effect, he would not have the right to proceed with its performance, and make the expense a charge upon the adjacent lands. *Warren v. Riddell*, 106 Cal. 352, 39 Pac. 781, is inapplicable. In that case the line of the official grade had not been changed, or the terms of the contract varied; and, as the work was not completed to the line fixed in the contract, the board of supervisors could have directed its completion if an appeal had been taken. The judgment is reversed, and the superior court is directed to enter judgment upon the findings in favor of the defendants.

We concur: HENSHAW, J.; VAN FLEET, J.

(5 Kan. App. 654)

#### DOUGLASS v. HEADY.

(Court of Appeals of Kansas, Southern Department, C. D. March 8, 1897.)

#### APPEAL.—PARTIES.

"All persons against whom a joint judgment has been rendered must be made parties to a proceeding to reverse such judgment, and a failure to join any of them, either as plaintiffs

or defendants, is ground for a dismissal." *Manufacturing Co. v. Richardson* (Kan. Sup.) 47 Pac. 537.

(Syllabus by the Court.)

Error from district court, Barber county; G. W. McKay, Judge.

Action by Richard Heady against John R. Douglass and Edward Brewer. Judgment for plaintiff, and Douglass brings error. Dismissed.

Defendant in error has filed his motion to dismiss the proceedings in error for two reasons, the first of which is as follows: "First. That the transcript and case-made attached to the petition in error show a joint judgment rendered against plaintiff in error and one Ed. Brewer in the court below in an action entitled 'Richard Heady v. John R. Douglass and Ed. Brewer'; that the petition in the said action declares a joint liability on the part of said defendants to the said plaintiff; that said defendants filed a joint answer; that the judgment of the court was against said defendants jointly for the amount of the verdict, to wit, \$116.13. It appears from the case-made that after the said defendants had filed a joint answer to the petition, containing merely a general denial, the defendant Ed. Brewer filed his amended separate answer, in which he admitted the contract set up in plaintiff's petition, and alleged he had paid thereon the sum of \$44.97, and claimed the balance due plaintiff was due from said Brewer alone. It also appears that said Brewer, in his testimony, claimed that he alone was liable for the debt to Richard Heady. It further appears that the trial court, in his instructions to the jury, used the following language: 'I further instruct you, gentlemen of the jury, that under the pleadings filed in this case, and the admission of the defendant Brewer, the plaintiff must recover as against the defendant Brewer, and the plaintiff may or may not recover against the defendant Douglass, jointly with Brewer, according as you may believe from the evidence that the plaintiff has or has not proved the material allegations contained in his petition as against the defendant Douglass.' The case-made also shows that the defendant Douglass alone filed a motion to set aside the verdict of the jury and for a new trial; and that the case-made was prepared, served, and presented for settlement by him alone."

Chester I. Long, for plaintiff in error. G. M. Martin, for defendant in error.

MILTON, J. (after stating the facts). In *Paving Co. v. Rotsford*, 50 Kan. 331, 31 Pac. 1106, it is held that all parties to a joint judgment, who would be necessarily affected by a reversal or modification of the same, are necessary parties to a proceeding in error to review such judgment, and that the absence of such necessary party will defeat the jurisdiction of the appellate court, and prevent a review of any part of the judgment. The rule is stated in *Elliott's Appellate Procedure* (section 138) as follows: "Where the judgment is

joint, there is no difficulty in making practical application of the general principle stated (that all persons whose interests may be substantially affected by the judgment on appeal should be made parties), for all who are parties to the judgment must be made parties on appeal." And in section 140: "While it is safe to say that all persons included in a joint judgment must be parties to the appeal," etc. The same rule has been very emphatically stated by our supreme court in the case of *Manufacturing Co. v. Richardson*, 47 Pac. 537, in which the following language is used: "The rule is well settled, and has often been enforced by this court, that all persons against whom a joint judgment has been rendered must be made parties to a proceeding to reverse such judgment, and that a failure to join any of them, either as plaintiffs or defendants, is ground for a dismissal of the case." In view of all the foregoing, and especially in the light of the *Richardson* Case, we must sustain the motion to dismiss. The petition in error is dismissed. All the judges concurring

(115 Cal. 357)

SHADE v. SISSON MILL & LUMBER CO.  
(Sac. 15.)

(Supreme Court of California. Dec. 17, 1896.)

APPEAL—WAIVER OF OBJECTIONS—BRIEFS—ESTOPPEL—ACCOUNT STATED—PLEADING—COMPLAINT—UNCERTAINTY.

1. Where exceptions are taken to the giving of an instruction and the refusal of another directly the converse of the first, it is not necessary to discuss both exceptions in the briefs.

2. An employé, by acquiescence in the itemized monthly statements rendered him by his employer, in which he is credited with less monthly salary than he should have received, and by which he is requested to advise the employer of any error therein, is estopped to claim salary in excess of that for which he was given credit. *Harrison, J., dissenting.*

3. A complaint in the common-law form for services rendered, which therefore fails to show whether plaintiff relies on a specific contract, or on an implied contract for the reasonable value of the services, is insufficient when attacked by special demurrer for uncertainty.

In bank. Appeal from superior court, Siskiyou county; Edward Sweeny, Judge.

Action by R. A. Shade against the Sisson Mill & Lumber Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Gillis & Tapscott, for appellant. L. F. Coburn, for respondent.

BEATTY, C. J. It was more than a year after the entry of judgment in this case when the notice of appeal from the judgment and from the order overruling the motion of defendant for a new trial was given. The appeal from the judgment has therefore been dismissed, and only the appeal from the order remains to be considered. The nature of the action is fully disclosed by the second paragraph of the complaint, which reads as follows: "That the said defendant herein is indebted to the plaintiff in the sum of one thousand five hundred and ninety-seven and twenty one-hundredths

dollars (\$1,597.20), on account of work, labor, and services rendered and performed within two years last past by plaintiff for defendant, as foreman of defendant's mill at Sisson, county of Siskiyou, state of California, at defendant's special instance and request." The answer denies any indebtedness, and alleges payment of all salary due, except \$3.38, tender of which is pleaded. The verdict of the jury was for the plaintiff for \$450, and judgment accordingly. It appears from the statement of the evidence that the defendant (a corporation) has been engaged since the year 1880 in the operation of a sawmill, and that the plaintiff, in April of that year, entered its service. He was at first employed in a superior position in the lumber yard to sort and pile the lumber, and continued in that position until the mill closed down, in December, 1890, when he was put in charge of a planing machine for a short time. Early in January, 1891, he was made foreman of the mill, and was occupying that position in July, 1891, when he received an offer of the superintendency of an electric light company, at \$125 per month. The salary he had been receiving from the defendant was \$100 per month. For the purpose of retaining him in the service of the mill company, the superintendent made him an offer in some form to increase his salary, with the result that the offer of the light company was declined, and the plaintiff remained at the mill. What the terms of the defendant's offer were, and whether its conditions were observed by the plaintiff, are the facts in controversy. The plaintiff testified, in substance, that he was offered \$150 per month with board, or \$170 per month without board, to commence from the month of January, 1891, the time he became foreman of the mill. But he admits that the offer was coupled with some condition, to the effect that he should assist the superintendent in the performance of his duties, or, in other words, that he should become an assistant or vice superintendent. He also admits that he did not perform the duties of assistant superintendent, but excuses his failure upon grounds which are disputed, and as to which the evidence is conflicting. The superintendent of the mill denies that he made any more definite offer than that he would do as well by the plaintiff as the electric light company, and claims that this offer was made subject to the condition that the plaintiff should go into the office of the company, familiarize himself with the books and business, take upon himself a share of the duties of the superintendent, and qualify himself to fill that position when necessary. Whatever the agreement may have been, the plaintiff remained at the mill, and continued until January, 1893, in the active discharge of the duties of foreman. On a few occasions he went into the office, and, as he claims, made a bona fide offer and attempt to familiarize himself with the business of the company, in order to qualify himself to act as superintendent, and to assist in performing the duties of that position. But he says an excuse was always found for sending him out of the office, and he was

made to feel that he was not wanted there, and accordingly ceased attending except when he was sent for. The superintendent, on the other hand, claims that the plaintiff strangely and unaccountably absented himself from the office, and stubbornly declined, in spite of remonstrances and expostulations, to assume the duties upon the performance of which any increase of his salary absolutely depended.

In view of this sharp conflict in the evidence as to what the contract with the plaintiff was, and as to whether he performed it upon his part, it is important to note the custom of the defendant, during the whole period of plaintiff's employment, to deliver to each of its employes at the end of the month a statement of his account, of which the following is a sample:

Sisson, Cal., February, 1892.

Mr. R. A. Shade, in account with Sisson Mill and Lumber Co. Please examine and advise us immediately if any errors are found.

Cr.		
Jan. 1, by balance.....	\$569 46	
" 31, " salary Jan. ....	100 00	
		\$669 46
Dr.		
Jan. 23, to cash .....	\$20 00	
Jan. 16, to check (Shreve & Co.) .....	25 00	
Jan. 26, to check (G. O. Brown) .....	22 00	
		67 00
		\$602 46

It was admitted by the plaintiff that he received such a statement every month from July, 1891, to January, 1893, inclusive, as he had received them prior to that time; but he claims that shortly after June, 1891, he called the attention of the superintendent and bookkeeper of defendant to the fact that the statements did not show correctly the rate of his salary, and requested that the books and statement should be made to conform to their agreement. But he says the superintendent then, and subsequently, when he again spoke of the matter, put him off with some excuse, and he allowed it to go on in that way, feeling confident that it would be made right when it came to a settlement. The superintendent denies that he ever heard of any claim on the part of plaintiff that he was to have more than \$100 per month until after his discharge, in January, 1893; and the bookkeeper says he never heard of plaintiff's claim until July, 1892, at which time, in a casual conversation, which occurred while they were on a fishing excursion to McLeod river, plaintiff made some general statement to the effect that he was to be allowed an additional salary for his past services.

Such being the conflicting state of the evidence upon these material points, the court, at the request of the plaintiff, gave the jury the following instructions: "If there has been any mistake, omission, accident, fraud, or undue advantage by which the balance of an account is incorrectly stated, it will not be conclusive between the parties, but it may be opened and re-examined, even though previ-

ously acquiesced in. I therefore charge you that if you find that monthly statements were rendered by defendant to plaintiff, which were by him retained without objection, that this is but a circumstance for you to consider, and which may be explained by evidence satisfactory to yourselves, and that said retention does not necessarily bind the plaintiff." And the court refused to give the following instruction, requested by the defendant: "If the jury believe from the evidence that the plaintiff was working for defendant by the month, and that defendant credited to plaintiff in satisfaction of plaintiff's wages a certain sum monthly, and those credits appeared as such on itemized monthly statements furnished to said plaintiff by said defendant, and that plaintiff accepted those statements without objection, then said plaintiff will be bound thereby, and it will be presumed that the monthly statements were made between said parties in accordance therewith." These rulings were duly excepted to by defendant, and specified as errors of law in the statement on motion for a new trial. But in the brief of appellant's counsel filed in this court he discusses only the ruling of the court refusing to give the instruction last above quoted (and another of similar purport), from which respondent's counsel infers that he has waived or abandoned his exception to the giving of the instructions requested by him, and thereby necessarily abandoned the exception which is discussed in the brief. But this is straining the doctrine of waiver too far. In discussing the refusal of the one instruction, the whole argument upon the giving of the other is necessarily involved; and it would have been mere useless repetition to have applied it to the converse of the proposition. Clearly, the appellant is entitled to a decision upon these exceptions, and, in our opinion, the rulings are clearly erroneous.

The question involved is not, as counsel assumes, a mere question of acquiescence in a stated account, or the extent to which a creditor is bound by failure to object within a reasonable time to a written statement of account by the debtor. It is, on the contrary, a question of estoppel, arising out of the action of the defendant, based, presumably, upon the silence of the plaintiff when he ought to have spoken,—a question, in other words, whether the plaintiff is not bound by that conclusive presumption which obtains "whenever a party has by his own declaration, act, or omission intentionally and deliberately led another to believe a particular thing true, and to act upon such belief." Code Civ. Proc. § 1962, subd. 3. When a statement of account of past transactions is delivered to a debtor or creditor, his retaining it without objection is, as to such past transactions, merely an item of evidence, more or less conclusive, according to circumstances. But when one person is employed in the service of another by the month, under an express contract for a fixed salary or wage, or under an implied contract

for the reasonable value of his services, and the employer delivers to the employé at the end of each successive month a statement of his account, showing the time he has worked and the rate of wages or salary allowed, and especially when upon the face of the account is indorsed an express request that the employé will examine it, and give immediate notice of any error, the failure to make any objection to the account within a reasonable time must be regarded as a deliberate admission that the rate of compensation stated in the account is the rate expressly agreed upon, or that it is the true value of the services, and that the employment is to be continued upon the same terms until there is some new agreement. In such case the employer must be deemed to have acted upon the tacit admission of the correctness of the account, for otherwise he will have been deprived of his option to terminate the employment upon notice that more is expected than he has offered to pay. This proposition is equally true, and the presumption would be equally conclusive, in case of an account delivered periodically by the employé to the employer. If he claimed by his account a salary of \$150 per month, the employer, after months of silent acquiescence, would not be heard to assert that the actual agreement was for only \$100, or that the services were reasonably worth no more than that amount. The reason in either case for holding master or servant bound by his tacit admission is that he has thereby deliberately led the other to believe the stated rate of compensation to be the true one, and to act upon it. The application of the principle of estoppel to an account stated is discussed in the case of *Janin v. Bank*, 92 Cal. 14, 27 Pac. 1100; and the only reason it was not enforced against the plaintiff in that case was that it clearly appeared that the bank had neither acted nor omitted to act in consequence of Janin's apparent acquiescence in the correctness of the account stated. The case of *McClain v. Schofield* (Sup.) 26 N. Y. Supp. 700, is direct authority on the proposition here involved. In this case there was, as above stated, evidence upon which the jury might have found that plaintiff did object to the accounts rendered; but there was conflicting evidence, and the instructions under consideration were based upon the assumption that no objection was made. The jury were instructed, in effect, that the plaintiff was not bound even if he never made any objection; and this, for the reasons stated, was an error, and a vital one, necessitating a reversal of the order.

In view of the necessity of a new trial, and the possibility of another appeal, it is proper to notice some of the remaining assignments of error.

The ruling of the court upon the demurrer to the complaint cannot be reviewed upon this appeal from the order denying a new trial; but, if the plaintiff should again recover a judgment, the question of the sufficiency of the complaint might be raised on the next ap-

peal, and therefore it is not improper to notice the point presented by the briefs.

The demurrer to the complaint was not a general demurrer for want of facts, but a special demurrer, upon the grounds of ambiguity and uncertainty, in this: "It cannot be told therefrom whether plaintiff relies upon a specific contract or upon an implied contract for the reasonable value of the services alleged." The authorities cited by the respondent to sustain the order of the superior court overruling the demurrer do not go to the extent of holding that a complaint, such as this, is good against a special demurrer for uncertainty or ambiguity. In the case of *Pavlich v. Bean*, 48 Cal. 364, there does not appear to have been even a general demurrer, and the complaint alleged a stipulated compensation. In *Whitton v. Sullivan*, 96 Cal. 480, 31 Pac. 1115, there was a special demurrer on the ground of uncertainty; but the complaint alleged the reasonable value of the services, and the question of its insufficiency is not alluded to in the opinion of the court. Of the cases referred to in *Pavlich v. Bean*, that of *Wilkins v. Stidger*, 22 Cal. 232, is the first in which a complaint, such as this, was held to state a cause of action according to the rules of our Code. But in that case there was not even a general demurrer, and the decision seems at last to have been rested upon the ground that, in the absence of a demurrer, the deficiencies of the complaint were cured by the verdict. In *Abadie v. Carillo*, 32 Cal. 172, there appears to have been only a general demurrer for want of facts. The complaint was held good, *Sanderson* and *Rhodes* concurring only because they felt bound by the decision in *Wilkins v. Stidger*. In *Merritt v. Glidden*, 39 Cal. 564, it is plainly intimated that, while such a complaint (one following the common-law forms) is good against a general demurrer, it is not good against a special demurrer, upon the ground that it is unintelligible or uncertain.

At the trial, the plaintiff relied principally upon the express agreement to which he testified; but, in view of the ambiguity of the complaint, the defendant was entitled to cross-examine the plaintiff and his witnesses as to the nature of his employment when the mill was idle, and when it was running, the length of time it was idle, etc., with a view to determining the reasonable value of his services. This was a matter necessarily in issue under the pleadings. The court erroneously sustained some objections to cross-examination on these points, but the error was rendered harmless by the persistence of counsel for defendant, who, in spite of the rulings, managed to bring the whole matter out by varying the form of his questions. And, considering the fact that the reasonable value of plaintiff's services was from first to last a contested issue in the case, it was error to exclude direct evidence offered by defendant as to the wages paid to other men

in the same and similar positions when the mill was idle and when it was running.

There was some evidence admitted over objections on both sides not strictly material, but none that could have prejudiced the party objecting. On the whole, with the slight exceptions noted above, the whole case seems to have been very fully and fairly laid before the jury. The order denying a new trial is reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.; VAN FLEET, J.

HARRISON, J. I dissent. The transactions between the plaintiff and the defendant do not, in my opinion, disclose any of the elements of an estoppel; nor do I think that the receipt and retention by a laborer, without objection, of a statement of account rendered him by his employer, is governed by different rules from those which control a similar transaction between other parties. No reason is urged in support of such a proposition, other than that of estoppel, and no authority is cited to sustain it. In *McClain v. Schofield* (Sup.) 26 N. Y. Supp. 700, the plaintiffs were commission merchants, and sold goods manufactured by the defendants, for which they had received a commission of 3 per cent. Subsequently the plaintiffs were informed by the defendant that for the future they would pay a commission of only 2 per cent., and assented thereto. The statements thereafter rendered by the defendants were made upon this basis, and the plaintiffs, without objection thereto, accepted payment of the amount thus shown. The basis of the rule which renders such transactions between other parties the equivalent of an account stated is that the acceptance, without objecting thereto within a reasonable time, is to be regarded as an implied admission that it is correct, but, like all admissions upon which no action has been had by the other party, is subject to explanation, and, if shown to have been made erroneously or under a mistake, is not binding upon the party making it. The application of the rule itself was originally limited to transactions between merchants, and in some jurisdictions is still so limited (*Anding v. Levy*, 57 Miss. 51), and was afterwards extended to statements made to their customers by all dealers in merchandise. It is only within modern days that it has been extended to persons in other relations. In *Lockwood v. Thorne*, 18 N. Y. 285, one of the leading cases in this country on this subject, it was said: "An account stated or settled is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors. Its effect is to establish prima facie the accuracy of the items without other proof; and the party seeking to impeach it is bound to show affirmatively the mistake or error alleged. The force of the admission, and the strength of the evidence which will be nec-

essary to overcome it, will depend upon the circumstances of the case. But the parties are never precluded from giving evidence to impeach the account, unless the case is brought within the principles of an estoppel in pais, or of an obligatory agreement between the parties, as, for instance, where, upon a settlement, mutual compromises are made." And in *Brown v. Kimmel*, 67 Mo. 430, it was said: "It will readily be perceived, on an examination of the numerous cases reported on this subject, that they have been decided on the peculiar circumstances attending each case, and most generally in proceedings in equity. In no case has such implied admission been held to be an estoppel, but simply a prima facie case, throwing the burden of contradiction or explanation on the adverse party." See, also, *Wiggins v. Burkham*, 10 Wall. 129; *Brewing Co. v. Friar*, 99 Mich. 190, 58 N. W. 52; *Hutchinson v. Bank*, 48 Barb. 302. Being only evidence from which an agreement may be inferred, it can be treated as the equivalent of an agreement only when the transaction is of such a nature as to authorize such inference; and since, as evidence, its effect is always varied by the circumstances under which the statement was given and received, and by the character of the transaction to which it refers, as well as the parties between whom it was made, it cannot be said, as matter of law, that the mere receipt and retention by the plaintiff of the statements rendered him by the defendant bound him by their contents.

The evidence before the jury concerning the terms of the original hiring of the plaintiff was conflicting; but, if the jury were satisfied from this evidence that the defendant had agreed to pay the plaintiff the wages as claimed by him, that agreement would be the basis of his right of recovery, and he would not be "bound" by any subsequent statements of the defendant as to the amount in which it claimed to be indebted to him therefor after such wages were earned. His failure to make objection thereto would not preclude him from explaining the circumstances under which he received the statements, and leaving to the jury to determine whether they were such as to constitute an express admission of their correctness. Of course, if the circumstances connected with the receipt of the statements are such as to create an estoppel in pais in behalf of the employer, a different rule would prevail; not by reason, however, of the implied admission of the correctness of the statement, but by reason of the fact that the employer had acted thereon, and would be injured if the admission could be repudiated. The burden of showing this fact, however, would rest upon the employer, and must be established affirmatively, and not left to conjecture. In *Janin v. Bank*, 92 Cal. 14, 27 Pac. 1100, it was said in reference thereto: "The burden of proof to show that the bank sustained damage or injury by the negligence [that is, the failure to make objection] of plaintiff was upon the de-

fendant, and this it was required to show by evidence having some reasonable tendency to establish such fact." There is nothing in the present record tending to show that the defendant acted, or failed to act, in respect to any matter, by reason of the omission of the plaintiff to object to the correctness of the statements; and there is nothing more than conjecture that, if he had objected thereto, the defendant would have sought to terminate the employment; and there is certainly no foundation for such a presumption.

An order overruling a demurrer to a complaint, on the ground of ambiguity, does not constitute reversible error, if after such order the cause is tried upon its merits, and it does not appear that the defendant was prevented from making whatever defense he had to the cause of action shown by the plaintiff's evidence. Code Civ. Proc. § 475.

(115 Cal. 388)

LANGE v. SCHOETTLER. (S. F. 402.)

(Supreme Court of California. Dec. 18, 1896.)

DEATH BY WRONGFUL ACT—EXEMPLARY DAMAGES—EVIDENCE—EXTENT OF INJURIES—ATTORNEY AND CLIENT—AUTHORITY TO BRING SUIT.

1. Under Code Civ. Proc. § 377, providing that, in actions for death by wrongful act, such damages may be given as, under the circumstances of the case, may be just, exemplary damages are not recoverable.

2. In actions for death by wrongful act, declarations of deceased in regard to his sufferings are admissible to show the extent of his injuries.

3. A witness may be asked whether he did not threaten to kill one of the parties to the action, to show bias.

4. Error in excluding such question is not cured by subsequent evidence that the witness was unfriendly.

5. In an action for death by wrongful act, evidence that deceased had intended to sue defendant is inadmissible.

6. No issue on the question whether the attorney was authorized by his client to commence suit can be taken before the jury.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Henry Lange against Frederick Schoettler. There was a judgment for plaintiff, and defendant appeals. Reversed.

Carroll Cook and F. H. Richardson, for appellant. Oliver Ellsworth and W. F. Williamson, for respondent.

TEMPLE, J. This action was brought to recover damages for the death of plaintiff's son, which it is charged was caused by the wrongful act of the defendant.

The first point, although apparently based upon the alleged insufficiency of the evidence, is that the jury was erroneously instructed that they could allow exemplary damages if the act causing death was wanton, cruel, and malicious. I think this instruction erroneous, and that it was probably given under some misapprehension as to our

statutes upon the subject. It has been uniformly ruled that the action provided for in section 376, Code Civ. Proc., is a new action, and not the action which the deceased might have brought for the wrong had he survived. Only such damages can be recovered as the statute authorizes, and, in the absence of an express provision authorizing a different rule, the only damage allowed is the probable value of the life to those in whose behalf the action is brought. Of course, this cannot include any grievance personal to the deceased, or any damage allowed in the interest of the people as punishment. The relatives, or the representative in their behalf, can recover the value of that which they have lost through the wrongful act of the defendant, and nothing more. It is true, in the case of a mother or a wife the jury have been allowed to consider the fact that they were deprived of the comfort, society, and protection of a son or husband, but it has been always held that this was in strict accordance with the rule that only the pecuniary value of the life to the relations could be recovered. The probable comfort, society, and protection of the deceased had some pecuniary value. The rule for computing damages in section 377 is expressly made applicable, and no doubt it was thus left in the judgment of the jury because all the elements upon which the estimate of pecuniary loss was to be based were problematical. The comfort, society, and protection, as well as the support which is to be estimated, is only something which might have been. The age, character, disposition, and health of the deceased were all to be taken into consideration. Everything is uncertain and indefinite. Therefore, it is left to the jury to say what they deem just; and if they have not made their estimate upon a wrong basis, and have not acted under the influence of passion or prejudice, their judgment is final. The statute of 1862 (St. 1862, p. 447) expressly allowed the jury to give exemplary damages, and this provision was carried into the first edition of the Codes. It authorized such damages, pecuniary and exemplary, as the jury should deem just. In 1874, section 377 was amended by striking out the words "pecuniary and exemplary." The purpose of this amendment must have been to take away the right to exemplary damages, and to make the rule accord with the general rule elsewhere.

The decisions upon this matter are cited and discussed in *Munro v. Reclamation Co.*, 84 Cal. 515, 24 Pac. 303. In that case, while holding that, in the case of a wife or mother suing under the statute, the jury may take into consideration the loss of "the comfort, society, and protection of the deceased," yet the remark of Mr. Justice Wills, that "the subject-matter of the statute is compensation for injury by reason of the deceased not being alive," is quoted with approval, and it is declared that the recovery can only be for the pecuniary injury to the relatives. In the

same case an instruction was given that the jury must not allow exemplary damages, but could consider the sorrow, grief, etc., of the mother. The instruction was held erroneous solely because it allowed damages for the grief occasioned by the death, and because such injury is not a pecuniary loss. This case seems directly in point. To the same effect is *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 30 Pac. 603. In that case it was held that the damages were so excessive that the verdict must have been the effect of passion and prejudice, and that the court erred in instructing the jury that "the jury is not limited to the actual pecuniary injury sustained by her by reason of the death of her child." It is again held that, under our statute, the damages are limited to the probable value of the life of the deceased to the relatives. The same matter was again under consideration in *Pepper v. Southern Pac. Co.*, 105 Cal. 389, 38 Pac. 974. In that case it was again held that the jury were confined to the probable pecuniary value of the life of the deceased to the relatives. No case has been cited, under a statute such as ours, in which exemplary damages have ever been claimed. The nearest to it are those cases in which it has been contended that a recovery could be had for the pain and suffering caused the deceased. The ruling has uniformly been against such a claim. The grievance to be redressed is that of the relatives, not of the deceased.

Several rulings made during the trial are complained of. They are generally unimportant, and, if erroneous, are not likely to be repeated on a new trial. A few may be briefly noticed.

The statements made by the deceased in regard to his sufferings were properly admitted. They indicated his bodily condition, and were part of the symptoms by which his case was to be judged, and by which it was ascertained to what extent he was injured. His declarations are taken because although they may be feigned, still it is the best we can do. Whether feigned or not must be left to the jury.

I think the question asked of the witness H. Lange, on cross-examination, as to whether he had not threatened to kill the defendant, should have been allowed. The injury caused by the ruling was not cured by the proof elsewhere that the witness was unfriendly. The degree of hostility was important.

I also think it was error to allow plaintiff to prove that the deceased intended to sue the defendant. It was immaterial, but might prejudice the defendant by showing that the deceased believed that he had a just cause of action against the defendant for the assault.

If a suit has been brought by an attorney without authority from his client, there is a mode in which the defendant can take advantage of the fact, and have the cause dismissed. The presumption is that the suit was

authorized, and no issue can be made upon that point before a jury.

The judgment and order are reversed.

We concur: MCFARLAND, J.; HENSHAW, J.

(8 Colo. App. 420)

**DENVER CHAMBER OF COMMERCE  
AND BOARD OF TRADE v.  
GREEN.<sup>1</sup>**

(Court of Appeals of Colorado. Oct. 12, 1896.)

**CORPORATIONS — DENVER CHAMBER OF COMMERCE  
—RIGHT TO COLLECT DUES FROM MEMBER  
—TERMINATION OF MEMBERSHIP.**

1. A person, on becoming a member of a chamber of commerce and board of trade corporation, signed an agreement to abide by the by-laws, rules, and regulations of the association, and to pay the fees and dues required thereby. The by-laws required the payment of annual dues, and provided that, on a failure to pay for an entire year, the member should be deemed to have relinquished his membership, and that he might be excluded from the rooms of the association, and his certificate of membership should be sold at auction; the proceeds, after deducting arrearages, to be paid to him. They further provided that his certificate should be transferable on the books of the association to any approved applicant, either by the member or his representatives after his death, on payment of dues to time of transfer. Held that, in the absence of statutory provision, the remedy of the corporation for nonpayment of dues by a member was not confined to a forfeiture and sale of his certificate of membership, but that it might sue on his agreement, and collect dues so long as his membership continued.

2. The membership of the holder of a certificate under such by-laws will not terminate, ipso facto, on his becoming in arrears for dues for one year; but so long as no steps are taken by him to withdraw, nor by the association for his exclusion and the sale of his certificate, his membership continues, and he is liable for dues.

Error to district court, Arapahoe county.

Action by the Denver Chamber of Commerce and Board of Trade against Hubert R. Green. Judgment for plaintiff for a part of its demand, and it brings error. Modified.

A corporation, the Denver Chamber of Commerce and Board of Trade, was organized under the act providing for the creation of corporations for purposes other than those of pecuniary profit and advantage. Subsequently, the defendant in error, Hubert R. Green, became a member, on complete compliance with all the prerequisites to membership. Thereafter a disagreement arose between the Chamber of Commerce and its member respecting those relations, and over the annual dues which Green was bound to pay by the terms of his membership, and his failure in this respect for a definite period. The dispute led them to make an agreed statement of facts, and submit their controversy to the court, which simply concerned two propositions: First, the amount for which Green was liable; and, second, whether the

<sup>1</sup> Rehearing denied December 14, 1896.



corporation could enforce the collection of the sum alleged to be due. The amount claimed was \$42. The Chamber of Commerce had judgment for \$12, the court holding as to the balance that there was no liability; and it prosecutes error to reverse that judgment. A few only of the different conditions and limitations expressed in the constitution, articles, and by-laws, to which Green became subject, and to which he was confessedly bound, need be stated. Some of them will be quoted, and others will be stated generally. According to the articles of incorporation, any person possessing certain qualifications, and taking certain steps, and on approval by the proper members of the governing body, and the payment of the initiation fee and the annual dues, might become a member. The member is required to sign an agreement to abide by the by-laws and regulations of the association. This agreement was as follows: "The undersigned, desirous of becoming a member of the Denver Chamber of Commerce and Board of Trade, hereby agrees, if elected, to abide by the by-laws, rules, and regulations of said organization, and to pay the initiation fees and all dues required by the same. [Signed] Hubert R. Green." A certificate of membership was then issued to him, which became, in a general way, his personal property. It is assignable only by the consent of the corporation, and on payment of the accumulated unpaid dues and a transfer fee. To accomplish the transfer, the transferee must be approved by the governing body. On the decease of the member, the certificate can likewise be transferred. The annual assessments were \$12. In case the member failed to pay his dues within a fixed time, he could be excluded from the rooms of the association, and "any member failing to pay the assessment during the entire year for which the same shall have been levied shall be deemed to have relinquished his membership, and the certificate thus relinquished shall, after public notice of the same shall have been given, be offered for sale at auction, and sold, subject to an approval of the application of the person buying, the proceeds of such sale to be applied first to the payment of all accumulated dues against such certificate, and the balance to be paid to the owner of such certificate." According to the agreement, Green paid his dues for 1886, 1887, 1888, 1889, and 1890. He failed to pay the dues assessed for the years 1891, 1892, and 1893, and the first half of 1894. After citing these with other facts, which need not be referred to, the statement continues that the defendant had never tendered his resignation, nor been excluded from the rooms of the corporation; nor had any steps been taken by the corporation, or any of its officers or directors, or by Green, looking to his expulsion, suspension, or any severance of his relations. It is likewise admitted that Green never attempted to relinquish his membership, although it is conceded that since 1891 he never attempted to exercise any of the rights or privileges of membership.

Yeaman & Gove, for plaintiff in error.  
James H. Brown, for defendant in error.

BISSELL, J. (after stating the facts). The right of the corporation to enforce the payment of dues by an action at law is somewhat seriously contested by the defendant in error, although we are cited to no case which directly denies it. The authorities generally concur in holding that the corporation has two remedies, of either of which it may avail itself for the purposes of compelling payment. The common-law remedy remains, unless there is a statutory limitation. The doctrine has been referred to in many cases where this was not the sole question, and decided in others, where the direct question was presented. *Association v. Benshimol*, 130 Mass. 325; *Freedman v. Chamberlain*, 70 Hun, 193, 24 N. Y. Supp. 388; *Lodge v. Hubbell*, 2 Strob. 457; *Railroad v. Johnson*, 30 N. H. 390; *Cook, Stocks & S.* § 124. Many others might be cited, but these are sufficiently illustrative of the general proposition. The only matters which the cases discuss are the provisions of the constitution and by-laws of the corporation and the statutes of the state, to ascertain whether in either the one or the other there is a limitation on the right, or whether it was the evident intention of the corporation to restrict itself to the remedy afforded by the sale of the certificate, and the application of the proceeds to the payment of the claim. There is no such limitation in the statutes of this state, nor is there any provision in the articles of incorporation, the by-laws, rules, and regulations of this corporation, which compel such a construction. The title to the certificate vested in the member, and while the corporation might proceed to expel him, and enforce the payment of the unliquidated assessments by the sale of the certificate, yet it was manifestly not within the contemplation of either of the parties that this should be the sole and only remedy. There is reserved to the member the right to sell and transfer the certificate on the consent of the governing body, and the member's title to whatever might remain after the sale and the liquidation of the assessments was regarded as his personal property. The same rights were conceded to the estate of the decedent, and all the provisions respecting it rebut any inference that the Chamber of Commerce intended to look to the certificate alone for the collection of its unpaid assessments. A more unanswerable reason in support of the remedy is found in the specific agreement entered into by Green to pay all dues which might be assessed against him. It was founded on a sufficient consideration, and would, undoubtedly, support an action on proof of the levy and a failure to pay so long as his membership continued. We must therefore conclude it had the right to proceed in either one of two ways to enforce the obligation which the member had assumed.

The remaining question is almost equally

free from difficulty, and we have been referred to no case directly in point which adjudges the membership forfeited by the failure to pay the assessments. In most of the cases cited, the member was insisting upon certain rights, which were contested by the association. They did not spring from an attempt on the part of the association to enforce the member's obligation. This, however, makes very little difference in the general rule applied in such cases, or in the principle which underlies them all, and must control this decision. The only inquiry is whether, according to the terms of the incorporation, or the language of the rules, by-laws, and regulations governing it, the inference may be legitimately indulged that the parties intended that membership should cease in the event of a failure to pay the levied assessment. As the cases generally put it, the question is, must it necessarily be concluded it was the purpose that the membership should ipso facto terminate on such failure? No principle is better settled, or of more universal application, than that all regulations of a quasi penal character, which effect a forfeiture, must be strictly construed. It is never assumed that the forfeiture will follow unless the result is compelled by the language, evident purport, and necessary construction of the terms relied on. No such construction is necessarily derivable from the terms of this agreement. By the by-laws, the member was permitted to sell the certificate to a person, agreeable to the governing body; and the proceeds would belong to him subject to any deduction for the sums which he might owe. It cannot therefore be concluded that the membership should be taken to be absolutely terminated by reason of the failure to pay. If this were true, the right to dispose of the certificate would no longer inure to the member, but would be reserved absolutely to the association, which would control the sale, handle the proceeds, and either appropriate them in their entirety, or turn over to the member what might remain after the settlement of his debts. The nonpayment of dues at the time they might accrue was evidently within the contemplation of the association, and while it provided the member should be excluded from enjoying its privileges, and should be deemed to relinquish his rights, this can only be taken as a regulation having for its object the retention by the association of the right to control its membership as against nonpaying associates. This view is strongly supported by the general rule laid down in all the cases. There is no way by which membership in a body can be terminated, unless it be otherwise directly provided by the organic law, or some rules made in conformity to it, save by direct action on the part of the association itself, by way of expulsion or suspension, or on the part of the member by resignation. If the association desired to terminate the membership, it could not, under the general principles governing such bodies, do this without

giving notice and a right to be heard. Such is universally held to be the rule applicable to similar bodies. *McDonald v. Ross-Lewin*, 29 Hun, 87; *Society v. Weatherly*, 75 Ala. 248; *Scheufler v. Grand Lodge*, 45 Minn. 256, 47 N. W. 799; *People v. Fire Department of Detroit*, 31 Mich. 458; *Sibley v. Carteret Club*, 40 N. J. Law, 295; *Com. v. Pennsylvania Beneficial Institution*, 2 Serg. & R. 140; *Diligent Fire Co. v. Com.*, 75 Pa. St. 291; *Supreme Lodge v. Kallinski*, 6 C. C. A. 373, 57 Fed. 348; *State v. Trustees of Vincennes University*, 5 Ind. 77.

Manifestly, Mr. Green had the right to retain his membership, to insist upon his rights as a member, and at any time prior to the severance of those relations, either by himself or by the association, tender his unpaid dues, and continue his relations to the body. This is stated with regard to the particular provisions of the constitution and by-laws of this organization. It might not be true in all cases, but it seems to be true in this. When this proposition is conceded, there is no escape from the conclusion that the association had the right to regard him as a member, to waive their right to expel him, and to insist on his paying the assessments which had been legitimately levied against him. It was, doubtless, the privilege of the member to sever his relationship, tender his resignation, and escape any further liability. That he failed to do this was his own neglect, and he cannot now complain because he is required to liquidate the assessments which have been legitimately and regularly laid against him.

This discussion disposes of the only propositions needful to be considered for the determination of the issue. We are cited to many authorities by the defendant in error which are supposed to throw more or less light on the questions under discussion; but, since they concern other matters and other controversies, the rules which they announce cannot be permitted to control our conclusions in respect to this matter. The conclusion of the district court was right to the extent to which it went, when it entered judgment against Mr. Green for \$12. The error consisted in a failure to assess the whole sum claimed. The judgment should have been for \$42, instead of \$12; and the proper judgment will be entered in this court against Mr. Green for that sum. The judgment of the district court is therefore affirmed and modified as indicated. Affirmed.

(14 Utah, 334)

BENSON v. ANDERSON et al.

(Supreme Court of Utah. Dec. 14, 1896.)

DECREE—WHEN OPENED—CHANGE OF VENUE.

1. A final decree upon the hearing of a cause on its merits cannot be amended or set aside on a motion made after the term has ended, and after the time has expired within which a motion for a new trial as fixed by the statute has passed. After that, such a decree can only be opened upon a bill of review, or upon an original com-

plaint for fraud. But this rule does not apply to avoid decrees or clerical errors.

2. A decree entered after a trial on the merits of the case cannot be opened, set aside, or changed upon a motion entered after the term, and after the time fixed by the statute for the entry of such motion. An order made upon such a motion is void, and this rule also applies to that part of the decree relating to costs.

3. A refusal of the court to change the venue, upon a motion to set aside a void order, made after final decree in a case, is not reversible error.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by Sophia V. Benson against Nicholas Anderson and Nephi P. Anderson. Judgment for plaintiff, and defendants appeal from an order denying a motion for change of venue and vacating an order. Affirmed.

Ricy H. Jones, for appellants. Maloney & Perkins, for respondent.

ZANE, C. J. This is an appeal from an order of the district court of Weber county, denying a motion of defendant Nephi P. Anderson to transfer the cause to the district court of Boxelder county, and vacating an order of the district court of the late territory of Utah sitting in the first-named county. It appears from the record that the district court of the territory, on December 15, 1894, heard the cause, and entered a final decree determining the rights of the parties to the land in litigation, and taxing the costs of the case against the defendants; that Nephi P. Anderson, on the 8th day of July, 1895, entered a motion to strike out of the decree that part taxing the costs, and adjudging them against the defendants; and that on the 9th day of December, 1895, another judge sitting in the same court granted the motion. It further appears from the record that the plaintiff, on the 21st day of January, 1896, filed a motion to vacate the last-mentioned order, and that another judge, sitting in the district court of the state in the same county, granted the last-mentioned motion. This is the order appealed from.

The term of the court at which the final decree adjudging the costs against the defendants was made had expired months before the motion to strike out was made. In fact, another term intervened. It was not a void decree,—merely a decree in form,—nor was it a decree pro confesso, or by default. Therefore the defendant should have entered his motion during the term at which the decree was made, or, if he desired a rehearing or new trial, he should have given notice and filed his motion for a new trial within such time as the statute allowed. That time having passed, the decree could be opened only by bill of review, or by an original complaint for fraud. But neither a final judgment nor a final decree, pronounced upon a hearing on the merits, can be set aside after the term, upon motion, for any error into which the court may have fallen. The law does not permit any judicial tribunal to exercise any

revisory power over its own adjudications after they have, in contemplation of the law, passed out of the breast of the judge." 1 Freem. Judgm. § 101. The same rule applies to the imposition of costs embodied in a final decree. "The discretion of the chancellor in the imposition of costs is exercised and exhausted when a decree for the payment of costs is embodied in a final decree settling the equities of the case and defining and declaring the rights of the parties. In the execution of the decree, and as to matters subsequently arising, a further consideration of the cause may be, and is usually, necessary in the court of chancery; but upon such consideration, the term of the court at which the decree was passed and entered having expired, it is not within the competency of the court, upon mere motion, to vary or impugn in any material respect the original decree. Clerical errors or omissions may be corrected, but the sentence of the court, that which has been deliberately ordered and adjudged, cannot be varied. And that is as true in reference to the decree for costs as to any other part of the decree, though as to their imposition the court had originally a discretion. The discretion has been exercised, and cannot be recalled without rendering it uncertain when there will be a final sentence disposing of them." Beach, Mod. Eq. Prac. § 1029. We are of the opinion that the order striking out that part of the final decree adjudging the costs against the defendants was without authority of law, and therefore void.

The defendant Nephi P. Anderson insists that the order appealed from is void; that, under the state constitution, the district court of Weber county was not authorized to make it; that the case should have been transferred to the district court of Boxelder county. Before statehood all causes of action arising in the latter county were tried in Weber county. It is conceded that the cause was properly brought in the district court of Weber county, and prosecuted therein during the existence of the territory, but it is claimed the district court of the state sitting in that county had no jurisdiction to make the order. The First district embraced Weber, Boxelder, and other counties before statehood, and the place of holding court in the district for many years was in Weber county, and the records of the district court, under the territory, remained in the office of the clerk of that court, after the inauguration of the state government, except such as were transferred under section 7 of article 24 of the state constitution, to the district courts of the respective counties in which the causes of action arose. So much of that section as it is necessary to consider, with respect to this case, is as follows: "All actions, cases, proceedings, and matters pending in the supreme court and district courts of the territory of Utah at the time the state shall be admitted into the Union, and all files, records, and indictments relating thereto, except as otherwise provided herein, shall be

appropriately transferred to the supreme and district courts of the state, respectively; and thereafter all such actions, matters, and cases shall be proceeded with in the proper state courts." This provision contemplated the transfer of cases, proceedings, and matters pending,—not cases closed. Such record remained in the counties in which they had been made up. The final decree, and the order striking out a portion of it, were rendered by the territorial court, and, under the state, the record thereof remained in the office of the clerk of the district court in Weber county. The order complained of declared an order void found on the records in the office of the clerk of the district court of Weber county.

Defendant also urges that the order appealed from was erroneous because notice that it would be made was not given until after the expiration of the term at which the order to be rescinded was made. Some orders may be made after the end of the term at which a final decree was made upon a hearing, and without a motion for a rehearing or new trial within the time specified in the statute, among which are void judgments, decrees, and orders; and orders making the record speak the truth, correcting clerical errors, and some others of like character, may be so made. *Freem. Judgm.* § 98; 2 *Beach, Mod. Eq. Prac.* § 851; *City of Olney v. Harvey*, 50 Ill. 453.

The order appealed from is affirmed, with costs.

BARTCH, J., and STREET, District Judge, concur.

(14 Utah, 245)

SILVA v. PICKARD et al.

(Supreme Court of Utah. Oct 27, 1896.)

RES ADJUDICATA—DECISIONS OF THE TERRITORIAL SUPREME COURT.

1. This was a partnership settlement, tried before a referee, and taken to the supreme court of the late territory, where the question of the exclusion of certain testimony, and the sufficiency of the evidence, were passed upon. On a second trial the referee adhered to the decision of the territorial supreme court, which on this appeal the appellant contends is not binding, because that court was not a court of last resort, inasmuch as the case might have been taken to the supreme court of the United States, the amount involved being over \$5,000. *Held*, that a decision of the supreme court of the territory of Utah is res adjudicata, and that the principles and questions there adjudicated on an appeal are binding, and will not be reviewed as between the same parties and their privies on a subsequent appeal in the same case. The law so declared controls all further proceedings in the cause until the termination.

2. *Held*, also, that a finding of fact made upon conflicting evidence will not be disturbed if there is evidence to sustain it.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; S. A. Merritt, Judge.

Action by V. M. C. Silva against W. L. Pickard and H. Cohn & Co. for a partnership accounting. From the judgment, Silva and Pickard appeal. Affirmed.

Sutherland & Murphy and Andrew Howat, for appellants. Marshall & Royle and Dickson, Ellis & Ellis, for respondents.

RITCHIE, District Judge. This suit is for a settlement of partnership accounts. In 1883, the plaintiff, as one partner, the defendant W. L. Pickard, as another, and the defendant H. Cohn & Co., as a third partner, constituted for a year the Territorial Wool Association. There was a renewal of that partnership afterwards, until and including 1887. The concern was so organized and continued for the business of buying wool in Utah, and selling it in Boston. Each year it had a contract with the Massachusetts Loan & Trust Company. By their contract entered into in 1887, the Boston company were to pay the drafts of the wool association drawn for 12 cents a pound of wool shipped to the company. The drafts were to be accompanied with bills of lading of the shipments. The wool so shipped was security for the advance and certain expenses incident to the storage and care of the wool. The association had an agent in Boston to look after the wool, and secure buyers for it. The partners in Utah did not make joint purchases. Each bought and shipped in his own name to the Boston correspondent, and received the draft of the association for the advance of 12 cents a pound; the agent in Boston keeping the account of the partners between themselves, the account of their several shipments, and their drafts for advances. The business of the wool association in 1886 was not prosperous. The wool bought that year remained mostly on hand in 1887, and for that reason the accounts between the partners were not settled when the season opened in the latter year. The wool association continued to buy wool through the season of 1887. The business of that year was not profitable. The wools were not sold, and the accounts with the Massachusetts Loan & Trust Company closed until about February, 1889. At that time the wool association received as the net balance due it from the Boston correspondent, as the result of its wool business in 1886 and 1887, \$27,804. That sum, and that alone, constituted the assets of the wool association to be divided. The company did not renew the partnership to do any new business after the close of 1887. After receiving a statement of their unsettled transactions, a dispute arose as to the rights of the several partners. Pending the efforts to settle, the money, by common consent, was placed March 24, 1889, in the hands of F. Auerbach, for safe-keeping, at an agreed interest of 6 per cent. per annum. The testimony is conflicting as to what was the dispute between the partners, and, being unable to agree, at length, in 1892, this suit was begun. The plaintiff, in his complaint, alleges, and defendant Pickard, in his pleading, admits, that on the 4th day of May, 1887, the association, at a meeting then held, adopted a resolution that it

would buy only a million pounds of wool during that year, and that each member should be limited to one-third of that amount. H. Cohn & Co., in their pleadings, denied the adoption of that resolution, or any agreed limitation, and alleged such consent to and acquiescence in the purchases that were made as should have the effect of a waiver of any objection. These are the important issues in the case. The second trial of this suit was had before Robert Harkness, as referee, and the report of the referee was confirmed by the court, and decree rendered accordingly, adverse to the claims of Silva and Pickard, who appealed. The errors relied upon for a reversal of the decree are: First, exclusion of the testimony of B. G. Raybould; second, insufficiency of the evidence to justify the fourth and sixth findings of fact made by the referee.

Discussing the first, we are met at the outset with the proposition from the respondents that, in excluding the evidence proffered of the witness Raybould, the referee simply followed the decision of the supreme court of the territory of Utah on a former appeal of this case (37 Pac. 86); that the question of its admissibility was then presented, and decided adversely to the view taken by the appellants. But it is contended on behalf of the latter that the territorial supreme court was not a court of last resort in this case, as, the amount involved being over \$5,000, either party might have appealed to the supreme court of the United States, and therefore the decision of the territorial supreme court is not the law of the case; and that on a second appeal that court might have corrected any error which then appeared to have been committed in the decision on a former appeal; and, by the same reasoning, that this court can now correct any such error.

The rule invoked upon behalf of the respondents is stated by Mr. Justice Field, now of the supreme court of the United States, speaking then for the supreme court of California, in the case of *Leese v. Clark*, 20 Cal. 417, in the following language: "A previous ruling of the appellate court upon a point distinctly made may be only authority in other cases, to be followed and affirmed, or to be modified and overruled, according to its intrinsic merits. But, in the case in which it is made, it is more than authority. It is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves. Such has been the doctrine of this court for years, and, after repeated examinations and affirmations, it cannot be considered as open to further discussion. *Dewey v. Gray*, 2 Cal. 377; *Clary v. Hoaglund*, 6 Cal. 687; *Gunter v. Laffan*, 7 Cal. 592; and *Davison v. Dallas*, 15 Cal. 82. Nor is the doctrine peculiar to this court. It is the established doctrine of the supreme court of the United States, and of the supreme courts of several of the states. [Citing, among other cases, *Sibbald v. U. S.*, 12

Pet. 491; *Bridge Co. v. Stewart*, 3 How. 413.] And the reasoning of the doctrine is obvious. The supreme court has no appellate jurisdiction over its own judgments. It cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control." The rule is also stated as follows: "Where a decision is given by a court of ultimate appeal in a case, the decision must be regarded as conclusive in that particular case. \* \* \* In the same case any ruling is final; in a different one it is only the precedent established; and, while the courts are reluctant to disregard previous decisions in similar cases, there may be a variety of reasons which will cause them to do it. This general distinction exists, and must be recognized, no matter how palpable the error or unfortunate the circumstance. It is one over which the court itself has no control." 23 Am. & Eng. Enc. Law, 33, citing many other cases. No doubt is raised but that such is the rule, but it is said to be inapplicable to this case. Is it applicable to the decision of an intermediate court of appeal, as well as to one of a court of ultimate appeal? An examination of the principles upon which the doctrine of the law of the case is found furnishes an answer to the inquiry. "Appellate courts have not, in general, the power to review their own decisions after the time for rehearing has expired. The exercise of such a power involves original jurisdiction, and appellate courts are limited to the review of the judgments of inferior tribunals. The doctrine of *res adjudicata*, and the principles upon which it rests, apply, therefore, to appellate judgments. The principles and questions adjudicated on an appeal are binding, and will not be reviewed as between the same parties and their privies on a subsequent appeal in the same cause. The law so declared controls all further proceedings in the cause until the termination." 2 Enc. Pl. & Prac. 373. "Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate courts. The superior courts have no power to review their decisions, whether in a case at law or in equity. \* \* \* No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes, \* \* \* or to reinstate a cause dismissed by mistake, \* \* \* from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing. Bills of review in cases of equity, and writs of error, *coram vobis* at law, are exceptions." *Sibbald v. U. S.*, 12 Pet. 488. " \* \* \* The final judgment of the highest court upon a question of law arising between the parties to an action on a given state of facts establishes the rights of the parties to that controversy, and is a final determination thereof, and, like a final judg-

ment in any other case, estops the parties thereto from afterwards questioning its correctness. This court has no appellate jurisdiction over its own judgments, and such judgment, therefore, constitutes an estoppel or record of the highest character, and is conclusive between the parties as to the matters adjudged." *Klauber v. Car Co.*, 98 Cal. 107, 32 Pac. 876. So, on the other hand, if, upon the construction of the contract supposed, this court reverses the judgment of the court below, and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the new trial. It is just as final to that extent as a judgment directing a particular judgment to be entered is as to the character of such judgment. The court cannot recall the case, and reverse its decision, after the remittitur is issued. It has determined the principles of law which shall govern, and, having thus determined, its jurisdiction in that respect is gone. *Young v. Frost*, 1 Md. 394; *McClellan v. Crook*, 7 Gill, 338; *Leese v. Clark*, 20 Cal. 417; *Hayne*, New Trial & App. § 291.

This is the reasoning upon which the rule is based in courts of last resort, both in Europe and America. 3 Dow, 157; *Himely v. Ross*, 5 Cranch, 313; *Bridge Co. v. Stewart*, 3 How. 424-426; *Sibbald v. U. S.*, 12 Pet. 488; 22 Cent. Law J. 497, note, and 25 Cent. Law J. 297, note, and many cases cited in the notes referred to; *Elliott*, App. Proc. § 578. See, also, *Pledge v. Carr* [1895] 1 Ch. 51; *The Vera Cruz*, 9 Prob. Div. 96, 98. It has been adopted by this court. *Krantz v. Railway Co.*, 13 Utah, 1, 43 Pac. 623; *Brimm v. Jones*, 13 Utah, 440, 45 Pac. 46. The jurisdictions in which provision has been made for successive appeals, at each step to a higher tribunal, are not numerous. In England, before the judicature acts, writs of error from the superior common-law courts into the exchequer chamber, and thence into the house of lords, and appeals from the high court of chancery to the court of appeals in chancery, and thence into the house of lords, furnish examples of such procedure; and at the present time appeals lie from the various divisions of the high court of justice to the court of appeal, and thence to the house of lords. Since 1891 similar provisions have existed with reference to certain classes of cases in the appellate procedure in the federal courts. In New York, appeals may be taken from the special term of the supreme court to the general term, and thence to the court of appeals. In Illinois certain classes of cases may be reviewed, first, in the appellate court, and then in the supreme court. Recently, other states have adopted similar systems, but, in those named, they have existed many years. A careful search among the decisions in these jurisdictions reveals no support for the position taken by the appellant; but the rule seems to be that when an appellant ceases to pursue his appeal from one appellate court to a higher,

though he might do so, the decision of the court where he sees fit to rest is a final one, within the meaning of the rule invoked by the respondents. *Metcalf v. Del Valle*, 66 Hun, 627, 20 N. Y. Supp. 984; *In re Nelson*, 66 Hun, 632, 21 N. Y. Supp. 1123; *Excelsior Brick Co. v. Village of Haverstraw*, 66 Hun, 631, 21 N. Y. Supp. 99; *Corn v. Rosenthal* (Com. Pl.) 22 N. Y. Supp. 700; *Morss v. Hawley*, 69 Hun, 614, 23 N. Y. Supp. 1144; *Whitesides v. Cook*, 43 Ill. App. 183; *Ogle v. Turpin*, 8 Ill. App. 453-458; *Steele v. Thompson*, 38 Mo. App. 312. See, especially, *Lackland v. Smith*, 75 Mo. 307. The cases in this court already cited—*Krantz v. Railway Co.*, 13 Utah, 1, 43 Pac. 623, and *Brimm v. Jones*, 13 Utah, 440, 45 Pac. 46—do not present the question in the precise form in which it appears in this case, but the reasoning therein leads to the same result. We are precluded by this doctrine from a re-examination of the question of the admissibility of the evidence offered.

The second ground upon which appellant prays for a reversal of the decree and order is the insufficiency of the evidence to justify the fourth and sixth findings of fact, which were to the effect that no agreement limiting the purchase was made, and, even if it had been made, that the subsequent conduct of the parties amounted to a waiver of the limitation. Again, we are met by a rule which bars an examination of the evidence in question. There being substantial conflict, this court cannot reverse the decree and order denying a new trial, upon the ground of the insufficiency of the evidence to justify the findings complained of. In cases wherein judgment has been rendered since January 4, 1896, the date when the state constitution went into effect, this question will have to be considered in the light of the provisions contained in section 9 of article 8 of the constitution, providing that "in equity cases the appeal may be taken on questions of both law and fact." But the constitutional provision has no application in this case. The controlling rule is stated by the supreme court of California: "Our system does not contemplate any distinction in this respect (between cases at law and in equity), and there is no propriety in making any under it. Under the old chancery practice, the testimony was taken by deposition, generally before a master or a commissioner, and reduced to writing. When the testimony had all been filed, the case was argued upon it before the proper court; and, on appeal, the entire evidence was before the chancellor or appellate court, in the same form in which it was presented to the court below. The appellate court had the same means of determining the credibility of the witnesses as the court below. But it is not so under our system. Now, the witnesses are examined in open court, and only brief minutes of the testimony taken, as in actions of law. The record is brought to this court by a statement on motion for new

trial in the same mode as in actions at law. The court below is possessed of all those aids necessary to enable it to give due credit to every item of testimony which is accessible to the judge who tries an action at law, and which, from the nature of things, is inaccessible to this court. For these reasons, if for no other, there would be no propriety in making a distinction in the two classes of cases. But it is enough to say that the principles governing the practice are already settled. *Gagliardo v. Hoberlin*, 18 Cal. 395; *Duff v. Fisher*, 15 Cal. 379; *Green v. Butler*, 26 Cal. 599; *Allen v. Fennon*, 27 Cal. 69, and cases cited." *Doe v. Vallejo*, 29 Cal. 390. The judgment and order of the court below denying the motion for a new trial must be affirmed.

ROLAPP, District Judge, concurs.

BARTCH, J., concurs in the result.

(14 Utah, 305)

# WALLEY v. DESERET NAT. BANK.

(Supreme Court of Utah. Dec. 9, 1896.)

BILLS AND NOTES—EXTENSION OF TIME—CONVERSION—WHAT IS—MEASURE OF DAMAGES—EVIDENCE—INSOLVENCY—WITNESS—EXAMINATION—FINDINGS—SUFFICIENCY—APPEAL—REVIEW.

1. A judgment must find its support in the actual state of facts ascertained and reported by the judge in his findings, or fail. No aid can be derived from facts not embodied in the findings.

2. The payment of interest in advance, on a note, by the principal to a creditor, is of itself, without more, sufficient prima facie evidence of an agreement to extend the time of payment for the period for which the interest is paid. The payment in advance presupposes that delay of payment of the principal is to be given for that time. The consideration for an agreement for delay in payment is implied from the transaction, if not sufficiently expressed. But this presumption may be overcome by evidence of a refusal to extend, demand of payment, or any other evidence showing that delay or extension was not agreed upon.

3. Section 9, art. 8, of the constitution of Utah, provides that "in equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone." *Held* that, when the testimony presents a question of fact, and the court finds the facts against one of the parties, such findings will not be disturbed by the supreme court if there is evidence to support the finding.

4. In an action in trover, for the conversion of promissory notes on December 16, 1893, wherein defendant was confined in his proof of the value of the notes at a date prior to the alleged date of conversion, the plaintiff, in his rebutting case, introduced testimony, under objection, that defendant sold the judgment obtained upon the notes, after the alleged conversion, demand, and refusal, and after commencement of suit, in January, 1894, for their face value. *Held*, that the owner is prima facie entitled to recover their face value,—that is, their presumptive value,—and he will be entitled to recover their actual value, if shown. But the defendant has the right to show, in reduction of damages, the payment in whole or in part, the inability of the maker to pay, a release, invalidity of the instrument, or any other matter which would legitimately affect or diminish their value, and that the proper measure of damages is the cash value of such notes at

the time of the conversion, with interest to the time of trial. *Held*, further, that the fact that the purchaser of the notes sold the judgment which he had obtained upon them six months after the actual conversion, and after the commencement of the action, for its face value, would not take the case out of the rule, and that it was error to admit such testimony, especially as the undisputed facts show that a wrongful conversion of the notes occurred on June 16, 1893, more than six months before the sale of the judgment, at a time when the defendant traded the notes for bank stock in violation of the condition of the contract, which provided that the notes should be sold at public or private sale in case of default in payment of the principal note, for which payment the notes in question were pledged.

5. After a witness has been examined in chief, and given testimony tending to show his solvency at a given time, it is error to refuse the opposite party the right, on cross-examination, to show, by the witness, that at a certain time, during the period referred to, he had stated, to a certain person named, that he had no property his creditors could reach, and it would do no good to sue him. Such testimony would affect the credit of the witness, and tend to contradict and qualify his testimony in chief, and was also proper, laying the foundation for impeachment.

6. Neglect and refusal of a maker to pay his note at maturity tends to show his inability to pay, and affects the value of his note.

7. A proper return of an execution nulla bona, issued upon a valid judgment rendered against the maker of a note, is prima facie evidence of insolvency of the maker.

8. When promissory notes were given in pledge to secure payment of plaintiff's note at maturity, with a right to sell the pledged notes on default of payment, at public or private sale, without notice, and it appears that, before the principal note became due, the pledgee traded the pledged notes for bank stock, *held*, that this amounted to a wrongful conversion of the notes at the time the trade was made.

9. The refusal to surrender possession in response to a demand is not, of itself, a conversion. It is only evidence of a conversion, and, like other inconclusive acts, is open to explanation.

10. A special finding that certain notes had no market value at a given time, when all the testimony given tended to show the notes had a market value of a specified amount at that time, is not supported by the evidence.

11. A general finding that the notes in question were worth their face value on a given date, and a special finding that such notes had no market value on that date, when the testimony supports the latter finding, renders the finding objectionable. Facts of an equivocal import cannot well be reduced to a certainty by conjecture. A finding should afford the means of its own interpretation, and for fixing its own sense, and should be sufficiently distinct and definite to enable the court to decide upon the judgment.

12. When promissory notes have a market value, it is competent to show what the cash market value was at the time of the conversion, as bearing upon and tending to fix their actual value. This rule applies to promissory notes and choses in action having a market value, the same as to other personal property.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; John A. Street, Judge.

Conversion by T. A. Walley against the Deseret National Bank. From a judgment for plaintiff, defendant appeals. Reversed.

Young & Moyle and C. S. Varian, for appellant. Jones & Schroeder, for respondent.

MINER, J. On the 18th day of December, 1893, plaintiff filed his complaint for the



alleged conversion by the defendant of two certain promissory notes, made by John Beck, one for \$5,000, and one for \$1,000, both dated April 1, 1892, payable April 1, 1893, and alleged that on the 16th day of December, 1893, he was the owner of said notes, and on that day defendant unlawfully disposed of and converted the same to its own use. The defendant answered, denying plaintiff's ownership of the notes, or its conversion of the same, and alleged that on September 6, 1892, plaintiff gave his note to defendant for \$1,000, with interest at 1 per cent. per month, and secured the payment of the same by pledging the notes of Beck; that the note provides that, in case of default in payment, the defendant should sell said pledged notes at public or private sale, with or without notice, in payment of the \$1,000 note; that said principal note fell due on April 1, 1893, and was not paid, and that on the 16th day of June, 1893, defendant sold said pledged notes to James T. Little, he being the highest bidder, for the sum of \$1,000, which was credited upon plaintiff's note, and that afterwards Little tendered said notes to plaintiff on payment of the principal note; that the price for which the notes were sold on June 16, 1893, was all that they were worth in that year. The case was tried before the court without a jury, whereupon the court made its findings of fact and conclusions of law, and also special findings, and rendered judgment in favor of the plaintiff in the sum of \$5,381.67, with interest thereon at 8 per cent. from December 16, 1893, amounting to the total sum of \$6,376.37. From this judgment defendant appeals to this court.

In the course of argument, and in the briefs of counsel, the question as to the effect of the sale of the Beck notes to James T. Little, as an officer of the bank, is discussed to a considerable extent; but, upon an examination, we discover no finding that Little was an officer of the bank, or in any way connected with it at the time, and therefore refrain from passing upon the questions involved in that subject. The judgment must find its support in the actual state of facts ascertained and reported by the judge, or fail. No aid can be derived from facts not embodied in the findings. *Brown v. McHugh*, 36 Mich. 433.

The note of \$1,000, given by plaintiff to the bank, September 6, 1892, due April 1, 1893, for which the Beck notes were pledged as security, gave the defendant the full authority to sell said Beck notes, at public or private sale, upon nonperformance of the promise to pay at maturity, and without notice. The interest was paid upon the note to the 6th day of April, 1893. On April 27, 1893, plaintiff paid \$10, and on June 3, 1893, \$10, and both payments were made and indorsed as interest. On June 10, 1893, plaintiff paid \$10 to defendant. The court found that the last payment paid the interest for the month of June, 1893, and that the time for the payment of the principal note was extended beyond the 16th day of June, 1893. On the 16th day of

June, 1893, defendant sold or exchanged the Beck notes to Little for \$1,000, and applied the same to the payment of plaintiff's note, and at once notified the plaintiff of the sale, and at the same time returned to the plaintiff \$7 overpaid, which plaintiff refused to accept. On December 16, 1893, plaintiff made tender of the amount due on the principal note, and made demand for the Beck notes. The court found that the plaintiff was insolvent. This suit was brought on the 18th day of December, 1893. There is a conflict in the evidence as to the purpose of the last payment of \$10. The court found that it was paid as interest, and that the note was therefore extended beyond the time when the bank sold the note to Little because of the nonpayment of the principal note when due. The plaintiff testified, in substance, that he went to the bank on June 10, 1893, when he made the last payment of \$10. The president, Mr. Hills, said "he wanted my note paid as soon as I could. Nothing was said about the extension of time when I made this payment. I had previously paid \$10 at different times each month. At the last payment I said, 'Here is the interest, Mr. Hills,' and he said, 'All right,' and took the money." Mr. Hills testified that, when the plaintiff made the last payment of \$10, he told him he would indorse the payment, but would not extend the time. When the last payment was made, he says, "I told the plaintiff we would have to have the whole note paid or sell the collateral." Plaintiff replied that he was not prepared to pay the note then. I did not agree to extend the time of payment at any time. It was not the custom of the bank to extend payments without making an entry showing it." The court found that the time for payment of the plaintiff's note was extended beyond June 16, 1893. The only evidence to support this finding is that the payment of interest on June 10th was made in advance, which covered the period when the bank sold the collateral notes to Little, and that the interest so paid was at the rate of 1 per cent. per month, as borne by the plaintiff's note, before the same was due; plaintiff claiming that the note only drew 8 per cent. after it was due, and that the extra interest was a consideration for the extension. The decided weight of authority, and, it seems, the better reason, is that the payment of interest in advance on a debt by the principal to the creditor is of itself, without more, sufficient prima facie evidence of an agreement to extend the time of payment for the period for which the interest is paid. The payment in advance presupposes that delay of the payment of the principal is to be given for that time. The consideration for an agreement for delay in payment is implied from the transaction, if not sufficiently expressed. But this presumption may be overcome by evidence of a refusal to extend, demand of payment, or any other evidence showing that delay or extension was not agreed upon. *Brandt, Sur.*



§ 352; *Bank v. Truesdell*, 55 Barb. 603; *Walters v. Swallow*, 6 Whart. 449; *Warner v. Campbell*, 26 Ill. 286; *Bank v. Pearsons*, 30 Vt. 710. The testimony offered on both sides left a question of fact, to be decided by the court. The court found the fact against the defendant.

Section 9 of article 8 of the constitution of Utah provides that "in equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone." While we might be able to reach a different conclusion from the trial court upon the correctness of this finding, yet, as the appeal brings up the question of law alone, and there is some evidence in the record tending to sustain the finding, we do not feel satisfied to disturb the finding on this subject.

The demand, refusal, and conversion are alleged to have been made December 16, 1893. The bank traded the notes June 16th. The defendant was limited in his proof of the market value of the notes and the insolvency of the maker to a period between the 16th day of June, and the 16th day of December, 1893, the date of the alleged conversion; and was precluded from showing their value or Beck's insolvency in 1894. The plaintiff, in his rebutting case, called Mr. Little as his witness, and, under objection that the testimony was incompetent, immaterial, and irrelevant, was allowed to show that, after the suit was commenced, and after the alleged conversion, and on January 6, 1894, he sold the judgment he obtained upon the notes in question to a syndicate of people who purchased it at its face value in order to protect their interests in the property levied upon; the property levied upon being Beck's equity of redemption in the stock of a mine. Exception was taken to the admission of this testimony; also, to the refusal of the court to permit the defendant to show, on cross-examination of the same witness, that Beck could not pay the judgment at this time, and that he was financially embarrassed, and that, but for the intervention of the syndicate named, the judgment would not have been paid. The question is, was the testimony of Little admissible as to these facts, occurring in January, 1894? In *Kennedy v. Whitwell*, 4 Pick. 466, the court held that, "in trover, the value of the article at the time of the conversion, with interest from that time to the time of the trial, is the measure of damages; and the facts, that before the conversion, the plaintiff, as vendee, paid the defendant for the article, and the defendant, before the trial, resold it at an advanced price, do not take the case out of the rule." *Bates v. Stansell*, 19 Mich. 91. *Sedgwick* states the general rule to be: "In actions for the conversion of personal property, the measure of damages is the value of the property at the time of the conversion, with interest to the time of trial." 2 *Sedg. Dam.* §§ 493-497; *Dows v. Bank*, 91 U. S. 618; *Tyng v. Warehouse Co.*, 58 N. Y.

308; 3 *Suth. Dam.* pp. 520-522, 482; *Robinson v. Hurley*, 11 Iowa, 410. For the conversion of money securities the owner is, *prima facie*, entitled to their face value,—that is, their presumptive value,—and he will be entitled to recover their actual value if shown; but the defendant has the right to show, in reduction of damages, the payment in whole or in part, the inability of the maker to pay, a release, invalidity of the instrument, or any other matter which will legitimately affect or diminish its value, and the proper measure of damages is the value of such securities at the time of the conversion, with interest to the time of trial. 3 *Suth. Dam.* pp. 520-522; 1 *Sedg. Dam.* §§ 256, 257; 5 *Am. & Eng. Enc. Law*, p. 40; *Stirling v. Garritee*, 18 Md. 468; *Insurance Co. v. Dalrymple*, 25 Md. 244. So it is held that the market value of the stock at the time of the conversion is the proper measure of damages. *Bank v. Boyd*, 44 Md. 47; *Sturges v. Keith*, 57 Ill. 451; *McKenney v. Haines*, 63 Me. 74; *Fisher v. Brown*, 104 Mass. 259; *Spencer v. Vance*, 57 Mo. 427. In New York and several other states the old rule of assessing damages, in cases of conversion of stocks which have a fluctuating value, at the highest market price from the time of conversion to the time of trial, is held to be without reason; and the supreme court, in the case of *Baker v. Drake*, 53 N. Y. 211, has seen fit to change the rule, and hold that a fixed, unqualified rule, giving the plaintiff, in all cases of conversion of property, the highest market price from the time of the conversion to the time of trial, cannot be upheld upon any sound principle of reason or justice, and that such doctrine cannot be regarded as one of those settled rules to which the principles of *stare decisis* should apply, and that the market price of stocks from the time of sale to a reasonable time after notice of sale affords a complete indemnity, and is the proper measure of damages in such cases. The supreme court of the United States, in *Gallagher v. Jones*, 129 U. S. 193, 9 *Sup. Ct.* 335, a case appealed from the supreme court of Utah, reported in 3 *Utah*, 54, 1 *Pac.* 15, hold, with New York, that, in trover for the conversion of stocks having a fluctuating value, the proper rule for damages is the highest intermediate value between the time of conversion and a reasonable time after the owner has received notice of it, to enable him to replace the stock. The court further says: "Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time, and hence, with regard to them, the ordinary measure of damages is their value at the time of the conversion, or, in case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust."

A plaintiff's right of recovery must be deemed fixed at some time, and he should not be permitted to wait for an indefinite period,

and speculate upon the changes in the market, while taking upon himself none of the risks of a decline in the value of the article converted. This would put him in a better position than if he had the property in possession. If the plaintiff had not lost his title to the property, he had the option of following and recovering it. But by bringing this action of trover he seeks to recover damages for the conversion. By the conversion he was deprived of the property, and a claim for the value of it took its place. Consequently, that value at the time of the conversion, with interest, should be the limit of his recovery. If the property, or the probability of collection of the judgment obtained upon the notes, had been increased because of the extra efforts, care, research, and expense bestowed by the purchaser of the notes, or his paid attorneys, in uncovering concealed or hypothecated property of the maker, so as to make the collection possible six months after the conversion, after the commencement of this suit, and after the purchaser had tendered the property back to the plaintiff, this increased value should not inure to the benefit of the plaintiff. 2 Sedg. Dam. § 409. It would be almost impossible to review and reconcile the many conflicting opinions that have been delivered upon this subject. We are inclined to adopt the rule that the measure of damages, in cases of this character, is the value of the property at the time of the conversion, with interest thereon to the time of the trial. It will be remembered that the bank sold and traded the collateral notes to Little on June 16, 1893, and that the plaintiff had notice of the sale at that time. Little testified that he offered the notes back to the plaintiff several times during the summer of 1893, on payment of the \$1,000 and interest, which offer was not accepted. Mr. Hills testified that he tendered the notes back to plaintiff three days after the demand was made in December, 1893; but there is a conflict on this point. This suit was brought December 18, 1893, about six months after plaintiff had notice of the sale of the collateral notes to Little. We are inclined to the view that the admission of the proof as to what Little received for the judgment from the syndicate, with which Beck had nothing to do, at a time over six months after the sale or trade of the notes with plaintiff's knowledge, and after demand, refusal, and alleged conversion by the bank, and after the commencement of this action, was error. *Kennedy v. Whitwell*, 4 Pick. 406; *Bates v. Stansell*, 19 Mich. 91; 2 Sedg. Dam. 499. If the admission of this testimony was proper, then the defendant had the right to show, on cross-examination of Little, the facts attending the assignment of the judgment, and that Beck was insolvent at that time. It is apparent, from the statements of counsel, that the court took this evidence into consideration in making its findings.

The next question to be considered is the question of damages arising from the alleged conversion of the Beck notes, and the errors assigned upon the admission and rejection of testimony with reference to Beck's solvency. At the trial the court limited the defendant's proof as to the value of Beck's notes and the solvency of Beck to a period between the 16th day of June, 1893, the day of the sale of the notes by the bank to Little, and the 16th day of December, 1893, the time of the alleged conversion, tender, and demand of the Beck notes by the plaintiff. The defendant had introduced testimony of several witnesses tending to show that the market value of Beck's notes between these dates was from 1 to 16 cents on the dollar, and that Beck was insolvent and unable to pay his debts, and was under serious financial embarrassment during that period; that several judgments against him remained unpaid; and that the notes could not be collected. The plaintiff, in his rebutting case, offered as a witness John Beck, the maker of the Beck notes, who gave testimony tending to show that he owned property liable to execution, and that he was solvent, although hard pressed for funds, during that period. Upon the cross-examination of Mr. Beck by the attorney for defendant, the following question was propounded to him: "Q. I will ask you whether, between June, 1893, and December, 1893, you did not tell me, in your office, when I went there with a claim for some Eastern people, that it would do no good to sue you,—that you had no property that your creditors could reach." The question was objected to, the answer was excluded, and an exception taken. We think this question was proper, and should have been answered. Mr. Beck had given testimony tending to show his solvency and ability to pay his debts. The question was pertinent to the issue. If he made such a statement concerning his property and want of financial ability, it was proper the court should know it, as affecting his credit as a witness, and as contradicting and qualifying his testimony in chief, and also as laying the foundation for impeachment. We think the court erred in sustaining the objection. Other questions of a similar character were asked, and the answers excluded. Whether Mr. Beck was solvent at that time, and was able and disposed to pay his debts, and had property that his creditors could reach upon execution, was one of the principal questions to be determined, in order to ascertain the value of his notes. In a case of this character, where the plaintiff was seeking to recover in trover for the value of the Beck notes, alleged to have been converted by the defendant, the plaintiff was *prima facie* entitled to recover the face value of the notes at the time of the conversion, with interest, upon showing ownership and conversion of the paper. But it was competent for the defendant, in his defense, to show, in reduc-

tion of damages, the insolvency and inability of the maker to pay, or any other matter which would legitimately affect or diminish their value, or which would tend to show insolvency and want of business integrity. 1 Sedg. Dam. § 256; 3 Suth. Dam. pp. 520-522. Under this rule, the neglect or refusal of the maker to pay his note at maturity is evidence tending to show his inability to pay; and such testimony was competent to be shown for the purpose of reducing the damages, and as affecting the value of the notes. *Booth v. Powers*, 56 N. Y. 22; *Brown v. Montgomery*, 20 N. Y. 287; *Terry v. Allis*, 20 Wis. 35; *King v. Ham*, 6 Allen, 298. The fact that Beck kept his property concealed or covered up in the name of other parties, where it could not be found or reached by execution, if shown, would tend to affect the value of his paper, was proper testimony, and should have been admitted. So the proper return of executions nulla bona, issued upon a valid judgment against Beck, were prima facie evidence of his insolvency at the time. *Phillips v. Webster*, 85 Ill. 146; *Brown v. Brooks*, 25 Pa. St. 210.

The appellant also contends that there is no evidence to support the finding that the defendant converted the notes to his own use on December 16, 1893, that being the time of the alleged demand and refusal. The testimony and findings show that the pledged notes were traded by the bank to Little June 16, 1893, and due notice given to plaintiff of the sale at that time. The defendant came into possession of the notes lawfully, as a pledge and security for the payment of plaintiff's note. The court found that the payment of plaintiff's note was extended beyond June 16, 1893, by the payment of interest beyond that date, and that plaintiff's note was not due at the time defendant sold or traded it for bank stock to Little. Therefore, the sale or trading of the collateral notes before the maturity of the principal note was unlawful and wrongful, and no demand or refusal was necessary. If the notes were converted at all by the defendant, the conversion took place at the time it made an absolute trade and wrongful disposition of them, of which plaintiff had immediate notice. "The refusal to surrender possession in response to a demand is not, of itself, a conversion. It is only evidence of a conversion, and, like other inconclusive acts, is open to explanation." *Cooley, Torts*, pp. 530-532; *Cooley, Elem. Torts*, pp. 181, 182; 2 *Add. Torts*, 395-398; *Insurance Co. v. Dalrymple*, 25 Md. 269; *Story, Ballm.* § 349; 1 *Chit. Pl.* 157, 158; *Ward v. Wood Co.*, 13 Nev. 44; *Mining Co. v. Tittle*, 4 Nev. 497; *Trudo v. Anderson*, 10 Mich. 357; *Howitt v. Estelle*, 92 Ill. 218; *Buntin v. Pritchett*, 85 Ind. 247; *Hake v. Buell*, 50 Mich. 89, 14 N. W. 710. If defendant had not the actual or constructive possession of the property at the time of the demand, and therefore could not deliver it, his liability would not be affected by the demand and refusal; for, if he had been guilty of the conversion before, no demand was necessary, and, if he had not

been, a failure to do what, for any reason, he was unable to do, could not render him so. *Cooley, Torts*, p. 532. It is held, in *Tyng v. Warehouse Co.*, 58 N. Y. 315, in an action for the conversion of bonds, "that the conversion took place when the defendant wrongfully sold the bonds, and the measure of damages was their value at the time of sale." *Insurance Co. v. Dalrymple*, 25 Md. 269. *Henshaw v. Bank*, 10 Gray, 568. *Bank v. Boyd*, 44 Md. 47. We are of the opinion that the court was in error in finding that the defendant converted the notes to its own use on December 16, 1893.

Appellant contends that the findings of the court are inconsistent and contradictory in this: That in general finding No. 3 the court found that on the 16th day of December, 1893, the defendant unlawfully disposed of and converted to its own use the two Beck notes, to the damage of the plaintiff in the sum of \$6,435, this sum being the value of said notes on that date; that in special finding No. 8 the court found that there was no market value to said Beck notes on the said 16th day of December, 1893, that being the day on which the alleged conversion took place, and in special finding No. 6 the court found that there was no market value to Beck's notes on the 16th day of June, 1893; that the special findings control, and that those findings do not support the judgment, but are contradictory and inconsistent with it; and that special finding No. 8 is contrary to the evidence, and is not supported by it. The value of the notes on December 16, 1893, is fixed at their full face and interest, while they are held to have no market value on that date. The court permitted the defendant to show that the notes had a market value, and that such market value was from 1 to 16 cents on the dollar between June 16 and December 16, 1893, and that Beck was insolvent, as bearing upon the value of the notes, but declined to allow defendant to show such value after these dates, as too remote from the date of conversion. If they had no market value, it was still competent for the defendant to show, in reduction of damages, the inability of the maker to pay, his insolvency, or any other matter which would legitimately affect or diminish the value of the notes at the time of conversion. *Bank v. Boyd*, 44 Md. 47; *Sturges v. Keith*, 57 Ill. 451; *McKenney v. Haines*, 63 Me. 74; *Fisher v. Brown*, 104 Mass. 259; *Spencer v. Vance*, 57 Mo. 427; 1 *Sedg. Dam.* §§ 256, 257, 357, 244, 497; 5 *Am. & Eng. Enc. Law*, p. 40; 3 *Suth. Dam.* 488, 491, 496; *Boylan v. Huguet*, 8 Nev. 345; *Brown v. Allen*, 35 Iowa, 306; *Galigher v. Jones*, 129 U. S. 193, 9 Sup. Ct. 335; *Baker v. Drake*, 53 N. Y. 211; *Ormsby v. Mining Co.*, 56 N. Y. 623; *Deck's Adm'r v. Feld*, 38 Mo. App. 674; *Tyng v. Warehouse Co.*, 58 N. Y. 308. The testimony given bore upon the value of the notes, and tended to fix such value. The object and purpose of such testimony was to inform the court what the value of the notes was, so that the court could render a judgment for that value. When the value was found, and judgment rendered, the parties had a right to know, from the

findings, what the ultimate facts were upon which the judgment was rendered. Such findings should be consistent, and support the judgment, and leave nothing to conjecture. The court found, in its general findings, that the value of the notes on December 16, 1893, was \$6,435, and afterwards made its special findings that such notes had no market value on December 16, 1893. The evidence on the part of the defendant tended to show the market value of the notes to be from 1 to 16 cents on the dollar at this time, and no evidence of the market value was offered by the plaintiff. Special findings control the general findings on the same subject, where there is a conflict between them. *Hidden v. Jordan*, 28 Cal. 302; *Reese v. Corcoran*, 52 Cal. 495; *Sloss v. Allman*, 64 Cal. 47, 30 Pac. 574; *Harris v. Harris*, 59 Cal. 620; *Manly v. Howlett*, 55 Cal. 95; *Burk v. Webb*, 32 Mich. 173; *Delashman v. Berry*, 20 Mich. 292; *Brown v. McHugh*, 36 Mich. 433. The cash market value of an article having a market value is usually the test of its value. This test, however, may not in all cases apply to commercial paper. In some cases such paper may be comparatively worthless in the market, and still have its intrinsic face value; while in other cases it may have its face market value, but be of no intrinsic value. The value in either case may be shown, as fixing the true value. We are of the opinion that the findings should have been more explicit, and have left less room for apparent contradiction and conjecture. The finding that the notes had no market value was against the evidence, and was not supported by it. Facts of an equivocal import cannot well be reduced to a certainty by conjecture. A finding should afford the means for its own interpretation, and for fixing its own sense, and should be sufficiently distinct and definite to enable the court to decide upon the judgment. *Brown v. McHugh*, 36 Mich. 435.

The judgment of the district court is set aside and reversed, with costs, and a new trial granted.

ZANE, C. J., and BARTCH, J., concur.

(5 Kan. App. 180)

DEVER v. CITY OF JUNCTION CITY et al.

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

PLEADING—AMENDMENT—DELAY.

When an action is brought to enjoin and prevent the doing of an act which, it is alleged, would result in irreparable injury to the plaintiff, and such action is pending and undetermined in the district court for about three years, it is not error for the court to deny the application of the plaintiff for leave to so amend his petition as to change the action from one for injunction to one to recover for the damages sustained subsequent to the commencement of the action.

(Syllabus by the Court.)

Error from district court, Geary county; James Humphrey, Judge.

Action by Thomas Dever against the city of Junction City and others. Judgment for

defendants, and plaintiff brings error. Affirmed.

Thos. Dever, in pro. per. J. R. McClure, for defendants in error.

CLARK, J. On February 24, 1888, the plaintiff in error commenced an action in the district court of Geary county against the defendants in error, and in his petition alleged that he was the owner of a certain lot abutting on Eighth street in Junction City; that said city had by ordinance ordered certain improvements to be made on said street, and had, in pursuance thereof, contracted with the said William Fisher to do the work; that the same was being defectively done; that the making of such pretended improvements in the manner contemplated by the ordinance would necessarily leave the street in an unfinished condition, and that to allow the defendants to further proceed with the making of such pretended improvements would not only result in depreciating the value of his lot, but would also subject him to the payment of a special tax; that he had no adequate remedy at law for the threatened injury, and therefore prayed that the defendants be enjoined from the further prosecution of the work. A temporary injunction was granted on the day the petition was filed, but was on February 27, 1888, vacated upon the ground that "the facts and statements set forth in said petition are not sufficient in law to justify the same." Thereupon the plaintiff prosecuted proceedings in error to the supreme court, where, in February, 1891, the action of the district judge in vacating the temporary injunction was affirmed. *Dever v. City of Junction City*, 45 Kan. 417, 25 Pac. 861. After the temporary injunction was vacated by the district judge, the cause was continued by order of the court, with the consent of both parties thereto, "to await decision of the supreme court on question taken there by plaintiff." On March 16, 1891, more than three years after the temporary injunction was vacated, the plaintiff filed in said cause what he denominated an "amended and supplemental petition," wherein he alleged, among other things, that for more than four years prior to the commencement of this action, and ever since that time, he had been the owner of a certain lot fronting on Eighth street in the city of Junction City; and that about the month of December, 1887, the city, by its officers and agents, contracted with the defendant William Fisher to make certain pretended improvements on said street; and that thereafter Fisher, under the directions of the city and its officers, made said pretended improvements, and in so doing trespassed upon his lot, and appropriated to the use of the city about three feet of the front end thereof; and that, by reason of the commission of the several acts therein recited, the property of the plaintiff had been damaged in the sum of \$500, for which he prayed judg-

ment. On April 24th thereafter, the defendants moved the court to strike this amended and supplemental pleading from the files, on the ground that it was filed without notice to defendants, and without leave of court. This motion was sustained on May 4, 1891, and leave was then granted plaintiff to file an amended petition, and the cause was continued until the next regular term of court. Plaintiff then filed what he termed an "amended petition," which pleading was almost identical in terms with the amended and supplemental petition before mentioned. On June 5, 1891, the defendants moved to strike this pleading from the files, on the ground that it set out an entirely different cause of action from the one stated in the original petition, and that the relief prayed for was the recovery of damages alleged to have been sustained by reason of certain wrongful acts therein charged to have been done by the defendants after the date of the commencement of this action; while the original petition only stated an equitable cause of action, and contained a corresponding prayer for relief. This motion was also sustained by the court. The plaintiff then asked leave to amend his original petition by adding thereto the allegation that "the acts already stated herein in the first five paragraphs of the original petition in this action, which acts were done and performed prior to the commencement of this action, and of which the plaintiff complains, were to the great injury of plaintiff, and to his damage in the sum of \$500"; and that, in addition to the prayer therein for an injunction, the following be added: "And that plaintiff also have judgment against the defendants in the sum of \$500, as his damages arising from the wrongs complained of, and committed by the defendant prior to the commencement of this action." The defendants objected to the proposed amendments being made, and, after due consideration, the objections were sustained; and, on the motion of the defendants, the court dismissed the action, and rendered judgment in favor of the defendants for the costs. The plaintiff has brought the case to this court for review.

The first contention of the plaintiff in error is that, as the defendants had filed no answer to the petition at the time the pleading denominated "amended and supplemental petition" was filed, the plaintiff had the right, under section 136 of the Civil Code, to make any amendments to his petition which he thought advisable to make, and that it required no "leave of court"; and that the defendants were given due notice of the filing of such petition. In support of this last contention the plaintiff in error directs our attention to a paper which is set out in the transcript of the record as a part thereof, marked "Notice," and which upon its face purports to be a typewritten acknowledgment by the attorney for the defendant of the service upon him on March 19, 1891, of no-

tice of the filing of an amended and supplemental petition. Whether in fact this notice was served, or the attorney for the defendants acknowledged service thereof, cannot be learned from the record. There is nothing to show that the acknowledgment of service was signed by the attorney for the defendants; the evidence, if any was introduced upon the hearing of the motion, is not preserved; and, for aught that appears, the court may have sustained the motion because the defendants were not given the proper notice of its having been filed. But, even if the court erred in its ruling, the error was not prejudicial, as no exception was saved thereto, and the amended petition, which was filed after having obtained leave of court, contained substantially the same allegations and prayer for relief as were set out in the amended and supplemental petition.

As we construe the original petition, it does not state sufficient facts upon which to base a prayer for damages. The plaintiff attempted to enjoin the defendants from doing certain acts, and assigned, as his reason for instituting such proceeding, that he had no adequate remedy at law. The supreme court held that the petition failed to state sufficient facts to warrant the interposition of a court of equity. It was after that decision was rendered that the plaintiff endeavored to file such a statement of facts as would entitle him to a recovery against the defendants, and in doing so he virtually alleged that the acts which he originally sought to enjoin had, in fact, been consummated by the defendants, and that he had sustained damages by reason thereof; thus changing substantially his claim against the defendants. The rights of the parties are to be determined as they existed when the suit was commenced; and, as at that time the plaintiff was not entitled to a recovery, he could not compel the defendant to litigate in that action a controversy concerning matters which occurred after the filing of the original petition, and to which reference is first made in a supplemental petition filed without leave of court. We think that the pleading filed by the plaintiff as an amended petition was, in fact, a supplemental petition, and that the court did not err in striking it from the files.

Nearly four years after the commencement of this action, the plaintiff asked leave of court to add certain specific amendments to his original petition, but, as the matter of allowing amendments to pleadings is one largely within the discretion of the trial court, only an abuse of such discretion will be reviewed by an appellate court. We do not think the court erred in refusing to allow the proposed amendments. As the petition then failed to state a cause of action, there remained no question to be litigated between the parties, and the court very properly sustained the motion to dismiss the action at the cost of the plaintiff. The judgment will be affirmed. All the judges concurring.

(5 Kan. App. 197)

**LOMBARD INV. CO. v. BURTON.**

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

**INTEREST ON JUDGMENT.**

A judgment creditor is entitled to interest on his judgment up to the time of confirmation of a sale of real estate which is made for the satisfaction of such judgment.

(Syllabus by the Court.)

Error from district court, Marshall county; R. B. Spilman, Judge.

Action by Denton Burton against the Lombard Investment Company. Judgment for plaintiff. Defendant brings error. Reversed.

Ferry & Small and H. P. Lowenstein, for plaintiff in error. J. A. Broughton and W. S. Glass, for defendant in error.

CLARK, J. On October 26, 1891, in an action then pending in the district court of Marshall county, the Lombard Investment Company, S. K. Martin, and the First National Bank of Marysville each recovered a personal judgment against one James Johnson, and in said action, on said day, a decree was duly entered establishing the priority of lien of the said judgments on the S. W.  $\frac{1}{4}$  of section 4, and the W.  $\frac{1}{2}$  of section 9, all in township 2, S., of range 8 E., in said county. By this decree the judgment in favor of the investment company was declared to be a first lien on all of said real estate; the judgment in favor of Martin was declared to be a second lien on the S. W.  $\frac{1}{4}$  of said section 9; and the judgment in favor of the bank was declared to be a second lien on said S. W.  $\frac{1}{4}$  of section 4, and a third lien on the S. W.  $\frac{1}{4}$  of said section 9. The decree also provided that, unless the judgment in favor of Martin should be paid within 10 days from the entry thereof, an order should issue for the sale of the S. W.  $\frac{1}{4}$  of said section 9, and the proceeds thereof be distributed according to the further orders of the court. It further provided that, if the said judgment in favor of the investment company should not be paid within six months from the date of its rendition, an order should issue for the sale of the said S. W.  $\frac{1}{4}$  of section 4, and the S. W.  $\frac{1}{4}$  of said section 9, and that the proceeds of such sale should be returned into court, to be distributed according to its further order; and that, if said land should not sell for a sufficient sum to satisfy said judgment, an order should issue for the sale of the N. W.  $\frac{1}{4}$  of said section 9. The decree further provided that, unless the judgment in favor of the bank of Marysville should be paid within six months from the date of its rendition, an order should issue for the sale of the said S. W.  $\frac{1}{4}$  of section 4, and the S. W.  $\frac{1}{4}$  of said section 9, and that the proceeds of such sale should be returned into court, to be distributed according to its further orders. On May 17, 1892, without the knowledge or consent of the investment company, the bank caused to be issued by the clerk an order of sale which recited the rendition of the judgment in its favor against Johnson, and that

part of the decree which provided that, if the judgment should not be paid within six months from its rendition, an order should issue for the sale of the said S. W.  $\frac{1}{4}$  of section 4, and the S. W.  $\frac{1}{4}$  of said section 9. This order of sale was duly executed, and the two quarter sections of land were duly and separately sold on the 20th day of June, 1892, to one E. R. Fulton, for the aggregate sum of \$7,300. The first regular term of the district court of Marshall county after the date of said sale duly convened on October 3, 1892, and on October 13th thereafter, on motion of the investment company and of the bank, a decree of confirmation was duly entered. The record shows that these sales could not have been confirmed prior to that term. The decree of confirmation contained, among other things, the following provision: "It is further ordered by the court that the proceeds of the sale of said premises by the sheriff of said county be paid to the parties respectively entitled thereto in the order of priority as found by the court in the decree of foreclosure in said cause dated October 26, 1891, and that the clerk of this court distribute the same according to law, after paying all the taxes on said premises." On the day that this decree was entered, Denton Burton, the clerk of the court, and who is the defendant in error herein, upon the demand of the investment company paid to it the sum of \$6,130, that amount representing the original judgment in its favor, with interest thereon from the date of the rendition of such judgment to the day of the confirmation of the sale. After payment of the costs, taxes, and the amounts adjudged to be due Martin and the investment company, with interest thereon to the date of confirmation, the amount of the proceeds of said sale was insufficient to pay off and discharge in full the judgment in favor of the bank, and the latter demanded of the clerk the amount which it alleged had been erroneously paid by him to the investment company as interest on said judgment from the date of the sale of the real estate to the date of the confirmation thereof, the same being \$206.95. This amount the clerk then paid to the bank, and demanded a return of a like sum from the investment company, which demand was refused; whereupon the clerk and the investment company, in order that it might be judicially determined as to whether or not the latter was entitled to receive interest upon its judgment from the day of the sale of said real estate to the date of the confirmation thereof, submitted that single question to the district court of Marshall county upon an agreed case embodying a statement of the foregoing facts, as authorized by section 525 of the Civil Code, and therein stipulated that, if the investment company was entitled to such interest, then judgment should be rendered in its favor for the costs of such proceeding, but that, if it was not entitled to such interest, then judgment should be rendered against it in favor of Fulton for \$206.95, with interest thereon from the 13th day of October, 1892. The district court found that said judgment did not

draw interest after the date of sale, and rendered judgment upon such finding, in accordance with the stipulation contained in said agreed case. The investment company is here seeking a reversal of that judgment. The defendant in error has made no appearance in this court, but the First National Bank of Marysville, while not a party to this proceeding, claims that it is a party in interest, and that its rights will be determined by the decision of this case, and with the consent of the plaintiff in error has voluntarily appeared, and filed a printed brief and argument in support of the finding and judgment of the trial court.

Paragraph 3501, Gen. St. 1889, provides that, "when a rate of interest is specified in any contract, that rate shall continue until full payment is made and any judgment rendered on any such contract shall bear the same rate of interest mentioned in the contract, which rate shall be specified in the judgment." The record shows that the contract upon which the judgment in favor of the Lombard Investment Company was based specified the rate of interest to which the plaintiff in error was entitled, and that such rate was in like manner specified in the judgment. It is therefore apparent that the real question at issue is as to the proper construction to place upon the words "until full payment is made," as used in the section of the statute above quoted. Counsel for the bank contend that, when the purchase price of real estate sold under foreclosure proceedings is paid to the sheriff, he holds the money in the dual capacity of an officer of the court and an agent of the judgment creditor; and that as the confirmation of the sale and conveyance of the real estate relate back to the date of the sale, and entitle the purchaser to the crops which were then unripe and growing on the premises (*Land Co. v. Barwick*, 50 Kan. 57, 31 Pac. 645), a sale by the sheriff for an amount sufficient to satisfy the judgment, interest to that date, and the costs, should be held tantamount to "full payment," and that interest on the judgment should therefore cease from such date, although the creditor might not actually receive the money, nor be entitled thereto until some time thereafter. We cannot agree with counsel in his conclusions. The law of this state requires that an order of sale or special execution shall conform to the judgment or order of the court. Civ. Code, § 517. The decree which was entered at the date of the rendition of these several judgments provided that, if the judgment in favor of the bank was not paid within six months from the date of its rendition, an order should issue for the sale of the real estate therein mentioned, and that the proceeds thereof should be returned into court, "to be distributed according to its further orders." The writ under which this sale was made conformed to the judgment and order of the court. Section 458 of the Civil Code in substance provides that the sheriff shall retain the purchase money in his hands until the sale is either duly confirmed or set aside, and that he shall

then pay the same to the persons entitled thereto, "agreeably to the order of the court." As was said by Horton, C. J., in *Johnson v. Lindsay*, 27 Kan. 514: "While the confirmation of a sale relates back to the date of the sale, the proceedings under an execution or order of sale are in fieri and not perfected until the court has examined the proceedings, and directed the clerk to make an entry on the journal that the court is satisfied with the legality of the sale, and for the officer to make to the purchaser a deed for the lands and tenements so sold. The officer making the sale retains the purchase money in his hands until the court confirms the proceedings, and no title passes to the purchaser without the order of confirmation; and until such confirmation the sale is not legally consummated, so as to entitle the purchaser to a conveyance thereof." In *Ferguson v. Tutt*, 8 Kan. 370, it was held that it is the duty of the sheriff to receive the purchase money when the sale is made, and to hold it until the sale is confirmed by the court, and then to pay it over to the person or persons entitled thereto. In *Kothman v. Markson*, 34 Kan. 542, 9 Pac. 218, it was held that while, by the levy of an attachment of real estate at the commencement of an action, a contingent lien thereon is created, yet, until a sale and conveyance of the real estate are made in pursuance of the judgment and order of the court rendered in such action, the right of possession remains in the debtor, and that, until such sale is completed in pursuance of the judgment and decree, neither the plaintiff nor the purchaser at the sale acquires any right to the rents, issues, or profits of the real estate. We cannot distinguish any difference in principle between the relative rights of the purchaser, the debtor, and the creditor with respect to the rents, issues, and profits of real estate sold by order of the court in an attachment proceeding, and a similar sale upon an order issued under a decree foreclosing a real estate mortgage. Until the sale is confirmed, —in fact, until the deed is executed,—the debtor is entitled to the possession of the property sold, and to the rents, issues, and profits thereof, and would be chargeable with interest on the judgment until such time as, by due process of law, the creditor would be entitled to the fund arising from the sale of the property given to secure the payment of his claim. In this case the sale was duly confirmed, and the sheriff, as ordered by the court, paid the proceeds thereof to the clerk, to be by him distributed among the several parties entitled thereto, "in the order of priority as found by the court in the decree of foreclosure in said cause dated October 26, 1891." Under the provisions of the sections of the statute above quoted, the decisions of our supreme court, the judgment and decree entered herein, and the order of sale issued in pursuance thereof, it is evident that the sale was not legally consummated, the purchaser was not entitled to a conveyance of the real estate, nor the judgment creditor to any part of the proceeds of the sale,

until after the confirmation. The judgment, in contemplation of law, was not "fully paid" until October 13, 1892, and the creditor was entitled to interest thereon until that date. *Taylor v. Robinson*, 2 Allen, 562. The judgment will therefore be reversed, and the cause remanded, with directions to enter judgment in favor of the plaintiff in error for costs, in accordance with the stipulations contained in the agreed case. All the judges concurring.

(5 Kan. App. 202)

**AULTMAN-TAYLOR CO. v. FRAZIER**  
et al.

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

**BRIEFS ON APPEAL — CONDITIONAL WARRANTY — NOTICE OF DEFECTS.**

1. The rules of this court upon the subject of briefs were adopted to be observed and followed, and a disregard of their plain requirements by plaintiff in error, without valid excuse, is of itself sufficient reason for the affirmance of the judgment or dismissal of the case. *Baker v. Sears*, 42 Pac. 501, 2 Kan. App. 617.

2. The warranty in this case should be construed to be a warranty of the machine as a whole, and to each and every part thereof (with the exception of the levers and belting), in case the machine received good management, and if certain directions were intelligently followed, it would do good work: and, if it did not, the company was to remedy the defect at its own expense, or take back the machine, and refund payments.

3. Where it is provided in the conditional warranty of the sale of a machine, "If the purchaser, intelligently following certain rules, directions, etc., is unable to make it operate well, he must, within ten days after the delivery, give notice in writing to the company at Mansfield, Ohio," and it is shown that the manager in charge of the company's business for the state of Kansas, at Kansas City, Mo., had notice, and sent a party to examine the machine and remedy the defect, this would be sufficient notice to the company that it did not comply with the warranty.

(Syllabus by the Court.)

Error from district court, Marshall county; R. B. Spilman, Judge.

Action by the Aultman-Taylor Company against S. J. Frazier and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. A. Broughten, for plaintiff in error. E. Hutchinson and Mann & Redmond, for defendants in error.

GILKESON, P. J. Our attention is called to the fact that in some respects the brief of the plaintiff in error is not in conformity with rule 5 of this court. We can add to this that it does not in any respect, except that it is printed. It consists of nine pages, and is styled "Statement of Facts," without a specification of error separately and particularly set out therein. Objections to the admission and rejection of testimony are strewn all through it, without quoting any of the evidence; criticisms upon instructions given and refused, without setting out the instructions; and it is impossible to distin-

guish between arguments and statement of facts. There can be no valid excuse for such total disregard of the plain requirements of rule 5 of this court, and, as was said per curiam in *Baker v. Sears*, 2 Kan. App. 620, 42 Pac. 501: "The rules of this court with reference to briefs, both as to their form, subject-matter, and time of service, were adopted for the purpose of affording to the court and counsel the fullest opportunities and best means for the consideration and disposition of cases. These rules should be regarded by the attorneys having business before the court as something more than mere suggestions to be observed or disregarded at their pleasure; and a failure to comply with the plain requirements on the part of the plaintiff in error, without adequate excuse, is sufficient reason of itself for affirming the judgment or dismissing the case."

On page 2 of the brief we find the following statement: "The contention of the plaintiff is that the machine was purchased under a written warranty; that Frazier, to avail himself of the warranty, must render substantial compliance therewith; and that no written or actual notice was given by him, and no waiver or knowledge to the company, and, by reason of his default, has no recourse against the plaintiff." On page 7 we find this statement: "If the machine was purchased under the contract, then, before defendant Frazier can recover, he must show one of the following propositions: (1) Written notice, as provided in the contract. Frazier makes no pretense of having given it. (2) The failure of such notice by plaintiff. There is no evidence to support a waiver of the requirements of the contract." Treating these as the assignment of error (for upon examination of the record we find that the only questions raised in the court below are embodied therein), we fail to find any reversible error in the record.

The warranty relied upon is as follows: "Warranty on Thresher. This machine is ordered, purchased, and sold to the following warranty and agreement/ viz.: That with good management the Aultman-Taylor thresher is capable of doing a good business in threshing and cleaning grain, and is superior in its adaptation for separating and saving from the straw the various kinds and conditions of grain and seeds. Conditioned, that the undersigned purchaser shall intelligently follow the printed hints, rules, and directions of the manufacturers; and if by so doing they are unable to make it operate well, written notice, stating wherein it fails to satisfy the warranty, is to be given by the purchaser to the Aultman & Taylor Company at Mansfield, Ohio, by registered letter, within ten days after the delivery of the machine to the purchaser, and reasonable time allowed to get to it and remedy the defect, unless it be of such a nature that they cannot advise by letter. If they are not able to



make it operate well (the purchaser rendering necessary and kindly assistance), and the fault is in the machine, it is to be taken back, and the payments refunded, or the defective part remedied, and made the same as in other machines which do perform satisfactorily. But, if the purchaser fails to make it perform through improper management, or neglects to observe the printed or written directions, then the purchasers are to pay all expenses incurred. Also that, if any part of said machine (except the levers or belting) fails during this year in consequence of any defect in material of said part, if the purchaser shall have observed the printed or written directions applicable to the management of such part, the Aultman & Taylor Company are to furnish a duplicate of said part free of charge, except freight, after the presentation of the defective piece, clearly showing a flaw in the material at the factory, at any time within one year; but deficiencies in pieces, or in special attachment, not to condemn other parts; and deficiencies in general adaptation, or the taking back of the machine, must be reported by registered letter to the Aultman & Taylor Company at Mansfield, Ohio, within ten days after delivery of it to the purchaser; otherwise all claims whatever are expressly waived by the purchaser." This warranty should be construed to be a warranty of the machine as a whole, and to each and every part thereof, except levers and belting, and with good management it is capable of doing good work in some particulars and superior in others; that, if certain printed directions are followed, and if it cannot be made to operate successfully, upon notice the company will at their expense make it operate, and, if the defect is in the machine, they will take it back, and refund the payments; if the fault is in a defective piece,—that is, the piece being imperfectly made,—they, upon notice, will replace the defective piece with a perfect one, at their expense, except freight. The terms of the warranty are mutual, and the company cannot insist upon a strict compliance with its terms by the purchaser, and fail, neglect, and refuse to comply with it themselves. The jury found generally for the defendants. No special findings were asked or returned, and the trial court has sanctioned their verdict. And the general finding in their favor is a finding in their favor for all the facts necessary to constitute their defense; and we think there is abundant testimony to support the verdict.

As we have said, the only contention on the part of the plaintiff raised by the pleadings is as follows: "That the defendant S. J. Frazier has wholly neglected and failed to keep and perform the conditions of said contract and warranty on his part, in this, to wit: 'Conditioned, that the undersigned purchaser shall intelligently follow the printed rules, hints, and directions of the manufacturer; and if, by so doing, they are unable to

make it operate well, written notice, stating wherein it fails to satisfy the warranty, is to be given by the purchaser to Aultman & Taylor Company, at Mansfield, Ohio, by registered letter, within ten days after the delivery of the machine to the purchaser.' That defendant S. J. Frazier did not 'cause a written notice, stating wherein such machine fails to satisfy the warranty, to be given to this plaintiff at Mansfield, Ohio, by the said defendant, within ten days after the delivery of the machine to him,' and by reason thereof, and under the terms and conditions of said contract and warranty, the said alleged defects and claims set forth in their several answers herein and by reason thereof, the said defendants are estopped from making their pretended counterclaim for damages." Now, construing this pleading (the reply) strictly, the plaintiff only complains of the failure to give the written notice, but, give it the most liberal construction possible, and it is, then, that the defendant did not intelligently follow the printed rules, hints, and directions of the manufacturer, and did not give the written notice. What these rules, hints, and directions are, we are unable to say, as there is not a syllable of testimony upon the subject, or that the defendant did not intelligently follow them in the management of the machine. We think, under the warranty, the facts necessary for the defendant to prove in order to sustain his defenses are: (1) That the machine received good management. There is not a word of testimony to show that it did not. On the contrary, the testimony is uncontradicted that parties who had had from two to ten years' experience with threshing machines did all they knew how to do to make it work,—that is, to keep the cylinder from heating. (2) That it was not capable of doing a good business in threshing and cleaning grain. All of the testimony upon this proposition is positive and undenied that it could not be run continuously without danger of setting it on fire by reason of the cylinder box, and that it was idle at least one-third of the time. (3) That he notified the company within the time. Upon this there is a conflict of testimony, but it is proven beyond dispute that the general manager of the company for the state of Kansas received notice (how or from whom is not shown), and that he sent an expert to look after this machine. But upon this proposition seems to hinge all of the company's contention "that they did not receive notice as required by the contract,—that is, by registered letter, sent to the company at Mansfield, Ohio." We think this notice to the general manager would be sufficient notice under the warranty, striking out the conflicting testimony upon the subject of written notice to the house. *Machine Co. v. Mann*, 42 Kan. 372, 22 Pac. 417. We think there is ample testimony to sustain the finding of all these facts. But, as we have said, the terms of the contract of warranty are mutual; yet the plaintiff did not perform its

part, or even attempt so to do. Under the contract they were "to remedy the defect, and, if possible, make the machine operate well." They did not even attempt so to do. The expert sent by the general manager, Boyd, refused to go to the place where the machine was, and ascertain what was the matter with it. "If they could not make it operate well, and the fault was in the machine, they were to take it back, and refund the payment. If the default was a defective part, that part was to be remedied, and made the same as in other machines which do perform well." But it is contended that the defendant should have had this defect remedied, under the rule "that it is the duty of the party injured to take reasonable measures to lessen the damages." We think the testimony in this case clearly shows that he did, and there is nothing to indicate that he aggravated them; and under the express terms of the contract it was the duty of the company to remedy the defects at their own expense, unless the fault was occasioned by improper management, or failure to observe the rules, hints, etc., of the manufacturer. And besides, the defects proven were in the machine, and required skilled workmen to remedy, and were (after the machine was taken by the company, and sold to another party) remedied by a party sent from the factory upon the same complaint being made, and a local artisan failing to correct it. The testimony shows that the power did not work as it should; from what cause, we are unable to state, as it is not disclosed by the testimony.

One other proposition we will pass upon in this case, as it is called to our attention in the brief; that is, that the verdict is excessive. We think not, and there is abundant testimony to support the amount of damages on the theory that the machine was worthless to the defendant Frazier; and, as the plaintiff had agreed to remedy the defects, could have done so, and in all probability made this machine operate well, but refused and neglected to do so, they cannot now complain of the damage their own wrong has caused. The judgment will be affirmed. All the judges concurring.

(5 Kan. App. 209)

#### WALKER v. COATES et al.

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

#### INSANITY — INQUISITION — DISCHARGE FROM CONFINEMENT — CONTRACTS.

On an inquisition duly instituted and had, one C. was adjudged to be of unsound mind, and a fit person to be committed to the insane asylum; but no guardian of his estate was appointed. Pursuant to such adjudication he was confined in the asylum, from which he was afterwards discharged, as restored to his right mind; but no adjudication thereof was had in the probate court which committed him. Thereafter C. and wife executed a mortgage on their homestead, which was alleged to be void, in an action to foreclose the same, because of un-

soundness of mind on the part of C. at the time it was executed. Held that, while evidence of adjudication of unsoundness of mind made out a prima facie defense, it was not conclusive, and it might be shown by any competent evidence that C. was of sound mind at the time he executed the mortgage.

(Syllabus by the Court.)

Error from district court, Smith county; Cyrus Heren, Judge.

Action by Asa Walker, guardian, against Daniel S. Coates and others. Judgment for defendants. Plaintiff brings error. Reversed.

Cook & Gossett, for plaintiff in error. R. M. Pickler, for defendants in error.

CLARK, J. This is an action brought in the district court of Smith county by Asa Walker, guardian, to recover from Daniel S. Coates and Roxana D. Coates, his wife, the amount due on a promissory note executed by them in the principal sum of \$900, bearing date April 23, 1889, payable to Willis G. Myers, and by him indorsed to the plaintiff, and also to foreclose a real-estate mortgage, in the form of a deed of trust, given by Coates and wife to Edward E. Holmes, trustee, to secure the payment of said note. Daniel S. Coates, although personally served with summons, made default. Several months after the commencement of the action, one W. E. Coates, as guardian of Daniel S. Coates, was made a party defendant, and he and Roxana D. Coates filed their separate answers, in which they denied generally the allegations of the petition, and then alleged that, at the time of the execution of the pretended mortgage mentioned in the petition, the real estate therein described was the homestead of said Daniel S. and Roxana D. Coates, and that said pretended mortgage was not executed by their joint consent; that, at the time of the execution of the said instrument sued on, the said Daniel S. Coates was insane and had been so declared by the probate court of Smith county; and that he was incapable of giving his consent to the making of any contract at the time of the execution of the said pretended mortgage; and prayed that the same be canceled and held for naught. The reply of the plaintiff denied each and every allegation of new matter contained in these answers, and alleged specifically that at the time of the execution of the note and mortgage Daniel S. Coates was of sound mind; that the mortgage was given and the money loaned thereon in good faith; that at that time there was nothing in the appearance or conduct of the husband to indicate that he was of unsound mind or incapable of the transaction of business, but that he was then apparently in possession of his mental faculties, and was then engaged in the transaction of business for himself; that at the time of making said note and mortgage there were two mortgage liens on the land, amounting to \$600, which were paid out of the proceeds of the note and mortgage in suit for the joint benefit of the defendants, and the residue applied by them to their joint use. The plaintiff recovered a verdict and personal judgment

against Roxana D. Coates for the amount due on the note, but was denied a judgment against Daniel S. Coates, or a decree foreclosing the mortgage, and he brings the case here for review. The principal errors complained of are the various rulings of the court upon the admission of evidence offered, and the instructions to the jury.

Under the pleadings, the court properly held that the burden of proof was on the defendants. They proved that the real estate mortgaged was the homestead of the mortgagors, who were husband and wife; that the husband, upon proceedings instituted in the probate court of Smith county, was on December 6, 1879, duly adjudged to be of unsound mind, and an order was then issued for his commitment to the state insane asylum; that similar proceedings were instituted in said court on January 29, 1884, and January 25, 1888, respectively, and in each instance he was again adjudged insane, and ordered to be committed to the asylum. The record shows that no guardian, either of his person or estate, was appointed until after the commencement of this action. The court overruled a demurrer to the evidence of the defendants, and sustained objections to the introduction of evidence by the plaintiff tending to show that the mental disease to which Daniel S. Coates was subject was not chronic in its nature, and that he had been discharged from the state insane asylum in the years 1884, 1887, and 1888, respectively, restored to his right mind; that he had been regularly adjudged insane on May 20, 1889, by the said probate court, and committed to the asylum; that he was discharged therefrom on August 20, 1889, restored to his right mind; that he was again adjudged insane on April 25, 1890, and thereafter again committed to the asylum, where he was confined at the time of the trial of this action; and that the defendant W. E. Coates was in 1892 duly appointed guardian of his person and estate. The plaintiff also sought to introduce evidence tending to show the conduct and appearance of the husband, and the actual condition of his mind at the time he executed the note and mortgage sued on, and the disposition that was made of the proceeds thereof; but the court ruled that such evidence was irrelevant and immaterial. The act concerning lunatics and habitual drunkards, being chapter 60, Gen. St. 1889, in substance provides that, upon an inquisition of insanity, if the jury should find that the subject of the inquiry is insane, and is a fit person to be sent to the insane asylum, the court should enter an order that he be so committed, and should appoint a guardian of his person and estate, who should publish notice of his appointment, take possession and control of the property of his ward, and manage his estate; and the act then provides that no contract made by such insane person without the consent of his guardian should be valid or binding. Section 37 of that act provides that, "if any person shall allege in writing, verified by oath or affirmation, that any person declared to be of

unsound mind or an habitual drunkard has been restored to his right mind or to temperate habits, the court by which the proceedings were had shall cause the facts to be inquired into either by a jury or without a jury as may seem proper to the court." And the next succeeding section provides that, "if it shall be found that such person has been restored to his right mind, or to temperate habits, he shall be discharged from care and custody, and the guardian shall immediately settle his accounts, and restore to such person all things remaining in his hands, belonging or appertaining to him." It is evident, from an examination of the record, that the court, in its rulings upon the introduction of the evidence offered, proceeded upon the assumption that proof that a person had, in an inquiry duly instituted under the provisions of the act above mentioned, been adjudged insane, would raise a conclusive presumption that such mental condition continued to exist until overcome by a finding of restoration to sanity, after due inquiry in accordance with the provisions of section 37 of that act, and that any contract entered into by such insane person, intermediate the adjudication of insanity and the decree of restoration, would be void, unless assented to by his guardian. This is the natural inference which would follow the perusal of the following instruction to the jury: "Under the law of this state, no contract of a person found to be of unsound mind by an inquisition before the probate court, under the statutes relating to lunatics, made without the consent of his guardian, is valid or binding. Such inquisition is conclusive until set aside by a subsequent inquisition. You will therefore find for the defendant Daniel S. Coates and W. E. Coates, his guardian. You are also instructed that no lien whatever was created by the mortgage upon the homestead of the defendants, Daniel S. Coates and Roxana D. Coates. Your verdict, therefore, should be a verdict personally against Roxana Coates only."

We think that the statutory incapacity to contract is not entirely dependent upon the state of mind of the person who has been adjudged insane, but upon the further fact that he is under guardianship, and that the possession and control of his property has, by virtue of the appointment and qualification of a guardian, been transferred to the latter, leaving in him nothing with respect to which he can contract. But, if no guardian has in fact been appointed, there is no apparent reason why a contract entered into, after his restoration to sanity, by one who had been adjudged insane, should not be held valid and binding. This seems to have been the view taken by our supreme court in *Water Supply Co. v. Root*, 56 Kan. 187, 42 Pac. 717. There a party had been adjudged insane, but, as in this case, no guardian of her person or estate was appointed. She was subsequently discharged from the asylum on account of her improved condition, and several years thereafter made the con-

tract then under consideration by the court, at which time she was in fact of sound mind, capable of contracting. In that case, Allen, J., speaking for the court, said: "There are two main purposes to be subserved by trials in the probate court of persons alleged to be insane. One is that they may be placed in an asylum for treatment of their disease; the other, that they may be placed under guardianship, and their property taken care of. Section 37 of this act makes provision for inquiring into the question of the restoration of a person of unsound mind or an habitual drunkard, and by the succeeding section it is provided that, if it be found that such person has been restored, he shall be discharged from care and custody, and his guardian shall immediately settle his accounts. The question presented, then, is whether a person who has been adjudged insane, and placed in an asylum for treatment, and has thereafter been discharged from the asylum because of her improved condition, is conclusively presumed to continue insane, notwithstanding the fact that she has no guardian, and is not under treatment for insanity, until a formal adjudication shall be had finding that she has been restored to her reason. After her discharge from the asylum, and after her restoration to reason, in fact, the only purposes such an adjudication could serve would be to discharge her guardian, if she had one, and restore her to the possession of her property, if she possessed any, and to remove her disability to enter into contracts. We think it would be extremely hazardous to hold that all contracts made by a person in fact sane and not under guardianship are void merely because of a prior adjudication of insanity, and a failure to have an adjudication of restoration to reason." And the law of that case as announced by the court is as follows: "Where a person has been duly adjudged insane, but no guardian of her person and estate has been appointed by the probate court, and where such person, after having been committed to the insane asylum, is discharged in an improved condition, and afterwards entirely recovers her reason, held, that a contract entered into by her more than seven years after such adjudication of insanity, and after such entire recovery of her reason, is valid, without any adjudication by the probate court that such person has been restored to reason."

We think that decision applies with equal force to the facts now under consideration. The said act concerning lunatics and habitual drunkards authorizes the superintendent to discharge any patient committed to the asylum, and provision is made for a notification from the proper officer of the asylum to the probate judge of the county, giving the name of the patient and date of his discharge, and stating whether the patient had been restored to his right mind or not. The general rule is that every man is presumed

to be sane until the contrary is shown, and at common law, where habitual unsoundness of mind has been shown to exist, such condition will be presumed to continue until this presumption is rebutted by competent proof. If a guardian of the person and estate of a person who has been duly adjudged insane, has been appointed by the proper court, we think, under the statute, the presumption of continued insanity of the person so adjudged insane could only be overcome by following the statutory direction set out in section 37 of the act above mentioned. If no such guardian has been appointed, the discharge of such person from the insane asylum as restored to his right mind would be deemed sufficient to overcome the presumption that the insanity continued to exist after the person had been restored to sanity, any competent evidence tending to establish that fact would be admissible to overcome the presumption of insanity caused by the adjudication of insanity. In this case no guardian had been appointed. The court refused to receive evidence tending to show that Coates had been restored to his right mind, or that he had been discharged from the asylum because of such restoration. In these respects the court erred, and in directing a verdict and in overruling a motion for a new trial the court committed reversible error. The judgment will therefore be reversed, and the cause remanded for a new trial. All the judges concurring.

(5 Kan. App. 380)

**O'FARREL v. McCLURE et al.**

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

**REPLEVIN — GENERAL VERDICT — SALE — VESTING TITLE — DELIVERY.**

1. Where a petition in replevin alleges ownership and right of possession in the plaintiff, and wrongful detention by the defendant, a general verdict finds all these issues for the plaintiff, and is proper. Upon such a petition and verdict, a judgment like the one in this case may properly be entered.

2. In a contract of sale of personal property, the intent of the parties controls, and, if they intended a present vesting of title, the title may, in fact, pass at once to the purchaser, although the actual delivery is to be made subsequently; and, whenever a dispute arises as to the true character of an agreement, the question of intent is rather one of fact than of law; and the finding of a jury, when sustained by the evidence upon this question, will not be disturbed upon review. *Kneeland v. Renner*, 43 Pac. 95, 2 Kan. App. 451.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by H. C. McClure and J. C. Mason, partners as H. C. McClure & Co., against Patrick O'Farrel. Judgment for plaintiffs. Defendant brings error. Affirmed.

Crans & Savary, for plaintiff in error. J. W. Sheafor and I. A. Rigby, for defendants in error.

GILKESON, P. J. Patrick O'Farrel, plaintiff in error, was on January 20, 1892, the owner of some 70 or 80 head of hogs, of various ages and conditions, about 38 head of which had attained the age of two years, and were fit for market. The defendants in error desired to purchase some of these hogs, and with that object in view, on that day, being Thursday, Mason called upon O'Farrel, and examined the hogs in question, agreed upon the price for 35 head, to wit, \$400, and, upon the suggestion of O'Farrel, pointed out the hogs he desired, or, rather, he pointed out 3 head of the 38 which he did not want and would not take, and thereupon paid to O'Farrel the sum of \$20. It was at this time agreed that the 35 head selected by Mason should remain in the corral where they then were until the following Saturday, when Mason was to take them away. On the next day, Friday, and after having consulted with his partner, McClure, he again called upon O'Farrel, and there was some conversation as to the hogs remaining in the corral until the following Monday. On Sunday, O'Farrel called upon McClure, and had a conversation with him about these hogs; and, upon the following Monday, McClure and Mason, with hired help, went to O'Farrel, for the purpose of taking the hogs to ship them, he tendering to O'Farrel the balance due upon the purchase price of the hogs, which O'Farrel refused to receive, and refused to deliver the hogs. Afterwards Mason and McClure brought an action in replevin for the recovery of the hogs. O'Farrel gave a redelivery bond, and retained possession of them, and subsequently disposed of them. In that action the jury returned a general verdict in favor of McClure and Mason. No special findings were asked or made. It is of this judgment and verdict rendered thereon that O'Farrel complains, and brings the case here on error for review.

The issues in this case are purely of fact, and it is admitted by the plaintiff in error that the rights of the parties in this case hinge on what passed between Mason and O'Farrel on Friday, he contending that the transaction of Thursday did not amount to a sale, but was merely an agreement to sell, and it was not to be consummated until the following Saturday, and that, by the transactions had between them on Friday, the contract of sale was abrogated. As to what really happened on Friday, there is some conflicting testimony; O'Farrel testifying, in substance, that when Mason asked him if he would keep the hogs for him until Monday, and feed them for him, he told him, "If I feed them until Monday, I shall feed them for myself, as my own hogs." This is denied by both McClure and Mason. O'Farrel admits that he did not tender back the \$20 at the time of the conversation with Mason on Friday, but claims that he did tender it back at the time of the conversation with McClure on Sunday. He does not deny that the balance of the purchase money was ten-

dered to him on Monday, but testifies that he refused to take it, because they had broken their contract with him by not taking these hogs away on Saturday. The record presented to us in this case does not purport to contain all of the proceedings, motions, etc., had at the trial; and, from an examination of it, we cannot say that it does, but merely purports to contain "all of the pleadings in the case, all of the evidence offered and received on the trial thereof, as well as all objections and objections made, rulings of the court thereon, and exceptions taken thereto."

The only inquiries open to us are, we think, whether the petition states a cause of action, and whether, under the pleadings and evidence, the verdict and judgment in favor of the plaintiffs appear to be so erroneous as to compel a reversal. The petition alleges ownership and right of possession in the plaintiffs, and wrongful detention by the defendant. The verdict is as follows: "We, the jury impaneled and sworn in the above-entitled case, do upon our oath find for the plaintiffs, and that, at the commencement of this suit, they were entitled to the possession of thirty-five head of hogs, and the same were of the value of \$500, with interest at 6%, making a total of \$519.18." The judgment is "that the plaintiffs do have and recover of and from the said defendant the possession of said thirty-five head of hogs; and in case a delivery thereof to said plaintiffs cannot be made, or if a return of said hogs to said plaintiffs cannot be had, then the plaintiffs have and recover of and from the said defendant the balance of the value thereof, the sum of \$137.95, together with costs herein, taxed at \$——." Thus far we have found nothing in the proceedings which seems to us to require any interference on our part. By the general verdict, the jury have passed upon all the issues between the parties. "Where the petition alleges ownership, and right of possession in the plaintiff, and wrongful detention by the defendant, a general verdict finds all these issues for the plaintiff, and is proper. Upon such a petition and verdict, a judgment like the one in this case may properly be entered; at least, we do not see how the defendant is prejudiced by it." *Arthur v. Wallace*, 8 Kan. 267. And that the verdict is sustained by a preponderance of the testimony is beyond question. There is no controversy as to what happened on Thursday. Did this constitute a sale, or was it a mere agreement or contract to sell? We think it was a sale. What other act was to be performed, what thing to be done, that would more effectually make the transaction of Thursday a sale than was done? The price was agreed upon, and payment made (not all of the consideration, it is true); and the record is silent as to when the remainder was to be paid. The articles sold were agreed upon (number and kind), and they were selected. It is contended that they were not to be removed until Saturday. This is true,

but the defendant was not to deliver them. With this he had nothing to do. The plaintiff was to take them from this lot or corral, and the testimony of the defendant is that he considered them sold on Thursday; and if they had taken, or attempted to have taken, them away on Saturday, he would have offered no objection. The subsequent transactions of Friday and Sunday were open to dispute, but they have been passed upon by the jury, and are no longer subjects of our consideration; and we think that the intent of the parties is proven beyond question to be a present vesting of the title in McClure and Mason, their title, undoubtedly, having been good against creditors. "In a contract of sale of personal property, the intent of the parties controls; and, if they intended a present vesting of title, the title may, in fact, pass at once to the purchaser, although the actual delivery is to be made subsequently; and, whenever a dispute arises as to the true character of an agreement, the question of intent is rather one of fact than of law; and the finding of the trial court, when sustained by the evidence, upon this question, will not be disturbed upon review." *Kneeland v. Renner*, 2 Kan. App. 451, 43 Pac. 95.

Questions are raised as to the correctness of the instructions given in this case. The record fails to show that all the instructions are contained therein, and as, from an examination thereof, we are unable to say that they are, these errors will not be considered. The judgment in this case will be affirmed. All the judges concurring.

(5 Kan. App. 220)

HANNON v. HOLMES, County Clerk.

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

APPEAL—CASE-MADE.

A case-made must be full and complete in itself as to the errors assigned for review, and omissions therefrom cannot be supplied by a mere reference to the record in another case.

(Syllabus by the Court.)

Error from district court, Smith county; Cyrus Heren, Judge.

Action by P. C. Hannon against J. W. Holmes, county clerk. Judgment for defendant. Plaintiff brings error. Affirmed.

Webb McNall and R. M. Pickler, for plaintiff in error. W. R. Myers and F. T. Burnham, for defendant in error.

GARVER, J. This was an action brought by the plaintiff in error in the district court of Smith county against the defendant in error, as county clerk of said county, to restrain him from placing on the tax rolls of said county, against the property of the plaintiff, certain taxes assessed by school district No. 116 in said county, alleging that the same were illegal. A temporary injunction

was granted by the probate judge, which was afterwards, on motion of the defendant, dissolved by Hon. Cyrus Heren, judge of the district court. To reverse such order, the plaintiff, P. C. Hannon, brought this proceeding in error. The journal entry of the order of the judge vacating the injunction recites: "After the presentation of the evidence for and against said motion, and after hearing the arguments of counsel, said motion is sustained; and it is considered, ordered, and adjudged by the judge of said court that the said temporary restraining order, heretofore granted and issued in said case by the said probate judge of Smith county, Kansas, be, and the same is hereby, dissolved, vacated, annulled, and set aside."

The questions for review arise upon the evidence presented on the hearing of the motion. Outside of the certificate of the judge, attached to the case-made, there is nothing to indicate that the record filed in this court contains all the evidence. When the errors sought to be reviewed are based upon the evidence, the record must show in a proper manner that all the evidence is included therein. The certificate of the trial judge alone is insufficient for that purpose. *Lebold v. Bank*, 51 Kan. 381, 32 Pac. 1103. Further, the record, on its face, affirmatively shows that it does not contain all of the evidence; for it refers, for a statement of certain facts which were in evidence and considered on the hearing of the motion, to the forty-seventh volume of the Kansas Reports, at page 413 (*Horneman v. Harlan*, 28 Pac. 177). A record cannot be made in this manner. A case-made must be complete in itself. It cannot be supplemented by a mere reference to the records of another case. Nothing can be construed as a part of a case-made unless it is actually incorporated therein. If any other practice was admissible, an appellate court might be required to search the records of other departments of the state government for the purpose of ascertaining the facts necessary to a proper consideration of a case. However convenient such a practice might be for counsel, in lessening the labor of making a case, it would necessarily lead to great annoyance and uncertainty in appellate proceedings. On this question the rule is stated by Johnson, J., in *Railroad Co. v. Andrews*, 34 Kan. 563, 9 Pac. 214, as follows: "Each proceeding in error is distinct and independent of the other, and the errors assigned in each proceeding are to be determined upon its own record. In determining errors assigned in this proceeding, we must look alone to the matters and things revealed by the present record, and cannot examine or be governed by anything on the files of this court in a former proceeding in error, although it was brought to review a former judgment rendered in this case." See, also, *Parkhurst v. Bank*, 55 Kan. 100, 39 Pac. 1027. Not having before us the evidence upon which the order complained of was based,

we cannot say there was error therein, and the same is affirmed. All the judges concurring.

(5 Kan. App. 880)

**SWEEDLUND v. HUTCHINSON et al.**

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

**APPEAL — REVIEW — CONFLICTING EVIDENCE — POWERS OF AGENT — RELEASE OF MORTGAGE.**

1. Findings of fact which are approved by the trial court, and which are based upon conflicting evidence, will not be disturbed by an appellate court.

2. In this case the special findings of fact are sustained by sufficient evidence; and support the conclusions of law.

(Syllabus by the Court.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action by Paul Hutchinson and W. M. Fields, executors of the last will and testament of Charles Hutchinson, deceased, against Peter Sweedlund. Judgment for plaintiffs. Defendant brings error. Affirmed.

Garver & Bond, for plaintiff in error. D. C. Chipman and Burch & Burch, for defendants in error.

CLARK, J. On April 25, 1884, August Erickson and wife executed and delivered to one Charles Hutchinson a note for \$1,000, due April 1, 1889, and a mortgage on the N. E.  $\frac{1}{4}$  of section 21, and the W.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  of section 22, all in township 16 S., of range 3 W., in Saline county, to secure its payment. On June 27, 1885, the said subdivision of section 22 was released from the operation of the mortgage. Prior to January 8, 1892, Hutchinson died, and on that day the executors of his will commenced this action in the district court of Saline county, and therein recovered a personal judgment against Erickson and wife for the amount then due on the note above mentioned, and a decree foreclosing the mortgage on the said N. E.  $\frac{1}{4}$  of section 21, and adjudging the same to be a first and prior lien on said real estate; but, under the decree, the officer was required to first sell the E.  $\frac{1}{2}$  thereof. Peter Sweedlund, one of the defendants, has brought the case to this court, seeking a modification of the decree, upon the ground, as claimed, that the court erred in adjudging the judgment a lien upon the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of said section 21, and in overruling his motion for a new trial.

The court made the following special findings of fact: "(1) That, at the dates and during the time covered by the transactions hereinafter mentioned, the Colonial & United States Mortgage Company, Limited, was located at Hull, England. (2) That during the time from the 1st day of January, 1884, to the 1st day of January, 1888, Charles Hutchinson, who resided at Des Moines, Iowa, was the general agent for the said the Colonial & United States Mortgage Company, for the purpose of making for it loans of money upon real estate

in this state. (3) About the 1st day of March, 1887, the Hutchinson Mortgage Company was incorporated under the laws of the state of Iowa; and on the 1st day of January, 1888, said company became the general agent for said Colonial & United States Mortgage Company, in place of said Charles Hutchinson, and with the same authority he had possessed to loan money for its principal, and continued to act as such agent during the year 1888. Said Hutchinson Mortgage Company consisted of said Charles Hutchinson and his three sons. (4) That during the year 1885 said Charles Hutchinson employed one S. T. Criss, who then lived in the city of Salina, in said county of Saline, to make real-estate loans for said Colonial & United States Mortgage Company; and, under such employment, said Criss was permitted and required to receive applications for loans, to pass upon the title and sufficiency of security offered, to draw the notes and mortgages, make the abstracts of title, and check upon a bank in Salina where funds were kept for such loans by said Charles Hutchinson (signing said checks, 'Charles Hutchinson, by S. T. Criss, Agent'), to have the mortgage recorded, and to forward all papers connected with each loan to said Charles Hutchinson, at Des Moines, Iowa. Such employment continued until January 1, 1888; and during the year 1888 said Criss acted for said Hutchinson Mortgage Company in making loans for said Colonial & United States Mortgage Company the same as he had done for said Charles Hutchinson. (5) The same parties, Charles Hutchinson and his three sons, who did the work for the said Hutchinson Mortgage Company under its agency for said Colonial & United States Mortgage Company, also performed the work under the agency of said Charles Hutchinson for the said last-named company. (6) That during the years 1887 and 1888 said Charles Hutchinson employed said Criss to collect the interest and principal on real-estate loans in said Saline county as they became due to the former, and deposit the same to his credit in a bank at Salina. (7) That on the 25th day of April, 1884, said Charles Hutchinson loaned to August Erickson the sum of \$1,000 for five years; and to evidence such loan, and to secure the payment of the same, said Erickson and wife executed and delivered to the said Charles Hutchinson the promissory note and mortgage set forth in plaintiff's petition. (8) That on the 27th day of June, 1885, said Colonial & United States Mortgage Company, through its agent, said Charles Hutchinson, loaned to said Erickson the sum of \$1,000 for five years; and, to secure the payment of the same, said Erickson and wife executed to said Colonial & United States Mortgage Company their mortgage on the real estate described in the mortgage to Charles Hutchinson, hereinbefore mentioned, to wit, the northeast quarter of section twenty-one (21), and the west half of the northwest quarter of section twenty-two (22), all in township sixteen (16) south, of

range three west of the sixth principal meridian, in Saline county, Kansas; and on the said day said Charles Hutchinson released from his said mortgage, for \$1,000, the west half of the northwest quarter of section 22. (9) On the 26th day of October, 1887, said August Erickson and wife sold and conveyed to said defendant, Sweedlund, by warranty deed, the west half of the northeast quarter of said section twenty-one (21). (10) That on the 2d day of April, 1888, defendant, Sweedlund, contracted with said Criss, as the agent for said Hutchinson Mortgage Company, as follows: Said Sweedlund agreed to execute his promissory note for \$800 to said Colonial & United States Mortgage Company, and to secure the payment of the same by mortgage on the west half of the northeast quarter of section twenty-one; and for said note and mortgage said Criss agreed that all other incumbrances on the land described in this paragraph should be released; and, in pursuance to such contract, said Sweedlund and wife then executed their note for \$800 to said Colonial & United States Mortgage Company, payable five years after date, and secured the payment of the same on the 80 acres of land last hereinbefore described. (11) On the 2d day of April, 1888, said Erickson and wife executed to said Colonial & United States Mortgage Company, through Criss, as agent for said Hutchinson Mortgage Company, a note and mortgage for \$800, payable five years after date, and secured the payment of the same by a mortgage on the east half of the said northeast quarter of said section twenty-one (21); that the amount of said note was used, with the \$800 on the note executed by Sweedlund, to pay the mortgage of \$1,000 to said Colonial & United States Mortgage Company, dated June 27, 1885, the taxes on said northeast quarter, and some other incumbrances on said quarter, not including the mortgage set up in plaintiff's petition. (12) That at the time the two mortgages for \$800, each hereinbefore described, were executed, said Criss thought that the release made by Charles Hutchinson, dated June 27, 1885, described in paragraph 8 of these findings, released the said northeast quarter of said section twenty-one (21) from the mortgage described in paragraph 7 of these findings, instead of the west half of the northwest quarter of section twenty-two (22). (13) That on the 2d day of April, 1888, the two mortgages for \$800 each were duly recorded in the office of the register of deeds of Saline county, Kan., and were soon thereafter forwarded by the said Criss to said Hutchinson Mortgage Company, and the said mortgages are set up by the Colonial & United States Mortgage Company in its answer herein."

Counsel insist that, under these findings of fact, the court erred in adjudging the personal judgment against Erickson and wife a lien upon the W. ½ of the N. W. ¼ of said section 21; but we are unable to discover therein anything which would sanction a conclusion of law that the land purchased by Sweedlund from Erick-

son should be held to have been discharged from the lien of this mortgage. From finding No. 4 it appears that Criss was employed by Charles Hutchinson to make real-estate loans for the Colonial & United States Mortgage Company; but the scope of his agency, as disclosed by that finding, was not broad enough to authorize him to bind Hutchinson to carry out the agreement set out in finding No. 10. But the employment of Criss by Hutchinson to make real-estate loans only continued until January 1, 1888; and thereafter, during that year, Criss, in making loans for the Colonial & United States Mortgage Company, acted as the representative of the Hutchinson Mortgage Company. It also appears by finding No. 6 that, during the years 1887 and 1888, Criss was employed by Hutchinson with specific authority to collect the interest and principal on real-estate loans held by him in Saline county, as they became due; but Hutchinson's \$1,000 loan to Erickson was not due at the time the contract mentioned in finding No. 10 was entered into between Criss and Sweedlund. By that transaction, Criss was making no collection either of interest or principal on a real-estate loan held by Hutchinson; but on the contrary, by the terms of that agreement, the entire security for the payment of that \$1,000 mortgage was to be discharged in consideration of the execution by Sweedlund and wife of a note in favor of the Colonial & United States Mortgage Company for \$800, and a mortgage on one-half of the real estate which was then covered by the Hutchinson mortgage, as security therefor. But the court does not find that Criss, as the agent of Hutchinson, agreed that this \$1,000 mortgage should be released. The finding is that Criss made that agreement in his representative capacity, as agent for the Hutchinson Mortgage Company. The fact that the same persons who did the work for the Hutchinson Mortgage Company, under its agency for the Colonial & United States Mortgage Company, also performed the work under the prior agency of Charles Hutchinson, would not authorize Sweedlund to interpose, as a defense to this action, an agreement made by Criss, as the agent of the Hutchinson Mortgage Company, that this mortgage should be released in consideration of the execution by Sweedlund and wife of a note for \$800 in favor of the Colonial & United States Mortgage Company, secured by a mortgage on real estate.

The assignment of error in overruling the motion for a new trial is based upon the contention that the findings of the court are not supported by the evidence, and our attention is directed by counsel to the testimony of Sweedlund and Criss with reference to the claimed authority of the latter to contract in the name of Hutchinson for the release of this mortgage. If any such authority existed, it was by virtue of the contents of letters of correspondence which passed between Hutchinson and Criss, but which were not introduced in evidence. This alleged correspondence was



carried on at the special request of Sweedlund. The proposition which Criss claimed to have submitted to Hutchinson, and which was accepted by him, as shown by the record, was substantially that the latter consent to surrender the security which he then held on 160 acres of land, and accept in lieu thereof a lien on 80 acres, which was not then covered by his mortgage, thus enabling Sweedlund, who had purchased one-half of the 160-acre tract, to acquire title thereto, unincumbered by any lien thereon in excess of \$800. There was some evidence introduced tending to discredit the testimony of the defendant's witnesses concerning the purport of this correspondence; and as the court made no special findings that such a proposition was ever submitted to Hutchinson, and accepted by him, and as the general finding was in favor of the plaintiffs, and, as such, must be treated as a finding in their favor of every essential fact necessary to be established in order to entitle them to a recovery, it must be presumed that the court found, under the evidence, that no such proposition was made to or accepted by Hutchinson; but even if the fact were otherwise, and the court had so found, it would hardly be contended that Hutchinson could be required to release the entire security held by him until there was, at least, a tender of the mortgage which was to be given in exchange for such release, and the record fails to show either a tender of such mortgage or that the same was ever executed. Under the evidence and the findings of the court, Criss, as the agent of Hutchinson, had no authority to obligate the latter to discharge his mortgage. The record fails to show, and the court does not find, that Sweedlund was warranted in the belief that Criss had such authority. Under the pleadings, the burden of proof was upon Sweedlund. Upon conflicting evidence, the court found in favor of the plaintiff. Sweedlund failed to point out any errors of the court which entitle him to a new trial, and the judgment must therefore be affirmed.

GILKESON, P. J., concurs. GARVER, J., not sitting, having been of counsel in the court below.

(5 Kan. App. 880)

**SULLIVAN et al. v. BOARD OF COM'RS OF CLOUD COUNTY.**

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

**REVIEW ON APPEAL—WEIGHT OF EVIDENCE.**

1. Recognizing the rule that "where there is some evidence to support the verdict of the jury," or "where the evidence is conflicting, an appellate court will accept the decision of the triors, and not disturb the verdict," yet, where the facts are undisputed, and there is not only no testimony to support the verdict, but a total failure thereof to sustain the defense, it is the duty of an appellate court to set aside the verdict and reverse the judgment.

2. The mere fact that the jury are the exclusive judges of all questions of fact submitted to them does not justify the judge of the trial court in

declining to examine the sufficiency of the evidence upon which the verdict rests, when it is challenged by motion for new trial; and whenever it is manifest that the jury have found against the clear weight of the evidence, and the party asking for a new trial has not in all probability had a fair trial, nor received substantial justice, it is his imperative duty to set aside the verdict, and grant a new trial.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by Charles Sullivan and George Steinmetz against the board of county commissioners of Cloud county, Kan. Judgment for defendant, and plaintiffs bring error. Reversed.

E. W. Moore and W. A. Matson, for plaintiffs in error. A. L. Wilmoth, for defendant in error.

GILKESON, P. J. In the spring of 1887 the county commissioners of Cloud county, Kan., entered into a contract with one John S. Huntley for the erection of a courthouse for the contract price of \$38,500. Huntley thereafter made a subcontract with Sullivan & Steinmetz to do the brick and stone work on the building, and to furnish the material therefor, according to the plans and specifications, for the sum of \$18,500. The county commissioners, at the time of letting this contract to Huntley, employed the firm of W. R. Parsons & Son, of Topeka, Kan., as architects and superintendents of this work, and also one F. A. La Rocque, as a local superintendent of the work. About the 1st of May, 1887, Sullivan & Steinmetz entered upon the performance of their contract, and about this time it was discovered that it would be necessary to make the foundation deeper. Shortly after this it was decided by the county commissioners to use St. Louis pressed brick instead of Kansas City brick, and the county commissioners agreed to pay the difference in the cost thereof, which consisted principally of the difference in freight. Subsequently it was decided by the county commissioners to increase the dimensions of two stacks (chimneys) from 9 to 18 inches, and later it was found that one of the walls of the building had to be increased in thickness to support a certain beam. All of this work was extra additional work, outside of and not covered by the contract, was so considered by the county commissioners, and they expected to pay for it as extras; and to recover for this extra work. Sullivan & Steinmetz brought this action, alleging the performance thereof, and the price, as follows:

To extra excavation in foundation...	\$ 100 00
To extra stone work on foundation by reason of the excavation.....	350 00
To extra work on stacks (chimneys)...	250 00
To extra work on wall.....	25 00
To pressed brick.....	467 50
	<b>\$1,192 50</b>

The defense interposed by the county commissioners is that no part of this work was done by Sullivan & Steinmetz; that they con-

tracted with them to do the work as the representatives of John S. Huntley, and that it was so done; and that they paid Huntley for the same. Case tried to court and jury, no special findings returned, and general verdict in favor of defendants, county commissioners.

The plaintiffs in error contend that the verdict in this case is not supported by, but is contrary to, the evidence, and therefore the court erred in overruling their motion for a new trial. There is no conflict of testimony in this case,—no dispute as to the facts above stated; and, in addition to those above set forth, there is not a scintilla of evidence contradicting that Sullivan & Steinmetz performed this work, and that the price charged therefor is its reasonable price, and that Sullivan & Steinmetz were ordered to do it either by Parsons & Son, the architects and superintendents, or by La Rocque, the local superintendent, and that they were ordered to have it done, and authorized by the board of county commissioners to make any and all corrections or changes in the plans that were necessary; that the St. Louis brick was used in place of the Kansas City brick, and that Sullivan & Steinmetz paid for them. Nor is there any testimony to support the defense that Sullivan & Steinmetz did this work as the representatives of John S. Huntley, or that they were his representatives. There is no testimony to show that the commissioners or their agents had any direct communication with Huntley about these matters, and it is conceded that he was not at Concordia at the time, was only there two or three times, and that he had representatives there, Mr. Tebrou and Mr. Richards, who looked after his interests; and it is positively testified to and uncontradicted that Huntley did not know that the excavating and extra stone work were done until long after they were completed; nor is it shown that he ever knew of the other changes. While it is true that Bramwell, the chairman of the board, testified that "we expected the work to be done by Huntley," and he supposed at the time that Sullivan was the superintendent, he is the only witness (although every member of the board was a witness) that so testified. La Rocque testified that Huntley told him that Sullivan was his superintendent, but not in Sullivan's presence, and before Sullivan came to Cloud county. This was objected to, and the objection should have been sustained. It is also shown by the testimony that a county warrant No. 8,577 was drawn for this extra work on the foundation, amounting to \$377.40, payable to J. S. Huntley; but it shows on its face that it was for "extra work of Sullivan & Steinmetz for foundation," and was drawn by this same man Richards as Huntley's representative, and when paid was indorsed by Richards. But suppose this warrant did not show what it was for, or if it was shown that all of this extra work had been paid for to Huntley; would this release the county from its obligation to Sullivan & Steinmetz? We

think not. It was their duty to know that they paid the right party, and to inquire who was entitled to the pay. If they did not, this and every other payment they might have made was at their peril. Or would the fact that they paid Huntley for Sullivan & Steinmetz's work prove that they were doing this work for Huntley, or were his representatives, without at least a showing that Sullivan & Steinmetz knew they were so paying? We think not. Under the uncontradicted, undisputed, admitted facts in this case, there is not a particle of testimony to support the verdict of the jury, and under the defense there is a total failure of proof. While we agree with the defendant in error "that where there is some evidence to support the verdict of the jury, or where the evidence is conflicting, an appellate court will accept the decision of the triors, and not disturb the verdict," yet, where the facts are undisputed, and there is no testimony to support the verdict, and a total failure of testimony to sustain the defense, it is the duty of an appellate court to set the verdict aside, and reverse the judgment rendered thereon. "The mere fact that the jury are the exclusive judges of all questions of fact submitted to them does not justify the judge of the trial court in declining to examine the sufficiency of the evidence upon which the verdict rests, when it is challenged by motion for new trial; and whenever it is manifest that the jury have found against the clear weight of the evidence, and that the party asking for a new trial has not in all probability had a fair trial, nor received substantial justice, it is his imperative duty to set aside the verdict, and grant a new trial." *Mining Co. v. Stoop* (Kan. Sup.) 43 Pac. 766. The judgment in this case will be reversed, and case remanded for a new trial. All the judges concurring.

(5 Kan. App. 185)

**WEBBER et al. v. HARSHBARGER,**  
Sheriff.

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

**DORMANT JUDGMENT—ORDER OF SALE.**

In an action before a justice of the peace, wherein property is attached, and after judgment, and within five years from the date thereof, an order of sale is issued by the justice for the disposition of the property so attached, such order of sale comes within the meaning of the term "execution" used in paragraphs 4542, 4989, Gen. St. 1889, and is sufficient, if regularly issued, to prevent the judgment from becoming dormant.

(Syllabus by the Court.)

Error from district court, Lincoln county; W. G. Earland, Judge.

Action by Jacob Webber, Sr., and Jacob Webber, Jr., against Jacob Harshbarger. Judgment for defendant, and plaintiffs bring error. Affirmed.

David Ritchie and Ira C. Buzick, for plaintiffs in error. E. A. McFarland and W. J. Sturgis, for defendant in error.

GILKESON, P. J. On the 14th day of March, 1887, J. B. Watkins obtained a judgment against the plaintiffs in error before a justice of the peace of the city of Beloit, in Mitchell county, Kan., for the sum of \$102.90. In this action certain property had been attached. Thereafter, and on the 5th day of April, 1887, an order of sale was issued by said justice of the peace to sell the property, to wit, corn, that had been attached as aforesaid. Subsequently, and upon April 2, 1892, an execution was issued upon said judgment. Afterwards, and upon the 6th day of July, 1892, an abstract of said judgment was filed in the office of the clerk of the district court of Mitchell county, and on the 7th day of July, 1892, an execution was issued out of said district court, and again, on the 7th day of December, 1892, another execution was issued out of said district court upon this judgment; and to restrain the collection of this judgment the plaintiffs in error, as plaintiffs below, brought suit against the defendant in error, as sheriff of Lincoln county, Kan., in the district court of said county, alleging that, as no execution had been issued on said judgment until after five years from the date thereof, said judgment was and did become dormant prior to the filing of the pretended abstract in the office of the clerk of the district court aforesaid, and that said execution in the hands of the sheriff was and is void upon its face, for the reason that it fails to show that said judgment had been kept alive, but in fact showed that said judgment was, at the time of the issuance thereof, dormant. Upon application to the probate judge of Lincoln county, a temporary injunction was by said judge issued, which was afterwards dissolved upon motion made in the district court of Lincoln county. And it is from this judgment of the district court the plaintiffs appeal, and bring the case here for review, alleging as errors: (1) That the district court of Lincoln county erred in holding that said judgment rendered in the justice court was not dormant at the time the abstract of judgment was filed in the district court; (2) that the court erred in holding that the order to sell the property attached issued on the 5th day of April, 1887, was equivalent to the issuance of a general execution for the purpose of keeping the judgment alive.

There is but one question in this case,—was the judgment dormant at the time the abstract was filed? If so, all of the subsequent proceedings are void. This question turns upon the effect to be given to the issuance of the order to sell the attached property in the case in the justice court, to wit, April 5, 1887. What is, then, an execution? "Execution, in practice, is the putting of the sentence of the law in force." 3 Bl. Comm. 412. "The act of carrying into effect the final judgment and decree of the court. The writ which directs and authorizes the officer to carry into effect such a judgment is called an execution." Bouv. Law Dict. And this definition has

been adopted by nearly every state in the Union. "An execution at law is a writ issuing out of a court, directed to an officer thereof, and running against the body or goods of a party." *Brown v. U. S.*, 6 Ct. CL 178. "Writ of execution is a written command or precept to the sheriff or ministerial officer, directing him to execute the judgment of the court. It is the command of the court, addressed to the ministerial officer, in writing, and under the seal of the court, containing with more certainty the command of the court, and expressed with more solemnity than if uttered verbally by the court." *Kelley v. Vincent*, 8 Ohio St. 420. "Execution is process authorizing the seizure and appropriation of the property of a defendant for the satisfaction of a judgment against him." *Lambert v. Powers*, 36 Iowa, 20. "An execution is properly defined to be the obtaining of actual possession of anything acquired by judgment of law, and necessarily goes on all final judgments." *Lessee of Darby v. Carson*, 9 Ohio, 150. "An execution is the end of the law. It gives the successful party the fruits of his judgment." *U. S. v. Nourse*, 9 Pet. 28.

Let us now compare the so-called "order of sale" issued in this case, and apply to it the definitions above quoted. It is as follows: "State of Kansas, Mitchell County: ss.: The state of Kansas, to the sheriff or any constable, of city of Beloit, in said county, greeting: Whereas, J. B. Watkins, on the 14th day of March, 1887, in an action then pending before the undersigned justice of the peace of said township, recovered judgment against Jacob Webber and Jacob Webber, Jr., for the sum of one hundred and two and  $\frac{90}{100}$  dollars and costs of suit twenty and  $\frac{20}{100}$  dollars; and whereas, an order of attachment in said action was on the 4th day of March, 1887, levied upon the following goods and chattels of said debtor remains unsold and in your hands, to wit, 75 bushels of corn in pile (snapped): Now, therefore, you are hereby commanded that of said goods and chattels of the said debtor you cause said judgment, costs, and accruing costs to be satisfied, as provided by law. And make return of this order with your certificate thereof showing the manner in which you have executed the same within thirty days from the time of your receipt hereof. Witness my hand, at city of Beloit, in said county, this 5th day of April, A. D. 1887. Chas. F. Bozell, Justice of the Peace." Is it not a writ directing and authorizing the officer of a court to carry into effect its judgment issued out of a court, running against the goods of a party? Is it not a written command or precept to the sheriff or ministerial officer authorizing the appropriation of the property of the defendant for the satisfaction of the judgment against him? Does not the officer, by this writ, obtain possession of the goods acquired upon judgment, and does it not give to the successful party the fruits of his judgment? But it is contended by the plaintiff in error that this "is an order of sale,"

and consequently cannot come within the meaning of section 445 (paragraph 4542, Gen. St. 1889) of the Code as the term "execution" alone is used in that paragraph, which reads: "If execution shall not be sued out within five years from the date of any judgment that now is, or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant and shall cease to operate as a lien on the estate of the judgment debtor." And the same is true of paragraph 4989, Gen. St. 1889 ("Procedure—Civil, before Justice"), which reads as follows: "Execution for the enforcement of a judgment before a justice of the peace may issue by the justice before whom the judgment was rendered, or by his successor in office on the application of the party entitled thereto, at any time within five years from the entry of the judgment, or the date of the last execution issued thereon." Paragraph 4539, Gen. St. 1889 (Code Civ. Proc. § 442), reads: "Executions are of four kinds: (1) Against the property of the judgment debtor. (2) Against his person. (3) For the delivery of the possession of real or personal property, with damages for withholding the same, and costs. (4) Executions in special cases." Paragraph 4543 describes the first kind of execution, paragraph 4604 describes the second, paragraph 4614 describes the third, and paragraph 4616 describes the fourth. We fail to find anything in paragraph 4542 or 4989, which limits or restricts the execution provided for therein to any one of the four classes of execution known to our law, yet it is contended by the plaintiff in error that the "execution" contemplated in paragraph 4542, supra, is of the first class, viz. "against the property of the judgment debtor," or, as he termed it, a "general execution," which directs the officer that "of the goods and chattels of the debtor he cause to be made the money specified in the writ, and for want of goods and chattels he cause the same to be made of the lands and tenements of the debtor." We fail to see any force in this argument, and, if the case at bar was controlled exclusively by the proceeding applicable to the district court, it would have no effect; but it is not. The writ complained of was issued by the justice of the peace during the time he had exclusive jurisdiction of the case, and is undoubtedly an execution, within the meaning of paragraph 4091 ("Procedure—Civil, before Justices"), which reads as follows: "The execution must be directed to a constable of the county, and subscribed by the justice by whom judgment was rendered, or by his successor in office, and must bear date the day of its delivery to the officer to be executed. It must intelligibly refer to the judgment by stating the names of the parties, and the name of the justice before judgment and of the county and township where, and the time when, it was rendered, the amount of the judgment, and, if less than the whole is due, the

true amount due thereon. It must require the constable substantially as follows: (1) If it be a case where the defendant cannot be arrested, it must direct the officer to collect the amount of the judgment out of the personal property of the debtor and pay the same to the party entitled thereto. (2) If it be a case where any of the judgment debtors are certified as sureties, it shall command that the money be made of the personal property of the principal debtor, and, for want thereof, of the personal property of the surety. In such a case, the personal property of the principal, subject to execution within the jurisdiction, shall be exhausted before any of the property of the surety shall be taken in execution. (3) If it be an action where the defendant may be arrested, in addition to the foregoing, it must direct the officer, if sufficient property of the defendant subject to execution, cannot be found to satisfy the judgment, that he arrest the debtor and commit him to the jail of the county until he pays the judgment or be discharged according to law, unless the execution be accompanied by an order of arrest. (4) It must, in all cases, direct the officer to make return of the execution, and a certificate thereon, showing the manner in which he has executed the same in thirty days from the time of his receipt thereof." Now, it nowhere appears in the above section that the officer is directed to make any of this debt out of real estate; on the contrary, he is confined and limited to personal property. Hence the argument that a general execution under which an officer can have recourse to the whole estate of the debtor fails.

Our view of this case is strengthened by very many other rules of law and statutory enactments. For instance, it is well established that "property not subject to execution cannot be attached." If we look to the procedure governing attachments before justices of the peace, we find that in reference to the satisfaction of a judgment paragraph 4893 provides: "If judgment be rendered for the plaintiff, it shall be satisfied as follows: So much of the property remaining in the hands of the officer, after applying the money arising from the sale of personal property, and so much of the personal property, if any, as may be necessary to satisfy the judgment, shall be sold by order of the justice under the same restrictions and regulations as if the same had been levied on by execution." And we are satisfied that "the order of sale" issued by the justice of the peace in this action is within the meaning of the term "execution," used in paragraphs 4542 and 4989, supra, and is sufficient to prevent the judgment becoming dormant, if regularly issued; and the regularity of the issuance in this case is not questioned. The spirit and intent of the statutes is that, where a party has slept upon his rights under a judgment for five years, it shall no longer be considered as a live judgment, but he cannot be said to have done this when he has had issued a writ for the purpose of subjecting the defendant's property to the payment of the judgment within the time required

by law, and we cannot believe that a writ that includes every element and ingredient necessary, and the express object of which is "to secure to the successful party the fruit of his judgment," which is in fact an execution, can be ignored merely upon account of its name, or what the printer, in making the blank, has seen fit to call it. The judgment in this case will, therefore, be affirmed. All the judges concurring.

(5 Kan. App. 192)

GERMAN-AMERICAN NAT. BANK v.  
THOMSON.

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

APPEAL—REVIEW—FINDINGS BY JUDGE.

Where a case is tried by the court, and a general verdict is made in favor of the defendant, and no special findings are requested or made, the general finding includes every material fact necessary to sustain the judgment based upon such finding; and, where there is some evidence to support the general finding and judgment, they will not be disturbed.

(Syllabus by the Court.)

Error from district court, Marshall county; R. B. Spilman, Judge.

Action by the German-American National Bank against C. T. Hessel and J. M. Clark. Judgment for plaintiff. Frank Thomson, receiver of the State Bank of Irving, filed a motion for an order that the money from the sale be paid over to him. From an order sustaining the motion, plaintiff brings error. Affirmed.

Glass & Polock, for plaintiff in error. John A. Broughton, for defendant in error.

GILKESON, P. J. During the year 1889, and previous thereto, the State Bank of Irving was engaged in a general banking business at Irving, Marshall county, Kan., and A. C. Emmons was the president thereof. On the 25th of November, 1889, Hessel & Clark were indebted to said bank upon their certain promissory note in the sum of \$1,000, payable four months after date, and drawing interest at the rate of 10 per cent. per annum. On December 2, 1889, the said State Bank of Irving, through its president, applied to the German-American National Bank of Kansas City, Mo., for a loan of \$2,000 upon 60 days' time, and as security therefor pledged the note of Hessel & Clark, with several others, in the manner following: "\$2,000.00. Kansas City, Mo., Dec. 2nd, 1889. Sixty days after date we promise to pay to the order of A. C. Emmons, German-American National Bank, Kansas City, Mo., two thousand dollars, value received, having deposited or pledged with him as collateral security, with authority to sell the same at public or private sale or otherwise, at his option, on the nonpayment of this promise, and without notice, one note of \$1,000.00, dated Nov. 25th, 1889, at 4 months, signed 'Hessel & Clark.' \* \* \*

The State Bank of Irving, by A. C. Emmons,

Pt." Indorsed: "Payment guaranteed. A. C. Emmons. Received on within note \$1,203.19, July 20th, 1890." Prior to the date of this \$2,000 note, the State Bank of Irving, was indebted to the German-American National Bank upon a loan of \$5,000, and on December 14, 1889, this loan was renewed, and a new note given therefor in the following form: "\$5,000.00. Kansas City, Mo., Dec. 14, 1889. Ninety days after date we promise to pay to the order of Jas. G. Stearns, Cash. German-American National Bank, Kansas City, Mo., five thousand dollars, value received, having deposited or pledged with him as collateral security, with authority to sell the same at public or private sale or otherwise, at his option, on the nonpayment of this promise, and without notice: 1 note, C. G. Magnussen, \$150.00; 1 note, Garen Reid, \$1,600.00; 1 note, W. A. Woodworth, \$600.00; 1 note, C. G. Magnussen, \$1,500.00; 1 note, L. N. Clark, \$877.50; 1 note, R. H. Swanson, \$412.23; 1 note, Chas. A. Schalz, \$683.70,—at six months from Aug. 31, 1889, and F. E. Edwards, \$1,000.00, 9 mo., 8—3—89. And it is hereby understood and agreed that the collateral upon this note shall be applicable upon any other note or claim held by the said \* \* \*, or the legal holder hereof, against \* \* \*; and in case of an addition to the collateral above described, the promisor of this note shall extend to such new or additional collateral. State Bank of Irving, by A. C. Emmons, Pt." Shortly after this renewal note was given, the State Bank of Irving failed, and Frank Thomson, the defendant in error, was appointed receiver about May, 1890. The loan of \$2,000 not having been paid, the German-American National Bank brought suit in the district court of Marshall county, Kan., on the \$1,000 note of Hessel & Clark, security for said loan, and obtained judgment thereon. Upon this judgment several payments were made by Hessel & Clark, and received by the German-American National Bank. On October 28, 1892, there was in the hands of the sheriff or clerk of the court \$312.60, a balance paid upon the judgment rendered against Hessel & Clark; and thereupon the defendant in error, as receiver of the State Bank of Irving, filed his motion in district court aforesaid, alleging that the loan of \$2,000 made by the German-American National Bank to the State Bank of Irving, and to secure which this note of Hessel & Clark had been pledged, had been fully paid, and asking that the balance of said judgment then in the hands of said officers be turned over to him as assets of the State Bank of Irving. Upon the hearing of this motion by the court it was admitted that upon this loan of \$2,000 there had been paid the sum of \$1,202.19, and that, in addition thereto, there had been paid as proceeds of the judgment on the \$1,000 note the following sums, \$324.75, \$275, and \$311, which had also been applied upon the loan of \$2,000, making a total payment on said loan of \$2,-

112.94, and that the sum of \$312.60 was in the hands of the officers. The German-American National Bank, contending that they were entitled to this balance by reason of an agreement made by it with the State Bank of Irving, at the time the \$2,000 was loaned, that any collateral given to secure this loan should, after it was paid, be held by them as collateral to and applied upon the other loan of \$5,000. The court found for the receiver, Frank Thomson, and ordered the sum of \$312.60 be paid over to him. Of this ruling the German-American National Bank complains, and brings the case here for review.

The only question presented for our consideration is, did the court err in admitting certain testimony? The other question raised by plaintiff in error is upon the weight of certain testimony, upon which we will not pass. The issues in this case are purely of fact, and, they having been passed upon by the court upon a full and fair hearing, will not be disturbed. "When a case is tried by the court, and a general finding is made in favor of the defendant, and no special findings are requested or made, the general finding includes every material fact necessary to sustain the judgment based upon such finding; and, where there is some evidence to support the general finding and judgment, they will not be disturbed." *Kirwan v. Bank*, 2 Kan. App. 687, 43 Pac. 796. And there is not only some evidence to support the general finding in this case, but the evidence strongly supports every material fact necessary to be found in this case to support the judgment; and this is true even if the testimony objected to by the plaintiff in error had been excluded. We have very carefully examined the record in this case, and are convinced that there was a full, fair, and impartial hearing of the motion. The learned trial judge earnestly and closely investigated the facts, and, even if we were to concede that some of the testimony admitted by him against the plaintiff in error was close to the line of strictly competent testimony, the same may be said of testimony admitted in their favor; but, as we have said, there is shown by the record a strong disposition on the part of the court to fully investigate and understand the question presented. The errors be committed, if any, are clearly immaterial, and his judgment is upheld by sufficient strictly legal testimony, and we cannot perceive how the defendant in error has been prejudiced in the least. The judgment of the court will therefore be affirmed. All the judges concurring.

(5 Kan. App. 225)

#### RIHODES v. AULD.

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

#### INJUNCTION BOND—DAMAGES.

1. In an action on an injunction bond only such damages are recoverable as are the nat-

ural and necessary or proximate results of the injunction, and within the reasonable contemplation of the parties.

2. When an injunction bond is given, and a sale, by the sheriff, of attached personal property, is thereby prevented, and it is thereafter determined that the injunction was wrongfully obtained, a surety on such bond is not liable for the wrongful disposal of the property by a party to the action to whom the property was surrendered pursuant to a subsequent order of the court, and upon the security of another bond given for the forthcoming of the property.

(Syllabus by the Court.)

Error from district court, Marshall county; R. B. Spillman, Judge.

Action by J. B. Auld against T. F. Rhodes. Judgment for plaintiff. Defendant brings error. Reversed.

W. W. & W. F. Guthrie, for plaintiff in error. E. Hutchinson and W. A. Calderhead, for defendant in error.

GARVER, J. This was an action brought in the district court of Marshall county by J. B. Auld against T. F. Rhodes upon an injunction bond executed by Rhodes, as surety for James S. Warden, in an action brought in said court, wherein James S. Warden was plaintiff and J. B. Auld and M. M. Haskin, as sheriff, were defendants. The material facts appear in the following special findings made by the trial court: "First. On the 2d day of March, 1887, J. B. Auld, who is the plaintiff in this suit, commenced a suit, numbered 2,843, in the district court of Marshall county, against Mary A. Jones, J. W. Jones, James S. Warden, and the First National Bank of Frankfort, Kansas, to recover the sum of \$1,000; and caused an order of attachment to be issued, which came into the hands of M. M. Haskin, sheriff of said county of Marshall, and was by him levied on certain personal property, which was appraised to be of the value of \$1,154; and on the 22d day of April, 1887, on application of the plaintiffs in said action, an order was made by the judge of said court, at chambers, directing said sheriff to sell said attached property as upon execution, and said sheriff, acting under said order, advertised said property to be sold on the 9th day of May, 1887. Second. On the 9th day of May, 1887, the said James S. Warden commenced a suit, numbered 2,863, in the district court of Marshall county, against the said J. B. Auld and M. M. Haskin, as sheriff, by filing his petition, duly verified, in which he claims to be the owner of the property attached in suit No. 2,843, and prayed that said Auld and Haskin be perpetually enjoined from selling said property, and that the same be surrendered to the said warden, and for a temporary injunction restraining said Auld and Haskin from making said sale of said property so advertised, or any sale thereof, until the further order of the court, and for an order that said property be surrendered to said Warden until the further order of the court; and on said petition, when filed, there was indorsed an order made by the judge of said court, at

chambers, that a temporary injunction issue as prayed for in said petition on the plaintiff therein giving an injunction bond to the defendant in the sum of \$2,000, and under said order the bond sued on in this action was executed and filed, and a temporary injunction issued, in obedience to which said sheriff, Haskin, proceeded no further with said sale, and retained said property in his possession under said order of attachment; that afterwards such proceedings were had in said injunction suit that on the 21st day of May, 1887, said James S. Warden obtained an order from the judge of said court that said sheriff, Haskin, should surrender to said Warden said attached property, on the execution by said Warden to said Haskin of a bond in the sum of \$2,500; conditioned that said Warden should return said property to the sheriff of said county on demand, when ordered by the court, or the judge thereof; that pursuant to said order, on the 28th day of May, 1887, there was executed and delivered to said sheriff the bond set out in the amended and supplemental answer of defendant T. F. Rhodes, filed in this suit, and thereupon said sheriff, in obedience to said order, on the 30th day of May, 1887, surrendered to said Warden said attached property, and he immediately took the same into his possession. Of the obtaining of said order, the giving of said bond, and the surrender of said property, said J. B. Auld had actual knowledge, but did not consent thereto. The said T. F. Rhodes had no knowledge whatever thereof. S. Reed, one of the sureties on said bond, at the time of its execution was, and ever since that time has been, solvent. J. B. Edwards, the other surety on said bond, at the time of its execution, and for some time thereafter,—how long is not shown by the evidence,—was also solvent." In the injunction suit an order allowing a temporary injunction was, on May 7, 1887, indorsed on the petition by the judge of the district court, as follows: "On reading the within petition and affidavit, it is ordered that a temporary injunction issue as prayed for, on the plaintiff giving an injunction bond to the defendant in the sum of \$2,000." The injunction bond, the one sued on in this case, was executed and approved May 9, 1887, and is as follows: "Whereas, James S. Warden has obtained an order of injunction against J. B. Auld and M. M. Haskin, sheriff, in an action pending in the said district court of Marshall county, state of Kansas, wherein the said James S. Warden is plaintiff, and the said J. B. Auld and M. M. Haskin are defendants, on his giving an undertaking to the said J. B. Auld and M. M. Haskin in the sum of two thousand dollars: Now, therefore, we, T. F. Rhodes and S. Warden, hereby undertake to the said J. B. Auld and M. M. Haskin in the sum of two thousand dollars, that the said James S. Warden shall pay to the said J. B. Auld and M. M. Haskin all damages which they, the said J. B. Auld, may sustain by reason of the issuing of said injunction and order of said court, if it should be finally decided

that the said injunction and order ought not to have been granted. Dated May 9, 1887." Trial was had, and judgment rendered in the attachment suit May 21, 1890, against Mary A. Jones and J. W. Jones, for \$849 debt and \$482.45 costs, and an order made for the sale of the attached property. In the injunction suit final judgment was rendered February 23, 1892, in favor of the defendants, dissolving the temporary injunction, and ordering a return by Warden of the property which had been theretofore delivered to him pursuant to the order of the court made May 21, 1887. The attached property was not forthcoming in either the attachment or injunction suits, the same having been converted by James S. Warden to his own use. The judgment of Auld against Jones remaining unsatisfied, this action was commenced, January 2, 1893, on the injunction bond, the plaintiff claiming the right to recover thereon the value of the attached property, which had been lost to him, together with the attorney's fees expended by him in the injunction suit. The district court found the value of the attached property to be \$1,250, and a reasonable attorney's fee in the injunction suit to be \$150, and for such sums rendered judgment against the plaintiff in error, Rhodes.

The main contention in this case is as to the extent of the liability of Rhodes upon this bond, and the measure of the damages recoverable thereon. In considering this question it is necessary to bear in mind that a surety is favorably regarded in law, and that his liability cannot be extended beyond the express terms of his agreement. Under this rule, as applied to the undisputed facts, we think it clear that Rhodes, as surety for Warden in the injunction proceedings, did not incur the liability for which he was held by the court. By the giving of the injunction bond the custody of the attached property was not changed or disturbed. It continued in the possession of the sheriff who had executed the writ of attachment. A portion of such property was live stock, and, because of the expense of keeping it, it was, pursuant to an order of the judge of said court, advertised to be sold on May 9, 1887. By the order allowing the injunction and the giving of the bond the sale was prevented, but beyond such interference with the making of an immediate sale of the property the bond had no effect. The evidence clearly shows that the sheriff continued in possession of the property after the execution of the bond, the same as before, no change whatever being made until May 30, 1887, when it was turned over and delivered to Warden pursuant to another and separate order. Such an order and delivery of possession could have been made in the attachment suit without regard to the injunction proceeding. Gen. St. 1889, pars. 4282, 4311. When the injunction bond was given, the parties thereto could have contemplated nothing more than the prevention of the proposed sale of the property, and the leaving of it in the cus-

tody of the officer. Its subsequent disposition was under another and entirely independent order of the judge, with which the surety on the prior bond was in no wise connected, and for which he cannot, either in fact or in law, be held responsible. That this was the view of the parties at the time is evident from the fact that the order for the surrender of the property to Warden was conditioned upon his giving another bond, with sureties, in the sum of \$2,500, for the return of the property when demanded. Such bond was given, and it was upon this order and bond alone that the sheriff parted with the possession of the attached property. Such bond, for the time, took the place of the property, and to it the attachment plaintiff had to look when the property was not forthcoming. These orders and bonds are as separate and distinct from each other as they would have been had the application for the custody of the property and the order therefor been made in the attachment case. The obligors in the injunction bond did not bind themselves to answer for any and every damage that might result in that action. The damages covered by the bond are only such as were sustained by reason of the injunction. They must be attributable to the order for the injunction, and be its natural and proximate consequences. When there is a new and independent intervening cause for an injury, it must be held to be the legal cause of such injury, rather than something which is remote, though indirectly connected therewith. We think, therefore, that in this case, so far as concerns the attached property, a surety on the injunction bond cannot be held liable for any disposition made of such property after its surrender by the sheriff to Warden. As the sale of the property was ordered for the purpose of avoiding the expense of its keeping, and the continuance of such expense from May 9, 1887, to May 30, 1887, was made necessary by reason of the injunction, and the value of the property, as a security for the plaintiff, was, to that extent, lessened, such expense, if necessarily and reasonably incurred, would be covered by the conditions of the bond. Likewise, the obligors therein would be liable for any depreciation in the value of the property, or for its loss, when such depreciation or loss is directly referable to the injunction, and occurred during the time possession was retained by the sheriff. As it was finally determined that the injunction should not have been granted, the bond is also holden for the necessary and reasonable expenses, including attorney's fees, incurred by the defendant in defending against that action. Stated briefly, we hold that on the injunction bond Warden and his sureties are liable for all damages sustained by Auld, with reference to the attached property, from May 9, 1887, to May 30, 1887, which were the natural and proximate results of the sale having been enjoined, and, in addition thereto, for the necessary and reasonable expenses, including attorney's fees, of defending against the injunction proceedings;

while Warden and his sureties, on the forthcoming bond given May 28, 1887, are liable for a return of the property, or the payment of its value. It follows, therefore, as the trial court did not observe these rules in fixing the liability of the plaintiff in error, that the judgment must be reversed.

Other errors are complained of and discussed in the brief of counsel for plaintiff in error, but, as they are not likely to occur upon another trial, we shall not treat of them in this opinion. The judgment will be reversed, and the case remanded for a new trial. All the judges concurring.

(5 Kan. App. 193)

**KERR v. HOSKINSON et al.**

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

**JUDICIAL SALES—PAYMENT OF TAXES—MORTGAGE FORECLOSURE.**

1. Taxes are always a lien upon the real estate upon which they are imposed, and are prior and paramount to any other lien or incumbrance; and courts of equity, in the foreclosure of mortgages, always have the power to ascertain what are liens upon mortgaged property, to determine their priority, and order that such liens be discharged out of the proceeds of the sale of such real estate, in accordance with their priority.

2. The provision—"or where any real estate shall be sold at judicial sale, or by administrators, executors, guardians, or trustees, the court shall order all taxes and penalties thereon against such to be discharged out of the proceeds of such sale"—of paragraph 6902, Gen. St. 1889, applies to and includes all unpaid taxes which have not ripened into tax deeds on the day of sale.

(Syllabus by the Court.)

Error from district court, Jewell county; Cyrus Heren, Judge.

Action by Jenet Kerr against W. N. and D. E. Hoskinson. Judgment for defendants, and plaintiff brings error. Reversed.

C. Angevine, for plaintiff in error. Kirkpatrick & Hodson, for defendants in error.

GILKESON, P. J. The plaintiff in error, as plaintiff below, filed her petition in the district court of Jewell county, Kan., on the 3d day of September, 1891, to foreclose a real-estate mortgage given by the defendants in error upon certain real estate therein described to secure the payment of a certain promissory note made, executed, and delivered by defendants, and in said petition prayed that the mortgaged premises be sold, and the proceeds applied (1) to the payment of any taxes and tax liens that may be due on said real estate, (2) to the payment of the costs of said suit and sale, and (3) to the payment of said judgment. The defendants were personally served with summons, and appeared and defended the action, and on the 7th day of March, A. D. 1892, judgment was rendered in favor of the plaintiff and against the defendants, and, among other things, it was ordered and adjudged that "the lands be appraised, advertised, and sold according to law in de-



fault of payment, and that the proceeds of said sale be applied first in satisfaction of the costs herein, then to the payment of all taxes and tax liens then due upon said premises, then to the payment of plaintiffs' judgment herein." Afterwards the premises were sold under such judgment, and purchased by the plaintiff in error for a sum less than the amount due on said judgment and costs. On the 8th of March, 1893, the plaintiff filed her motion to confirm said sale, and to order the sheriff to pay all taxes and tax liens due against said premises at the time of such sale out of the proceeds of sale, and setting up in said motion that the premises had been sold for taxes to some person other than the plaintiff, and also showing the amount required by law to redeem said premises from tax sale. It was admitted by all of the parties that the property had been so sold, and that the amount stated in the motion was correct. The court sustained the motion to confirm the sale, but overruled it as to the payment of taxes, and refused to order the sheriff to pay them out of the proceeds of sale.

The only question presented for our consideration is, did the court err in refusing to order the sheriff to pay the amount due on the tax-sale certificate out of the proceeds of the sale? Taxes are always a lien upon the real estate upon which they are imposed, and are always prior and paramount to any other lien or incumbrance. And courts of equity, in the foreclosure of mortgages, always have the power to ascertain what are liens upon the mortgaged property, to determine their priority, and to order that such liens be discharged out of the proceeds of the sale of such real estate in accordance with their priority. In this state a holder of a mortgage has two remedies: (1) He may pay the taxes, and then recover them back from the mortgagor, or have them included in the judgment rendered in his favor on foreclosure. Paragraph 7003, Gen. St. 1889: "In cases where lands are mortgaged, if the mortgagor fails or neglects to pay the taxes, or in case said mortgagor permits any land so mortgaged to be sold for any taxes, the mortgagee may pay said taxes, or redeem any land so sold for taxes. And on the payment of any such mortgage, or in the action to enforce the same, such mortgagee may demand the taxes so paid, with interest thereon at the rate of twelve per cent. per annum, or include them in any judgment rendered on the mortgage; and any taxes so paid by any mortgagee shall be a lien on such land so mortgaged until the same be paid." Or (2) he, as well as the mortgagor, may neglect to pay the taxes, and then he may have the amount thereof paid out of the proceeds of the sale of the mortgaged property on foreclosure. The statute upon this subject is: Paragraph 6902, Gen. St. 1889: "Whenever any land so held by tenants-in-common, shall be sold upon proceedings in partition, or shall be taken by the election of any parties to

such proceeding, or where any real estate shall be sold at judicial sale, or by administrators, executors, guardians, or trustees, the court shall order all taxes and penalties thereon against such lands to be discharged out of the proceeds of such sale." And it has been so often decided that it is no longer an open question in this state, that "in an action on a promissory note and real-estate mortgage, when there are taxes due on the mortgaged property, the court should, on the application of the plaintiff, in rendering judgment on the note and mortgage, order that the taxes due on such mortgaged property be first paid out of the proceeds of the sale of such mortgaged property." *Stancliff v. Norton*, 11 Kan. 218; *Sharp v. Barker*, Id. 381; *Brown v. Evans*, 15 Kan. 88; *Watterson v. Devoe*, 18 Kan. 223; *Opdyke v. Crawford*, 19 Kan. 604; *Alexander v. Shonyo*, 20 Kan. 708; *Seaman v. Huffaker*, 21 Kan. 263; *Reading v. Wier*, 29 Kan. 429, 430; *Insurance Co. v. Swayze*, 30 Kan. 122, 1 Pac. 36. But it is contended by defendants in error that, as this land had been sold for taxes, and a tax-sale certificate had been issued, paragraph 6902 of the General Statutes does not apply. We cannot agree with them. Our supreme court, in passing upon this section in *Galbreath v. Drough*, 29 Kan. 718, after stating the right of the mortgagee to have paid the taxes or redeemed the land, and had the amount included in his judgment, under paragraph 7003, says: "Further than this, if he had not redeemed before judgment, as the tax liens had not ripened into tax deeds on the day of sale, and for many months thereafter, he might have obtained a confirmation of the sale at the term of court following his purchase, and had the sheriff directed to satisfy all tax liens from the proceeds of the land;" citing section 40, c. 107, Gen. St. 1868, which is the same as paragraph 6902, Gen. St. 1889. Again, in *Brown v. Evans*, 15 Kan. 93, Mr. Justice Valentine, in delivering the opinion of the court, construing said section with reference to sales made by administrators, says: "This provision, when applied to sales of land by administrators, includes all unpaid taxes which have accrued against the lands, whether they have accrued before or after the death of the deceased owner, and include all unpaid taxes which have not yet merged into tax titles." And surely it cannot be said that the terms of the statute are any stronger against administrators than in reference to judicial sales. This construction of these statutes is so firmly fixed in this state that it may be said to have become a rule of property. We think the court erred in overruling the plaintiff's motion and refusing to order the sheriff to pay the tax liens against this property. The judgment, therefore, will be reversed, and cause remanded, with instructions to render judgment thereon sustaining the motion of the plaintiff as prayed for therein. All the judges concurring.

(5 Kan. App. 242)

**CITY OF LINCOLN CENTER v. LINKER.**

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

**INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.**

1. In a complaint charging the violation of a city ordinance by an unlawful sale of intoxicating or other liquors, it is not necessary to allege the name of the person or persons to whom such sale was made.

2. When a complaint charges the unlawful sale of a beverage called "American Hop Ale," the defendant cannot be convicted on proof of an unlawful sale of a different beverage, though of a similar kind.

(Syllabus by the Court.)

Appeal from district court, Lincoln county; W. G. Eastland, Judge.

Charles Linker was convicted of an illegal sale of liquor, and appeals. Reversed.

Geo. D. Abel and David Ritchie, for appellant. G. M. Meeks, C. B. Daughters, and F. H. Dunham, for appellee.

**GARVER, J.** The appellant, Charles Linker, was prosecuted in the police court of Lincoln Center on a complaint filed therein charging him with certain violations of Ordinances No. 113 and No. 139, relating to the sale of intoxicating liquors and other drinks. On an appeal taken by him to the district court, he was therein convicted on the sixth count of the complaint, which charged him with an offense under Ordinance No. 139, in the selling of a certain drink designated as "American Hop Ale" in a less quantity than one gallon. Said Ordinance No. 139, the validity of which has been sustained by the supreme court in *Re Jahn*, 55 Kan. 694, 41 Pac. 956, provided: "That it shall be unlawful for any person or persons in this city to barter, sell or give away any malt, hop tea tonic, ginger ale, cider, or any other drink of like nature no matter by what name it may be called, in less quantities than one gallon, or permit or allow the same to be drunk at any stand, store or other place of sale." Ordinance No. 113 prohibited the unlawful sale of intoxicating liquors, while Ordinance No. 139 was aimed at certain sales of nonintoxicating drinks.

The ruling of the court first complained of is its refusal to sustain the appellant's motion to quash the complaint. In this respect, no error was committed. The motion is general as to the whole complaint, which embraces seven separate counts. Hence, if any count was not open to the objection made, the motion was properly overruled. As against this motion, we think an offense was sufficiently charged in the sixth count. The special contention of counsel for the appellant is that the complaint is insufficient, because it fails to state to whom the unlawful sale was made. This, we think, was unnecessary. Although there is very far from uniformity in the decisions of the courts on this question, yet we think the better rea-

son and authority sustain the proposition that in this class of cases it is unnecessary to state to whom the unlawful sale was made. "The offense complained of worked no injury upon the individual rights of the person to whom the sale was made, and none was supposed to have been violated; and hence the designation of such person by name is in no way material to constitute the offense." *State v. Schweiter*, 27 Kan. 490, 512. See, also, *State v. Becker*, 20 Iowa, 438; *Cannady v. People*, 17 Ill. 158; *Myers v. People*, 67 Ill. 503; *State v. Jaques*, 68 Mo. 260; *State v. Bielby*, 21 Wis. 204; *State v. Munger*, 15 Vt. 290; *Riley v. State*, 43 Miss. 397; *People v. Adams*, 17 Wend. 475; *State v. Parnell*, 16 Ark. 506; *State v. Heldt*, 41 Tex. 220.

Error is also assigned upon the instructions of the court. For a conviction under the sixth count of the complaint the city elected to rely upon a sale made to one A. J. Harland. The court instructed the jury that they should find the defendant guilty on this count if they believed from the evidence that he sold to A. J. Harland any liquor to be used as a beverage in quantity less than one gallon, and that said liquor was of a like nature to beer, malt, hop tea, hop tea tonic, ginger ale, or cider. It is claimed by counsel for the city that the court mentioned beer in this instruction by inadvertence, and that it could not have influenced the verdict of the jury against the defendant. In another portion of the instructions we find the same improper designation of beer as one of the drinks covered by this count of the complaint. There is nothing in the instructions to suggest to the jury that the word "beer" was inadvertently used, and should not be considered by them. We think the instruction was clearly misleading. It is elementary that a defendant must be tried upon the identical charge which is preferred against him. He cannot be charged with doing one thing and be found guilty of doing another, even though a similar thing. Here the defendant was charged with selling a certain definitely named drink, called "American Hop Ale," alleged to be of a like nature with malt, hop tea tonic, ginger ale, and cider, and therefore prohibited by the ordinance. Such a charge cannot be sustained by proving the sale of something else. The city having seen proper to thus limit the charge, the court could not enlarge it as was attempted by the instruction complained of. Even had the word "beer" not been used, the instruction would be open to objection, for the reason that it did not limit the inquiry of the jury to the unlawful sale of a drink known as "American Hop Ale." That the complaint may have alleged the offense with unnecessary particularity, and thus have narrowed the inquiry before the jury, is not a matter for this court to consider. The judgment will be reversed, and the case remanded for a new trial. All the judges concurring.

(5 Kan. App. 222)

**WOLFERT v. MILFORD SAV. BANK.**

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

**FORECLOSURE SALE—SETTING ASIDE—INADEQUACY OF PRICE.**

While mere inadequacy of price alone is not sufficient to justify a court in setting aside a sheriff's sale of real estate, yet, when the equities of the party moving to set aside the sale are strong, and it fairly appears that such party was prevented by accident and mistake, and without negligence, from attending the sale, the ruling of the court setting aside a sale, on condition that a reasonable bid be made at the resale, will not be disturbed.

(Syllabus by the Court.)

Error from district court, Smith county; Cyrus Heren, Judge.

Action by the Milford Savings Bank against John W. Flora and others to foreclose a mortgage John Wolfert purchased at foreclosure sale. From an order setting aside the sale, he brings error. Affirmed.

Robinson & McBride, for plaintiff in error. Clark A. Smith, for defendant in error.

**GARVER, J.** At a sheriff's sale of real estate, made pursuant to a judgment of foreclosure of a mortgage in the district court of Smith county, John Wolfert, the plaintiff in error, became the purchaser. Thereafter, on application of the judgment creditor, the sale was set aside. Of this order complaint is now made by Wolfert. In the foreclosure action judgment was rendered in favor of the plaintiff therein, the Milford Savings Bank, for \$1,587.06; and the mortgaged premises, being a quarter section of land in Smith county, were ordered to be sold, if such judgment was not paid within six months. Under an order of sale, duly issued, the land was sold, May 1, 1893, to John Wolfert, for \$500. Motions to confirm and to set the sale aside were made by Wolfert and the Milford Savings Bank, respectively, and the same heard September 12, 1893, when the motion to confirm was overruled, and the motion to set aside was sustained. On the hearing of such motions, evidence was introduced tending to show that the land at the time of the sale was reasonably worth from \$1,800 to \$2,000; that the plaintiff, the Milford Savings Bank, being a nonresident of the state, relied upon its attorney, Clark A. Smith, to attend the sale, and protect its rights therein, and that he was authorized, as such attorney, to bid at said sale an amount sufficient to cover plaintiff's judgment; that, through accident and mistake, and without negligence on his part, mistaking the date when said sale was to be made, said attorney failed to be present at the sale, and the plaintiff was not otherwise represented. It also appeared that the purchaser, Wolfert, was the only bidder at the sale. In its motion, and again at the hearing thereof, the plaintiff tendered a bid for said land of \$1,800, and the order of the court setting aside the sale was conditioned upon such bid being

made. Ordinarily, mere inadequacy of price alone is insufficient to authorize the setting aside of a judicial sale. *Bank v. Huntoon*, 35 Kan. 577, 591, 11 Pac. 369. But, when other grounds intervene, gross inadequacy of price may be a fact of controlling consideration with the court. The purchaser at such sale has rights in which he should be protected. But his right to be assisted to the enjoyment of a great bargain or speculation is not of such a character as to override strong equities in favor of other parties. Upon the evidence presented to the court in this case the court found that there was not such fault or negligence on the part of the plaintiff or its attorney, in failing to attend the sale, as should bar it from the relief asked for in its motion. In such cases, especially when the sale is set aside, the court has a discretion which should be exercised in furtherance of justice, and with due consideration for the rights of all parties. *Moore v. Pye*, 10 Kan. 246; *Dewey v. Linscott*, 20 Kan. 684; *Fowler v. Krutz*, 54 Kan. 622, 38 Pac. 808. It must be admitted that the property in this case was struck off at a grossly inadequate price, leaving a deficiency judgment for a large amount against the judgment debtors. Under the ruling of the court of which complaint is made the plaintiff's claim will be satisfied, and the judgment debtors relieved of the burden of their debt. This will be accomplished without any prejudice to the plaintiff in error, except the loss of opportunity to make a great profit at the expense of other innocent parties. Under the evidence and the facts as presented to the trial court, we cannot say that any substantial error was committed. We arrive at the foregoing conclusion by assuming that a complete record of the proceedings is before us, although there is nothing to show that fact outside of the certificate of the trial judge. As the errors complained of arose upon the testimony presented on the hearing of the motions, it is necessary, to warrant a review thereof, that the record affirmatively show that it is full and complete. The certificate of the trial judge alone is insufficient. *Lebold v. Bank*, 51 Kan. 381, 32 Pac. 1103. The ruling of the court sustaining the motion to set aside the sale is affirmed. All the judges concurring.

(5 Kan. App. 217)

**THISLER et al. v. MACKEY et al.**

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

**SALE OF PERSONALTY—STATUTE OF FRAUDS.**

A contract concerning personal property, not in writing, which does not admit of a possible performance within one year, is void under the statute of frauds and perjuries, notwithstanding there may have been a partial performance thereof.

(Syllabus by the Court.)

Error from district court, Geary county; James Humphrey, Judge.

Action by O. L. Thisler and James Spilman against W. H. Mackey, Jr., and Henry Staatz.

Judgment for defendants, and plaintiffs bring error. Reversed.

James Ketner and Stambaugh & Hurd, for plaintiffs in error. J. R. McClure and J. V. Humphrey, for defendants in error.

GILKESON, P. J. During the month of February, 1891, the defendants Mackey & Staats, who were partners in the livery business at Junction City, Kan., went to the farm of O. L. Thisler, one of the plaintiffs, who was engaged in the business of buying and selling coach and draft stallions in Dickinson county, Kan., to examine some stallions he there had for sale. Among them was one called "Kepi," No. 585, which was owned by Thisler and Spilman in partnership. Negotiations were there begun for the purchase and sale of this horse. At least, the terms of sale and purchase were agreed upon. On the 23d day of February, 1891, Thisler sent one of his men with the horse to Junction City, and also sent with him, at the same time, a written bill of sale, containing covenants of warranty with respect to the horse being a reasonably sure foal getter, giving his name, number, and other like matters; also, three promissory notes, of \$400 each, in accordance with the terms of sale previously agreed upon. The horse and bill of sale were delivered to the defendants, and at the same time they executed the three notes, and delivered them to Thisler's agent, together with a certain draft stallion owned by the defendants, which Thisler had agreed to take in part payment for the horse Kepi. These notes and the stallion were by the agent delivered to Thisler. Subsequently, the defendants paid Thisler \$100 in cash, which had also been previously agreed upon. The notes given by the defendants were to run, respectively, one, two, and three years. The first note falling due, not being paid, the plaintiffs brought suit for its recovery. In this action defendants filed answer, admitting the execution and delivery of the note, and that it was a part and parcel of an agreement, which was set out, as follows: "That on or about the twenty-third day of February, 1891, the said plaintiffs, being desirous of making a sale to said defendants of a certain stallion called 'Kepi,' No. 585, agreed with defendants that if defendants would receive said stallion, pay to the plaintiffs the sum of four hundred dollars down, and execute and deliver to plaintiffs their promissory note for the sum of twelve hundred dollars therefor, they (the said defendants) might retain the possession of said stallion until he became four years old, and, after the expiration of said time, have the option to return said stallion to plaintiffs, who agreed to receive him back, and repay said defendants the sum of \$400, paid by them, and also \$100 in addition, and cancel the notes of \$1,200. That, relying on plaintiffs' agreement as aforesaid, defendants consented to receive said stallion, and, on account thereof, paid them the sum of four hundred dollars, and executed and delivered their three certain promissory notes,

in the aggregate for the sum of \$1,200, to plaintiffs; and plaintiffs thereupon delivered to defendants, at their livery stable, in Junction City, Kansas, the said stallion. That thereafter, and shortly prior to the time said stallion became four years of age, and about the first day of February, 1892, defendants duly notified plaintiffs that they (defendants) desired plaintiffs to take back said stallion, according to their aforesaid agreement, and requested plaintiffs to take said stallion. That plaintiffs failed and refused to receive said stallion back, but forthwith entered into negotiations with defendants for a settlement of said transaction concerning said stallion in some other manner, and requested defendants to retain possession of said stallion during the course of such negotiations. That some time thereafter plaintiffs abruptly terminated said negotiations for settlement, refused to take back said stallion, and informed defendants they were about to institute suit against them on the note attached to plaintiffs' petition. That plaintiffs now have in their possession each of the three aforesaid notes, and the note set out in their petition is one of the same. Defendants say they are ready and willing to return said stallion to plaintiffs, if plaintiffs will receive him, and have been ready and willing to do so ever since said stallion became four years of age. Wherefore defendants ask judgment against said plaintiffs for the sum of five hundred dollars, with interest thereon at the legal rate from the first day of February, 1892; that plaintiffs may be required to surrender into court the aforesaid three promissory notes; and that the same be canceled; and that they be allowed their costs of action; and other proper relief." To this answer, plaintiffs filed a general denial. Trial had to court and jury. General verdict for defendants, and special findings as follows: "Q. Did the plaintiff, at the time of the sale of the stallion Kepi, agree to take him back at the price of \$1,700 after said stallion was over four years old, if the defendant then elected to return him? A. Yes. Q. Did the defendant offer to return the stallion Kepi after he was four years old, and did the plaintiff refuse to take him back? A. Yes. Q. Have the defendants, ever since said stallion was four years old, been ready and willing to return him to the plaintiffs, provided said plaintiffs would allow said defendants \$1,700 for him? A. Yes. Q. Since said stallion Kepi was four years old, has he been in sound condition? A. Yes. \* \* \*

All of the questions in this case can be disposed of by answering one: Is the contract relied upon by the defendants within the statute of frauds? This we must answer in the affirmative. It is conceded that the contract was not in writing, and was one which did not admit of possible performance within one year; and from these facts it is very clear that the defendants ought not to have succeeded, the contract being directly in conflict with the act for the prevention of frauds and perjuries, which provides: "That no action shall be brought \* \* \* upon any agreement that is not to be

performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized." Gen. St. 1889, par. 3166. And it is contended that it is taken out of the operation of the statute of frauds by partial performance. We cannot agree with counsel in this contention. We think that the doctrine that partial performance is not applicable to contracts for the sale of personal property has been settled in this state. *Osborne v. Kimball*, 41 Kan. 187, 21 Pac. 163. Mr. Justice Johnston, in delivering the opinion of the court in that case, says: "The doctrine of partial performance is not applicable to this class of contracts. It is confined only to those relating to lands, the non-execution of which would operate as a fraud upon the party who had made partial performance to such an extent that he could not be reasonably compensated in damages. It is an equitable principle, frequently invoked in actions for the specific performance of parol contracts for the purchase of land, under which possession has been taken, improvements made, and where there has been payment, or partial payment, of the purchase price. The courts are slow to introduce additional exceptions, or to depart further from the strict letter of the statute of frauds; and, even in the contracts of a class mentioned, full payment of the purchase money is not sufficient performance to take them out of the statute. *Nay v. Mograin*, 24 Kan. 80. We have heretofore had occasion to deny the enforcement of contracts other than those relating to lands, and which were not to be performed within one year, where they had been partially performed; and we see no reason to extend the doctrine to enforce such oral contracts upon the ground of part performance. *Wolf v. Dozer*, 22 Kan. 436; *Wonsettler v. Lee*, 40 Kan. 367, 19 Pac. 862. After distinguishing between the case at bar and the case of *Bard v. Elston*, 31 Kan. 275, 1 Pac. 565, which was cited by the plaintiff in that case to sustain his position, he continues: "The contract in question had no such characteristic, and could not be regarded as falling within any of the exceptions of the statute. It was simply an agreement that each should so fence as to protect his own premises, and prevent his cattle from passing upon the premises of the other; and, under the authorities, the equitable doctrine of part performance is never applied to this kind of cases, but is confined alone to contracts relating to land. *McElroy v. Ludlum*, 32 N. J. Eq. 828; *Brittain v. Rossiter*, 18 Am. Law Reg. (N. S.) 716; *Emery v. Smith*, 46 N. H. 151; *Wheeler v. Frankenthal*, 78 Ill. 124; *Creighton v. Sanders*, 89 Ill. 543. Under the facts in this case, we think the agreement is invalid. It is a verbal agreement, not to be performed within the space of one year, and not of such a character as to fall within any of the exceptions of the statute of frauds.

47 Pac.—12

One other question we will notice in this case: Can the statute of frauds be relied upon as a defense under a general denial? We think it can. "The general denial of the defendants raises the question of the statute, as well as any other answer could raise it." *Wiswell v. Tefft*, 5 Kan. 263; *Browne, St. Frauds*, § 511 et seq.; *Fry, Spec. Perf.* § 336; *Harris v. Knickerbacker*, 5 Wend. 638-643; *Cozine v. Graham*, 2 Paige, 177-181; *Bank v. Root*, 3 Paige, 478-481. The judgment in this case will be reversed, and remanded for further proceedings in accordance with the views herein expressed. All the judges concurring.

(5 Kan. App. 753)

## SKILTON v. HARREL.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 6, 1897.)

## FORECLOSURE SALE — RIGHT TO GROWING CROPS.

Growing crops pass, with the soil, to the purchaser at a mortgage sale, where there is no reservation or waiver of right to the crops at said sale. Nor does it vary the case because the tenant was not made a party to the foreclosure suit. The purchaser's rights are just the same as they would have been if the tenant had been made a party.

(Syllabus by the Court.)

Error from district court, Pratt county; W. O. Bashore, Judge.

Action by N. C. Skilton against Doddridge Harrel. Judgment for defendant. Plaintiff brings error. Reversed.

E. A. Harriman and B. D. Crawford, for plaintiff in error.

COLE, J. The defendant in error entered upon a certain piece of land as the tenant of one Bergen in March, 1889. April 12, 1889, an action was brought to foreclose a mortgage upon said land, and a decree was entered in said suit October 31, 1889, upon which decree a sale was had May 4, 1891. Defendant in error was not made a party in the foreclosure case. Plaintiff in error purchased the premises at sheriff's sale under the decree of foreclosure, and received a sheriff's deed May 5, 1891. At the time of said sale there were certain crops growing upon the land, which had been planted by the defendant in error. This action was brought by plaintiff in error to recover said crops or their value. The defendant in error contends that, as he was not made a party to the foreclosure suit, he is not bound by the decree therein, and, therefore, that the crops growing upon the land did not pass by the foreclosure sale. This seems to have been the view adopted by the trial court, and numerous errors are complained of by counsel for plaintiff in error.

We are clearly of the opinion that the trial court adopted an erroneous theory in this case. There was considerable conflicting testimony as to the nature of the tenancy of the defendant in error Harrel. The jury, in answer to certain special questions, find that

the tenancy was erected by an oral agreement, and that it began in March, 1889. The jury also find that said lease was to continue "as long as the defendant wants the land." This agreement, resting in parol, could only create, at the greatest, a tenancy from year to year, giving to the defendant in error, at the close of each year, the option of renewing the same. In this case the first year of the tenancy would expire in April, 1890, which was long after the commencement of the foreclosure action under which the plaintiff in error obtained title. Under such circumstances the defendant in error must be considered as having obtained an interest pendente lite. It has been frequently held in this state that growing crops pass with the land upon a foreclosure sale. *Beckman v. Sikes*, 35 Kan. 120, 10 Pac. 592; *Land Co. v. Barwick*, 50 Kan. 57, 31 Pac. 685. But defendant in error claims that a different rule applies in this case for the reason that he was not made a party in the foreclosure action. We are of the opinion that this would not change the rule. "The right of the purchaser was not and could not be defeated by reason of the lease, or by the fact that the possession was in or that the crops were grown by the lessee. The right to the possession and the right to the growing crops pass to the purchaser. If the tenant had been a party to the foreclosure suit, the possession and the crops could have been delivered to him by process under that judgment; but, since he was not made a party thereto, he cannot obtain that remedy except by some other action. The purchaser's rights, however, are just the same as they would have been if the tenant had been made a party." *Shockey v. Johntz*, 2 Kan. App. 483, 43 Pac. 993; *Downard v. Goff*, 40 Iowa, 597.

This being our view of the case, we do not consider it necessary to examine each of the errors complained of in detail. Nor do we think that a retrial of this cause would be of any advantage. The facts seem to be practically conceded, and we consider that the law applicable thereto is well settled. The judgment will be reversed, and the cause remanded to the district court of Pratt county, with instructions to render a judgment on the special findings for plaintiff in error. All the judges concurring.

(5 Kan. App. 174)

**PHOENIX INS. CO. OF BROOKLYN v. ARNOLDY et al.**

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 11, 1897.)

**PETITION—MOTION TO MAKE MORE DEFINITE—INSURANCE—WAIVER OF CONDITIONS—DEMURRER TO EVIDENCE.**

1. When, after the issues in an action are made up, and upon the day of trial, the petition, by leave of the court, is permitted to be amended in a manner that clearly makes it more definite and certain, and this amendment is allowed

by motion to make it more definite and certain, the court should construe the amendment in connection with the pleadings filed, so as to give it full force and effect, and, unless it clearly appears that the defendant is or has been misled, it is not error to overrule it.

2. In an action to recover on a policy of fire insurance for a loss, where the plaintiff relies upon a waiver by the defendant of the performance of certain conditions of the policy, and the defendant alleges that said conditions are not performed, because the said defendant company and its agents directed and requested the plaintiff not to do and perform the same, such petition states a waiver with sufficient certainty, and is a statement of facts.

3. Where there is evidence tending to prove all the material allegations of the plaintiff's petition, a demurrer thereto should not be sustained.

(Syllabus by the Court.)

Error from district court, Osborne county; Cyrus Heren, Judge.

Action by M. J. Arnoldy and others against the Phoenix Insurance Company of Brooklyn, N. Y. Judgment for plaintiffs, and defendant brings error. Affirmed.

H. M. Jackson, for plaintiff in error. Clark A. Smith, for defendants in error.

GILKESON, P. J. The petition, as amended March 17, 1891, alleges:

"The plaintiffs complain of the defendants, and, for cause of action, allege the following facts: That these plaintiffs M. J. Arnoldy and Angela May (née Arnoldy) are the only duly qualified and acting executor and executrix of the last will and testament of Nicholas Arnoldy, deceased. That the defendant Phoenix Insurance Company is a corporation duly organized under the laws of the state of New York, and doing business in the state of Kansas. That the said Nicholas Arnoldy, in his lifetime, and at the time of his death, which occurred on the — day of August, 1888, was the owner of the hotel building situate on lots eleven (11) and twelve (12) in block twenty-one (21) in the city of Downs, Osborne county, Kansas, and the said property ever since has been, and still is, the property of the estate of the said Nicholas Arnoldy, deceased. That on the 30th day of October, 1888, at Downs, Kansas, in consideration of the payment by these plaintiffs to the defendant Phoenix Insurance Company the premium sum of forty dollars, the said defendant made, executed, and delivered to the plaintiffs M. J. Arnoldy, executor, for the benefit of said estate, its certain policy of insurance, in writing, a true copy of which is hereto attached, marked 'Exhibit A,' and made a part of this petition. That on the 1st day of June, 1889, the said hotel building was destroyed by fire, to the damage of these plaintiffs, in the sum of sixteen hundred dollars. That the plaintiffs have performed all the conditions of the said policy of insurance on their part.

"Amendment filed by leave of court, May 16, 1891: Except that the plaintiffs admit that they have not performed some of the

conditions contained in paragraph numbered nine of said policy, and failed to notify the said defendant company, in writing, of the loss alleged in this petition, and failed to render to said defendant company a particular and specific account of the said loss within the time specified by said policy, and failed to include some of the statements and certificates mentioned in said paragraph nine in the account which plaintiffs, long before the commencement of this action, did actually furnish said defendant company, because and for the reason that said plaintiffs were directed so to do by said defendant company and its agents; and the only reason that the said conditions of said paragraph were not all performed by the plaintiffs was and is because the said defendant company and its agents directed and requested the plaintiffs not to do and perform said conditions, and said defendant company thereby waived the performance of said conditions, and was in no way prejudiced thereby. \* \* \* But the defendant the Phoenix Insurance Company has failed and refused to pay the said loss, or any part thereof; and there is due thereon from the said defendant to these plaintiffs, for the benefit of said estate, the sum of one thousand dollars, and interest thereon from the 1st day of June, A. D. 1889. \* \* \* That the said defendants Mrs. A. C. Taylor and M. C. Armstrong refused, and still refuse, to join as plaintiffs in this case, and they have no other or further interest in the cause than as above set forth."

Defendant company answered March 17, 1891, as follows: "First. It admits that it is an insurance company, and a corporation duly organized under the laws of the state of New York, and doing business in the state of Kansas; that the said Nicholas Arnoldy, in his lifetime, and at the time of his death, was the owner of the hotel building situate on lots described in said petition; that on the 30th day of October, A. D. 1888, this defendant executed and delivered to the plaintiffs the certain policy of insurance marked 'Exhibit A,' and attached to said petition, and alleges that, subsequently to the execution thereof, certain changes were made therein, all of which became a part of said policy as of the said date of the execution thereof; that on or about the 1st day of June, A. D. 1889, said hotel building was damaged by fire, but this defendant denies that the damage was of the sum and amount of fifteen hundred (\$1,500) dollars. Second. This defendant denies (A) each and every allegation in said amended petition not herein expressly admitted, and also denies that the plaintiffs have performed all or any of the conditions of the said policy of insurance on their part, and denies that there is due to the plaintiffs, for the benefit of said estate or otherwise, the sum of one thousand (\$1,000) dollars and interest thereon from the first day of June, 1889, because of said failure to

perform said conditions subsequently to said loss. (B) And denies each and every allegation of the amended petition as amended May 19, 1891, except as herein expressly admitted. Third. This defendant alleges, and charges the fact to be, that, by the terms of said policy of insurance, it was and is provided that no suit or action should be brought against this defendant for the recovery of any claim by virtue of said policy, and that no action should be sustainable thereon, unless such suit or action should be commenced within twelve months next after the date of the fire from which loss should occur; and that, should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time should be taken and deemed as conclusive evidence against the validity of such claim, any statute or limitation to the contrary notwithstanding. And this defendant alleges, and charges the fact to be, that said plaintiff did not commence any action upon said policy until the 17th day of March, 1891, and more than eighteen months after the said injury to said building so insured, whereby the said plaintiffs are barred from any recovery herein, or from maintaining any action upon said policy. Wherefore this defendant asks to be discharged, with its costs."

Plaintiffs replied May 1, 1891, as follows: "And come the plaintiffs, and, for their reply to the separate answer of the defendant the Phoenix Insurance Company to the amended petition filed in this action, deny each and every allegation of new matter of fact in said answer contained inconsistent with the allegations of the petition, except such facts as may be hereinafter expressly admitted. Second. In reply to the second defense set forth in said answer, the plaintiffs allege that if they have failed to perform any condition or conditions of said policy of insurance sued on subsequent to the said loss by fire, that the defendant the Phoenix Insurance Company has in no way been prejudiced thereby, and the performance of such condition or conditions has been waived by the acts, declaration, and conduct of the agents and general officers of said defendant the Phoenix Insurance Company. Wherefore the plaintiffs pray judgment as in their petition they pray."

Defendant, on May 4, 1891, filed a motion to strike out the second clause of plaintiffs' reply, which was sustained. On May 19, 1891, the plaintiffs filed their motion to require the defendant to definitely state and number the specific conditions, if any, which the plaintiffs have failed to perform; and second, to specifically point out which, if any, of the conditions of the policy the plaintiffs have failed to perform, as alleged by defendant, which was by the court overruled. On May 19, 1891, said plaintiffs moved to amend their petition. And thereupon said plaintiffs moved the court for leave to amend their

petition by interlineation, which motion was forthwith taken up and considered by the court, and by the court sustained. May 19, 1891, defendant filed the following motion: "Comes now the defendant the Phoenix Insurance Company of Brooklyn, N. Y., and moves the court to order and require the plaintiffs to make the attached and interlined amendment this day added to plaintiffs' amended petition more definite and certain, in this, to wit: To state therein what statements and certificates were not included by plaintiff, and were failed to be included, and which are required by section nine (9) of the policy referred to. (2) To state what agents of defendant, if any, directed plaintiff to not make out a notice of loss, and particular and specific account of said loss. (3) To state whether the alleged direction by said defendant and its agents to not make out such particular and specific account of said loss was verbal, or in writing, and, if in writing, to attach a copy thereof to said petition as so amended. (4) To state when such alleged directions were so given to plaintiff. (5) In the latter part of said amendment, to state when it is claimed that said defendant and its agents directed and requested plaintiff not to do and perform said conditions. (6) To state what agents are claimed to have so directed and requested plaintiff to not do and perform such conditions. (7) To state whether such direction and request was oral or in writing, and, if in writing, to attach a copy to said petition. (8) To state when it is claimed such direction and request was so given to plaintiff. Because said allegations, in the respects stated, are so indefinite and uncertain that the precise nature of the charge is not apparent, and said defendant cannot anticipate the nature and extent of such allegations, and prepare to meet the same in the trial. Which motion was by the court overruled." On May 19, 1891, the defendant amended its answer. "And thereon, by leave of court, this defendant amended its answer, by interlining, at the commencement of the second count thereof, the clause (A), and adding to said second count the clause (B)." The defendants Taylor and Armstrong made no appearance, and, upon the issues thus joined, trial was had by court and jury.

Special questions on part of insurance company: "(1) Was the policy sued upon in this case upon the building described in the petition? Answer. Yes. (2) Was the policy sued on issued by J. W. Huff, local agent of defendant company, at Downs, Kansas? Answer. Yes. (3) Was such agent, as such, authorized to solicit insurance, countersign and deliver policies, make changes therein by indorsement written in on such policy, subject to the approval of the defendant company? Answer. Yes. (4) Did a fire occur in the building described in the policy about May

27, 1889, causing a few dollars' damage to such building? Answer. Yes. (5) Did the defendant company direct or authorize said J. W. Huff to settle such small loss? Answer. Yes. (6) Were the plaintiffs, or either of them, informed of such authority to settle such small loss? Answer. Yes. (7) Which of the plaintiffs, if either, were informed of the authority to said J. W. Huff to settle such small loss? Answer. Yes; M. J. Arnoldy. (8) Did the plaintiff Angela May transact any business with J. W. Huff relating to such small loss, or have any notice or knowledge of the authority of said J. W. Huff, as agent of defendant? Answer. Evidence fails to discover as to fact. (9) If you say that M. J. Arnoldy knew of the authority given said J. W. Huff to settle said small loss, then state when he learned that said J. W. Huff was so authorized. Answer. June 1, 1889. (10) What business transaction did M. J. Arnoldy have with J. W. Huff, as agent of defendant company, if any, other than that relating to issuing the policy of insurance sued upon, and changes therein prior to fire of June 1, 1889, and the matter of the settlement of the small loss? State fully. Answer. \* \* \* (11) Were changes made in the policy sued upon by J. W. Huff, or under his direction, after the policy was issued, and before June 1, 1889? Answer. Yes. (12) If you answer number 11, 'Yes,' then state if they were made by said J. W. Huff as a local agent of defendant, and by the direction of defendant company. Answer. \* \* \* (13) On June 1, 1889, did said J. W. Huff write to the defendant company, notifying it of the fire of June 1, 1889? Answer. Yes. (14) Was that letter received by the defendant company about June 3 or 4, 1889? Answer. Yes. (15) Did said J. W. Huff, on June 5, 1889, receive from the general agent of defendant company a telegram saying, 'Stop all proceedings in settlement of loss under 1,046 until further notice'? Answer. Yes. (16) Did '1,046,' in the telegram of June 5, 1889, offered in evidence, refer to the number of the policy sued upon? Answer. Yes. (17) Did J. W. Huff, on or about June 5, 1889, notify plaintiff M. J. Arnoldy that he had received a telegram from the general agent of defendant company, directing him (J. W. Huff) to stop all proceedings in the settlement of the loss? Answer. Yes. (18) What, if anything, did J. W. Huff do about the settlement of such loss after June 5, 1889? State fully, giving transactions and date. Answer. He corresponded with the company through their agent, T. R. Birch, Chicago; transmitted information, and received instructions, communicating the same to said Arnoldy, plaintiff. After June 5, 1889, two weeks later, or thereabout, he had oral communication with General Agent Bailey, in Topeka, detalling information as to fact concerning fire as relative to policy



1,046. Again, after June 5, 1889, three weeks after, or thereabout, he conversed with General Agent Hamlin, relating facts in substance as per above. This, in Downs, Kansas; and he related said conversation to Arnoldy, assuring him adjustment would be made by company. Furthermore, the evidence shows that said agent Huff continually advised said plaintiff Arnoldy from time to time, advising him of action of the company that they would adjust, convincing him of good faith, and he would be protected in his rights, thus delaying the plaintiff's action to recover his rights. (19) After June 5, 1889, did the plaintiff rely entirely upon the settlement and adjustment of the loss of June 1, 1889, being made by some adjuster of the company? Answer. Not entirely, but in a measure. (20) Did the plaintiff deliver to the company a particular and specific account of loss signed and sworn to by them, or either of them? Answer. No. (21) If you shall answer question No. 20 in the affirmative, then state when such account was delivered to the company. Answer. No answer required. (22) Was there a particular and specific account of the said loss, signed and sworn to by Frank J. Kelley, delivered to the company? Answer. Yes. (23) If you answer question No. 22 in the affirmative, then state when such account was so delivered. Answer. December 2, 1889. (24) If you answer question No. 22 in the affirmative, then state whether plaintiffs produced a certificate under the hand and seal of a magistrate or notary public nearest to the place of the fire, stating that he had examined the circumstances attending the fire, and knew the circumstances of the assured, and believed that assured had sustained a loss, and stating the amount. Answer. No. (25) If you answer question No. 22 in the affirmative, then state whether Frank J. Kelley was the agent or attorney of plaintiffs as to the property insured at the time of the fire, or before June 1, 1889. Answer. No testimony introduced to show. (26) If you answer question No. 22 in the affirmative, then state whether said Frank J. Kelley had any knowledge of the particulars of the property or fire before August 17, 1889. Answer. Evidence does not show. (27) Has the defendant company waived any of the conditions of the said policy relating to the proceedings of the assured thereunder after the loss? Answer. Yes. (28) If you answer question 27 in the affirmative, state each and every condition that you may find has been waived. Answer. Paragraph 9 of policy, more especially with regard to notice of loss, proof of loss, and certificate of notary. (29) If you answer question 27 in the affirmative, state when and by whom such waiver was made. Answer. By J. W. Huff, General Agent Bailey, General Agent Hamlin, and Secretary Birch, by his approval, as implied by the acts of the said agent J. W. Huff, after notification of the

same at intervals from date of fire to November 1, 1889; actual or positive dates we cannot give. (30) Was the plaintiff induced to delay the rendition to defendant of the particular and specific account of loss by any agent of defendant company? Answer. Yes. (31) If you answer question 30 in the affirmative, then state the times when such delay was induced, and the name of the agent who induced the delay. Answer. At divers times within thirty days after fire, by Agents Huff, Bailey, and Hamlin, the general agent Birch, July 1, 1889, and on various occasions thereafter by Agent Huff, and General Secretary Birch; exact dates we cannot give. (32) If you answer question 30 in the affirmative, then state each and every act of the defendant, or its agent, inducing such delay. Answer. The act of the company authorizing J. W. Huff to adjust fire loss; the frequent request of said Huff to plaintiff Arnoldy that he should take no steps or legal advice to secure payment from the company for loss by fire. The said Huff wished Arnoldy to keep quiet, to enable the company to ascertain the cause of the fire and loss. Also, the assurance of Agents Bailey and Hamlin, communicated to said Arnoldy by J. W. Huff, when he met Bailey in Topeka, and told Huff that he or Hamlin would adjust the loss as soon as the press of business would allow them to reach Downs; and also the assurance of Secretary Birch to send an adjuster to settle the loss, said communication to said J. W. Huff being transmitted to Arnoldy. Also, the failure of Sec. Birch to notify Arnoldy not to depend upon the assurance and advice of J. W. Huff, after Birch was advised and notified by Huff of what he (Huff) has assumed with Arnoldy. (33) If you answer No. 30 in the affirmative, state when the company was informed, if at all, of the facts stated in your answer to question 32. Answer. The company was informed of the acts of J. W. Huff in the interview with Agent Bailey, 2 weeks or thereabouts after June 5, 1889, and in the interview with Agent Hamlin, 3 weeks after June 5, 1889, in the letter to General Sec. Birch, August 5, 1889. (34) Was the plaintiff or his attorney informed that defendant relied on the failure to make proof of loss? Answer. Yes; the plaintiff's attorney was notified. (35) If you answer question 34 in the affirmative, then state when such information was first obtained by plaintiff or his attorney. Answer. First obtained by the plaintiff's attorney November, 1889."

The plaintiff in error contends that the amendment is indefinite and uncertain, and that, for these reasons, the insurance company had no opportunity to prepare for trial on any of the issues so pretended to be presented. While we are willing to concede that the allegations of the amendment might be more definite and certain, yet, from an examination of the record, we cannot see that the insur-

ance company was prejudiced in the least by the overruling of this motion. How the company could be better prepared by having the plaintiffs tell them who the names of the agents who had been connected with this loss were, we are unable to see. They certainly had as much knowledge of this proposition as the plaintiffs could possibly have. As to the time of the alleged furnishing of the specific account of loss and the time of making said request, we think that a fair construction of the language employed in this amendment fully apprised them as to these items. The amendment expressly states that they failed to notify the company, in writing, of the loss, and failed to render the company a particular and specific account of said loss within the time specified by said policy; but they did afterwards, and long before the commencement of this action, actually furnish the defendant an account, in which they failed to include some of the statements and certificates mentioned in said paragraph 9, and that the reason for their failure to furnish the notice in time, and for omitting certain items required in paragraph 9, was and is because the defendant company and its agents directed and requested the plaintiffs not to do and perform said conditions, said company thereby waiving the performance of said conditions. It is true that this amendment does not state that the statement or account which they did furnish was furnished 60 days before the commencement of this action, but the insurance company makes no complaint of this in their answer; and, from an examination of the record, we find that from the time of the loss and the expiration of the 30 days, to the commencement of the suit, there was ample time, even if the other notice had not been given until the expiration of the 30 days, for it to have been given 60 days prior to the commencement of this action.

We think the amendment should receive the construction placed upon it by the defendants in error: that is, that the plaintiffs did perform all the conditions long before the commencement of the action, but did not perform some of them within the time required, and that the reason of this nonperformance within the time was that they were requested by the company and its agents not to do so. And how could the requests be the only reason proof was not made within the time, unless the requests were made within the time? In actions of this character, the plaintiff, in order to recover, must establish one of two things,—the performance of the conditions of the contract, or a waiver. And, if she relies on either one or the other, she must plead and prove them. It is evident in this case that a waiver was relied upon, and it certainly was pleaded with sufficient certainty to apprise the company that it would be. But it is contended that this waiver states only conclusions, and not facts. We think not. It expressly states that the nonperformance

"was and is because the said defendant company and its agents directed and requested the plaintiffs not to do and perform said conditions, and said company thereby waived the performance of said conditions." Is not the allegation that the request was made and direction given the allegation of a fact?

The third specification of error is as to the admission of evidence claimed to be incompetent, upon the ground that no foundation was laid, and that there was no proof of Huff's agency. We cannot agree with plaintiff in error in this. Huff issued this policy, and signed it as agent; and, by the terms of the policy, it did not become effective until it was countersigned by Huff. He made changes in the policy after it was issued. He was authorized to adjust a former loss under this policy, and had waived notice as to that loss. He notified the company of what he had done, particularly what he had directed Arnoldy to do with reference to notice and proof of loss. He told the adjuster Hamlin of what he had done. He told the special agent and adjuster Bailey about the fire, and what had been done; and, with regard to Hamlin and Bailey, they are certainly shown to be the adjusting agents of the company. The evidence objected to only tends to prove, by conversation of the agents, that the company waived proof of loss. Concede this to be weak, or strike it all out; there is abundance of uncontradicted evidence to sustain the findings of the jury that Huff, who had abundant authority to do so, expressly waived such proof of loss; and it must be noted in this connection that neither General Agent Birch, nor Adjuster Hamlin or Bailey, with full knowledge of Agent Huff's assumption of authority and directions to Arnoldy, ever repudiated the claim of authority of Huff, or advised Arnoldy not to rely upon it.

The fourth specification of error is the exclusion of evidence offered by the insurance company with reference to a question asked witness Pugh. This was in reference to the alterations made in the policy, was not in issue in this case, and was immaterial.

The fifth specification of error is the overruling of the demurrer to the evidence. We think it is well established in this state that "when there is evidence tending to prove all the material allegations of the plaintiff's petition, a demurrer thereto should not be sustained."

Again, it is urged that the court erred in refusing and in giving certain instructions. As to those refused, we perceive no error; and, in the general charge, we think the trial court fully and fairly laid down the law applicable to this case, and supported by the testimony therein.

There are other errors assigned by counsel, which we will not attempt to answer in detail. We have carefully examined each specification of error, and fail to discover any reversible error therein. We think the special findings

are fully sustained by the evidence, and we fail to discover wherein the defendant company has been precluded from having a fair, full, and impartial trial. The judgment of the lower court will therefore be affirmed. All the judges concurring.

(5 Kan. App. 231)

**MISSOURI PAC. RY. CO. v. BENNETT'S ESTATE.**

(Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.)

**APPEAL—HARMLESS ERROR—ACTION FOR PERSONAL INJURIES—ABATEMENT—DAMAGES—ASSETS OF ESTATE.**

1. An erroneous ruling of a trial court does not warrant the reversal of the decision or judgment based thereon, when it is apparent that no substantial right of the party complaining was prejudiced thereby.

2. An action brought by one who has sustained personal injuries from the negligent or wrongful act of another, to recover for the resulting loss and suffering, does not abate by the death of the plaintiff, but will, under sections 420 and 421 of the Civil Code, survive, and may be prosecuted to final judgment in the name of the personal representative, notwithstanding the death may have resulted from the injuries.

3. The damages recoverable in such action, when revived, are only such as were sustained by the person injured in his lifetime, and are recovered for the benefit of the estate, and not for the benefit of the widow or next of kin.

4. Such a claim for damages is assets of the estate, and warrants the appointment of an executor or administrator.

5. Section 422 of the Civil Code creates a new cause of action, separate and different from the cause of action which may have accrued to the person injured when the death was not instantaneous, and does not have the effect to transform a pending action brought by the deceased in his lifetime, to recover for his loss and suffering, into an action to recover the damages sustained by the widow or the next of kin by reason of the death.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturgis, Judge.

Proceeding by the Missouri Pacific Railway Company, in the matter of the estate of Lucy Bennett, to secure the revocation of the appointment of an executor. Application denied. On appeal and error to the district court, the proceedings were dismissed, and the railroad company brings error. Affirmed.

Waggener, Horton & Orr and Wilmoth & Ackley, for plaintiff in error. L. J. Crans and W. H. Savary, for defendant in error.

**GARVER, J.** The controversy in this case arises out of certain proceedings instituted by the plaintiff in error, the Missouri Pacific Railway Company, in the probate court of Cloud county, this state, to secure the revocation of the appointment by said court of the defendant in error, Theodore Martin, as executor of the estate of Lucy Bennett, deceased. The probate court refused to hear any evidence in support of such application, and denied the same. An appeal was thereupon taken to the district

court of said county, a petition in error also being filed therein, for the purpose of reviewing the decision of the probate court. On motion of the defendant in error, said appeal and petition in error were dismissed by the district court; and, to reverse such judgment of dismissal, the case has been brought to this court. The railway company bases its right to appear in the probate court, and contest the validity of the letters of administration issued to Theodore Martin, on the ground that said Lucy Bennett, deceased, had no estate to be administered; that said appointment was merely colorable and invalid; and that the railway company was interested therein, because of the fact that said Theodore Martin, as executor of said estate, was attempting to prosecute an action, commenced by said Lucy Bennett in her lifetime, in the district court of said county, against said railway company, to recover damages for personal injuries alleged to have been sustained by her through the negligence of said company. The record does not disclose when the injuries complained of were inflicted, except that it was some time prior to September 19, 1893, on which day Lucy Bennett commenced the action which was pending and undetermined at the time of her death, December 7, 1893. Her death resulted from the injuries sustained.

Under the practice recognized and established by the supreme court in this class of cases, the questions presented for our consideration are of little practical importance to either of the parties, from the fact that the matters alleged and attempted to be shown by the railway company in the probate court could be shown as a defense in the main action pending in the district court. In that case the defendant had a right to put in issue the appointment and authority of the plaintiff as executor, and, if it appeared that the appointment was invalid and void, the action would fail. *City of Atchison v. Twine*, 9 Kan. 350; *Perry v. Railway Co.*, 29 Kan. 420; *Railway Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501. In the view we take of the case, we do not deem it necessary to decide as to the right of the plaintiff in error to appear in the probate court, and contest the validity of the letters issued by it. There seems, however, no good reason why such a practice should not be recognized, and the tribunal which issued the letters given an opportunity to revoke them, if improperly granted, thus effectually terminating a false and merely colorable administration. Such a practice would, in a regular manner, finally relieve and discharge the person assuming to act as executor or administrator, and would avoid useless, and, perhaps, expensive, complications. There is also precedent and authority for it. *Wheeler v. Railway Co.*, 31 Kan. 640, 3 Pac. 297; *Railway Co. v. Swayne's Adm'r*, 26 Ind. 477.

But conceding that the railway company had a right to be heard in the probate court, and to show that the appointment of Martin, as executor, was invalid, because there was no estate to be administered, the further question arises whether any prejudicial error was committed,

even though unsound reasons were given as a basis for the rulings of the lower courts. In considering this matter, it is necessary to have a correct understanding of the nature and object of the action pending in the district court which the executor was attempting to prosecute. On the part of the defendant therein, it is claimed that the action, after the death of the original plaintiff, Lucy Bennett, must be regarded as being prosecuted under section 422 of the Civil Code, the damages recoverable inuring to the exclusive benefit of the children, if any, or to the next of kin, and not to the estate; and, therefore, that the claim for damages cannot be regarded as assets of the estate. On the other hand, it is claimed by counsel for the executor that the action is one which survives, under sections 420 and 421 of the Civil Code, for the benefit of the estate. We have not before us the pleadings in that action, and are, consequently, unable to say what damages were alleged and sought to be recovered under the amended petition. We may, however, accept as true, the statement of facts made in the application filed by the railway company in the probate court, and determine therefrom what are the legal rights of the parties. We may assume, therefore, that, in her lifetime, Lucy Bennett had a claim against the railway company for damages sustained by her by reason of personal injuries inflicted upon her through the negligence of said company; that, for the purpose of recovering such damages, she instituted, on September 19, 1893, a civil action in the district court of Cloud county; and that such action was pending in said court, at the time of her death, December 7, 1893. It is clear, then, that, from the time of the injury until her death, a period of, at least, nearly three months, she had a cause of action which was of more or less value to her and to her estate. Unless this was extinguished by her death, it was sufficient to warrant the appointment of a personal representative, with authority to prosecute such action to final judgment.

The following sections of the Civil Code bear upon these questions:

"Sec. 420. In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

"Sec. 421. No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, for a nuisance, or against a justice of the peace for misconduct in office, which shall abate by the death of the defendant.

"Sec. 422. When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The

action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Counsel for plaintiff in error contend that the cause of action which Lucy Bennett had in her lifetime became extinct at her death; that thereafter no right of action existed, except such as was given by said section 422; and that the damages recoverable would not be assets of the estate. In support of this contention, we are referred to what is said in the opinion in *McCarthy v. Railroad Co.*, 18 Kan. 46, 52. The writer thereof expressed the opinion that sections 420 and 422 of the Code should be construed together, and that "section 420, as construed with section 422, only causes the actions to survive for injuries to the person, when the death does not result from such injury, but does occur from other circumstances. \* \* \* When death results from wrongful acts, section 422 is intended solely to apply." It is with great reluctance that we dissent from the views thus expressed by the eminent judge who wrote the opinion in that case, appreciating, as we do, the deep learning and careful discrimination which characterize his judicial utterances. But such construction, in our opinion, is not the most reasonable one, and would in many cases deny that relief against the wrongs of others which the law clearly contemplates. In this respect we think the opinion goes outside the issues in the case then under consideration, and was not necessary to the decision made by the court. Section 420 had nothing to do with that case. It was an action brought expressly under section 422, the damages alleged to have been sustained being such as were caused by the death of the person injured. A cause of action for such an injury did not exist at common law, and, except for the statute, it would not exist today in this state. Hence it will not do to say that section 420, which provides solely for the survival of certain actions which did not survive at common law, has any legitimate connection with the subsequent section, which creates a new cause of action, different from that which the deceased would have had if he had survived, and based on different principles. No cause of action is created by the former section. It simply recognizes, as already existing, a cause of action in one sustaining a personal injury, but which, at the common law, terminated at his death. Its object was to abrogate this harsh rule by which all such actions died with the person, and to provide for the survival of the cause of action, so as to give to the personal representative the right to sue for and recover the same damages which the person injured could have sued for and recovered had he lived. The latter section (section 422) was enacted solely for the purpose of creating a right of action where before no right of action of any

nature existed. Under the first section, the right of action survives for the benefit of the estate. Under the second, a new right of action is created for the sole benefit of the widow or children or next of kin of the deceased. In the one case damages are recoverable, notwithstanding the death of the person injured, as compensation for the loss and suffering which he sustained in his lifetime by reason of bodily hurt wrongfully inflicted. *Railroad Co. v. Rowe*, 56 Kan. 412, 43 Pac. 683. In the other they are recoverable as compensation to a designated class, because of the pecuniary loss sustained by them by reason of his death. *Perry v. Railroad Co.*, 29 Kan. 420. The measure of the damages, and the beneficiaries thereof, are entirely different and separate in the two classes of cases. We can find nothing in section 422 indicating that the legislature intended thereby in any way to affect a cause of action which existed at common law.

Again, we see no reason for a judicial interpolation that would make section 420 provide for the survival of an action to recover damages for a personal injury, notwithstanding the death of the person entitled thereto, only in case the death occurred from other causes. At common law such action abated on the death of the person injured, regardless of the cause of the death; the legal effect being the same whether the death was caused by the injury, or resulted from another independent cause. To remedy this defect in the law the statute under consideration was enacted, its object being to enable the representative of a deceased person to recover on the cause of action which had accrued to the deceased in his lifetime. "As the result of the bodily hurt, the deceased may have endured great pain and suffering for weeks or months, and have expended a valuable estate in fruitless efforts for recovery. It is now contended that the right of action for such loss and suffering becomes extinct with the death of the person injured, unless it appears that the death was not caused by the injuries. While this contention is not without support (*Andrews v. Railway Co.*, 34 Conn. 57; *Holton v. Daly*, 106 Ill. 131), we think it is not well founded. Such a construction is not warranted by the language of the statute, nor can it be sustained upon principle. The provisions of the statute are general, and broad enough to embrace any cause of death; and the evident intent and purpose of the legislature are in harmony with the plain, apt words in which such provisions are framed. In holding that the statute means just what it says, we think we are supported by the better reason, and, at the same time, by ample authority. *Needham v. Railway Co.*, 38 Vt. 294; *Bowes v. City of Boston*, 155 Mass. 344, 29 N. E. 633; *Belding v. Railway Co.*, 3 S. D. 369, 53 N. W. 750; *Hyatt v. Adams*, 16 Mich. 180. These decisions, made under statutes similar to the quoted sections of our Code, recognize the survival of the right of action to recover

damages for the loss and suffering sustained by the person injured, and the co-existence of another cause of action, for the benefit of the widow and children of the deceased, to recover the damages sustained by them by reason of his death. In *Needham v. Railway Co.*, supra, it is said: "We are entirely agreed that, where death occurs in consequence of a bodily injury, two causes of suit or action may arise,—one in favor of the deceased for his loss and suffering resulting from the injury in his lifetime, and revived by the act of 1847; the other founded on his death, or in the damages resulting from his death to his widow and next of kin under the act of 1849. Both actions are to be prosecuted, in point of form, in the name of his personal representative; but the damages in the two suits are given upon entirely different principles, and for different purposes. \* \* \* The principle that a wrong resulting in death affords, under these statutes, two different causes of suit, obviates many difficulties that would arise under a different rule. We think the principle fairly deducible from the statutes, and that it is in harmony with the law applicable to analagous cases. It allows the estate to take its own, and the widow and next of kin to take exclusive benefit of the latter statute." The same principle was recognized and applied in *Bowes v. City of Boston*, supra, and is stated in the opinion of the court, as follows: "The right of action given to an administrator \* \* \* to sue for his intestate's loss of life for the benefit of the widow is independent of the administrator's right to sue for damages suffered by the intestate in his lifetime from the injury which caused his death, and both actions may proceed at the same time." Section 421 goes even further than section 420, and would seem to apply to the facts of this case without question. It clearly includes the action of Lucy Bennett which was pending in the district court of Cloud county at the time of her death. But, as we understand the contention of the plaintiff in error, it is claimed that, while the action did not abate by the death of the plaintiff therein, it, by some peculiar method of devolution, was transformed into an action for the recovery of damages for the benefit of the next of kin; that it became extinct as an action to recover damages for the injuries sustained by Lucy Bennett, but was revived as an action for the damages sustained by those who had a pecuniary interest in the continuance of her life. We are clearly of the opinion that no such transformation of the case was permissible; that, if it failed as an action to recover for the loss and suffering sustained by the original plaintiff, it became extinct for all purposes. As before stated, the causes of action are separate and distinct, the only element in common being the wrongful act of the defendant. Such wrongful act, causing the bodily hurt, gave rise to a cause of action in her favor to recover damages for the resulting loss and

suffering. The same wrongful act, causing her death, and thereby causing a pecuniary loss to the next of kin, gave rise to a cause of action to be prosecuted for their benefit. A revivor of the pending action would revive it as an action to be prosecuted for the same cause that existed when the action was commenced. No right of amendment would enable the personal representative of the deceased plaintiff to abandon the original cause of action, and convert the action into one based on an entirely new injury,—the death,—and prosecute it for the recovery of damages not contemplated nor sustained when the action was commenced. There is nothing in section 422 that is even suggestive that any such effect was intended to be given to it. This section is similar in its provisions to the act commonly called "Lord Campbell's Act," passed by the English parliament in 1846. In construing that act in *Blake v. Railway Co.*, 10 Eng. Law & Eq. 437, 443, Coleridge, J., said: "This act does not transfer this right of action (for the loss and suffering of the deceased) to his representative, but gives to his representative a totally new right of action, on different principles." See, also, *Whitford v. Railroad Co.*, 23 N. Y. 465. It cannot be objected that this construction gives two actions for the same cause. The actionable injuries are not the same. Although the responsible cause is the same wrongful act, yet in the one case the injury which gives the right to recover damages is the bodily hurt, resulting in loss and suffering to the person injured, in his lifetime, and thus affecting his estate; in the other the injury is his death, resulting in loss to those who are peculiarly interested in the continuance of his life. In principle, it is the same as where the same negligent or wrongful act, at the same time, injures two different persons. Each has a right of action to recover the particular damages sustained by him.

We conclude, therefore, that the action survived solely for the purpose of recovering damages for the benefit of the estate, as compensation for the loss and suffering sustained by Lucy Bennett, in her lifetime, as the result of the bodily hurt inflicted upon her. If it be conceded that it did not survive for that purpose, then it follows that the action was abated by her death, and could not be prosecuted by any one for any purpose. Hence the questions in this case resolve themselves into this: If the cause of action survived, as we think it did, for the benefit of the estate the claim for damages was an asset which justified the appointment of an executor or administrator. If the right of action did not survive for that purpose, as claimed by the plaintiff in error, then it became wholly extinct, and it was entirely immaterial whether Theodore Martin was legally appointed or not. As these facts appeared on the face of the application made for the revocation of the letters issued by the probate court, no substantial right of the plaintiff in error was prejudiced by the rul-

ings complained of, whichever view may be adopted. The judgment will be affirmed. All the judges concurring.

(5 Kan. A. 543)

# REAMER et al. v. COLUMBIA

(Court of Appeals of Kansas, Southern Department, E. D. Jan. 5, 1897.)

## INJURIES TO THIRD PERSON—LIABILITY OF MASTER—INSTRUCTIONS.

1. Instructions in this case considered, and held to fairly present the law under the evidence in this case.

2. As a general rule, where the court properly instructs the jury, except that it omits some matter which might properly be given, no available error is committed, unless the court has been properly requested to instruct in reference to such matter. *State v. Cox*, 40 Pac. 816, 1 Kan. App. 447.

(Syllabus by the Court.)

Error from district court, Labette county; J. D. McCue, Judge.

Action by W. G. Reamer and Samuel Johnson against Joseph W. Columbia. Judgment for defendant. Plaintiffs bring error. Affirmed.

Le Roy, Neal & Son, for plaintiffs in error. J. H. Crichton, for defendant in error.

COLE, J. This action was brought by the plaintiffs in error against defendant in error to recover for damages alleged to have been sustained through the negligence, carelessness, and willfulness of a servant of the defendant. The cause was tried by court and jury, and resulted in a verdict for the defendant. Several errors are complained of in this court, principally the instructions given by the trial court. It is contended by counsel for plaintiffs in error that, under the evidence, there should have been instructions covering the ground not only of negligence but contributory negligence; and it is also contended that the instructions which were given by the court contained material error. We have carefully examined all the instructions which were given in connection with the evidence, which has been carefully read, and, without considering each instruction in detail, are clearly of the opinion that they cover the evidence, and that they contain no material error. This was a case originally commenced before a justice of the peace upon a bill of particulars, and, so far as the record discloses, the defendant filed no written answer. The evidence was very conflicting, and was given by a number of witnesses. There was no request upon the part of counsel for plaintiff in error that any further or different instructions should be given than those which were given by the court; and, while we believe that there are portions of the instructions which, taken by themselves, would be erroneous, yet we are confident that, taken as a whole, they presented the law fairly to the jury, and we are satisfied the jury was not misled. As a general rule, where the instructions fairly set forth the law of a case, and no further instructions are re-

quested, it is too late to complain when the case reaches a court of review. Perceiving no error in this case, the judgment of the district court is affirmed. All the judges concurring.

(5 Kan. App. 761)

MERRILL et al. v. YOUNG.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 6, 1897.)

CONTRACTS—PARTIES—PERSONAL LIABILITY—DESCRIPTIVE PERSONÆ.

Defendants signed a written instrument, which reads as follows: "State of Kansas, County of Ford, Township of Grandview, District No. 16, 4—24—1889. Treasurer of school district No. 16, in said county and state, 15th January, 1890, will pay to the Educational Aid Association, or bearer, the sum of thirty-three and one-third dollars, with interest at ten per cent., out of any money belonging to said district, for 'Learning to Do by Doing. Dictionary of Arithmetical Business Methods and Bookkeeping Forms, Illustrated with Cabinet Easel Lock Case. Business Methods and Bookkeeping.' Issued by authority of officers of said district, and payment guaranteed by Bert Merrill, W. F. Petillon, School Officers. Officers' P. O. address, Dodge City." Held to create a personal obligation upon defendants, and that the trial court did not err in sustaining a motion to strike the answer of defendants from the files, where such answer sets up a defense contrary to the express terms of said written instrument.

(Syllabus by the Court.)

Error from district court, Ford county; A. J. Abbott, Judge.

Action by P. H. Young against Bert Merrill and W. F. Petillon. Judgment for plaintiff. Defendants bring error. Affirmed.

Sutton & McGarry, for plaintiffs in error. B. F. Milton, for defendant in error.

COLE, J. Plaintiffs in error executed an instrument in writing which reads as follows: "State of Kansas, County of Ford, Township of Grandview, District No. 16, 4—24—1889. Treasurer of school district No. 16, in said county and state, 15th January, 1890, will pay to the Educational Aid Association, or bearer, the sum of thirty-three and one-third dollars, with interest at ten per cent., out of any money belonging to said district, for 'Learning to Do by Doing. Dictionary of Arithmetical Business Methods and Bookkeeping Forms, Illustrated with Cabinet Easel Lock Case. Business Methods and Bookkeeping.' Issued by authority of officers of said district, and payment guaranteed by Bert Merrill, W. F. Petillon, School Officers. Officers' P. O. address, Dodge City." And this action was brought upon said instrument, together with two others of a like character. The bill of particulars filed by plaintiffs below alleged that the instruments upon which suit was brought were executed by plaintiffs in error, defendants below, in their individual capacity, and asked judgment against them as individuals. A demurrer was filed to the bill of particulars, and the overruling of said demurrer by the dis-

trict court is alleged as the first error. We cannot consider this assignment of error, for the reason that the record expressly discloses that no exception was taken to this ruling of the district court.

The next error complained of is the ruling of the district court sustaining the motion of the plaintiff below to strike the amended answer of the defendants from the files for the reason that the defense set up therein was contrary to the express agreement, and varied the terms of the written instrument sued on. There was no error in this ruling of the district court. The answer in question set up as a defense, in substance, that the written instruments upon which the suit was brought were not executed by defendants below, plaintiffs in error, in their individual capacity, but as officers of the school district, and further alleged that at the time of their execution it was well understood by both parties thereto that the defendants did not intend to bind themselves individually. The answer further alleged that the property was bought exclusively for the use of the school district, which was well understood by all parties to the transaction. Counsel for plaintiffs in error rely upon the case of *Watson v. Rickard*, 25 Kan. 662. We are of the opinion that the decision in that case cannot govern in this one. It is true that the instrument sued upon in this case bears upon it all the marks of an ordinary school order. It is directed to the treasurer of the school district, and requests said officer to pay a certain sum of money; but at the same time the defendants below, plaintiffs in error, guaranty the payment of said order, and they cannot now be permitted to set up a defense which attempts to vary and modify the terms of their written contract. It is also true that the words "School Officers" appear immediately after the signatures of the plaintiffs in error. These words, however, are merely descriptive in their character, and do not change the force of their obligation. *Mining Co. v. Sweeney*, 15 Kan. 245; *Wing v. Glick*, 56 Iowa, 473, 9 N. W. 384, and cases there cited.

These are the only questions raised by the briefs of counsel, and it follows, from what has been said upon them, that the judgment of the district court must be affirmed. It is so ordered. All the judges concurring.

(5 Kan. App. 756)

KAUTER v. FRITZ.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 6, 1897.)

SERVICE OF SUMMONS—WAIVER OF DEFECTS—PLEADING—VERIFIED STATEMENT OF ACCOUNTS—DISMISSAL OF ACTION—REHEARING.

1. Where the issuance and service of summons are unauthorized or defective, and should be quashed and set aside on motion of the defendant, but, after a motion to quash has been overruled by the court, the defendant then asks leave to answer, and files an answer to the original petition, he thereby waives the defects in



the issuance and service of summons, and submits himself to the jurisdiction of the court.

2. Where the petition of the plaintiff sets up a cause of action for trespass, and the defendant, in answer thereto, denies the trespass, and by way of set-off and counterclaim sets up that there was an agreement between the plaintiff and defendant whereby defendant was to furnish seed for the planting of different kinds of crops on certain premises, and he was to have one-half of the crops raised by plaintiff on the premises, and the crops were grown according to the agreement, and that the plaintiff took and converted the crops to his own use, and deprived the defendant of all interest therein, and that by reason thereof he has been damaged in the sum of \$285, and then itemizes the amount of the different kinds of crops he should have received under the agreement, and the answer is duly verified by the defendant, and the reply thereto is not verified, *held*, that this is not the statement of an account, the correctness of which shall be taken as true unless the denial of the same be verified by the affidavit of the plaintiff.

3. Where the court, on proper proceeding, dismisses an action, and within three days thereafter the plaintiff files his motion for a new trial on the motion upon which the case was dismissed, and the motion is overruled, the jurisdiction of the court over the matter has terminated, and the court cannot, three months thereafter, entertain a motion for a rehearing of the motion by which the case was dismissed, and, on the rehearing, set aside the order of dismissal, and reinstate the case on the docket, and set the same down for trial.

(Syllabus by the Court.)

Error from district court, Kearney county; A. J. Abbott, Judge.

Action by Christ Fritz against John Kauter. Judgment for plaintiff. Defendant brings error. Reversed.

Milton Brown, for plaintiff in error.

JOHNSON, P. J. On the 7th day of October, 1889, Christ Fritz commenced an action in the district court of Kearney county, Kan., against John Kauter, to recover the sum of \$250 for taking and carrying away some corn from the premises claimed by plaintiff below. On the filing of the petition the clerk of the court, as required in the *præcipe* of the plaintiff below, issued a summons, directed to the sheriff of Kearney county, which was on the 9th day of October returned by the sheriff not served. On the 27th day of December, 1889, the clerk of the court issued another summons in said action, directed to the sheriff of Kearney county. On the same day the sheriff served the summons by delivering a certified copy to the defendant below, and made return thereof with his doings indorsed thereon. On the 17th day of January, 1890, the defendant, John Kauter, made special appearance in said case, and filed a motion to quash and set aside the summons and service thereof, which motion was overruled, and defendant below duly excepted, and by leave of the court filed an answer to the petition, setting up two separate defenses, and, as a third answer, set up a counterclaim and set-off. The first defense consisted of a general denial of the allegations of plaintiff's petition. The second answer was a special denial of the trespass set out in the plaintiff's petition. The third an-

swer, by way of set-off and counterclaim, sets up an agreement between plaintiff and defendant, made in 1889, by which he alleges that the defendant was to furnish the plaintiff seed potatoes, seed rice corn, seed Indian corn, and seed oats, which the plaintiff was to put in ground to be furnished, prepared, and cultivated by the plaintiff, and, in consideration thereof, the defendant was to have and be entitled to an undivided one-half of the crop raised therefrom in the field; and the defendant further avers that he fully kept and performed his part of the contract by furnishing and delivering the seed to the plaintiff, and sets out the value of the seed furnished by him, and avers that the plaintiff received said seed, and planted and cultivated it on the premises mentioned in plaintiff's petition; that the defendant did sell, of said crop, a certain amount of corn and oats, and that he did enter the premises, and take and carry away 20 acres of corn, 10 acres of oats, and for no other purpose whatever; and alleges that, from the seed furnished, planted, and cultivated under the agreement, certain crops of corn, rice corn, and potatoes were grown, all of the aggregate value of \$570; and alleges that under the agreement he was entitled to one-half of said crops, but that the plaintiff unlawfully and without right prevented said defendant from receiving his said share, except the 20 acres of corn and 10 acres of oats, which he took away; that the plaintiff unlawfully converted the remainder of defendant's share to his own use and benefit, and to his damage and injury in the sum of \$285; and avers that he is not only not indebted to the plaintiff in any sum whatever, as claimed in plaintiff's petition, but that the plaintiff is indebted to him in the sum of \$285, which the defendant now avers as a set-off and counterclaim against the plaintiff's pretended claim. This answer is verified as follows:

"State of Kansas, Kearney County—ss.: John Kauter, defendant in the above action, being duly sworn, upon his oath deposes and says that he has read over the above and foregoing amended answer, and knows the contents thereof, and swears that the statements therein contained are true, and further swears that the account stated in the third cause of action is just, true, correct, past due, and unpaid, and further says not. John Kauter.

"Subscribed and sworn to before me, the undersigned, on this 24th day of April, 1890. W. H. Johnson, Clerk Kearney County District Court."

To this answer the plaintiff filed a reply, denying all and singular the allegations in the answer of the defendant which were inconsistent with his original petition. The case proceeded to trial before the court and jury on the issues joined between the parties, and resulted in a verdict in favor of the plaintiff below for one dollar damages. Defendant below filed motion for new trial, which was overruled, and excepted to, made case, and brings the matter to this court, and asks that the judgment be reversed.



The first error complained of is the overruling of the motion of the defendant below to quash and set aside the summons and service therein, for the reason that the summons had not been issued within 60 days after the filing of the petition. The contention of plaintiff in error is that the petition was filed October 7, 1889, and summons issued thereon and returned not served, and that the second summons was issued December 27th, more than 60 days after the filing of the petition, and that thereby the court lost jurisdiction prior to the issuing of the second summons. Section 20, Code Civ. Proc., provides: "An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days." We think the objection was well taken, and the motion should have been sustained; but the defendant below waived any defect in the summons, and the service and return thereon, by submitting himself to the jurisdiction of the court, and asking leave to file an answer, and by filing answer and proceeding thereafter to a trial of the cause.

In the second assignment of error it is urged that, inasmuch as the answer of the defendant below was verified as true, and the third defense therein set up a set-off and counterclaim, claiming that the plaintiff below was indebted to John Kauter, defendant below, in the sum of \$285 over and above the claim of the plaintiff below, with 6 per cent. interest thereon, and that Kauter's set-off and counterclaim arose out of the same matter set out in the original bill of particulars, judgment should have been rendered for him on the pleadings, because the plaintiff's reply was not verified. We do not think this position is tenable. The first defense in the answer is a general denial, the second is a special denial of the trespass, and the third, while it is claimed as a set-off and counterclaim, asks for damages on account of a failure of the plaintiff below to comply with his agreement with the defendant. It is not in the nature of a statement of account verified, which is admitted as true by failure on the part of the plaintiff to deny it under oath. It is true that defendant below, in the third paragraph of his answer, sets up that, by failure and refusal of the plaintiff below to permit him to take certain parts of the grain grown on the leased premises, he suffered damages, and itemized what his loss was on each kind of crop that he claims he was to have; but it is not in the nature of a state-

ment of an account verified, which shall be taken as true by failure to deny under oath. Section 108, Code Civ. Proc., provides: "In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." The third paragraph in the answer of the defendant is simply a statement of the items which he claims constitutes his damage by the failure and refusal of the plaintiff below to carry out his contract.

On the 25th day of November, 1890, the defendant below filed a motion asking the court to require the plaintiff below to give a good and sufficient bond for costs, or that the case be dismissed, and in support of said motion shows that this case has been continued at great cost, for witness fees, etc., and that the sureties on the original bond are entirely insolvent, and have no property subject to execution. This motion was duly verified by affidavit, and the motion was heard by the court, and the following record made on the trial: "And said motion came on to be heard in open court, and the court, having heard said motion, evidence adduced thereon, and being fully advised, sustained the same, and ordered plaintiff to secure costs herein by the first day of the next term of this court, in April, 1891, or said cause will then be dismissed." And afterwards, on the 29th day of April, 1891, the further proceedings were had on said motion: "And now, on this 29th day of April, 1891, the same being one of the regular days of the April term of this court, this cause came on for hearing on the motion of defendant to dismiss said action for want of sufficient cost bond; the plaintiff appearing by J. M. Johnson and N. W. Sonnedecker, and the defendant by Milton Brown. The defendant introduced the evidence of W. H. Johnson, clerk of the district court, in support of his motion. The plaintiff introduced the evidence of W. H. Johnson, Christ Fritz, and J. W. Johnson; also, a bond signed by Christ Fritz and A. V. Sykes, both residents of Kearney county, Kansas, and which had been tendered by plaintiff to the clerk of the district court, and his approval refused. Whereupon the court, being fully advised in the premises, and after hearing the argument of counsel, sustained said motion to dismiss said case. It is therefore ordered, considered, and adjudged that said cause be dismissed, at cost of plaintiff, without prejudice to a new action. To which order and ruling the plaintiff objected and excepted at the time, which exception was allowed by the court." On the 1st day of May, 1891, plaintiff below filed motion for new trial on said motion, which was duly heard by the court and overruled. On the

20th day of July, 1891, plaintiff filed his motion for a rehearing on his motion for a new trial, and the court sustained said motion, and reinstated the case on the docket for a trial, and required the plaintiff to deposit \$15 with the clerk to secure the costs, and ordered the case to stand on the docket for trial at the next term of the court, and the defendant below excepted to the order and judgment of the court in granting a new trial, and in setting aside the order of dismissal. We think, when the court made its final order dismissing this case, and overruled the motion for a new trial on said order and judgment of dismissal, the jurisdiction of the court over the case was terminated; and the court could not, three months thereafter, entertain a motion for rehearing of the motion for a new trial. Having once determined the matter on a motion for a new trial, the court had no authority to hear a second motion for a new trial of the case.

Other errors complained of are unnecessary to be noticed, as the judgment must be reversed for errors already indicated. The judgment of the district court is reversed, and the case remanded, with direction to set aside the order granting a new trial and reinstating said case on the docket for trial. All the judges concurring.

(5 Kan. App. 748)

ATCHISON, T. & S. F. R. CO. v. HINE.

(Court of Appeals of Kansas, Southern Department, W. D. Jan. 6, 1897.)

VERDICT—CONFLICTING SPECIAL FINDINGS.

Where the special findings of the jury are directly in conflict with all the evidence in the case, and are not supported by any evidence, it is the duty of the trial court to set the verdict aside, and grant a new trial.

(Syllabus by the Court.)

Error from district court, Edwards county; S. W. Vandivert, Judge.

Action by F. B. Hine against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. A. Hurd, W. Littlefield, and O. J. Wood, for plaintiff in error. F. D. Smith, for defendant in error.

COLE, J. This action was brought by defendant in error to recover the value of a house and barn alleged to have been destroyed by fire caused by sparks from one of defendant's engines. From a verdict and judgment against it, the railroad company brings the case here for review.

A number of questions are raised by the briefs of counsel, but, from our view of the case, there is but one question that needs to be discussed at this time. It is urged by plaintiff in error that the trial court should have set the verdict aside because the special findings of the jury were wholly unsupported by the evidence in this case, and were

contrary to all the evidence in the case. After a careful examination of all the evidence and the findings, we are of the opinion that this position is well taken. The jury found, in answer to special questions, that the fire in question was caused by the negligence of the defendant company, and that said negligence consisted in the fact that the engineer in charge of the engine in question took the same out without said engine being properly inspected. The jury further found that said engineer was careless, in that he operated his engine without having the netting in proper condition to prevent the escape of an unusual amount of sparks. The jury further found that the engine in question was not in good condition, in that the netting was out of repair, so as to allow an unusual amount of sparks to escape. They found, however, that the engine was of the most approved pattern, and provided with the latest appliances to prevent the escape of fire, and found no other act of negligence upon the part of the company or any of its servants. This simplifies the question which demands our attention, and we have only to inquire whether the record discloses any evidence showing that the wire netting used in the engine in question was out of repair. Of course, if there is a conflict in the evidence, then this court cannot set aside the verdict; neither ought the lower court to have done so. But, while the act of 1885 shifted the burden of proof with regard to negligence in a case of this character, yet we do not understand that the act intended to make railroad companies insurers of property, or to raise a presumption of fact, but rather one of law, in an action brought against a railroad company for damages. The act prescribes, in substance, that when it shall have been shown that a railroad company has set out a fire, negligence shall be presumed until the contrary is shown; but, when the legal presumption has been fully rebutted by positive testimony, it remains the duty of the plaintiff in such an action to show proof of negligence as much as before the passage of the act of 1885. It is not claimed by counsel for defendant in error that there is any direct proof that the netting in the engine in question was out of repair, but it is claimed that the jury had a right to find such a fact from the evidence that was given in the case. It is urged that the evidence of the railroad company itself shows that the engine in question was permitted to leave upon its trip from Newton to Dodge City, on the day when the fire is alleged to have occurred, without the engine being properly inspected.

The testimony, so far as it relates to this question, is as follows: Henry Johnson, the engineer, says: "Q. Is it not a fact that all engines of every pattern throw more or less sparks? A. Of course, they throw some sparks. Q. You say this spark arrester was in good condition. How do you know that?"

A. By the man that examined it. Q. You don't know that of your own personal knowledge, do you? A. Yes, sir; I do. Q. How do you know that? A. I looked at it. Q. How did you look at it? A. There is a door on the side to look at it, and I looked at it through that. Q. You looked at it through that, did you? A. Yes, sir. Q. This spark arrester is composed of netting, is it not? A. Yes, sir. Q. There might be small holes in that netting, and you would not see them, might there not? A. Yes; there might be. It is not probable, though. Q. Could you tell whether there was holes in that netting by looking through that hole in the side? A. Yes, sir; I could. Q. How could you do it? It is dark in there, is it not? A. Yes; but I looked in it with a torch." The examination which this witness testifies to was made by him on the morning of the 27th of February, when he took out the engine in question. There was further testimony tending to show that an examination of this engine had been made on the 25th day of February. The witness Thomas Paxton testifies as follows: "Q. These front end extensions have a side door? A. Yes, sir. Q. How large is that? A. The opening is about eight inches large. Q. Eight inches across? A. Yes, sir. Q. What is the purpose of that door? A. It has one purpose, and that is to let an inspector make an examination of the interior of the front end,—to look into and see the condition of the netting." There was further testimony by another witness, known as an "inspector," with regard to the condition of the netting in question on the 25th day of the same month, which showed that upon said date the netting was in proper condition.

The defendant in error urges that this testimony shows that the inspection on the morning of the 27th was not made by an inspector, and that it should have been, and that the inspection which was made by the engineer was not what it ought to have been. We do not understand the main question at issue to be when or what kind of an inspection was made, but what was the condition of the engine; and the engineer in question testifies positively as to its condition on the morning the fire occurred, and there is no evidence to the contrary. The evidence with regard to the inspections which were made simply goes to fortify the direct and positive evidence upon that point. It is true that the witness Smith, called by the defendant in error, testifies that he saw the train in question pulling out of Kinsley and that the engine was throwing a good many sparks; but it is a matter of common knowledge that, when an engine starts with a freight train from a depot, it will throw sparks, and the jury had no right, from this piece of testimony, to build one presumption upon another, and say that, because the engine threw a number of sparks when it started from the depot, it was throwing sparks when it reached the place where the buildings which were

destroyed by fire were situated, and that the number of sparks thrown was unusual, and sufficient to show that the netting in question must have been defective; and this the jury were compelled to do to arrive at the verdict which they did. There is no testimony anywhere in this case that the engine in question threw an unusual amount of sparks, nor is there any testimony of its throwing any sparks except as it started from the depot at Kinsley. Evidence that the engine threw some sparks as it started from the depot at Kinsley will not support a finding that the netting was out of repair, so as to allow an unusual amount of sparks to escape.

We have also taken the precaution in this case to examine the diagrams attached to the record, and forming a part thereof; and, taking them in connection with the balance of the testimony, we are convinced that a new trial should be awarded in this case. The judgment of the district court is reversed, and the cause remanded for a new trial. All the judges concurring.

(5 Kan. App. 539)

#### COX v. STATE.

(Court of Appeals of Kansas. Southern Department, E. D. Jan. 5, 1897.)

#### RECOGNIZANCE—VALIDITY.

Where a justice of the peace has once fixed the amount of bail in an undertaking in appeal in a criminal case, and a bond has been given by the appellant, and approved by the justice, and the defendant discharged from arrest thereunder, the jurisdiction of the justice has terminated, and a recognizance taken eight days thereafter is void.

(Syllabus by the Court.)

Error from district court, Elk county; M. G. Troup, Judge.

Action by the state of Kansas against T. F. Cox. Judgment for plaintiff. Defendant brings error. Reversed.

L. Scott, for plaintiff in error. F. B. Dawes, Atty. Gen., and John Marshall, Co. Atty., for the State.

JOHNSON, P. J. This action was brought in the district court of Elk county, Kan., by the state of Kansas, to recover upon a forfeited bond purporting to have been executed by T. C. Hatton as principal and T. F. Cox and W. M. Crooks as sureties. The case is brought to this court upon a transcript attached to the petition in error. The defendant in error contends, in its brief, "that this case is not in this court in such a manner that this court can pass upon the question raised, and say that there is error in the record and proceedings in the trial court." The only question raised in this case is, did the court err in its conclusions of law upon the facts found? The clerk of the district court certifies that the "above and foregoing" contains a true, complete, and correct copy of all the pleadings and all the indorsements thereon; all orders; all findings of fact and

the conclusions of law thereon; together with all the judgments, orders, and proceedings thereon; motions for a new trial, and judgment thereon. This is a copy of the record and proceedings, and certainly is all that is necessary for us to have before us to intelligently pass upon the errors complained of. To refuse to review the case would be to apply an extremely technical ruling to the certificate of the clerk certifying to the transcript. We will consider the case upon its merits.

The court made the following findings of fact and conclusions of law:

"Findings of Fact.

"(1) On the 18th day of July, 1891, one Lee Wait was the duly elected, qualified, and acting justice of the peace in and for the township of Howard, in Elk county, Kansas, and on that day the defendant T. C. Hatton was regularly tried and convicted by the jury for a violation of the prohibitory liquor law of this state, and upon such conviction the said defendant T. C. Hatton was adjudged by said justice of the peace to pay a fine to the state of Kansas in the sum of \$250, and to pay the costs of this prosecution, and the said defendant T. C. Hatton was further adjudged by said justice of the peace to be committed to the jail of Elk county, Kansas, for a period of 40 days.

"(2) Upon said 18th day of July, and after the conviction and sentence of said T. C. Hatton, the said defendant T. C. Hatton, duly signed and executed the appeal bond or recognizance in suit in this case, a copy of which appeal bond is attached to plaintiff's petition in this case, and the said T. C. Hatton at that time procured the defendant W. M. Crooks and one G. W. Harris to sign said appeal bond or recognizance with himself, as sureties, and the said W. M. Crooks and G. W. Harris duly signed and executed the said appeal bond before the said justice of the peace, Lee Wait, and the said W. M. Crooks and G. W. Harris also duly signed the affidavit on the reverse side of said undertaking, and swore to the same before the said Lee Wait, justice of the peace, and, after thus qualifying themselves as sureties upon said undertaking, the said bond was duly approved by the said Lee Wait, justice of the peace, and duly filed in his office.

"(3) After the conviction of the said defendant T. C. Hatton, and after said justice of the peace had pronounced judgment against him, as shown in the first paragraph hereof, the said justice of the peace directed the constable in attendance upon his court to take charge of said defendant T. C. Hatton, and the said defendant T. C. Hatton remained in charge of the said constable until after the execution of the appeal bond or recognizance in suit herein, as hereinbefore stated in the second paragraph hereof; and after the approval of said recognizance the said justice directed said constable to release

and discharge the said defendant T. C. Hatton, and the said defendant T. C. Hatton has never been since that time again arrested or apprehended or committed in said action.

"(4) After the said appeal bond or recognizance had been thus executed, approved, and filed in the office of the justice of the peace, and there had remained for perhaps about one week, or at least six or eight days, the said G. W. Harris, becoming dissatisfied as security on said bond, the dissatisfaction of G. W. Harris growing out of complaint made by his wife for having signed said bond as surety, and growing out of the further complaint of his creditors, who, after his justification in the sum of \$400 as surety on said bond, were pressing him for the collection of their debts, the said G. W. Harris procured the defendant T. F. Cox to go with him to the office of the said Lee Wait, justice of the peace, and there induced said justice of the peace to erase his name, 'G. W. Harris' from said appeal bond, both upon the face of the same and upon the reverse side of said bond, following the justification as said surety; and said G. W. Harris also induced the defendant T. F. Cox to sign his name as surety upon said appeal bond where the name of the said G. W. Harris had heretofore been, and also induced said T. F. Cox to sign his name on the reverse side, following the affidavit for suretyship, in place where the name of G. W. Harris had heretofore been; and the said justice of the peace thereupon duly swore said T. F. Cox as surety to the affidavit of justification on the back of said appeal bond. The said G. W. Harris, in order to induce said T. F. Cox to take his place on said appeal bond as surety, paid and delivered to said T. F. Cox a load of oats of about 30 bushels; this load of oats of about 30 bushels being the only consideration which the said T. F. Cox received for signing said appeal bond or undertaking as surety. That said G. W. Harris delivered to said T. F. Cox the said load of oats to compensate him for taking his place as surety upon said bond.

"(5) The defendant W. M. Crooks at no time, either directly or indirectly, ever consented to or assented to the change of surety upon the bond from G. W. Harris to T. F. Cox, and the erasures of the name of G. W. Harris upon said bond, both upon the face and upon the reverse side, were made without the knowledge and consent of said W. M. Crooks, and T. F. Cox signed said bond, both upon the face thereof and upon the reverse side, as surety, without the knowledge or consent of the said W. M. Crooks.

"(6) After the changes heretofore indicated had been made as to the sureties upon said appeal bond, and on, to wit, the 31st day of July, 1891, the said appeal bond, together with a duly-certified transcript of the case of the state of Kansas against T. C. Hatton was duly transmitted to the clerk of this court, and by the said clerk duly filed in his

office, and on the same day the appeal bond was duly recorded in a book kept by said clerk for recording recognizances in the manner provided by law.

"(7) Afterwards, and on, to wit, the 5th day of October, 1891, being the first day of the next term of this court succeeding the time when the appeal of the said defendant T. C. Hatton in the case of the state of Kansas against himself was transmitted to this court, the said recognizance was duly forfeited by this court, as provided by law, by reason of the failure of said T. C. Hatton to appear at said term for trial, as he had agreed to do by the terms of the appeal bond or recognizance in controversy in this case.

"(8) After the said October term of this court, on, to wit, the 28th day of November, 1891, the plaintiff commenced this action, and seeks to recover the penal sum set forth in said appeal bond and undertaking. The plaintiff obtained service by summons upon the defendants W. M. Crooks and T. F. Cox, but the plaintiff has failed to obtain any service upon defendant T. C. Hatton in said appeal bond; the said T. C. Hatton having fled from the state of Kansas about the time his appeal was transmitted to this court, namely, on or about the 31st day of July, 1891, and said T. C. Hatton has remained in parts unknown from that day to this.

"(9) The recognizance or appeal bond in controversy was first signed and executed by the original parties to the same, in the manner following, to wit: The said defendant in that case, T. C. Hatton, first signed the recognizance, and the said defendant in this case, W. M. Crooks, next signed the recognizance upon the reverse side, immediately following the affidavit of sureties; and the said W. M. Crooks was there duly qualified or sworn by said justice of the peace as surety upon said bond. Afterwards the said G. W. Harris appeared at the office of the said justice of the peace, and he signed the bond upon its face, and also signed the affidavit of suretyship on the reverse side, immediately following the name of W. M. Crooks; and said G. W. Harris was at that time sworn by said justice of the peace as surety upon said bond; and each and all of the signers of said bond, viz. T. C. Hatton, W. M. Crooks, and G. W. Harris, were probably in the office of the justice of the peace at the time when said T. C. Hatton was discharged from custody, and at the time when the said bond was approved by said justice of the peace, late in the evening of said 18th day of July, 1891."

#### "Conclusions of Law.

"(1) The defendant W. M. Crooks is entitled to judgment against the plaintiff for costs in this action.

"(2) The plaintiff is entitled to judgment against the defendant T. F. Cox for the full penal sum mentioned in the appeal bond in suit, together with interest thereon at the

rate of 6 per cent. from the date of commencement of this action.

"(3) The plaintiff is entitled to dismiss its cause of action against the defendant T. C. Hatton without prejudice, at costs of plaintiff.  
M. G. Troup, Judge."

There is no question as to the regularity of the trial before the justice of the peace; no question as to the legality of the conviction; no question that the appeal bond was properly filed, and the prisoner released from custody by reason of the execution and approval of the bond signed by Hatton as principal and Crooks and Harris as sureties. We think the justice of the peace had no jurisdiction to either fix the amount of recognizance or direct or authorize the giving of a new recognizance or any alteration or amendment to the recognizance already given, eight days after it had been executed and approved. When the justice fixed the amount of the undertaking in appeal, and the recognizance had been given as required, and approved, and defendant discharged thereon, his jurisdiction in the matter terminated. He could do nothing further in the matter except make a transcript of the proceedings had before him, and certifying the case to the district court. In the case of *State v. Wininger*, 81 Ind. 51, the supreme court held: "That in a complaint upon a forfeited recognizance it must state facts showing that the officer by whom the bail was accepted had authority to take it. A recognizance must be valid at the time that it is entered into, and the officer taking the same must have authority to take the same, or it is void, and no action can be maintained thereon." The attempt of the justice to strike out the name of Harris and insert the name of Cox in lieu thereof destroyed the validity of the recognizance, and it was beyond the jurisdiction of the justice. In the case of *Waugh v. People*, 17 Ill. 562, —an action on forfeited recognizance,—where the court had ordered the defendant in a criminal prosecution to be held in bail for his appearance in the sum of \$100, the sheriff, in taking the recognizance for his appearance, required him to give bail in the sum of \$200. The court, in commenting on the validity of this bond, says: "It is not and cannot be denied that the plea showed the recognizance was void as to a part, and, if so as to a part, then it was void as to the whole." In the case of *Roberts v. State*, 34 Kan. 151, 8 Pac. 246, an action on the forfeited recognizance executed to discharge C. F. Roberts from custody, who was charged with having committed robbery,—the order of the court admitting him to bail fixed the amount of his bond at \$1,200, but the sheriff, in taking the recognizance, took it in the sum of \$1,250. Horton, C. J., in delivering the opinion of the court, says: "The recognizance is not defective on account of form, omission of recital, condition of undertaking, or for the neglect of any clerk or magistrate,

or for any other irregularities. It is more than defective or irregular; it is utterly void. The recognizance is a substantial departure from the bond required by the district court. Bond to secure the appearance of a person charged with crime must be taken and executed in pursuance of the order of the proper court or officer." In the same case the chief justice, in further commenting on the recognizance, says: "A recognizance taken by a court without jurisdiction, or by an officer without authority, is void. The sheriff was bound to pursue his authority strictly, and when he departed from it, and required bail in excess of the order of the district court, he acted without authority, and the recognizance was as void as if he had no authority whatever to require bail." The conclusions of law holding the recognizance valid as to Cox was erroneous. There being no objections made to the findings of fact made by the court, each party being satisfied with them, the judgment of the court should have been for the defendant below. The judgment of the district court is reversed, and the case remanded, with direction to render judgment for the defendant below. All the judges concurring.

(23 Nev. 346)

**STATE v. BUSTER.** (No. 1,475.)

(Supreme Court of Nevada. Dec. 31, 1896.)

CRIMINAL LAW—EVIDENCE—CONFESSIONS—COMPETENCY—ERRONEOUS ADMISSION—HARMLESS ERROR.

1. The fact that portions of a voluntary confession made by an accused out of court were not understood by the person to whom they were made, because made in a language with which he was unacquainted, render the entire confession inadmissible.

2. Error in admitting the evidence of one witness of a confession by an accused is harmless where the same confession is proved by other witnesses.

Appeal from district court, Humboldt county; A. E. Cheney, Judge.

John Buster was convicted of murder, and appeals. Affirmed.

S. J. Bonnifield, for appellant. L. A. Buckner, Dist. Atty., and Robt. M. Beatty, Atty. Gen., for the State.

BELKNAP, J. Appellant was convicted of the crime of murder in the first degree in killing Frank Messa. The only exception urged in this court is upon a motion to strike out the testimony of Eugene Cozzens, a witness introduced by the prosecution to prove a confession made by the defendant upon the ground that a portion of it was hearsay. The defendant is an Indian. The confession was spoken in the jargon formed by the mixture of the language of his tribe with English words. Cozzens did not understand that portion of it which was spoken in the native language of the Indian, and an interpreter translated it. The court allowed the motion to strike out all of Cozzens' testimony

that he understood by the aid of the interpreter, but all the testimony that Cozzens understood without the aid of the interpreter was allowed to stand. "Some of the reasons given why extrajudicial confessions should be received with great caution are that there is danger of mistake from the misapprehension of the witness, the misuse of words, the failure of the party to express his own meaning, the infirmity of memory." *People v. Gelabert*, 39 Cal. 663. "In the proof of confessions, as in the case of admissions in civil cases, the whole of what the prisoner said on the subject at the time of making the confession should be taken together. This rule is the dictate of reason, as well as of humanity. The prisoner is supposed to have stated a proposition respecting his own connection with the crime, but it is not reasonable to assume that the entire proposition, with all its limitations, was contained in one sentence, or in any particular number of sentences, excluding all other parts of the conversation. As in other cases the meaning and intent of the parties are collected from the whole writing taken together, and all the instruments, executed at one time by the parties, and relating to the same matter, are equally resorted to for that purpose, so here, if one part of the conversation is relied on, as a confession of the crime, the prisoner has a right to lay before the court the whole of what was said in that conversation; not being confined to so much only as is explanatory of the part already proved against him, but being permitted to give evidence of all that was said upon that occasion relative to the subject-matter in issue." 1 Greenl. Ev. § 218. The court should have granted appellant's motion, and have stricken out all of the testimony of the witness concerning the confession. But the failure to make the proper order will not result in reversing the judgment, as the same confession was conclusively established by several other witnesses, who were familiar with the Indian language, and whose testimony was not attempted to be contradicted. Therefore the error was harmless. *State v. Murphy*, 9 Nev. 394; *Perrin v. State* (Wis.) 50 N. W. 516; *Torris v. People* (Colo. Sup.) 36 Pac. 153; *Mayor, etc. of New York v. National Broadway Bank of City of New York* (N. Y. App.) 27 N. E. 555; *Brown v. Klock* (Sup.) 5 N. Y. Supp. 245; *Crim. Prac. Act*, § 487. Judgment affirmed.

BIGELOW, C. J., and BONNIFIELD, J., concur.

(23 Nev. 349)

**SHIELDS v. ORR EXTENSION DITCH CO.** (No. 1,478.)

(Supreme Court of Nevada. Jan. 2, 1897.)

IRRIGATION—SEEPAGE—LIABILITY FOR DAMAGES—INJUNCTION—CONTRIBUTORY NEGLIGENCE—AMENDMENT—INSTRUCTIONS—RECORD.

1. Instructions as to the law under a certain state of facts are properly denied where the un-

contradicted evidence shows such facts do not exist.

2. The doctrine of contributory negligence does not apply in case of injury to land from the escape of water from a ditch, the owner of the ditch knowing of the defects therein, and being able to prevent the injury.

3. The owner of a ditch is liable for damage caused by seepage of water from it.

4. Amendment of the ad damnum clause by increasing the amount claimed may be allowed during the trial.

5. Sustaining objections to questions cannot be held error where the record does not show what the proposed testimony would have been.

6. Where, in an action against the owner of a ditch for escape of water therefrom onto the plaintiff's land, defendant claims a prescriptive right, which would in time ripen into an adverse right, plaintiff prevailing is entitled to an injunction.

Appeal from district court, Washoe county; A. E. Cheney, Judge.

Action by M. Shields against the Orr Extension Ditch Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Torreyson & Summerfield and Thos. E. Haydon, for appellant. Curler & Curler, for respondent.

BELKNAP, J. Respondent brought this action to recover damages to his land and crops by water escaping from appellant's ditch, and for an injunction restraining a repetition of the wrongs complained of. A trial was had before a jury, which resulted in a verdict for respondent, assessing his damages in the sum of \$50.36, and for costs. Thereupon the court ordered judgment to be entered upon the verdict, and granted an injunction, restraining defendant from permitting water to escape from its ditch upon a portion of the described premises, and denying it as to another portion used by respondent as pasture land. It was shown at the trial that the ditch of defendant was upon a hillside sloping towards the lands where the damage complained of occurred. The ground through which the ditch ran was rocky and porous, and water constantly escaped, with the knowledge of the defendant, during the irrigating season, when the ditch was full; not by means of overflow, but by seepage and leakage through its banks. These facts were uncontroverted at the trial. Several of the instructions asked for by defendant were refused by the court upon the ground that they were not applicable to the facts of the case as presented by the testimony. One of these was, in effect, that defendant was not liable for a mere accidental injury when no negligence was shown. There was no testimony tending to show that the escape of water was the result of accident; on the contrary, the uncontradicted testimony showed a constant escape of water during the irrigating season, with defendant's knowledge. Another of the refused instructions was, in effect, that defendant claimed a prescriptive right to have the escaping water flow upon plaintiff's land; but, in fact, there was no testimony tending to show such claim. On the contrary, the testimony

introduced by defendant itself was inconsistent with the instruction. Again, two proposed instructions, numbered 1 and 2, respectively, in the transcript, were refused by the court. Each of them is drawn upon the theory that defendant might recover if it has not been guilty of negligence. But, as the uncontradicted testimony showed negligence of defendant in permitting water to escape from its ditch, the issue of negligence was eliminated from the case. They were, therefore, inapplicable and misleading. An instruction also was asked to the effect that the plaintiff himself should have exercised ordinary care to have avoided the consequences of defendant's acts, and, failing to do so, the parties were in mutual fault. The doctrine of contributory negligence is not applicable to cases of this nature, where the defendant had knowledge of the defects of its ditch, and could have prevented the injury. Under these circumstances, no duty rested upon plaintiff to have avoided the consequences of defendant's acts. In a case from Idaho, the supreme court of that state said: "A person owning a ditch, from which water escapes upon the premises of an adjoining landowner, cannot escape liability on the ground that such landowner might, at a small expense, have prevented any damage by digging a ditch on his own land that would have carried off the waste water." *McCarty v. Canal Co.*, 10 Pac. 623, and cases there cited; *Black, Pom. Water Rights*, § 197. The court was asked to instruct the jury that, if the injury was caused solely by seepage, filtering, or percolation, defendant was not liable. All of the testimony showed that the seepage of water from defendant's ditch was the cause of the damage. In such case defendant's liability is well settled. In *Richardson v. Kier*, 34 Cal. 63, the court said: "He [the ditch owner] is bound to keep it [the ditch] in good repair, so that the water will not overflow or break through its banks, or destroy or damage the lands of other parties; and if, through any fault or neglect of his in not properly managing and keeping it in repair, the water does overflow or break through the banks of the ditch, and injure the lands of others, either by washing away the soil or covering the soil with sand, the law holds him responsible." See, also, *Parker v. Larsen*, 86 Cal. 236, 24 Pac. 989; *Pixley v. Clark*, 35 N. Y. 520; *Angell, Watercourses*, § 330.

At the trial the court allowed plaintiff to amend the ad damnum claim. Plaintiff originally claimed \$1,000 damages. By the amendment \$1,400 was claimed. This was a matter within the discretion of the trial judge. If the amendment operated as a surprise to defendant, that fact could have been stated, and a continuance asked for. The verdict, however, being for only \$50 when \$1,400 was claimed by the complaint, no prejudice could have resulted to defendant by the ruling. *Miaghan v. Insurance Co.*, 24 Hun, 58; *Johnson v. Brown*, 57 Barb. 118; *Vibbard v. Rod-*

erick, 51 Barb. 616; Currie v. Railroad Co., 61 Miss. 725.

An objection was made to a ruling of the court in excluding one or two questions propounded to the witness Bryant by the defendant. There is nothing in the record to indicate what the proposed testimony would be. It was incumbent upon appellant to have shown the substance of his testimony, so that its materiality could be determined by this court. As the record now is, we cannot determine whether the court erred or not. *Marshall v. Hancock*, 80 Cal. 82, 22 Pac. 61; *Dainese v. Allen*, 36 N. Y. Super. Ct. 98; *Berry v. Mayhew*, 1 Daly, 54; *Insurance Co. v. Boulden* (Ala.) 11 South. 773.

Error is also claimed to have been committed by granting an injunction. It is said that the damages sustained by the plaintiff were trivial, and the inconvenience to the defendant disproportionate to the loss sustained. In its answer, defendant claimed a prescriptive right, which would in time ripen into an adverse right. In such cases the party prevailing is entitled to have an injunction for the vindication of his right, and its preservation. *Brown v. Ashley*, 16 Nev. 316, and cases cited. Judgment affirmed.

BONNIFIELD, J., concurs. BIGELOW, C. J., concurs in the judgment.

(30 Or. 108)

#### STATE v. MARTIN.

(Supreme Court of Oregon. Dec. 21, 1896.)

#### CRIMINAL LAW—APPEAL—ABATEMENT BY DEATH.

An appeal from a conviction cannot, on accused's death, be prosecuted by the personal representative of the accused, though there is a judgment for costs, enforceable against the accused's estate.

Appeal from circuit court, Wasco county; W. L. Bradshaw, Judge.

E. Martin was convicted of a crime, and appealed. On his death, the state moved to abate the appeal. Granted.

A. S. Bennett, for appellant. A. A. Jayne, Dist. Atty., and C. M. Idleman, Atty. Gen., for the State.

BEAN, J. The defendant was convicted and sentenced to the penitentiary for the crime of forgery. From this judgment he appealed, but died before the cause could be heard in this court. His death having been suggested, the attorney general moves for an order abating the appeal. This motion must be allowed. There is no right of appeal in any case, unless given either by statute or some rule of common law; and we are advised of no common-law rule or statutory enactment authorizing the prosecution of an appeal in a criminal case in this state by the personal representatives of a deceased defendant. At common law, such an appeal could be brought by the heirs or executors to reverse an attainder of treason or felony (*Bish. Cr. Proc.* § 1363); but this was upon

the principle that the effect of such attainder was to work the forfeiture of the estate, and thereby take from the heirs or executors, and give to the government, property belonging to them as representatives of the deceased person, and for this reason it was held that they had such an interest in the forfeited estate and judgment as entitled them to prosecute the appeal in their own right. In no other instance, it is believed, can there be found affirmative authority in the common law for the prosecution of an appeal in a criminal action by the representatives of a deceased defendant; and, since our constitution provides that "no conviction shall work corruption of blood or forfeiture of estate" (section 25, art. 1), it is clear the right to prosecute this appeal cannot be supported under the common law, and, as there is no statute authorizing such a procedure, it is manifest that the cause cannot now be heard. Indeed, to take any further proceeding in this case would be a vain and useless thing. If the appeal is to be heard, we must either affirm the judgment and order its execution, or reverse it and order a new trial. But in neither case could the judgment be carried into effect, because there is no person in existence upon whom it could operate. If affirmed, it could not be enforced against the personal representatives of the deceased by confinement during the term of the sentence; and, if reversed, there is no person to try. In a civil action, the judgment may be enforced by or against the personal representatives of the parties, and hence, under the statute (*Hill's Ann. Laws*, § 38), the action does not abate by the death of a party if the cause of action survive or continue. But, in a criminal action, the sole purpose of the proceeding being to punish the defendant in person, the action must necessarily abate upon his death.

It is argued, however, that there is a judgment in this case for costs which can be enforced against the defendant's estate, and for that reason his personal representatives have a right to prosecute this appeal. But costs are only incidental to the real question in issue, and are recovered or not according to the determination of such question. In criminal proceedings, they result solely as a legal consequence from the judgment of conviction, and, unless the judgment itself can be reviewed on appeal, after the death of the defendant, it is manifest that a mere incident thereto cannot be so reviewed. The questions involved in this case were directly presented in *O'Sullivan v. People*, 144 Ill. 604, 32 N. E. 192, and *Harrington v. State*, 53 Ga. 552. In each of these cases the defendant died after the cause had been submitted to the appellate court for decision, and the right to continue them in the name of a personal representative of the deceased was denied; the courts refusing to proceed any further in the matter or pronounce any decision in the cases. It follows that this appeal must abate, and it is so ordered.



(30 Or. 238)

SAYRE v. MOHNEY et al.

(Supreme Court of Oregon. Dec. 21, 1896.)

PROMISSORY NOTES — FAILURE OF CONSIDERATION — DEMURRER.

In an action on a note given in payment for real estate, a demurrer will not lie to the answer which alleges that the defendants tendered the amount due on the note, and demanded a conveyance of the premises in accordance with plaintiff's bond therefor, but that plaintiff could not give title to the land, and that, in consequence thereof, defendants abandoned the property, and rescinded the contract; since the answer states a defense.

Appeal from circuit court, Marion county; George H. Burnett, Judge.

Action by Ruth E. Sayre, executrix, against W. D. Mohney and others, on a promissory note. From a judgment on a verdict in favor of plaintiff after defendants' refusal to plead on the sustaining of a demurrer to the answer, defendants appeal. Reversed.

This is an action by Ruth E. Sayre against W. D. Mohney, F. J. Strayer, M. W. Smith, and J. A. Rinehardt to recover the balance due on a promissory note for \$1,724.25, executed September 16, 1892, by the defendants and one L. M. Hensel to the plaintiff, and payable on or before two years from that date, with interest thereon at the rate of 10 per cent. per annum, payable annually. The summons being served upon Mohney and Smith only, they alone appeared in the action, and, after denying the material allegations of the complaint, which are in the usual form, alleged: That said note was executed as evidence of the purchase price of a tract of land and right of way to and from the same in Marion county, which the plaintiff, by her bond, agreed to sell and convey by warranty deed to the makers of said note, as partners, upon the payment thereof. That soon after its execution they paid her thereon \$804.65, whereupon she permitted them, as partners, to enter into possession of said premises, which they occupied and improved, and on September 16, 1893, paid her the interest then due, amounting to \$91.96. That Hensel, Strayer, and Rinehardt having assigned their respective interests in said property to them prior to the maturity of the note, of which fact plaintiff had due notice, they, on September 18, 1894, tendered plaintiff \$1,011.60, the balance due on said note, and demanded of her a conveyance of the premises and right of way according to the terms and conditions of the contract, and she thereupon tendered a pretended deed therefor; but at that time, and at the maturity of the note, the premises were subject to a mortgage to secure the sum of \$2,700 and a delinquent tax of \$19.04 for 1893; and that a part of said premises was in the possession of one Whelon, whom they allege, on information and belief, was the owner thereof. That in consequence of these liens upon and failure of title to the premises they, on September 25th of that year, offered to return and cancel said

contract and bond for a deed, and then abandoned the property, and surrendered the possession thereof to the plaintiff, and, after giving her due notice, rescinded the contract. That they had ever been ready and willing to perform their part of the agreement, but the plaintiff had failed, neglected, and refused to perform her part thereof, in consequence of which they had been damaged in the amount paid on the note, and also in the sum of \$375 on account of improvements made upon the premises for which they prayed judgment. A copy of the bond having been made a part of the answer, from which it appeared that plaintiff agreed to convey the premises and right of way to the defendants as tenants in common, the court, upon motion, struck out the allegations of possession and agreement to purchase as partners, and sustained a general demurrer to the allegations of new matter contained in the answer. The defendants refusing to plead further, a trial was had, resulting in a verdict and judgment against them for the amount demanded, from which they appeal.

H. J. Bigger and G. G. Bingham, for appellants. Wm. M. Kaiser and John A. Carson, for respondent.

MOORE, C. J. (after stating the facts). It is contended by counsel for the defendants that the contract entered into by the parties was executory merely, and the agreement to pay the purchase price evidenced by the note depended upon the execution of a good and sufficient warranty deed conveying a fee-simple and unincumbered title to the premises; and that, these stipulations being mutual, the failure of consideration and rescission of the contract were rightfully pleaded as a defense to an action on the note, and hence the court erred in sustaining the demurrer; while counsel for the plaintiff maintain that, the bond for a deed having conveyed an equitable estate in the premises to five persons, neither of the obligees could assign his interest, except by deed duly executed; that, there being no allegation of such a conveyance having been made, Mohney and Smith were powerless to rescind the contract; that the surrender of the premises did not reinvest the plaintiff with the title; and that, the defendants having alleged that plaintiff tendered a deed, the answer should have stated that they at that time made known to her their objections to the title, but failed to do so, and for these reasons the demurrer was properly sustained. When there is a total failure of the consideration of the note upon which the action is instituted, the defendant may rescind the contract, as a matter of right. 1 Daniel, Neg. Inst. 203. But it has been held that failure of title to real estate purchased by the defendant will not be a sufficient defense to an action on notes given for the purchase money when he retains the deed, remains in the possession, and has been sub-

jected to no inconvenience or expense on account of the alleged defective title. *Grubbs v. Barber*, 102 Ind. 131, 1 N. E. 636. The reason for this rule is that the purchaser, by accepting an estate and retaining possession thereof, is estopped from denying the title under which he holds. If he would rescind the contract of purchase on account of a defect in the title, or for any other breach of the agreement, he must restore the possession and estate to the vendor. *Marsh v. Thompson*, 102 Ind. 272, 1 N. E. 630; *Jackson v. McGinness*, 14 Pa. St. 331; *McIndoe v. Morman*, 26 Wis. 588; *Diggle v. Boulden*, 48 Wis. 477, 4 N. W. 678; *Hill v. Winn*, 60 Ga. 337. The answer having interposed a defense to an action at law on the note, the nature of the estate created by the agreement to convey real property must be determined by the rules of law, and not by the maxims of equity. In *Burkhart v. Howard*, 14 Or. 39, 12 Pac. 79, it was held, in a suit in equity, that a bond for a deed transferred to the obligee the equitable estate in the premises while the obligor held the legal title as security for the payment of the purchase money. This conclusion is reached by invoking the maxim that equity treats that as done which was intended, and considers the vendor as a trustee for the purchaser of the estate agreed to be sold, and the purchaser as a trustee of the purchase money for the vendor. 1 Sugd. Vend. 175. "In law," says Mr. Pomeroy, in his work on Specific Performance of Contracts (section 314), "a contract for the sale of land is wholly, in every particular, executory, and produces no effect upon the respective estates and titles of the parties. The vendor remains to all intents the owner of the land. He can convey it free from any legal claim or incumbrance. He can devise it. On his death, intestate, it descends to his heirs. The contract in no manner interferes with his legal right to and estate in the land; and he is simply subjected to the legal duty of performing the contract, or paying such damages as a jury should award. On the other hand, the vendee acquires no interest whatever in the land. His right is a mere thing in action, and his duty is a debt—an obligation—to pay the price; and on his death both this right and this duty pass to his personal representatives, and not to his heirs. In short, he obtains at law no real property or interest in real property. The relations between the two parties are wholly personal. No change is made until, by the execution and delivery of a deed of conveyance, the estate in the land passes to the vendee." A bond for title is not distinguishable in its ordinary operation and effect from a simple agreement for the same purpose. 1 Warv. Vend. 146. "Formerly," says this author, at page 397 of the text-book cited, "every estate was legal, in the proper acceptance of that term; and in the contemplation of law there is and can be but one estate, which may properly be denominated the 'legal estate.' But

the introduction of what were known as 'uses,' and the subsequent origination of trusts, where one party held the title, but upon some trust or confidence for another, early led the court of chancery to take cognizance of the rights of the beneficiary; and thus there grew up a double ownership of lands thus situated, the interests which were cognizable as such only in a court of equity taking the name of 'equitable' to distinguish them from 'legal' estates." Tested by this rule, the defendants, not having acquired, at law, any estate in the premises, were under no obligation to plead, in an action for the purchase money, or prove, a tender of the deed conveying to plaintiff any possible right they might have in the premises as a condition precedent to the rescission of the contract; and, this being so, the obligees in the bond could assign their respective rights at law without the execution of a conveyance. The defendants allege that they surrendered the possession of the premises to the plaintiff, and, if this be true, it must be conceded that they showed a right, upon a failure of the title and breach of the conditions of the bond, to rescind the contract, for, as was said by Mr. Justice Thompson in *Bank v. Hagner*, 1 Pet. 455, "the possession was taken, doubtless, under a belief that the contract would be performed by the plaintiff, and a full title conveyed to him; but, if the contract was unexecuted, the defendant had a right to disaffirm it, and restore the possession, and could have sustained an action to recover back the purchase money, had it been paid." The defendants further allege that they demanded of plaintiff a conveyance of the premises and right of way according to the terms and conditions of the contract, and this would imply that she was requested to name each of the makers of the note as grantees in the deed. The statute declares: "The person to whom a tender is made shall at the time specify any objection he may have to the money, instrument, or other property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards." Hill's Ann. Laws Or. § 854. It must be presumed that the plaintiff tendered a warranty deed, since she was required by the contract to do so, and, having complied therewith, no objections that the defendants could have made to the terms of the instrument would have been availing, and they were not obliged to allege that they specified the reasons of their objections to the title. The bond for a deed not having provided that the defendants should have the possession of the premises, the right of possession remained with the legal title, and was, therefore, in the plaintiff, and, as the note was executed for the entire purchase money before the surrender of the possession by plaintiff, it is quite evident the

license given the defendants to occupy the land formed no part of the consideration of the note.

The plaintiff having instituted an action on the note, the important question for consideration is whether the defendants could plead a failure of consideration as a defense to the action, or whether their remedy was by a cross bill in equity. It must be admitted that plaintiff's complaint stated a good cause of action, but, had she relied upon the contract, instead of the note, it would have been necessary for her to allege and prove that she duly performed, or offered to perform, all the terms of her agreement, or that she was prevented from so doing by the defendants. Although the contract may be under seal, yet the purchaser, if he has a right to rescind it, may bring an action for money had and received, to recover both the purchase money and interest. 1 Sugd. Vend. 238. So, too, a vendor in the recovery of pecuniary damages has an adequate remedy at law, yet he has a choice of remedies, and may resort either to a court of law or a court of equity. *Crary v. Smith*, 2 N. Y. 60; *Brown v. Haff*, 5 Paige, 249. In *School Dist. v. Rogers*, 8 Iowa, 316, it appeared in evidence that the consideration of the note which was the subject of the action was a house and lot sold by the plaintiff to the defendant, a deed of conveyance of which was to be made on the payment of the note; and the court was asked to charge the jury that, "if the consideration of the note was real estate sold, before the plaintiff can recover the amount thereof he must show that he has made and tendered, or offered to make and tender, to defendant, a conveyance of the real estate," which instruction being refused, a judgment was rendered for the plaintiff, in reversing which the court said: "In refusing to give the instruction, we think the court erred. Under the issue joined, and under the evidence before the court, we think the instruction was proper to be given. When it is made to appear that the conveyance was to be made upon the payment of the purchase money, the courts regard the two acts as so far dependent that it is held that to entitle the plaintiff to recover he must show a performance, or offer to perform, the contract on his part, unless the defendant has waived a tender of the deed." In *Leonard v. Bates*, 1 Blackf. 171, an action was instituted on an obligation to purchase a tract of land to which the defendant pleaded that he executed the instrument in consideration that the vendor would make to him a good and sufficient deed in fee simple, and that, although he had fully kept his part of the agreement, the plaintiff, not having any title to the said land, neither did nor could make to him the said deed, but had wholly failed and refused to do so, wherefore he alleged that the consideration of the obligation had altogether failed. To this answer a demurrer was sustained, and, a judgment having been rendered in favor of the plaintiff, Blackford, J., in reversing

it, says: "The undertaking to make a good and sufficient deed in fee simple is nothing more nor less than to execute a clear and perfect title. The actual doing of that was the consideration of the defendant's promise. By this plea the defendant not only denies the performance by the plaintiff of the precedent condition, but also disputes his ability to perform it. Hence, if the consideration was duly stated, it became necessary for the maintenance of the suit that the plaintiff, in his replication, should state the goodness of his title, and show that he had done everything in his power to perform his part of the contract. Instead of such a reply, the plaintiff demurs to the plea; and by thus admitting that he never had any title he puts an end at once to the idea of his being able to make any." The contract in the case at bar was wholly executory, and the payment of the purchase money and the tender of the deed were to occur simultaneously, rendering the acts to be performed mutual and concurrent, so that upon an allegation of a failure of the consideration it was the duty of the plaintiff to meet the issue, and prove a performance upon her part of all the terms of the agreement. *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717. It follows that the judgment is reversed, and the cause remanded, with instructions to overrule the demurrer; and it is so ordered.

(30 Or. 145)

#### STATE v. ELLSWORTH.

(Supreme Court of Oregon. Dec. 21, 1896.)

WITNESSES — CROSS-EXAMINATION TO SHOW HOSTILITY—HOMICIDE BY POISONING—INSTRUCTIONS AS TO DEGREE.

1. A witness for the state in a homicide case, having stated on cross-examination that he had a very decided opinion, and had expressed it to others, including defendant's counsel, and the jury not having been informed what the opinion was, it was error to refuse to allow such counsel to ask him, "Do you remember at any time making an expression to me that he was as guilty as hell?"

2. As a foundation for showing hostility of a witness to defendant, E., it is enough to ask if, in referring to failure of the jury to agree on a verdict at a former trial, he did not, at a certain time and place, ask his friend, a man about 60 or 65 years old, with a gray moustache, whose name was unknown to counsel, what he thought of the jury in the E. case, and, on his answering that he understood that they disagreed, say to him that was better than an acquittal.

3. Where deceased died in a convulsion soon after defendant administered what he claimed was a powder of corn starch, and strychnine was found in her stomach, and experts said she died of strychnine poison, though there was no evidence that strychnine was kept by defendant or deceased, from which it might be inferred that he administered it by mistake, yet, he having offered proof of his general reputation for peace and good order, tending to raise a doubt as to the intent with which the act was done, if done by him, it was proper to instruct on manslaughter.

Appeal from circuit court, Multnomah county; T. A. Stephens, Judge.

W. E. Ellsworth appeals from a conviction of manslaughter. Reversed.

J. R. Stoddard and J. C. Leasure, for appellant. C. H. Idleman, Atty. Gen., and C. F. Lord, Dist. Atty., for the State.

MOORE, C. J. The defendant, W. E. Ellsworth, having been indicted for murder in the first degree in killing his wife, Edith Ellsworth, by administering strychnine to her, was convicted of manslaughter, and sentenced to imprisonment in the penitentiary for a term of 15 years, and to pay a fine of \$1,000. From this judgment he appeals, assigning as error the action of the trial court in rejecting material evidence and instructing the jury that they might find him guilty of manslaughter.

1. The record discloses that at the trial one Frank C. Middleton, a newspaper reporter, being called as a witness by, and having given material evidence for, the state, testified on cross-examination that he had talked considerably about the case; that he had a very decided opinion about it, and had expressed such opinion to others; and, referring to counsel for the defendant, said, "I have expressed it to you, Mr. Leasure, and also to Mr. Sears." Mr. Leasure, for the purpose of showing the bias of the witness, asked him the following questions: "Do you remember at any time making an expression to me that he was as guilty as hell?" "Did you ever state to Mr. Alfred Sears, counsel in this case, that you thought the defendant ought to be hung?" The court, referring to the first question, and without objection from counsel for the state, said to the witness, "You need not answer it," and sustained an objection to the other question. The defendant excepted to this remark and ruling, and now contends that he was thereby denied the right of showing to the jury the prejudice of the witness. It will be observed, from an examination of the testimony of the witness, that as to the merits of the case he had a decided opinion, which he expressed to others; but the jury were not informed as to whether such opinion was in favor of or opposed to the accused, and hence were left in doubt as to the degree of credibility to be accorded to his evidence. It might seem that the question as propounded to the witness did not sufficiently call his attention to the time, place, and circumstances when it is assumed he expressed the opinion to Mr. Leasure. The object of this requirement in connection with such questions is to enable the witness to revive in his memory the particular circumstance of which inquiry is made; but this witness, having stated that he had expressed an opinion to Mr. Leasure and Mr. Sears, the necessity of calling his attention to these preliminary facts was obviated, and the question to be considered is whether the refusal of the court to permit the witness to answer the question was the denial of a substantial right, to the prejudice of the defendant. Prof. Greenleaf, in his work on Evidence (volume 1, § 450), in speaking of the right of a defendant in a crim-

inal action to inquire as to the bias of a witness called by his adversary, says: "It has been held not irrelevant to the guilt or innocence of one charged with a crime to inquire of the witness for the prosecution, in cross-examination, whether he has not expressed feelings of hostility towards the prisoner." In *Starks v. People*, 5 Denio, 106, the plaintiff in error being on trial for arson, one E. Perkins appeared as a witness for the prosecution, and on cross-examination was asked whether, at a certain time, in speaking to one James Dunton of the prisoner, and referring to a certain black ash swamp, he had not said, "There would be a good place to kill Starks." The witness having answered in the negative, Dunton was called on the part of the accused, to prove that Perkins had made use of the language attributed to him; but, an objection to the question having been sustained, and an exception allowed, the prisoner appealed upon being convicted and sentenced, and Beardsley, C. J., in reversing the judgment, says: "How much, if anything, the evidence of the witness Dunton would have amounted to, is not for us to say, but it was clearly competent, and should not have been rejected by the court. It tended more or less to show ill will or malice on the part of the witness towards the prisoner on trial, and was, therefore, pertinent and material. It is always competent to show that a witness is hostile to the party against whom he is called; that he has threatened revenge; or that a quarrel exists between them. A jury would scrutinize more closely and doubtingly the evidence of a hostile than of an indifferent or friendly witness. Hence it is always competent to show the relations which exist between the witness and the party against, as well as the one for, whom he was called. The inquiry is material, and goes directly to the credit of the witness in the particular case." In *People v. Wasson*, 65 Cal. 538, 4 Pac. 555, the defendant, being tried for murder, one Thomas Carroll was called as a witness for the prosecution, and on cross-examination was asked the following question: "I will ask you now, Mr. Carroll, if on Saturday evening, in Pike Payne's saloon, in the town of Red Bluff, in the presence of Mr. McGowan and Mr. Thatch, both witnesses in this case, you did not make the remark that Wasson [the defendant] ought to have been hung before he left Butte Creek?" An objection to this question having been sustained, and an exception allowed, the defendant was found guilty, and the court, in reversing the judgment, and quoting from the opinion in *People v. Benson*, 52 Cal. 380, say: "It is difficult to see on what ground this evidence was excluded, as it is perfectly well settled that on cross-examination a witness may be interrogated as to any circumstance which tends to impeach his credibility by showing that he is biased against the party conducting the cross-examination, or that he has an interest

in the result adverse to such party. No citation of authorities is needed on a point so well settled, and the ruling was obviously erroneous." In the case at bar the jury were entitled to know what opinion the witness had expressed, that they might be able to judge of the weight and credibility to be given to his testimony, and the refusal of the court to permit the question to be answered was clearly erroneous, and the denial of a substantial right.

Dr. H. W. Cardwell was also called as a witness by the state, and gave material evidence against the defendant, and on cross-examination was asked if, in referring to the failure of the jury to agree upon a verdict at a former trial of this action, he did not, at a certain time and place, ask his friend, a man with a gray moustache, and whose age was about 60 or 65 years, but whose name was unknown to counsel for the defendant, "What do you think of the jury in the Ellsworth case?" and upon his answering, "Oh, I understand they have disagreed," "did you not then say, 'Well, that is better than an acquittal?'" An objection to this question having been sustained, the defendant excepted, and now insists that the language attributed to the witness shows hostility to the defendant, and that the person to whom the question was propounded and the remark made was sufficiently identified to revive in the memory of the witness the conversation to which his attention was directed. The rule is well settled in this state that, before the hostility of a witness can be shown by proof of unfriendly remarks or implicative acts, such proof must be laid by calling his attention to the time, place, and persons present when the words or acts attributed to him were uttered or done, that he may refresh his memory, and be afforded an opportunity for explanation. *State v. Stewart*, 11 Or. 52, 4 Pac. 128. The name of the person to whom the remark was made is not given, but that, if unknown to counsel, could be of little consequence, if the circumstances were detailed with that degree of particularity that necessarily called attention to the language or act complained of, and revived them in the memory of the witness. *Pendleton v. Dressing Co.*, 19 N. Y. 13. Viewed by the rule laid down in that case, we think the question must have accomplished this purpose, and, if the answer should be in the affirmative, it would tend to show bias; the remark being more than the mere expression of an opinion as to the guilt of the accused, in which case it was the duty of the court to permit the question to be answered. *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859.

2. Counsel for the defendant insist that under the evidence submitted the jury were compelled either to find him guilty as charged in the indictment, or not guilty, and that the verdict rendered is equivalent to an acquittal, and, this being so, the judgment should be reversed, and the cause remanded,

with instructions to discharge the prisoner. In invoking this principle of law, counsel assumes that the jury must have found that the deceased died from the effects of poison administered by the defendant, and hence the use of the means adopted manifests such a degree of deliberation and premeditation as to show conclusively the existence of malice, from which the jury must have found him guilty of murder in the first degree; and that, if they could not so find, it was their duty to acquit him; and, such an instruction having been requested, it is claimed the court erred in charging that he might be convicted of manslaughter. Except in the commission of or attempt to commit rape, arson, robbery, or burglary, the killing of another, to constitute murder in the first degree, must have been done purposely and of deliberate and premeditated malice. *Hill's Ann. Laws Or. § 1714*. And it is further provided that: "There shall be some other evidence of malice than the mere proof of the killing to constitute murder in the first degree, unless the killing was effected in the commission or attempt to commit a felony; and deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood and not hastily upon the occasion." *Id. § 1727*. It is not the mere intent to kill, but rather the manner and circumstances of the killing, coupled with the intent, that renders the act malicious. "The fact that a killing was intentional," says *Bigelow, C. J.*, in *State v. Vaughan* (Nev.) 39 Pac. 733, "does not necessarily prove that it was done with malice; for an intentional killing may be entirely justifiable, as where it is done in necessary self-defense, or it may be only manslaughter, as where it is done in the heat of passion, caused by a sufficient provocation. What it is must depend upon the manner of the killing and the surrounding circumstances." The intention to take the life of another by poison presupposes that the substance adopted to carry the evil design into execution can be administered to the victim without the latter's knowledge, and the mere intent to take life by this means, when death ensues, evinces such deliberation and premeditation as to establish conclusively the existence of malice. But can it be said that proof of death by poison conclusively implies that the substance producing such result was administered with intent to take life? If this question be answered in the affirmative, then it follows that the physician who prescribes a toxic remedy in ordinary doses for the relief of his patient, the druggist who compounds it, and the friend of the deceased, who knowingly administers it, each equally guilty of murder in the first degree, providing the patient, possessing some unknown constitutional idiosyncrasy, die from its effects, although the same medicine,

when given to others, less susceptible to its influences, would prove a mild tonic, or gentle stimulant. The mere statement of the consequences dependent upon the adoption of such a legal proposition ought to prove its own refutation, for, if such a rule could be invoked, heroic treatment in dangerous cases could never be adopted by the most skillful physician. In cases of death by other means, courts have said, in effect, that homicide by poison carries with it conclusive evidence from which a jury would have no option but to find the person administering the substance guilty of murder in the first degree. *People v. Bealoba*, 17 Cal. 389; *State v. Millain*, 3 Nev. 409; *State v. Garrand*, 5 Or. 216; *Aguilar v. Territory* (N. M.) 46 Pac. 342; *Territory v. Padilla*, Id. 346. The language here used was adopted by way of illustration only, and to show that "death by other means than poison" did not necessarily imply deliberation and premeditation, and hence was not evidence of malice; but the dictum, not having been used in cases of death by poisoning, can have but little weight in the case at bar. In *Com. v. Dougherty*, 2 Browne (Pa.) Append. 18, it is said that in murder by poison the intention is of the essence of the crime. So, too, in *Com. v. Keeper of the Prison*, 2 Ashm. 227, it was held that to constitute murder in the first degree by poison the killing must have been willful. In Pennsylvania, under a statute which provides that the jury in the trial of a person indicted for homicide shall, in case of conviction, find whether it is murder in the first or second degree, it has been held error in the trial of a person accused of murder by poison to charge the jury that, if they found the defendant guilty, their verdict must be of murder in the first degree. *Lane v. Com.*, 59 Pa. St. 371; *Shaffner v. Com.*, 72 Pa. St. 60; *McMeen v. Com.*, 114 Pa. St. 300, 9 Atl. 878. Such also would seem to be the rule in Connecticut. See *State v. Dowd*, 19 Conn. 387. In these cases, however, it may well be doubted if the question at bar was involved, for in *Com. v. Dougherty* the defendant was tried for a homicide committed with an ax, while *Com. v. Keeper of the Prison*, supra, was a proceeding by habeas corpus to admit to bail persons held for trial upon a charge of murder by administration of poison. The decisions in the other Pennsylvania cases proceed upon the theory that the instructions complained of took from the jury the consideration of a question which was solely within their province. In *Ann v. State*, 11 Humph. 159, the plaintiff in error, a female slave, aged about 15 years, being convicted of murder in the first degree in killing an infant about 5 weeks old by administering laudanum to it, to produce sleep, appealed, and *McKinney, J.*, referring to 4 Bl. Comm. 199, and *Fost. Crown Law*, 261, in reversing the judgment, says: "If, as Blackstone says, the poison were willfully administered,—that is, with

intent that it should have the effect of destroying the life of the party,—or if, in the language of Foster, the act were 'done deliberately, and with intention of mischief or great bodily harm,' and death ensue, it will be murder. But, if it were not willful, and such deliberate mischievous intention do not appear, and the act was done heedlessly and incautiously, it will be only manslaughter at most." In *State v. Wagner*, 47 Am. Rep. 131, Hough, C. J., in commenting upon the question, says: "Poison may be carefully and innocently administered for a lawful purpose, and yet may produce death, in which case no crime will have been committed. So, also, a homicide committed by poison heedlessly or incautiously administered for no unlawful purpose, will amount at most only to manslaughter. But, where poison is knowingly administered with intention of mischief, and to accomplish some unlawful purpose, if death ensue it will be murder, although death was not intended." In *Bechtelheimer v. State*, 54 Ind. 128, it is held that a purpose to kill is an ingredient of the crime of murder, when the killing is effected by the administration of poison. To the same effect, also, see the case of *Robbins v. State*, 8 Ohio St. 131. The decision in that case is questioned in *State v. Brown*, 7 Or. 186, in which *Kelly, C. J.*, says: "When a homicide takes place in the commission of a robbery, it is not necessary, in order to constitute murder in the first degree, that the one perpetrating it should purposely kill the person slain; and, where purpose is not required to constitute the crime, it need not be alleged in the indictment." But the criticism does not go to the question of homicide by poison. In *State v. Wells* (Iowa) 17 N. W. 90, which was a trial for murder, committed by a prisoner in the penitentiary by administering chloroform to one of the guards of that institution, the supreme court of Iowa seems to have reached a different conclusion. *SeEVERS, J.*, in rendering the decision, says: "We are unable to draw a distinction between a homicide which occurs during the perpetration of a robbery, and when the homicide is caused by the administration of poison. Both under the statute must be deemed murder." In *People v. Harris*, 136 N. Y. 423, 33 N. E. 65, *Gray, J.*, in speaking of the issues to be tried under an indictment charging murder by administering poison, says: "The two questions which, upon all the circumstances detailed in the evidence, the jury had to pass upon in coming to their verdict, were, in the first order, whether the deceased came to her death by morphine poisoning, and, having determined that in the affirmative, then whether the defendant was guilty of the charge of having administered it to her, with a deliberate intent to cause her death thereby." And in this state it is provided by statute that in all cases of murder in the first degree, except in the commission or at-

tempt to commit certain felonies therein enumerated, it is incumbent upon the state to allege in the indictment, and prove at the trial, that the killing was purposely done (Hill's Ann. Laws Or. § 1714); and, this fact having been established, proof that it was accomplished by poison shows such deliberation and premeditation as evince murder in the first degree. (Id. § 1727).

An indictment for the crime of murder in the first degree necessarily involves all other grades of homicide which the evidence tends to establish. The state, in preferring its charge, may carve out and allege in the indictment any degree of crime that the grand jury may consider the defendant guilty of, but at the trial he may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime. Hill's Ann. Laws Or., § 1383. The evidence introduced tended to show that the deceased died in a tetanic convulsion, soon after the defendant administered to her what he claims was a powder composed of corn starch; that, an autopsy having been made, and Mrs. Ellsworth's stomach removed, an analysis of its contents revealed the presence of strychnine; and that several physicians, as experts, in answer to a hypothetical question predicated upon her symptoms and the discovery of poison in her stomach, say the deceased died of strychnine poison. Here was evidence to warrant a finding that she died by this means, and, this fact having been established, the jury were compelled to ascertain whether the defendant administered the poison, and, if so, to find with what intent, or under what circumstances, it was given. In *State v. Garand*, supra, it is held that if, on a trial for murder, there is no evidence of facts and circumstances such as would, under the law, reduce the crime charged to manslaughter, the judge may so inform the jury, and may charge them that they cannot consider the question of manslaughter. So, too, in *State v. Whitney*, 7 Or. 386, Kelly, C. J., says: "We do not undertake to say that when certain facts have been testified to, the court may not say to the jury that, if they believe the testimony to be true, they should find the accused guilty of murder in the first degree." In 1794 the rule was announced in Pennsylvania that every unlawful killing was presumed to be murder, unless the person accused could show such circumstances as would reduce it to a lower degree of homicide (*Pennsylvania v. McFall*, Add. 255); but in a later case it was held that, although malice was presumed till the want thereof was shown, yet an unlawful killing, though it may be presumed murder, will not be presumed murder in the first degree (*Pennsylvania v. Lewis*, Id. 279). In 1845, Wilde, J., in a dissenting opinion in *Com. v. York*, 9 Metc. (Mass.) 93, criticized this doctrine, and maintained that in criminal cases the burden

of proof is on the prosecution throughout, to make out the whole case. Since that time the reason assigned in this dissenting opinion is fast becoming the settled rule of law in this country, and seems to have been approved in *State v. Whitney*, supra, for it is there said: "The plea of not guilty was a continuous denial of every allegation in the indictment, and every statement of the witnesses who testified against him." In the case at bar, the defendant not having admitted the killing, the presumption of his innocence controverted all evidence introduced by the state, and tended to disprove every grade of crime embraced in the indictment and put in issue by the plea of not guilty; and, while no evidence was introduced tending to show that any strychnine was kept by the defendant or his wife, from which an inference might be drawn that in giving what he supposed to be corn starch he thereby carelessly administered a poison, yet he offered proof of his general reputation for peace and good order, which tended to raise a doubt as to the intent with which the act was done, and aided the jury in ascertaining the probable degree of his guilt (*Carroll v. State*, 3 Humph. 315), from which, if it appeared to them that he had committed a crime, and there was reasonable doubt as to which of two degrees he was guilty, he could be convicted of the lower degree only (Hill's Ann. Laws Or., § 1359); and, as the mere proof of death by the administration of poison does not necessarily imply an intentional killing, and there being evidence introduced at the trial tending to reduce the grade of homicide, it follows that there was no error in giving the instruction of which the defendant complains, but, by reason of the court's refusal to permit the witnesses Middleton and Cardwell to answer the questions propounded to them, the judgment will be reversed, and the cause remanded for a new trial; and it is so ordered.

(19 Mont. 11)

#### TUTTLE v. MERCHANTS' NAT. BANK OF GREAT FALLS.

(Supreme Court of Montana. Dec. 7, 1896.)

ASSIGNMENT FOR CREDITORS—WHAT CONSTITUTES—  
DELIVERY OF PROPERTY—EVIDENCE—DEATH OF  
ASSIGNEE—APPOINTMENT OF SUCCESSOR—APPEAL—  
OBJECTIONS—REVIEW.

1. A deed of trust, conveying property of the grantor absolutely to the trustee, with directions to sell it and out of the proceeds of sale pay certain preferred debts of the grantor, is an assignment for the benefit of creditors, and not a mortgage.

2. On death of a trustee for benefit of creditors, pending an action by him in equity to enforce the trust, the court has jurisdiction, independent of statute, to appoint on its own motion a new trustee, and substitute him as plaintiff in the action.

3. The objection that an assignment, for preferred creditors, of a building on leased ground, after the lease had expired, is void, because it was personalty, and immediate actual posses-



sion, as required by Comp. St. 1887, div. 5, § 226, was not taken by the trustee, cannot be urged by an unpreferred attaching creditor, whose attachment, if it be considered personalty, would be void, because levied on it as realty without taking actual possession.

4. When shares of stock are assigned in trust for benefit of preferred creditors, evidence that the assignor transferred a receipt therefor, the only evidence he had of his ownership, to the assignee in writing, and that the assignee thereafter voted the stock, and exercised all the rights of ownership over it, shows a delivery to and taking of possession by the assignee, as required by Comp. St. 1887, div. 5, § 226, so as to prevent the assignment from being void as to other creditors.

5. Objections not raised by assignment of error on motion for a new trial will not be considered on appeal.

6. Where a building, which is personal property, is assigned for the benefit of creditors, a finding that immediate possession was delivered and taken by the assignee, as required by Comp. St. 1887, div. 5, § 226, so as to prevent the assignment from being void as to other creditors, on evidence of conduct of the assignors showing that, by delivery of the deed of assignment, they intended to and did voluntarily give up the possession to the assignee, will not, in the absence of any evidence of fraud, be disturbed, on the ground that it is not shown that the assignee never took actual, physical occupation of the building.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by Frank E. Tuttle, trustee for creditors, against the Merchants' National Bank of Great Falls, to have his title to property conveyed by the deed of trust declared superior to attachment liens of defendant, and for further relief. Plaintiff dying pending the action, the court of its own motion appointed C. M. Webster trustee in his stead. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

F. B. Tuttle, as trustee, instituted this action in September, 1892, alleging: That the firm of Hanks & Fullerton were indebted to certain insurance companies in large sums, which they failed to pay on demand, and that, to secure the indebtedness to such companies, the defendant Fullerton and his wife, on July 22, 1893, executed, acknowledged, and delivered a quitclaim deed of certain realties, in trust, to secure the sums due to such insurance companies. To further provide for the indebtedness, Fullerton and his wife executed and delivered to Tuttle, as trustee, an assignment in writing of a contract for the purchase of a lot in Great Falls, Mont. Fullerton and wife also executed and delivered to Tuttle, as trustee aforesaid, a bill of sale for a one-story frame building. The firm also executed and delivered, for further security, a written assignment to plaintiff, as trustee, of all the right, title, and interest the firm of Hanks & Fullerton had in the Great Falls Improvement Company. This last assignment was signed by "Hanks & Fullerton, by Fullerton." The instrument was simply a receipt by the Great Falls Improvement Company to Hanks & Fullerton for \$2,750, "being 55 per cent. of your stock in the Great Falls Improvement Com-

pany, and the final payment for the year 1892." The plaintiff alleged, in his complaint, that the defendant bank claimed some interest in the property transferred, and asked for judgment adjudging their interest subordinate to the interest of the insurance companies, and prayed the court to confirm his title as trustee to the property transferred, that he be directed to execute the trust, and for further relief. The defendant bank denied that the instruments under which Tuttle claimed were executed before the 24th of July, 1893, and alleged that on July 22, 1893, and prior to the transfer of the property to Tuttle, and prior to the execution of the instruments, the property had been levied upon under writs of attachment by the bank in suits against Hanks & Fullerton and against Fullerton. The answer avers fraud in the execution of the instruments for the purposes of defrauding the appellant bank. While the action was pending, Tuttle, the trustee, died. When the case was called for trial on July 14, 1894, the appellant bank having suggested to the court that Tuttle was dead, and that no person had been substituted as plaintiff in his stead, was granted leave to file a supplemental answer setting forth the fact of Tuttle's death. Tuttle's death being confessed, the court of its own motion appointed C. M. Webster as trustee of the trust set up in the complaint, and ordered that the said Webster be substituted as plaintiff. Webster appeared in open court and accepted the trust. The defendant bank's counsel excepted to so much of the order as related to the appointment of a trustee as a part of the proceedings in the action. The trial proceeded, then, to the court. Testimony was heard, and findings and judgment made in favor of the plaintiff. The defendant bank moved for a new trial. This motion was overruled, and from the order overruling that motion and from the judgment the bank appeals.

The findings of the court established the indebtedness of Hanks & Fullerton to the insurance companies, and set forth the execution and delivery of the instruments of transfer to Tuttle as trustee, and that all of said instruments were made in good faith, and not with a view of cheating or defrauding the defendant bank, and that each and all of said transfers were made, executed, and delivered before the bank commenced action against Hanks & Fullerton and Fullerton. As conclusions of law, the court found that the instruments were valid and lawful conveyances in trust, and that the attachment liens of the defendant bank were subject to the conveyances to the plaintiff. The judgment directed the trustee to sell the property in the manner prescribed by law for the sale of property under execution, and that, after payment to the trustee of the amount found due to him, with interest thereon, any balance, if there should be any, was to be deposited with the clerk of the district court. No objection is made to the form of the decree.



T. E. Brady, for appellant. Alex. C. Botkin, for respondent.

HUNT, J. (after stating the facts). This appeal first presents for decision the question of the jurisdiction of the court to appoint Webster as trustee to succeed Tuttle as trustee, who had died. We regard the instruments upon which the action was brought as in effect assignments for the benefit of the creditors of Hanks & Fullerton. As debtors, they evidently made the transfers by reason of business embarrassments, growing out of their inability to pay over to the various insurance companies premiums which, as agents for such companies, the firm had collected. They accordingly executed the several conveyances, vesting the legal and equitable title in the assignee, Tuttle, subject to trusts in favor of certain creditors, and providing a method by which money could be raised with which to pay such creditors. The intervention of a trustee was expressly contemplated, and a trust for the benefit of creditors was clearly created, by the debtors thus making an absolute appropriation of their property to the payment of certain of their creditors. Burrill, Assignm. § 7; *Marshall v. Bank*, 11 Mont. 351, 28 Pac. 312. The instruments are similar, in effect, to one considered by the supreme court of Missouri in the case of *State v. Benoist*, 37 Mo. 500, where Judge Holmes, for the court, said: "There was some discussion as to whether the instrument in question here was to be considered as a deed of trust in the nature of a mortgage security for a debt, or a partial assignment for the benefit of creditors. It does not purport to be a security for a debt, with power to sell if the debt be not paid when due. It conveys the property absolutely to trustees, to be sold for the payment of the debts named and preferred in it. It is clearly a partial assignment for the benefit of creditors, and not a mortgage security. Such instruments have always been treated as assignments. *Gale v. Mensing*, 20 Mo. 461." We do not think appellant's counsel meant to dispute the correctness of these views, for in his brief he says that the instruments upon which the action is based "were not mortgages, but were, so far as they had any force or effect, absolute conveyances to Tuttle of all the grantor's title to and interest in the property." His contention, nevertheless, is that the court, in the absence of statutory authority, had no power to appoint a new trustee. But in this respect we think appellant is in error. The familiar general principle is that an express trust, validly created, must not fail for want of a trustee, and that a court of equity, in its general equity jurisdiction, may remove or appoint trustees under wills or other written instruments upon sufficient cause shown. This doctrine is laid down in *Attorney General v. Barbour*, 121 Mass. 568. It is also recognized in *Re Eastern R. Co.*, 120 Mass. 412, where it was held that the supreme judicial court of

Massachusetts was authorized, in cases of trusts which would not be complete until a trustee was appointed, to appoint trustees for the purpose of selling or conveying or holding and managing the property. The rule is thus stated by Pomeroy in his *Equity Jurisprudence* (section 1087): "Courts of equity, therefore, independently of statute, possess the inherent power and jurisdiction to appoint new trustees whenever such action is necessary to protect the rights of the beneficiaries. In the absence of any other method prescribed by the instrument creating the trust, a court of equity will appoint trustees when none at all have been named by the creator of the trust, and will appoint new trustees when those originally named refuse to accept, or when a vacancy occurs by their death, resignation, permanent residence in a foreign country, or removal from office, as heretofore described."

The principle, as applicable to cases where the trustee, after taking possession of the property, dies without rendering any account, is sustained in the case of *Gorsuch v. Briscoe*, 58 Md. 573. There one Eden made a deed of trust for the benefit of his creditors to one Alexander. The trustee took possession, and died without rendering any account. It appeared that he was indebted to the trust estate. The creditors petitioned for the appointment of a trustee to complete and settle the trust. The court upheld the appointment of a trustee in the following language: "We can see no objection to the appointment of a trustee by a court of equity, in a case like this, for the purpose of settling the trust. The former trustee had died with trust funds in his hands unaccounted for, and the appointment of another trustee to take charge of the trust estate was but the ordinary exercise of equity jurisdiction. So long as there was a trust in existence, a court of equity would not permit it to fail." In the case of *Batesville Institute v. Kauffman*, 18 Wall. 151, the supreme court overruled a demurrer resting upon an objection that, the trustee being dead, and no successor having been appointed, the trust recited in a deed of trust could not be enforced, saying: "That the court have power to appoint a new trustee, and to compel the performance of the trust by him, is quite certain. It is, however, equally within the power of a court of equity to decree and enforce the execution of the trust through its own officers and agents, without the intervention of a new trustee." Burrill, Assignm. § 415, recognizes the rule that, where an assignee dies before the trust is finally executed, the court may appoint a new assignee, or select some other person to discharge the duties of the trust. It was likewise decided, in *People v. Norton*, 9 N. Y. 176, that the court of chancery, with its general jurisdiction of all cases of trust, had power, by its general authority, independent of any statutes, to displace a trustee on good cause shown, and to substitute another in his stead. See, also, *Sugd. Powers*, p. 507. If additional authority

were required, it would be easy to add a list of cases to those we have selected, but the proposition seems fundamental, and therefore need not be dwelt upon. If the fitness of the trustee selected were questioned, or if objection to his appointment were made because the interest of the cestui que trust would not all be fairly looked after, or if it appeared that the execution of the trust would in any way be impeded, appellant's position would be different. But, the objections being independent of any such considerations as those just suggested, we think it was proper for the court, when advised by the appellant of the death of the trustee, to make an appointment, in order that the very purposes of the trust might be carried into execution. In re Tempest, 1 Ch. App. 485.

Included in the property assigned in trust to Tuttle was a frame building, situated upon leased ground, the leasehold of which had expired. This building was attached by appellant as a portion of the Hanks & Fullerton real estate; that is, the sheriff filed with the clerk and recorder a copy of the writ and a notice of attachment that certain realty and this building were attached. No actual possession was ever pretended to be taken by the sheriff, yet appellant contends that the transfer to Tuttle, as trustee, was void because there was no delivery or immediate change of possession, as contemplated by section 226, div. 5, Comp. St. 1887. As this section applies to assignments of goods and chattels, the appellant's position is not altogether consistent. Plainly, if the property was personalty, and actual possession were necessary, no valid levy was made by the appellant, while, if it was realty, as appellant evidently regarded it when it attached, it was sufficiently delivered to the trustee—at least until a reasonable time elapsed—by mere delivery of the deed to Tuttle, which was found to have been before the appellant's attachment was made. Burrill, Assignm. § 243. Appellant is, therefore, in no position to urge the line of argument he pursues.

Whether the assignment of this building and of the other property transferred was fraudulently made, for the purpose of defrauding appellant in the collection of its judgment, and, consequently, was wholly void, was, however, made an issue at the trial, and was found against appellant. This issue might have properly involved the question of the delivery of this building to the assignee. But the court evidently treated the building as personalty, and found that the assignors delivered possession of the same to the trustee, Tuttle, before the defendant bank attached. Probably the delivery was made upon the theory that the instrument of transfer to Tuttle, as trustee, was of the nature of a chattel mortgage, where possession was delivered to the trustee named; but the fact of the delivery of possession was found, and, considering the pe-

culiar nature of the property, and the impossibility of physical delivery, we cannot now say that possession of it was withheld by Hanks & Fullerton, and thus imply fraud. We think the evidence fairly tends to show that, by their conduct and the delivery of the written instruments, the assignors intended to give up, and did voluntarily give up, to the trustee, possession of all the property assigned, including possession of this building, for the benefit of their creditors. At least, in the absence of some circumstance tending to show fraud, we cannot deduce a fraudulent intent on the part of the assignors solely because the assignee, Tuttle, did not have instantaneous physical occupation of the building.

The remaining contention of appellant is that the assignors did not deliver certain stock in the Great Falls Improvement Company to the assignee. But the evidence is that the paper delivered to the assignee, and transferred in writing to him, was the only instrument which the assignors themselves ever had evidencing their interest in the shares of the corporation, and consisted of a receipt to Hanks & Fullerton for \$2,750, being 55 per cent. of their stock in the company. It appears, also, that Tuttle, as trustee, afterwards voted in behalf of these shares at the corporation's meetings, and exercised full possession of the shares to which the assignors might have been entitled. Under such circumstances, we think the property was delivered.

Appellant makes the further point in his brief that the delivery of this receipt was void because the written instrument of transfer was signed by only one member of the firm of Hanks & Fullerton. But, as this question was not raised by an assignment of error, it was not before the district court for review, and is not before us on appeal. This disposes of all errors relied on. The judgment is affirmed.

PEMBERTON, C. J., and DE WITT, J.  
concur.

(19 Mont. 5.)

PRIEST v. EIDE et al.<sup>1</sup>

(Supreme Court of Montana. Dec. 21, 1896.)

APPEAL—EFFECT OF DECISION—LAW OF THE CASE—INTEREST.

1. In an action for the reformation of a bond, and judgment thereon after reformed, a decision on appeal that the bond is valid without reformation is conclusive as to its validity, and becomes the law of the case in a second trial to recover the amount due on the bond.

2. In an action for the reformation of a contractor's bond, and judgment thereon after reformed, on appeal the supreme court reversed the judgment of nonsuit on the ground that the bond was valid without reformation. *Held*, that under Comp. St. 1887, div. 5, § 1237, allowing interest on the settlement of accounts only after the balance due has been ascertained, the plaintiff was not entitled to recover, on the second trial, interest from the date of the judgment rendered at the former trial.

<sup>1</sup> For opinion on rehearing, see 47 Pac. 368.

Appeal from district court, Lewis and Clarke county; Henry N. Blake, Judge.

Action by A. H. Priest, assignee of John R. Watson, against Frederick Eide, Jacob Switzer, and Joseph O'Neill. From a judgment for plaintiff, defendants appeal. Affirmed.

This is a suit to reform a bond, and for judgment therefor, after reformation thereof has been decreed. This is the second appeal of the case. See *Watson v. O'Neill*, 14 Mont. 197, 35 Pac. 1064. When the case was here on the first appeal, we held substantially that, if the bond is construed in connection with the building contract and plans and specifications of the building mentioned in the complaint, as it should be, as all of said instruments were contemporaneous, and parts of the same transaction, then there was no necessity for a reformation of the bond; and that the bond so construed was a valid instrument, upon which the plaintiff was entitled to recover the amount sued for. We also held that under the foregoing view all the allegations in the complaint referring to a reformation of the bond were surplusage. In the second trial of the case below the court ignored all the allegations of the complaint relating to the reformation of the bond, in accordance with the decision of this court, and, treating that decision as the law of the case, entered judgment for the amount claimed by plaintiff. The defendants appeal from the judgment and order of the court denying a new trial.

Henry C. Smith, for appellants. F. C. Stranahan, for appellee.

PEMBERTON, C. J. (after stating the facts). We are clearly of the opinion that the action of the trial court in holding the decision of this court in *Watson v. O'Neill* (14 Mont. 197, 35 Pac. 1064) to be the law of the case was correct. We do not see how the court could have done otherwise. Counsel for the appellants contends that the question of the validity of the bond sued on was not before this court in *Watson v. O'Neill*. We think this contention cannot be supported. We held that the bond which was in suit for reformation, and, after reformation, for judgment thereon, was valid without reformation, when properly construed. We necessarily passed upon, and had to pass upon, the validity of the bond. The plaintiff also appeals from the refusal of the trial court to allow his interest on the demand from the date of the judgment rendered at the former trial of the case. We think the view of the court was correct. The statute (section 1237, div. 5, Comp. St. 1887) allows interest in such cases as the one at bar after "ascertaining the balance due." The amount, or "balance due," was only ascertained when the verdict was rendered in favor of plaintiff at the second trial of the case. The judgment and order appealed from are affirmed.

DE WITT, J., concurs. HUNT, J., disqualified.

(19 Mont. 48)

## STATE v. GAWITH.

(Supreme Court of Montana. Dec. 21, 1896.)

CRIMINAL LAW—SETTLEMENT OF EXCEPTION—NOTICE—ERROR AS TO INSTRUCTIONS—ASSIGNMENT OF ERROR.

1. The bill of exceptions will not be considered on appeal in a criminal case where the record does not show that two days' notice of the presentation of the bill to the judge for settlement was given to the county attorney, as required by Pen. Code, § 2171.

2. An assignment of error, based on the refusal of the trial judge to instruct the jury to acquit the defendant, cannot be considered where the evidence is not in the record.

3. Under Pen. Code, § 2194, providing that motion for new trial, if based on error committed by the trial judge in misdirecting the jury in a matter of law, or that the verdict is contrary to law and evidence, must be made on bill of exceptions, and the notice of motion must designate the grounds upon which it will be based, an assignment that the verdict is contrary to law and evidence is insufficient to bring before the appellate court alleged error in the instructions.

Appeal from district court, Flathead county; Charles W. Pomeroy, Judge.

Jesse Gawith was convicted of grand larceny, and appeals. Affirmed.

The defendant was convicted of grand larceny, and sentenced to the penitentiary by the district court of Flathead county on February 12, 1896. On February 17th he gave his notice of intention to move for a new trial, upon the grounds, among others, that the court erred "in refusing to instruct or advise the jury to acquit," and "that the verdict in said cause is contrary to the law and evidence." The notice stated that the motion would be made upon a bill of exceptions, to be thereafter submitted to and settled by the court, and upon the files and records and minutes of said court. The notice of intention to move for a new trial was duly served upon the county attorney on February 17, 1896. The record contains no proof of service upon the county attorney of the bill of exceptions, or of notice of the presentation of the bill of exceptions to the judge for settlement. On May 19, 1896, Judge Pomeroy certified that the bill of exceptions was settled and allowed. On June 23d the motion for a new trial was overruled, and on August 22d defendant's counsel duly gave notice of appeal from the judgment, and from the order denying defendant's motion for a new trial.

C. B. Nolan, for appellant. H. J. Haskell, for the State.

HUNT, J. (after stating the facts). At the outset of this case the state objects to the consideration by this court of the bill of exceptions embodied in the transcript, because it does not appear by the record that the appellant ever notified the county attorney that he would present a bill of exceptions to the judge for settlement. The recitals and statements of record, by which, of course, we must determine whether the appellate power of this court is invoked, nowhere disclose that any notice of

the presentation of a bill of exceptions to the judge for settlement was ever given to the county attorney; nor does it appear that the county attorney ever appeared to offer amendments for any purpose whatsoever connected with the settlement of any bill of exceptions, or in any manner knew of the existence of any such paper before appeal was taken, or that he waived the notice required by the statute. The statute requiring a notice of at least two days to the county attorney of the presentation of the bill to the judge is mandatory. Notice is indispensable, and it must appear on the face of the record that this step has been taken. *Railroad Co. v. Ditmars* (Kan. App.) 42 Pac. 933. The statute provides one necessary way by which possible errors in the presentation of matter excepted to on the trial, and sought to be preserved for review by bill of exceptions, can be revised and made correct, which is by extending to the prosecuting officer an opportunity to examine the defendant's proposed bill of exceptions, that he may offer amendments to the same. *McKay v. Railway Co.*, 13 Mont. 15, 31 Pac. 999. To deny him this opportunity is to ignore the law, and that he has had this opportunity this court can only be advised by an affirmative showing by the record. This must be so, for the reason that, if the county attorney has had no notice of the bill of exceptions, he has had no chance to object thereto, and matter may thus have been incorporated in the bill as settled by the judge which had no proper place therein, and which would not have been allowed had the county attorney had the statutory opportunity to call the judge's attention to errors or defects in the proposed bill. In *State v. Hinchey*, 5 Wash. 326, 31 Pac. 870, this exact question was raised, and the court said: "The respondent also moves the court to strike the bill of exceptions from the files on the ground that no notice of the settlement thereof was served upon the respondent, as required by law. And, as the record is silent as to notice, there is nothing before us to show that the court had jurisdiction to settle the same." The following cases are also in point, and hold that the record should show that the bill of exceptions was served, or notice of the presentation of the same for settlement must be given to the opposite party or his counsel: *Snead v. Tietjen* (Ariz.) 24 Pac. 324; *People v. Hill*, 78 Cal. 405, 20 Pac. 862; *Coleman v. Ransom*, 45 Ga. 316; *Arnett v. Gurley*, 59 Ga. 666; *Akerman v. Neel*, 70 Ga. 728; 3 Enc. Pl. & Prac. pp. 444-446. The bill of exceptions which contains the evidence cannot, therefore, be considered. On the appeal from the judgment we cannot consider the alleged error of the court in refusing to instruct or advise the jury to acquit, for the reason that the ground of that motion was the insufficiency of the evidence to warrant a conviction. But, as the evidence is not before us, as heretofore decided, we cannot review the same.

The defendant relies upon errors alleged to have been committed by the court in instruct-

ing the jury. Section 2194 of the Penal Code provides that a motion for a new trial, if error has been committed by the court in misdirecting the jury in a matter of law, or if the court has erred in the decision of any question of law arising during the course of the trial, or when the verdict is contrary to the law or evidence, must be made upon a bill of exceptions, and the notice of motion must designate the grounds upon which the motion will be made. The ground designated in the notice of motion in the case before us is that "the verdict is contrary to law and evidence." So far, therefore, as the motion pertains to the evidence, it must be disregarded at once, as the evidence is not before us. The question remaining, therefore, resolves itself into this: Can this court review the instructions on an appeal from the judgment, or from an order denying a motion for a new trial, where the only designation of the ground upon which the motion for a new trial was made is that "the verdict is contrary to law"? It would seem as if, under any circumstances, there should be a more specific designation of the ground relied on than we find in this case (*State v. Black*, 15 Mont. 144, 38 Pac. 674); but, assuming that by changes in the Code since *State v. Black*, supra, was decided the statutory words are now a sufficient designation upon which the court will review the question of whether "a verdict is contrary to law or evidence," still the appellant here is not in a position to have the instructions considered by the court, because, under a notice of motion designating as grounds for a new trial that "the verdict is contrary to law and evidence," the statute does not mean to include the distinct and separate ground of motion enumerated in subdivision 5 of section 2192, which authorizes the court to grant a new trial "when the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial." In *Froman v. Patterson*, 10 Mont. 107, 24 Pac. 692, the court approvingly quoted from the opinion in *Brumagim v. Bradshaw*, 39 Cal. 24, where the court held that it was not enough to aver that the verdict was against law, and then offer to support the averment by showing that the verdict was not supported by the evidence, and was, for that reason, against law, and said: "If such a course of proceeding was tolerated, all the other specific grounds for new trial enumerated in the statute might, for the same reason, be condensed into the one ground that 'the verdict is against law'; for, in that general sense, it would be 'against law' if there was any valid reason whatsoever for a new trial. But the statute, in authorizing a new trial on the ground that the verdict 'is against law,' evidently does not intend to include in that phrase all or any of the other several distinct and separate grounds of the motion which are specified in the act." *Hayne*, New Trial & App. § 99. It seems to us that to hold that the instructions may be reviewed on appeal under the sole designated ground that the ver-

dict is contrary to law would do entirely away with the distinct and separate ground upon which a new trial may be granted when the court has misdirected the jury in a matter of law. A verdict is against law, says Hayne on New Trial and Appeal, § 99, only "where it can be seen that the verdict of the jury was against the instructions." *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, and 43 Pac. 714. There being nothing left for review of which appellant complains, the judgment and order appealed from must be affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

(18 Mont. 533)

**MADDOX v. TEAGUE et al. (GADDIS, Intervener).**

(Supreme Court of Montana. Dec. 21, 1896.)

**ACTION ON SHERIFF'S BOND—INTERVENTION.**

In an action by a mortgagee on a sheriff's bond for misconduct in a sale under the mortgage, the holder of a note secured by the same mortgage may intervene, under Code Civ. Proc. § 24, as a person "who has an interest in the matter of litigation."

Appeal from district court, Meagher county; Frank Henry, Judge.

Action by Fletcher Maddox against E. H. Teague, administrator of William Rader, and others. William Gaddis was allowed to intervene, and plaintiff appeals, complaining thereof. Affirmed.

Toole & Wallace and Thompson & Maddox, for appellant. Carpenter & Carpenter, for respondent.

DE WITT, J. We have here another appeal in the case in which we rendered a decision, reported in 18 Mont. —, 46 Pac. 535. This appeal is by the plaintiff below as against the intervener, Gaddis. Appellant here alleges error of the court below in allowing the intervention of Gaddis. For a statement of the case, see the former decision, 18 Mont. 512, 46 Pac. 535, and also the decision on the first appeal, 9 Mont. 126, 22 Pac. 386. Gaddis, the intervener, and respondent here, defends the action of the lower court in allowing him to intervene upon two grounds: First, that the allowance of intervention is now the law of the case, for the reason that it was decided in the old appeal, 9 Mont. 126, 22 Pac. 386; second, that the decision upon this question in 9 Mont. and 22 Pac. is correct in law. The decision upon the first appeal that Gaddis had a right to intervene was made upon a stipulation of counsel that the court should decide that question. See page 136, 9 Mont., and page 386, 22 Pac. A dissenting opinion in that case, however, contends that the court had no jurisdiction to decide that point, because no appeal had been taken by the party alleged to have been aggrieved. We shall not now determine whether the decision in that respect, made by the court on the old appeal, is now

47 Pac.—14

the law of the case, because we are of the opinion that the decision was correct in law, and may now be so held as an original question. The reasons for the correctness of the decision, we are of opinion, are well set forth in the opinion upon the first appeal. Page 137, 9 Mont., and page 386, 22 Pac. See, also, the authorities cited by the respondent, Gaddis, in that case. See, also, *Coburn v. Smart*, 53 Cal. 742.

Upon the question of division of the proceeds of a mortgage securing several notes, we also add the following remarks in 1 Beach, Mod. Eq. Jur. § 465: "But the weight of authority, especially of the more recent decisions, is that the proceeds should be applied pro rata in part payment of the several notes, irrespective of their dates of maturity or assignment; and this rule would seem to be the most equitable, and not less upon purely technical distinctions." See, also, cases cited to this text. We are certainly of opinion that Gaddis—the third person—had an interest in the matter in litigation. The matter in litigation was the only security by which he could realize upon his note. Adapting the language of Mr. Pomeroy, quoted in 9 Mont. and 22 Pac., we think it is true that, if the original action of Maddox had never been commenced, and Gaddis had first brought the action as sole plaintiff, he would have been entitled to recover in his own name, to the extent, at least, sought. It is therefore ordered that the judgment in this case be affirmed.

PEMBERTON, C. J., concurs. HUNT, J., disqualified.

(19 Mont. 61)

**PALMER v. CITY OF HELENA et al.**

(Supreme Court of Montana. Dec. 26, 1896.)

**MUNICIPAL CORPORATIONS—INDEBTEDNESS BEYOND CONSTITUTIONAL LIMIT—FUNDING BONDS.**

1. The issuing of new bonds, for the purpose of funding a like amount of outstanding bonds and warrants, does not create an "indebtedness," within Const. art. 13, § 6, limiting the amount of indebtedness which a municipality may incur. *Hotchkiss v. Marion*, 29 Pac. 821, 2 Mont. 218, followed.

2. Const. art. 13, § 6, and Pol. Code, § 4800, subd. 64, forbidding municipal corporations to incur an indebtedness exceeding 3 per cent. of the assessed value of the taxable property therein, unless an increase is "necessary to construct a sewerage system, or to secure a supply of water," and is authorized by a vote of the taxpayers affected thereby, do not authorize cities which had sewerage systems at the time the constitution was adopted to create an indebtedness beyond the 3 per cent. limit.

Appeal from district court, Lewis and Clarke county; Henry W. Blake, Judge.

Action by Harry B. Palmer against the city of Helena and others to restrain the issuance and sale of municipal bonds. Defendants recovered judgment on the pleadings, and plaintiff appeals. Reversed.

The plaintiff and appellant is a resident and taxpayer of the city of Helena. The defendants are the city of Helena and the may-

or, aldermen, treasurer, and city attorney of said city. This action is prosecuted by the plaintiff, as a taxpayer, to restrain the defendant city and its officers from issuing, negotiating, and selling certain bonds, described in the complaint, which it is alleged that said city proposes to issue, negotiate, and sell for the purpose of refunding certain other bonds denominated "Sewer Bonds," and for the purpose of funding a large amount of outstanding warrants heretofore issued by said city. It is alleged in the complaint that the indebtedness which would be created by issuing, negotiating, and selling such bonds will be in excess of the limit prescribed by the provisions of article 13, § 6, of the state constitution. The complaint alleges that on July 9, 1895, a resolution was introduced in the city council of said city, and passed, to call an election to submit to the electors the question of declaring \$280,000 sewer bonds outside of the constitutional limitation; that, in pursuance thereof, an election was held, and a majority of the electors of said city voted in favor of declaring the bonds outside of the constitutional limitation. It is also alleged that on the 13th day of August, 1895, the city council of said city passed a resolution to call an election for the purpose of submitting to the voters the question of issuing bonds to refund and fund the bonds and warrants mentioned in the complaint; that said election was held, and a majority of the voters of the city voted in favor of the issuing of such bonds; that afterwards ordinances were passed by the city council of said city directing the bonds to be issued and sold to the highest bidder, that the city council of said city advertised for bids for the bonds, and on the 29th day of February, 1896, sold the bonds to one George F. Cope. The plaintiff alleges, in substance, that at the time of the passing of said resolutions and ordinances by the city council of said city, and the election held thereunder for the purposes already stated, the debt of said city, already incurred and existing, exceeded the amount of the indebtedness which the city was permitted to incur under the provisions of article 13, § 6, of the constitution of the state; that the amount of warrants then outstanding, exclusive of interest, was \$368,811.35; that the amount of bonds outstanding at that date was \$391,500, making a total indebtedness of bonds and warrants, exclusive of interest, in the sum of \$760,311.35; that the assessed valuation of the city for the year 1895 was \$13,943,637; that the resolutions and ordinances passed by the city council of said city were absolutely null and void, because in violation of the provisions of the section of the constitution above referred to; and that the election held under and in pursuance of said resolutions and ordinances were also ineffectual and void for the same reason. The defendants, in their answer, claim that \$161,500 of the bonds mentioned in the complaint

are bonds which the city is seeking to refund at a lower rate of interest than said bonds are now drawing, and claim that the city has power and authority to refund said bonds under section 4800, subd. 64, of the Political Code, and claim, also, that the refunding of said bonds is not the creation of a new indebtedness. The defendants further contend that, without reference to the question of the city's undertaking to place the sewer bonds outside of the ordinary 3 per cent. limit fixed by the constitution, the city is entitled to issue bonds to the amount of \$168,204 for any indebtedness that was existing on the 12th day of September, 1893, provided such indebtedness still remains unpaid. The defendants allege that on the 12th day of September, 1893, there were outstanding warrants, that still remain unpaid, to the amount of \$145,171. This is not disputed by the plaintiff. The defendants further allege, and which is not disputed by the plaintiff, that the assessment of the city of Helena for the year 1892, and which remained the basis for calculating the limit of indebtedness until September, 1893, was \$18,656,828, and that 3 per cent. of this amount is \$559,704, and that the city was, therefore, authorized to incur an indebtedness for ordinary purposes, on the 12th day of September, 1893, to the amount of \$559,704, from which said sum, they claim, if the bonded indebtedness of \$391,500 is deducted, it will leave the sum of \$168,204, and for which last sum the city is authorized to issue its bonds, for the purpose of funding said debt, without infringing upon said constitutional limitation. The defendants claim that, in any event, and without infringing upon the constitutional provision invoked by the plaintiff in this case, the city of Helena may issue refunding bonds to the amount of \$161,500 to take up the old bonds, and \$168,204 for the purpose of funding the warrant indebtedness of the city, with the accrued interest due on said bonds and warrants. Defendants deny that the resolutions and ordinances of the city council of said city and the elections held thereunder were ineffectual and void, and claim that the city had the right by such ordinances and elections to declare the \$280,000 sewer bonds outside of the 3 per cent. limitation of indebtedness prescribed by the constitutional provision mentioned and invoked by plaintiff. The district court rendered judgment on the pleadings in favor of defendants, and dismissed plaintiff's complaint. From this judgment the plaintiff appeals.

Walsh & Newman, for appellant. M. Bulard, for respondents.

PEMBERTON, C. J. (after stating the facts). The first question presented by this appeal is as to whether the issuing and sale of new bonds, in the sum of \$161,500, by the city, for the purpose of refunding a like amount of old bonds of the city, creates a

new debt. The only objection urged by appellant to such proposed action by the city is that an additional debt will be created thereby. This court, in *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821, held that the funding of an existing indebtedness by the issuance of bonds did not create a new or additional indebtedness, but that the form of the liability of a county was only changed thereby. In that case this question is fully discussed, and, we think, the proper conclusion reached. We think that case is decisive of the question raised here. The respondents contend that, in any view of the case, the city can issue bonds in the sum of \$168,204 for the purpose of funding a like amount of city warrants now outstanding. It is conceded that the assessment of the city of Helena for the year 1892, and which remained the basis for calculating the amount of indebtedness the city might incur under the constitution until September, 1893, was \$18,656,828; that 3 per cent. of this is \$559,704; that the city was authorized to incur an indebtedness to that amount for ordinary purposes on September 12, 1893; that, if the whole bonded indebtedness of the city, to wit, \$391,500, be deducted from said sum, it would leave the sum of \$168,204, evidenced in this case by warrants, which the city could legally fund by issuing bonds therefor. It is also conceded that on the 12th day of September, 1893, there were outstanding warrants of the city, which still remain unpaid, to the amount of \$145,171. Upon this showing and these concessions, we think the city may lawfully fund the warrants of the city by issuing its bonds to the amount of \$168,204, provided said warrants were issued for indebtedness incurred under the assessment of 1892, if warrants to that amount remain now unpaid. This is in accordance with the views expressed in *Hotchkiss v. Marion*, supra. These warrants remaining unpaid should be funded according to the date of their issue.

The important question that arises on this appeal is as to the authority of the city, by ordinance and vote of the electors, at an election held under such ordinance, to take the sewer bonds mentioned in the pleadings out of the 3 per cent. limit of indebtedness for ordinary expenses prescribed by the constitution, and place the indebtedness evidenced by such bonds under the larger limit allowed by the constitution for sewer and water systems, and which larger limit is fixed by section 4800, subd. 64, Pol. Code, at 10 per cent. of the assessed valuation of property, as the maximum amount of indebtedness the city can incur for such sewer and water systems, when the same shall be necessary to construct such system or systems, and after the same shall be authorized by vote of the people. Section 6, art. 13, of the constitution, reads as follows: "No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in

the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by, or on behalf of, such city, town, township or school district shall be void: Provided, however, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt." That part of subdivision 64, § 4800, Pol. Code, pertinent to this question, is as follows: "That an additional indebtedness may be incurred, when necessary, to construct a sewerage system. \* \* \* The additional indebtedness authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, for the construction of a sewerage system, shall not exceed ten per centum over and above the three per cent. heretofore referred to of the total assessed valuation of the taxable property of the city as ascertained by the last assessment for state and county taxes. And, provided further, that the above limit of ten per centum shall not be extended unless the question shall have been submitted to a vote of the tax-payers affected thereby and carried in the affirmative by a vote of a majority of said tax-payers who vote at such election." It will be observed that the section of the Code quoted above is in harmony with the constitutional provision involved. The creation of an indebtedness greater than 3 per cent. of the assessed value of property within the limits is absolutely forbidden to the city by the constitution and the statute, unless the creation thereof is necessary, and is authorized by a vote of the electors, for the purpose of constructing a sewer or water system. It is conceded that, at the time the ordinance ordering an election was passed by the city, and when the election was held thereunder to declare the sewer bonds out of the 3 per cent. limit, and into the 10 per cent. limit allowed by law for sewer and water systems, the city of Helena had already constructed her sewer system. In fact, her sewer system was constructed prior to the adoption of the constitution and the enactment of the provision of the Code thereunder. The bonds in question were issued under laws passed by the territorial legislature. These laws and the validity of the bonds are not questioned. The defendants contend that, as cities which had no sewer systems when the constitution was adopted might take advantage and get the benefit of its provisions by declaring their sewer bonds out of the 3 per cent. limit fixed by the constitution for ordinary expenses, by proceeding in the manner that the city of Helena

has undertaken to proceed, it would be a manifest injustice to deny to cities that had a sewer system before the adoption of the constitution the right to so place, distribute, and dispose of their indebtedness. But, under the constitution and the statutes enacted thereunder, before any city can create a debt in excess of 3 per cent. of the value of the taxable property therein, it must be necessary to do so for the purpose of constructing a "sewerage system or to secure a supply of water for such municipality." Was it necessary, in order to secure a sewerage system or supply of water for the city, by ordinance and vote of the people to take these sewer bonds out of the 3 per cent. limit and place them in the 10 per cent. limit, at the time the attempt to do so was made, as shown in the statement? We think not. It could not be necessary, for the city had its sewer system at the time. Suppose, as suggested by counsel for appellant in the argument of the case, that a city which had constructed its sewer system since the adoption of the constitution, and had paid for it out of its general fund, should undertake to vote and place the amount of the cost of its construction out of the 3 per cent. limit and into the 10 per cent. limit permitted under circumstances shown above, would it be contended that such action would be warranted, either by the constitution or the provision of the Code cited above? We think not. There would, clearly, in such case, be no necessity that would authorize such action. The constitution, we think, is prospective in its terms and purposes. If this view acts harshly upon the city of Helena in this instance, we cannot help it, however much we may regret it. We must construe the constitution and laws as we find them. We have no power or disposition to legislate in this matter. We have so far contended for and held to a strict construction of the fundamental law of the state. We believe it to be right, and for the best interest of the people, to strictly construe the constitution. We cannot consent to such a loose and liberal construction of that sacred instrument as shall, in effect, abrogate its provisions, and thereby endanger the guaranties of life, liberty, and property which the framers thereof sought to secure to the people. *State v. Rotwitt*, 15 Mont. 29, 37 Pac. 845; *State v. Tooker*, 15 Mont. 8, 37 Pac. 840; *State v. Mitchell*, 17 Mont. 67, 42 Pac. 100; *State v. Camp Sing*, 18 Mont. 128, 44 Pac. 516. In *State v. Camp Sing* we said: "And in the matter before us it is better that we suffer all the inconveniences of a present loss of revenue than that we let go of the constitution for the sake of relief from temporary distresses. The argument of ab inconvenienti must be excluded from all control over the decision." The provisions of the constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise. Const. art. 3, § 29. We are therefore of the opinion that the city cannot now place the sewer bonds involved in the 10

per cent. limit, as it has sought to do, and that its attempt to do so is void. The cause is remanded to the district court with instructions to enter judgment in accordance with the views herein expressed. Remittitur forthwith.

DE WITT and HUNT, JJ., concur.

(19 Mont. 56)

SANFORD et al. v. EDWARDS.

(Supreme Court of Montana. Dec. 21, 1896.)

SUMMONS—SERVICE—PAROL EVIDENCE.

1. Under Code Civ. Proc. § 744, subd. 4 (Comp. St. 1887), providing for service of summons by reading it to defendant personally, or by leaving a copy at his place of residence, service by merely delivering a copy to defendant personally is void, and will not support a judgment.

2. In an action on a judgment of another court, parol evidence is not admissible merely to show that the summons in the original action was so served as to authorize rendition of the judgment, whatever may be the right as to amendment of the return to conform to the facts, so as to show service in accordance with the statute.

Appeal from district court, Lewis and Clarke county; H. R. Buck, Judge.

Action by John B. Sanford and others against Mary Edwards. Judgment for plaintiffs. Defendant appeals. Reversed.

It appears from the record and pleadings in this case that on March 4, 1887, plaintiffs recovered judgment against the defendant before a justice of the peace for the sum of \$298.99 and costs. This is an action commenced in the district court to recover judgment on the judgment rendered before said justice of the peace. The complaint in this case alleges that by mistake the name of the defendant in said justice's court was given as "Ada" Edwards, instead of "Mary" Edwards, but that Mary Edwards was and is the real defendant in said action before said justice, and that summons in said justice's court was served upon Mary Edwards, and judgment rendered against her as the real defendant in said cause before said justice. The defendant filed a general demurrer to the complaint, which was overruled. The answer denies the indebtedness sued for in the justice's court; alleges defendant's real name is "Mary" and not "Ada," Edwards; that the summons issued in the case by the justice of the peace was directed to Ada Edwards as defendant; and that on the 28th day of February, 1887, the constable served a copy of said summons upon this defendant, but did not read the same to her. The answer sets up the return of the constable, which is as follows: "I hereby certify that I received the within summons on the 28th day of February, Anno Domini 1887, and personally served the same on the 28th day of February, Anno Domini 1887, upon Ada Edwards, being the defendant named in said summons, by delivering to said defendant personally, in



the said county of Lewis and Clarke, a copy of said summons." Defendant, in her answer, alleges that judgment was rendered in said justice's court against Ada Edwards on the 4th day of March, 1887, and that said judgment is null and void, for the reason that said justice of the peace never acquired jurisdiction to render the same against the defendant; that this defendant never appeared in said justice's court; and that judgment entered therein was by default against this defendant as "Ada Edwards." The replication to the answer alleges that the constable served the summons upon the defendant by delivering a copy thereof to her at her place of residence, in the county of Lewis and Clarke, state of Montana, and alleges on information and belief that it was delivered to her at her place of residence. Thereafter the defendant moved the court for judgment on the pleadings, which motion was overruled by the court. The case was tried to the court without a jury. On the trial the constable, White, was introduced, and over the objection of the defendant was permitted to testify, and did testify, that he served the summons issued by the justice of the peace upon the defendant by delivering a copy of it to her at the front door of her residence. The defendant, at the close of the plaintiffs' testimony, moved the court for a nonsuit, on the ground that the judgment sued on was void, which motion was overruled. The court made certain findings of fact in favor of plaintiffs, and rendered judgment as prayed for against the defendant. This appeal is from the judgment, and from an order refusing a new trial.

Henry C. Smith and T. J. Walsh, for appellant. M. Bullard, for respondents.

PEMBERTON, C. J. (after stating the facts). The first question presented by this appeal is as to whether the constable's service of the summons issued by the justice was void. If the service of the summons was void, then it will not be disputed that the judgment of the justice, on which this suit is brought, was and is void also, as well as all proceedings thereunder. Section 744, Code Civ. Proc. (Comp. St. 1887), in force at the time of the service of the summons in question, and which must govern in the determination of the case, after prescribing the manner of service of summons on corporations, minors, persons of unsound mind, etc., in subdivision 4 provides for service of summons in cases like the one under discussion, as follows: "In all other cases, by reading the same to the defendant personally, or by leaving a copy at his place of residence." It is conceded that in this case the constable did not read the summons to the defendant personally. In Brown, Jur. p. 110, § 41, it is said: "When the statute provides the form of service or mode of obtaining it, that mode must be pursued strictly." Statutes prescrib-

ing the manner of service are mandatory, not directory. Wells, Jur. § 97; Freem. Judgm. (4th Ed.) § 125. In Robbins v. Clemmens, 41 Ohio St. 285, under a statute requiring service to be made by delivering a copy, service was made by reading the summons to the defendant. The court held the service void, and that a judgment rendered on such service could be attacked collaterally. In Newlove v. Woodward, 9 Neb. 502, 4 N. W. 237, the court held that "a summons must be served upon a defendant in the mode provided by the statute, in order to give the court jurisdiction, unless the defendant by an appearance waive the defect." To the same effect, see Campau v. Fairbanks, 1 Mich. 152; Young v. Capen, 7 Metc. (Mass.) 287. In Transportation Co. v. Schirmer, 64 Ill. 106, the court says: "The officer making the service was bound to pursue the requirements of the statute. He is not invested with power to substitute another and different mode from that pointed out in the statute." See, also, McCoy's Heirs v. Crawford, 9 Tex. 353; Hart v. Gray, 3 Sumn. 339, Fed. Cas. No. 6,152; Matteson v. Smith, 37 Wis. 333. In fact, the authorities, if not absolutely uniform upon this question, seem to largely and strongly support the view that such service as we are here discussing is void, and that the judgment rendered thereon is necessarily void also. We, at least, have been shown no authority to the contrary by counsel for respondents, nor has our attention in any manner been called to any such authority. We are therefore of the opinion that the constable's service of the summons issued by the justice was void, and gave the justice no jurisdiction of the defendant.

The court permitted the constable to testify in this case that he served the summons issued by the justice upon the defendant by delivering a copy thereof to her personally at the door of her residence. This is assigned as error. We think the action of the court was erroneous. The constable might, we think, have amended his return to show service in compliance with the requirements of the statute, if the facts warranted such amendment, in the justice court, where the original proceedings and judgment were had and entered. But in this suit, commenced in the district court, we do not think it was permissible to prove or show the manner of service in the justice's court by parol testimony. This parol evidence was not an offer or effort to amend a return to conform to the facts, so as to show service in conformity with the statute,—if such amendment could have been made in the district court. It was an attempt in one case and court to show by parol evidence that such service of summons was had on a defendant in another case and court as would authorize such other court to render the judgment in controversy. We think the admission of parol evidence to establish such fact was error. Section 78, Code Civ. Proc. (Comp. St. 1887); Settlemier v.

Sullivan, 97 U. S. 444; Botsford v. O'Conner, 57 Ill. 73; Wellington v. Gale, 13 Mass. 483; Miller v. Plue (Neb.) 64 N. W. 232; Brown v. Mining Co., 1 Mont. 57; Dyas v. Keaton, 3 Mont. 495; Sawyer v. Robertson, 11 Mont. 416, 28 Pac. 456. We regard this question as settled by the great weight of authority in accordance with the foregoing view. If there are respectable authorities to the contrary, our attention has not been called to them. Counsel for appellant concedes that the question of suing the defendant by a wrong Christian name in the justice's court is unimportant, and of itself would be unavailing on this appeal. The judgment and order appealed from are reversed.

DE WITT, J., concurs. HUNT, J., disqualified.

(16 Wash. 30)

FENTON et al. v. MORGAN et al.  
(Supreme Court of Washington. Dec. 3, 1896.)

APPEAL—AMOUNT INVOLVED—SUITS IN EQUITY—  
GROUNDS FOR DISMISSAL—CREDITORS' SUIT.

1. 2 Hill's Code, § 1402, limiting the jurisdiction of the supreme court on appeal in civil actions at law to cases involving \$200, does not apply to a creditors' suit in equity to set aside a conveyance on the ground of fraud.

2. The fact that, pending an appeal by plaintiff in a suit by a judgment creditor to set aside a conveyance by his debtor as fraudulent, in which it appeared that the conveyance attacked was by way of mortgage, plaintiff caused execution to issue on his judgment, and sold the equity of redemption of the judgment debtor in the property, the proceeds being applied in part payment of the judgment, does not constitute a "ground going to the merits of the further prosecution of the appeal," requiring its dismissal, under Laws 1893, p. 129, § 18.

3. Where, in a suit by a judgment creditor to subject property conveyed by his debtor to the plaintiff's judgment, it is found that the conveyance attacked was valid, but was in effect a mortgage, plaintiff is entitled to a judgment subjecting his debtor's equity of redemption in the property to his judgment.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Creditors' suit by James E. Fenton and Daniel M. Henley, partners as Fenton & Henley, against John M. Morgan and others. Judgment for defendants, and plaintiffs appeal. Reversed.

W. A. Lewis, for appellants. Jones, Voorhees & Stephens, for respondents.

GORDON, J. This action was brought by the appellants for the purpose of setting aside a certain deed executed March 4, 1895, by the respondents John M. Morgan and Maryetta E. Morgan (husband and wife) to their co-respondent, Dyer, as being in fraud of creditors of the grantors. The complaint in the action alleges the recovery by appellants (plaintiffs) of judgment against respondent John M. Morgan for \$1,036 on June 19, 1895, the issuance of an execution and its return nulla bona, and other allegations usual in such cases, including the insolvency of respondent

John M. Morgan at the time when said conveyance was executed. The answer admits the recovery of judgment by appellants, the execution and delivery of the deed in question, and denies each and every other allegation contained in the complaint. Respondents have moved for a dismissal of the appeal "because the amount involved in this action does not equal or exceed the sum of \$200," and for further grounds of dismissal set forth certain proceedings taken by appellants subsequent to their appeal herein, namely, the issuance of an execution, and sale of property of the respondents, part of which was included in the deed of conveyance which is assailed by the plaintiffs in this action, as the result of which sale appellants' judgment has been satisfied, with the exception, only, of a balance of \$109.65. This action, however, was not for the recovery of money, but was equitable in its nature, and the fact that the amount remaining unpaid upon appellants' judgment is less than \$200 affords no reason for dismissing the appeal; nor do we think that the subsequent proceedings taken by appellants are inconsistent with the remedy which they seek by the appeal, or that anything is presented "going to the merits of the further prosecution of the appeal"; and the motion is denied.

The findings and conclusions of the trial court were as follows:

"First. That on the 14th day of June, 1895, the above-named plaintiffs recovered a judgment against defendant John M. Morgan for one thousand (1,000) dollars. Second. That an execution issued upon said judgment, and was returned nulla bona, before the commencement of this action. Third. That before the commencement of said suit, wherein judgment was rendered as aforesaid, defendants John M. Morgan and Maryetta E. Morgan made, executed, and delivered to defendant Edward J. Dyer their warranty deed conveying property described in the answer of defendant herein, which said warranty deed was so made, executed, and delivered for the purpose of securing persons and debts mentioned and described in a certain declaration of trust admitted in evidence, and for the purposes set forth therein, in good faith, and for a valuable consideration, all said debts being bona fide debts of the said John M. Morgan and Maryetta E. Morgan at the time of the execution and delivery of the said warranty deed; and that the said deed or conveyance, which, in effect, was a mortgage, was not made for the purpose of hindering and delaying the creditors, or any creditor, of the said John M. Morgan and Maryetta E. Morgan, or either of them, and was not made with undue haste, or for the purpose of placing said property beyond the reach of plaintiffs, or either of them, or any other creditor of the said John M. Morgan and Maryetta E. Morgan, or either of them.

"Conclusions of law: The court finds as conclusions of law: First. That said warranty

deed from John M. Morgan and Maryetta E. Morgan to Edward J. Dyer is, in effect, a mortgage, and was made in good faith to secure a bona fide indebtedness of the said John M. Morgan, due and owing at the time of the execution and delivery of said warranty deed; and that the same was not made for the purpose of hindering or delaying or defrauding creditors, or any creditor, of the said John M. Morgan and Maryetta E. Morgan, or either of them, and was not made for the purpose of placing the property of said John M. Morgan and Maryetta E. Morgan, or either of them, beyond the reach of creditors, or any creditor; and that defendants are entitled to judgment herein that the plaintiffs have and take nothing by their action herein, and that defendants have and recover of and from plaintiffs their costs and disbursements herein."

After an examination of the entire record and the elaborate briefs of counsel we are satisfied that the only error the court committed was in dismissing the plaintiffs' complaint, when, in accordance with its findings and conclusions, it should have decreed appellants' judgment to be a valid lien upon the property conveyed from respondents Morgan to the co-respondent, Dyer, subject only to the lien created by that instrument, and the declaration of trust accompanying it in favor of the creditors therein mentioned, and permitting the equity of redemption to be sold to satisfy the lien of appellants' judgment; and for this purpose the judgment will be reversed, and the cause remanded, with directions to the lower court to enter a decree in accordance herewith.

HOYT, C. J., and ANDERS, DUNBAR, and SCOTT, JJ., concur.

(16 Wash. 82)

**MULLEN v. CITY OF TACOMA et al.**

(Supreme Court of Washington. Dec. 7, 1896.)

**INJUNCTION—CONTEST OF OFFICE.**

Where amendments to a city's charter legislated a member of the board of public works out of office, and provided that substantially the same office should be filled by appointment, he could not maintain an action against the city officers to restrain them from carrying into effect such amendments on the ground that they had not been legally adopted, the real object of the suit being to contest the right of one appointed to the office to succeed him.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Robert B. Mullen against the city of Tacoma, Edward S. Orr, as mayor, A. V. Fawcett, as mayor-elect, and S. J. Smyth, as city clerk. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Edward E. Cushman, Francis W. Cushman, Charles Ethelbert Claypool, and Doolittle & Fogg, for appellant. Govnor Teats, John P. Judson, and W. H. H. Kean, for respondents.

HOYT, C. J. Appellant was a member of the board of public works of the city of Tacoma. Certain amendments to the charter had been declared adopted, the effect of which was to legislate him out of office, and to provide that substantially the same office should be filled by appointment. He sought by this action to have the officers of the city restrained from carrying into effect said amendments to the charter on the ground that they had not been legally submitted to and adopted by the electors of the city. The answer showed that one Thomas E. Doherty had been appointed to the office made vacant by such amendments, and that, if they had been properly adopted, he was entitled to the possession of the office. These facts appearing, it was held by the superior court that it had no jurisdiction in the premises, and the action was dismissed. The suit was in equity, and sought only equitable relief, and, in our opinion, the superior court was right when it held that, under the pleadings, no such relief could be awarded. The real object sought to be accomplished was to contest the right to the office, as between the plaintiff and Doherty, who had been appointed to succeed him. This being so, it came within the general rule governing contests over the right to hold an office. It would be against public policy to allow the functions of the government to be arrested by injunction in aid of such a contest. The judgment will be affirmed.

DUNBAR, ANDERS, and SCOTT, JJ., concur.

(16 Wash. 39)

**OWEN et al. v. HENDERSON.**

(Supreme Court of Washington. Dec. 4, 1896.)

**DEEDS—CONSTRUCTION—PAROL EVIDENCE—PATENT AMBIGUITIES.**

1. A deed of the "west half" of a fractional lot, which lot contains less than a legal subdivision of 40 acres, conveys an equal half of the area.

2. Parol evidence is inadmissible to show what acreage passed under a deed of the "west half" of a tract of land, as there is no ambiguity on the face of the deed.

Appeal from superior court, Kitsap county; John C. Denney, Judge.

Action by Elizabeth W. Owen and another against M. C. Henderson for a balance alleged to be due on a written contract. There was a judgment in favor of plaintiffs, and defendant appeals. Reversed.

H. E. Shields and John K. Brown, for appellant. Arthur & Wheeler and James B. Dowd, for respondents.

GORDON, J. Respondents brought this action to recover the balance alleged to be due on a written contract entered into between the parties on the 13th of December, 1892, by the terms of which the respondents agreed to sell and the appellant to buy certain premises described as "Lots 16, 17, 18,

and 19, in the town of Charleston, Kitsap county," for the sum of \$1,300, of which \$100 was paid down at the time of entering into the contract, \$500 was paid on the 15th of December, 1892, and the balance was to be paid on or before December 12, 1893. The complaint alleges that on said last-mentioned day a tender was made of a good and sufficient deed of conveyance, and a demand upon appellant for the payment of the balance of the purchase price. The answer admits the making of the contract, and payment of \$600 on account thereof, and for defense and counterclaim alleges a want of title in the plaintiffs (respondents) on December 12, 1893; that on that day, namely, December 12, 1893, defendant (appellant) tendered to plaintiffs the amount remaining due under the terms of the agreement, and demanded a deed conveying to defendant a good title to the premises in fee simple, and that thereafter, on the 2d day of January, 1894, defendant elected to rescind on account of the plaintiffs' failure to comply with the terms of the written contract; that thereupon defendant notified respondents of such rescission, and demanded from them the repayment of the sum of \$600 theretofore paid. The case was tried by the court without a jury, and findings of fact and conclusions of law duly made, upon which judgment was entered in favor of the plaintiffs, and defendant has appealed.

Among other things, the court found that on December 12, 1893, plaintiffs tendered to defendant "a good and sufficient deed of conveyance of said real property; \* \* \* that at the time said tender was made, and at all times mentioned herein, the plaintiffs owned said real estate, and had a right to convey the same." This finding was excepted to, and is assigned as error. The record discloses that the premises embraced in the contract of sale between the parties are located in lot 1, section 22, township 24 N., range 1 E., W. M. This lot was owned on August 11, 1890, by W. H. Braden, M. L. Beets, and R. C. Bott, who on that day conveyed to O. A. Bulette the "west half" of lot 1, section 22, township 24 N., range 1 E., W. M., according to the government survey, containing 20 acres, more or less. It is the claim of the appellant that the grant of the "west half" conveyed to Bulette the west half in quantity, and not the part lying westerly of a line drawn north and south midway between and parallel to the side lines of said lot. The lot is the fraction of a 40-acre subdivision, a portion of the southeast corner being cut off by the bay. Bulette platted the town of Charleston on the west half of said lot only, and the premises concerning which this litigation arises lie on the easterly margin of the plat, and, if appellant's contention as to the effect of the deed to Bulette is correct, the eastern portion of the premises described in the com-

plaint do not lie within the grant to Bulette, and the plaintiffs had no title to that portion of the premises on the 12th of December, 1893; so that the sole question is whether a deed conveying the "west half" of a fractional lot, which lot contains less than a legal subdivision of 40 acres, conveys an equal half of the lot in area. We think it must be answered affirmatively, and that appellant must prevail. In *Hartford Iron Min. Co. v. Cambria Min. Co.*, 80 Mich. 491, 45 N. W. 351, the court say: "The literal significance of the word 'half' is one of two equal parts into which anything may be divided. \* \* \* It must be held that the true boundary line between these two pieces of land is by a line drawn north and south, dividing the lands into equal acreage." Counsel for respondents strenuously insist that the question involved, being one of boundary, is to be determined by ascertaining the intention of the parties to certain conveyances made prior to the execution of the contract between the parties to this action; and further contend that the prior conveyances, and the understanding of the parties thereto as ascertained from their testimony upon the trial, are sufficient to show that there were 20 acres in the tract known as the "west half." We think that no proper case was presented calling for the introduction of parol evidence as to the intention of the parties. No ambiguity is apparent upon the face of the deed. "There should be interpretation only when it is needed; that is, only where, without it, the meaning or effect of the contract would be in doubt." *Hartford Iron Min. Co. v. Cambria Min. Co.*, supra. See, also, *Dart v. Barbour*, 32 Mich. 267; *Harris v. Oakley* (N. Y. App.) 28 N. E. 531. In the contract between the parties it is expressly stipulated that time was the essence thereof, and, it satisfactorily appearing that the defect in plaintiffs' title was not remedied prior to the time when defendant elected to rescind, it follows that judgment should have been entered for defendant for the amount which she had paid upon the purchase price, together with legal interest thereon from the dates of such payments. She was entitled to a marketable title, and could not be required to accept less in quantity than what she had agreed to purchase and pay for. Under the wording of this contract, she was entitled to withdraw from its provisions, and demand a return of the money theretofore paid by her upon it at any time after the expiration of the time fixed by the contract for plaintiffs to perform their part, and before such actual performance. The judgment will be reversed, and the cause remanded for further proceedings in accordance herewith.

HOYT, C. J., and ANDERS and DUNBAR, JJ., concur.

(16 Wash. 34)

## HARTIGAN v. HOFFMAN.

(Supreme Court of Washington. Dec. 4, 1896.)

APPEAL—OBJECTIONS NOT RAISED BELOW—DEED  
—SUFFICIENCY OF DESCRIPTIONS.

1. Where a deed in defendant's chain of title, purporting to have been executed by husband and wife, but which shows on its face that the husband executed for the wife as her attorney in fact, was admitted in evidence without objection, it cannot be objected, on appeal, that no power of attorney from the wife was shown on the trial.

2. A deed which does not show the state and county in which the land is situated, the meridian to which the range should be referred, nor whether the township named in the description is north or south, is insufficient to convey title.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by John C. Hartigan against F. A. Hoffman. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Millon & Houser, for appellant. C. J. McDougall and W. A. M. Jones, for respondent.

GORDON, J. Appellant brought this action to quiet title to certain real property in Skagit county. The lands in question were originally patented to one Snyder. On the 4th of June, 1892, Snyder conveyed the premises, by a deed of general warranty, to one Nelson, who, on the 22d of August, 1892, by a like instrument, conveyed to one Edson L. Shaw. On the 29th of September, 1892, Shaw and his wife, Annie W. Shaw, she purporting to act through her husband as her attorney in fact, by deed of general warranty conveyed the premises to Eugene Stebinger, who, on the 1st of October, 1892, conveyed the premises by a like deed to the respondent. The deeds from Snyder to Nelson, from Nelson to Shaw, and from Shaw to Stebinger were filed for record in the office of the auditor of Skagit county (in which county the premises are situated) on the 5th day of September, 1893. The deed from Stebinger to the respondent was filed for record on the 17th of August, 1893. The deeds above mentioned were offered in evidence by the respondent at the trial below, and were received without objection upon the part of the appellant, and constituted the case for the respondent. The appellant relies upon a quitclaim deed executed by Snyder to the appellant on the 13th day of May, 1893, which was filed for record with the auditor of Skagit county on the 24th day of June, 1893. It will be observed that this last-mentioned deed was recorded prior to the record of any of the deeds in respondent's chain of title. The lower court made its findings of fact and conclusions of law in writing, as required by statute, and entered judgment dismissing the appellant's complaint, and decreeing the respondent to be the owner in fee simple of the lands in controversy. From this judgment and decree the appellant (plaintiff below) has appealed.

Only two errors are assigned. The first is

that the court erred in making the following finding, viz.: "That on the 29th day of September, 1892, the said Edson L. Shaw and Annie W. Shaw, husband and wife, by warranty deed duly executed, conveyed said property to Eugene Stebinger, which deed was duly acknowledged as required by law, and filed for record in the office of the auditor of said Skagit county on the 5th day of September, 1893, and appears of record therein." The specific objection is that no proof was introduced as to the existence of the power of attorney or authority under which said Edson L. Shaw purported to act in executing said instrument on behalf of his wife. But, as already noticed, this deed, like the others in respondent's chain of title, was offered and received without objection upon the part of the appellant, and this particular objection, as appears from the record, is urged here for the first time. For this reason we cannot consider it. Had the objection been timely made, respondent might have obviated it by the introduction of other evidence.

The remaining assignment is that "the conclusions of law and judgment are unsupported by the law and facts." This assignment is somewhat indefinite, and it does not challenge the correctness of any of the findings not already referred to. The court, in effect, found that the quitclaim deed from Snyder to the appellant was void because of uncertainty in the description. The premises are described in the deed as follows, viz.: "East half, northeast quarter, and northwest quarter of northeast quarter, of section 13, in town 35, range eight east." The deed was executed in the state of Nebraska, in which state the grantor was then residing. Neither the county nor the state in which the granted premises are situated is specified in the deed. The name of the meridian is not mentioned, nor is it apparent from the deed whether the township in which the premises are located is north or south. To be effective, a deed to real estate must describe it with sufficient certainty to enable it to be located. Counsel for the appellant contend that the description in appellant's deed is sufficient under the holding of the territorial court in *Carson v. Railsback*, 3 Wash. T. 168, 13 Pac. 618. We have examined a great many cases upon the question of what constitutes a sufficient description in a deed to real estate, and think that *Carson v. Railsback*, supra, is as favorable to the appellant as any that is to be found. But the sufficiency of the description in the deed here in question cannot be upheld upon the authority of that case. In that case the deed was executed and recorded in Pierce county, in which the grantor resided, and, while neither the territory nor county was mentioned in describing the granted premises, the township and range were given; and the court held that it would take judicial notice of the system of survey of public lands adopted by

the United States, which, as applied to the description then under consideration, enabled the court to ascertain that the premises were located in Pierce county, aforesaid. But considering the description in the deed before us with reference to the system of survey adopted by the United States, it cannot be ascertained that the granted premises are within Skagit county, or even the state of Washington. As before mentioned, the name of the meridian is not given, nor whether the township is north or south; and the deed might as properly be recorded in any of the several states as in the state of Washington or the county of Skagit. This uncertainty renders the deed void, and the court did not err when it reached that conclusion. Upon the entire record we think that the judgment and decree must be affirmed.

HOYT, C. J., and ANDERS, DUNBAR, and SCOTT, JJ., concur.

(16 Wash. 1)

SHOEMAKE v. STIMSON, Sheriff, et al.  
(Supreme Court of Washington. Dec. 1, 1896.)

EXEMPTION—HOMESTEAD ACT—DEBT.

A claim by one surety against another for contribution becomes a debt only on payment by the former in excess of his share, and therefore, where such excessive payment is made after the issuance of a patent to the latter under the homestead act, the land is not exempt, under Rev. St. U. S. § 2206, providing that lands acquired under the act shall not be liable to the satisfaction of any debt "contracted prior to the issue of the patent therefor."

Appeal from superior court, Klickitat county; Sol Smith, Judge.

Action by Mary A. Shoemaker against Frank Stimson, sheriff of Klickitat county, and another. There was a judgment for defendants, and plaintiff appeals. Affirmed.

M. M. Godman, S. G. Cosgrove, and N. B. Brooks, for appellant. C. H. Spalding and W. B. Presby, for respondents.

GORDON, J. In April, 1891, Peter Shoemaker and W. B. Hayden, as principals, and respondent Daniel Finlayson, John Shoemaker, Edward Judy, W. W. Gregory, and Gilbert Hayden, as sureties, executed and delivered to one I. R. Dawson promissory notes in a sum aggregating \$5,000, which notes matured December 1, 1891. Thereafter the respondent Finlayson and said Edward Judy were compelled to and did pay, on account of said notes, about \$2,500, upward of \$500 of which was paid subsequent to the 6th day of June, 1892. Thereafter Judy duly assigned to respondent Finlayson his claim for the money so paid by him, and Finlayson commenced an action in the superior court for the county of Klickitat against said John Shoemaker, one of his co-sureties upon the notes to Dawson, to recover from said Shoemaker one-third of the amount so

paid by Finlayson and Judy, and in said action recovered judgment for the sum of \$961.46. In January, 1894, execution was issued upon the judgment, and placed in the hands of the sheriff of Klickitat county, who proceeded to levy upon the property which is the subject of this action, viz. 160 acres of land located in said county, which had been patented to the said John Shoemaker on the 6th day of June, 1892, pursuant to the homestead laws of the United States. The property was sold under said execution to the respondent Finlayson, and thereafter the sale was confirmed by the court. The present action was commenced by Mary A. Shoemaker, wife of said John Shoemaker, to restrain and to enjoin the sheriff of Klickitat county from delivering to the respondent Finlayson a sheriff's deed to the land so sold. In her complaint she alleges that she is the owner of the land by virtue of a conveyance from her husband, John Shoemaker, executed prior to the execution sale above referred to; also, that the land was exempt from execution by virtue of section 2206 of the Revised Statutes of the United States, providing that "no lands acquired under this chapter [relating to homesteads] shall in any event become liable to the satisfaction of any debt contracted prior to the issue of the patent therefor." At the trial below, the parties filed a written stipulation embracing all of the facts within the issues raised by the pleadings, excepting as to the good faith of the conveyance to the appellant by her husband, and the consideration therefor. Upon these issues, evidence was introduced, from which the lower court found that the deed to the appellant from her husband was made and delivered "with the mutual intent to hinder, delay, and defraud creditors." The court further found that the sum of \$533 was paid by Finlayson and Judy on the Dawson note after the issuing of the patent to the land in question, and that "the said premises are not exempt from that sum." The court further concluded: "That the indebtedness between Shoemaker, Judy, and Finlayson, as co-sureties on said notes, \* \* \* was contracted when the said Finlayson and Judy paid more than their proportion of said notes"; and "that said deed is void so far as creditors are concerned." These findings and conclusions, and the judgment entered thereon, were duly excepted to, and the cause comes to this court upon appeal.

1. The first assignment is that the finding of a fraud is not sustained by the pleadings, and was against the evidence in the cause. We do not think that counsel are in a position to urge the first proposition embraced in the assignment. The evidence upon which the finding is based was received below without objection; and it is obvious from an inspection of the record that the case was tried below on the theory that the question of fraud was within the pleadings. The appellant appears, moreover, to have opened the door for the admission of the evidence by affirmatively undertaking to prove the good faith of the transaction surrounding the conveyance from her husband. Section 1455,

1 Hill's Code, provides that "in every case where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith." Both by her pleading and conduct at the trial, the appellant assumed the burden of establishing the good faith of the transaction in question, and we think the finding was proper, and that it is fully sustained by the evidence received upon the trial.

2. It is next urged that even if the premises were conveyed by John Shoemake to his wife, with intent to delay, hinder, and defraud his creditors, yet the effect of such conveyance did not and could not defraud the respondent Finlayson, for the reason that the premises in question were not subject to be sold in satisfaction of his judgment. This makes it necessary to determine when the indebtedness arose upon which respondent Finlayson recovered judgment against Shoemake. Appellant's contention in this regard is that that indebtedness was incurred and contracted on the 9th day of April, 1891, being the date on which the notes to Dawson, already referred to, were executed by Shoemake, Finlayson, Judy, and the other co-sureties of Shoemake and Hayden, while the position of the respondent is that there was no indebtedness contracted or incurred by John Shoemake to the respondent Finlayson or to Judy until they were obliged to, and actually did, pay the sums hereinbefore referred to. The contention of the respondent must be sustained, and, upon the facts here stated, we think it must be held that there was no "debt" from Shoemake to Finlayson or Judy prior to the time that they made payment on the common obligation in excess of their share of the common burden; and, as we have already seen, these payments, or at least some of them, were not made until after the patent to the land in question had actually issued. Until such payments were made, no right of action existed against John Shoemake in favor of either Finlayson or Judy. The subsequent suit by Finlayson, in which judgment was obtained, was not upon the notes executed to Dawson. Prior to such payment no right of action existed, but only an equity, which sprung up at the time the relation of co-sureties was entered into, and which did not ripen into a cause of action until such payments were actually made. The equity which theretofore existed cannot be held to be a "debt contracted prior to the issuing of the patent, within the meaning of the homestead law, which exempts lands acquired under it therefrom." *Chipman v. Morrill*, 20 Cal. 131; *Camp v. Bostwick*, 20 Ohio St. 337; *White v. Banks*, 21 Ala. 705; 1 Story, Eq. Jur. (13th Ed.) § 493; 1 Brandt, Sur. (2d Ed.) § 254. Upon the entire record, we think no error was committed, and the judgment and decree of the superior court will be affirmed.

SCOTT, DUNBAR, and ANDERS, JJ., concur.

(16 Wash. 69)

## FRACE v. CITY OF TACOMA.

(Supreme Court of Washington. Dec. 7, 1896.)

TAXATION—MUNICIPAL BENEFITS—JUST COMPENSATION—ANNEXATION OF TERRITORY.

1. A city tax levied on lands within the corporate limits, but outside the range of municipal benefits, is not invalid, as a taking of property without just compensation.

2. In an action to restrain the collection of taxes assessed by a city upon lands situated within territory annexed to the city, the validity of the proceeding extending the city limits cannot be attacked.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by James A. Frace against the city of Tacoma to restrain the collection of taxes levied on plaintiff's land. From a judgment for plaintiff, defendant appeals. Reversed.

W. W. Likens, for plaintiff. John Paul Judson, W. H. H. Kean, and James Wickersham, for defendant.

GORDON, J. Plaintiff in this action is the owner, and in possession of, 160 acres of land lying within the corporate limits of the city of Tacoma. He brought this action to restrain the collection and enforcement of taxes levied and assessed against the land by the city for the years 1893 and 1894. The grounds relied upon for relief are that the corporate limits of the city as originally incorporated did not include his land; that, in attempting to extend its limits, the city wholly failed to comply with the provisions of the act of March, 1890, authorizing an extension; and that the premises are beyond the line of all municipal benefits. Upon the issues joined, the superior court granted the relief asked as to 80 acres, or one-half of plaintiff's land, and denied it as to the other half. Each of the parties has appealed.

The court found: "That in April, 1891, in compliance with the general incorporation act approved March 27, 1890, the corporate limits and boundaries of the city of Tacoma were altered and changed so as to include the following described territory: \* \* \* That the lands of the plaintiff described in the amended complaint are not within the corporate limits of said city as established prior to 1891, but are within the extended limits of 1891. That said city complied with the requirements of the act of March 27, 1890, in making the extension." The court also found that the premises were situated beyond and outside the line and range of municipal benefits, and that "plaintiff has not had any, and cannot have or derive any, benefit or privilege or advantage from the municipal government of said city of Tacoma; but the levying and imposing of said taxes is solely for the use and benefit of those within the benefited limits of said city, and is the taking of this plaintiff's property without a just or any compensation." These are the questions involved in the appeal taken by the city.

This court held in *Kuhn v. City of Port Townsend*, 12 Wash. 605, 41 Pac. 923, that "A private citizen cannot \* \* \* question the right of a municipal corporation to exercise the authority, powers, and functions of an incorporated city. This can be done only in a direct proceeding prosecuted by the proper public officers of the state." And in *Ferguson v. City of Snohomish*, 8 Wash. 668, 36 Pac. 969, we said: "But it is further contended by the appellant that, even if his lands were properly included within the corporate limits of the city, they are not subject to taxation for general municipal purposes, because such taxation would be a taking of private property without just compensation. This view of the law, although favored by the courts of Iowa and Kentucky (*Morford v. Unger*, 8 Iowa, 82; *City of Covington v. Southgate*, 15 B. Mon. 498), is contrary to the great weight of authority in this country." The question here involved was examined with great care, and is fully discussed, in those cases; and what is there said must be regarded as decisive of the present controversy.

The appeal taken by the plaintiff raises questions which relate mainly to rulings of the trial court upon the introduction of evidence, and to certain findings of fact made by it. We have examined the record, and think that no prejudicial error was committed in the reception of evidence, and that the court properly found that plaintiff's land was within the corporate limits of the city; and it follows upon the authority of the cases above, aside from the reasons which led the trial court to deny the relief prayed by the plaintiff, that it was properly denied. The judgment and decree of the superior court will be reversed, and the cause remanded, with directions to dismiss the action.

HOYT, C. J., and SCOTT, DUNBAR, and ANDERS, JJ., concur.

(16 Wash. 90)

TAAKE v. CITY OF SEATTLE et al.  
(Supreme Court of Washington. Dec. 7, 1896.)  
APPEAL—DISMISSAL AS TO ONE PARTY—DEFECTIVE STREET—LIABILITY OF CITY.

1. Though plaintiff take his appeal by one notice directed to both defendants, and give but one bond to both as joint obligees, his dismissal of the appeal as to one, by stipulation with him, does not affect the validity of the bond as to the other, or entitle him to a dismissal.

2. A city may be liable for injuries received from defects in a street which it has laid out and invited the public to use, notwithstanding illegality in the proceedings to open or lay it out.

Hoyt, C. J., dissenting.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Frederick Taake against the city of Seattle and another. Judgment for defendants. Plaintiff appeals. Dismissed by

stipulation as to the other defendant, and as to the city reversed.

Brady & Gay and A. E. Isham, for appellant. John K. Brown and F. B. Tipton, for respondents.

DUNBAR, J. This is an action against the city of Seattle for alleged injuries sustained in falling through an unguarded hole in the street. The respondent moves to dismiss the appeal for the reason that the plaintiff sued the respondent city and the Seattle, Lake Shore & Eastern Railway Company. Judgment was rendered against the plaintiff and in favor of both defendants. From this judgment plaintiff took his appeal, by one notice directed to both respondents, and gave one appeal bond to both respondents as joint obligees. Since the appeal the appellant has filed in this court a stipulation, signed by his attorneys and the attorneys for the respondent the Seattle, Lake Shore & Eastern Railway Company, by which appellant stipulates that in this cause the appeal of plaintiff and appellant shall be and is dismissed as against the defendant the Seattle, Lake Shore & Eastern Railway Company. It is argued by the respondent that, inasmuch as plaintiff's appeal is from the entire judgment, and not from a part of it, he cannot now, after time to appeal has elapsed, change the nature of his appeal by a stipulation with one of the respondents to which this respondent was not a party; that the dismissal as to one respondent renders the appeal bond worthless as to the other respondent; and, therefore, that the remaining respondent has no security for the costs of the appeal. We do not think there is sufficient merit in this action on which to base a dismissal. The appellant could have appealed from that portion of the judgment only which was in favor of respondent. We cannot see that the respondent is in any way injured or affected by the dismissal of this appeal so far as the Seattle, Lake Shore & Eastern Railway Company is affected, nor do we think that the bond given on appeal would be affected by this dismissal. The motion to dismiss will, therefore, be denied.

The answer to the complaint of the appellant, so far as it is relevant to the discussion of this case, is as follows: "That the place where plaintiff is alleged to have been injured is not now, nor has it ever been, a public street or highway of the city of Seattle, or any part of a public street or highway, or a public place at all, nor at any time within the control of the city of Seattle." Upon the issues thus framed, the case went to trial before a jury. After the testimony was submitted, the respondents challenged the sufficiency of the evidence, the case was taken from the jury, and the action dismissed, with costs in favor of the respondents. From this action and judgment of the court this appeal is taken. The defense to this action



is based largely upon the respondent's construction of the decision of this court in *Seattle & M. Ry. Co. v. State*, 7 Wash. 150, 34 Pac. 551. All that was decided in that case, so far as this street was concerned, was that the city had no right to donate the right of way over tide lands to railway companies, thereby depriving the state of its constitutional right to the same. It is not a defense to this action, even if it be conceded that the city had no authority to lay out this street. The right of the party injured to obtain redress does not depend upon the technical rights of a city to maintain a street. If, as a matter of fact, this street was laid out by the city of Seattle, was used by it as a street, and the public were invited to use it as such, it becomes its duty to maintain it in proper repair, and to protect the life and limb of those whom it invites to travel upon it; and the ordinary traveler is not called upon to examine the technical legality of the proceedings of the city in opening or laying out the street. So that the question in this case is, was there testimony tending to show the user by the public, at the instance or invitation of the city, of the street at the place where this hole was left unguarded, and where the alleged injuries were sustained. An examination of the testimony introduced, and of other testimony which was offered and rejected, convinces us that there was sufficient testimony on that point to go to the jury, and, if believed by the jury, to sustain a verdict. The judgment will therefore be reversed, and the cause remanded, with instructions to deny the challenge to the sufficiency of the testimony.

SCOTT and ANDERS, JJ., concur. HOYT, C. J., dissents. GORDON, J., did not sit in this case.

(16 Wash. 9)

STOSSEL et al. v. VAN DE VANTER  
(KNAPP, BURRELL & CO.,  
Interveners).

(Supreme Court of Washington. Dec. 1, 1896.)  
ESTOPPEL IN PAIS—CHattel MORTGAGE—ACTION  
BY MORTGAGOR FOR CONVERSION—WIT-  
NESS—CREDIBILITY.

1. The fact that one of the joint owners of personalty levied on as the property of a third person, together with another person, and with the knowledge of the other owners, filed with the sheriff a joint claim to the property, does not of itself estop the owners from claiming title thereto.

2. The mortgagor of personalty may sue for a conversion thereof, though the mortgage, on its face, purports to be an absolute conveyance.

3. In an action for the conversion of sawlogs, levied on as the property of one D., a witness testified that one of the plaintiffs admitted that he had "certain personal property" belonging to D., and that he was keeping the "stuff" to protect it from D.'s creditors. Held, that the question, "That was referring to what?" was properly excluded, as asking for the witness' opinion.

4. Where, in an action for conversion of prop-

erty levied on by defendant as the property of one D., defendant claims that plaintiff and D. conspired to cover up the latter's property from creditors, a witness for defendant may be cross-examined as to his ill feeling towards D., to discredit his testimony.

Appeal from superior court, King county.

Action by Frank Stossel and others, copartners as Fraser & Ross, against A. T. Van De Vanter and Knapp, Burrell & Co., a corporation, intervener. From a judgment for plaintiffs, defendant and intervener appeal. Affirmed.

Gill, Keene & Shaw, for appellants. Charles E. Patterson, for respondents.

SCOTT, J. This was an action for the conversion of a quantity of saw logs, which the appellants caused to be levied upon and sold under an execution issued upon a judgment recovered by them against one Duvall. The appeal was taken from a verdict and judgment in favor of the plaintiffs.

One of the defenses pleaded was that the plaintiffs were estopped from prosecuting the action on the ground that, after the logs had been seized under the execution, Stossel, one of the plaintiffs, and one Faulds, with the knowledge and consent of Fraser & Ross, served upon the defendant Van De Vanter, the sheriff who had served the execution, a joint claim as owners of said logs, notifying the defendants that they would be held responsible to said Stossel and Faulds for all damages resulting from the sale thereof, said claim being supported by the affidavit of Stossel and Faulds. The paragraphs relating to this defense were stricken from the answer, and error is assigned thereon. We think the facts pleaded were not sufficient to constitute an estoppel, for the execution plaintiffs were not proceeding against the logs as the property of Stossel and Faulds, but as the property of Duvall, the execution defendant, and they thereafter proceeded to sell sufficient of them under the execution to satisfy it, and the remainder were released. It does not appear that the appellants were misled in any wise, or acted differently than they would have done, in consequence of this claim and the action of the plaintiffs relating thereto.

It is next contended that the complaint did not state a cause of action. It appears that the plaintiffs were partners in said logging business, and that the plaintiffs, Fraser & Ross, had executed and delivered to said Faulds an instrument in writing in the form of a bill of sale, which the complaint alleged, and the parties testified, was intended as a mortgage to secure him for advances made to Fraser & Ross to enable them to conduct said business. Under this allegation the title to the property was still in the plaintiffs, and they could maintain the action.

It is next contended that the court erred in refusing to grant the motion for a nonsuit, on the ground of the insufficiency of the evi-

dence; but there was no error in this, under the proofs introduced.

It is also contended that the court erred in sustaining an objection to a question asked one of the witnesses. This witness had testified that he had a conversation with Mr. Stossel concerning his possession of "certain personal property" which he stated was Duvall's, and that Stossel said he was holding the "stuff" there for Duvall, to keep Duvall's creditors from taking it, as Duvall was indebted, and could not hold any property. Then appellants' counsel asked the witness the question, "That was referring to what?" and an objection to it by the plaintiffs was sustained. There is no sufficient foundation in the record to predicate error upon in this particular, for several reasons. It must be conceded that the appellants had a right to show that the conversation related to these logs. But it does not appear that the question was calculated to draw out anything more than the conclusion of the witness as to what the conversation referred. The record would indicate that the witness had testified already as to the entire conversation between himself and Stossel, and after that was given in evidence, and the circumstances under which it was given, the defendants were not entitled to the conclusion of the witness as to the property referred to. No offer was made to show by the witness that there was any further conversation between the parties, showing that it was these logs that were being talked about, or to show any circumstances connected with the conversation to that end, nor was there any exception taken to the ruling of the court upon the objection.

There was no error in permitting the plaintiffs to cross-examine one of the witnesses for the defendants as to the state of feeling existing between himself and Duvall, as the ill feeling existing between them was a matter that the plaintiffs had a right to have before the jury for the purpose of considering the credit to be given to the testimony of the witness. The appellants were attempting to show a fraudulent scheme upon the part of Duvall and the plaintiffs to cover up his property.

It is urged that it was error to refuse to give certain instructions requested by the defendants; but these were based upon the alleged insufficiency of the evidence to support a recovery, and upon the question of estoppel, and were properly refused; nor do we find any error in the instructions given. Affirmed.

DUNBAR, ANDERS, and GORDON, JJ., concur.

(16 Wash. 72)

WOODLAND LUMBER CO. v. LINK et ux.  
(Supreme Court of Washington. Dec. 7, 1896.)

COMMUNITY PROPERTY.

In the absence of proof that it was the intention, at the time a deed to a lot was taken

in the name of a wife, and a house was built thereon, that it should be the separate property of the wife, it will be held community property, and subject to debt of the husband, though contracted after he contributed to the purchase of the lot and erection of the house.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by the Woodland Lumber Company against Henry W. Link and wife. Judgment for plaintiff, and defendant wife appeals. Affirmed.

Sharpstein & Blattner, for appellant. Hiram F. Garretson, for respondent.

GORDON, J. Respondent brought this action to set aside a quitclaim deed of conveyance from Henry W. Link to Ada C. Link, his wife, bearing date December 14, 1893, and to subject the real property described therein to the lien of respondent's judgment against the said Henry W. Link and John H. Estes, partners as Link & Estes, which judgment was recovered on the 24th day of March, 1894. The complaint alleges the issuance of execution, and its return unsatisfied, the insolvency of the judgment debtors, and contains other allegations usual in such cases. From a judgment and decree in favor of the plaintiff below, Ada C. Link has appealed.

It appears that the premises were purchased by the defendants in this action subsequent to their marriage, for the sum of \$400, and title was taken up the 13th day of February, 1889, in the name of Ada C. Link, the wife. Thereafter a dwelling house was erected thereon. The evidence is conflicting on some material points, but it is undisputed that \$220 of the purchase price of \$400, paid for these lots, was paid by the check of Link & Estes, and hence was a community contribution. It is also undisputed that the dwelling house thereafter built on the premises was paid for out of the community funds. During all this time the property was presumptively community property. "Lands conveyed by deed of purchase to either husband or wife during the continuance of the marriage relation are prima facie common property." *Yesler v. Hochstettler*, 4 Wash. St. 349, 30 Pac. 398. And while the record shows that the debt upon which respondent's judgment was rendered was not contracted until June, 1893, and respondent could not rightfully complain of any gift theretofore made by the husband to the wife, still the evidence failed to satisfy the lower court, and does not convince us, that it was the intention and purpose of the parties, at the time when the lots were purchased and these contributions were made, that the property should become the separate property of the wife. It was improved by contributions from the community funds, and title of record remained in the wife (presumably for the community) until long after the debt to the respondent was contracted. In the meanwhile the partnership of Link & Estes became financially em-

barrassed. Then, and not till then, was the deed under consideration made. The case falls within section 1455, 1 Hill's Code, and the rule announced by this court in *Yesler v. Hochstettler*, supra: "If the evidence of the opposite parties leaves the matter in doubt, the presumption continues to weigh for the community, and will decide the question." Upon consideration of the entire record, we are unable to say that the findings of the lower court were not sustained by the evidence; and its judgment and decree will be affirmed.

ANDERS, DUNBAR, and SCOTT, JJ., concur. HOYT, C. J., dissents.

(16 Wash. 46)

**FIRST NAT. BANK OF SEATTLE v.  
HAGAN, Sheriff, et al.**

(Supreme Court of Washington. Dec. 7, 1896.)

**EXECUTION—CLAIM BY THIRD PERSON.**

2 Hill's Code, § 491, provides that, when any other person than the judgment debtor shall "claim" property levied on, he may have the right to receive the same from the sheriff on making affidavit, and that in such proceedings the person "claiming" the property shall be plaintiff, and the sheriff and the execution creditor defendants. No other pleadings are required in the proceeding. A mortgagee in possession of the mortgaged chattel filed an affidavit of claim, in which he stated that he was the "owner" of the property. *Held*, that it was proper to permit the claimant to show his right to possession as mortgagee.

Appeal from superior court, Snohomish county; R. A. Ballinger, Judge.

Proceeding by the First National Bank of Seattle against James Hagan, sheriff of Snohomish county, and another, to claim property seized under execution against one Monroe. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Ault & Munns, for appellants. Bell & Austin, for appellee.

GORDON, J. This proceeding was instituted by the respondent under section 491, 2 Hill's Code. The appellant Hagan, as sheriff of Snohomish county, had levied upon the personal property in question as the property of one Monroe, who was indebted to the respondent. At the time of the levy, the property was in the possession of the respondent, and held as security for the indebtedness owing to it by Monroe. Respondent was proceeding to sell the same for the purpose of applying the proceeds upon the debt so owing to it, and had advertised the same for sale prior to appellant's levy. The affidavit upon which the proceeding was initiated alleged that the respondent was the owner, and entitled to the immediate possession, of the property. Upon the verdict of a jury, judgment was entered in favor of plaintiff, from which defendants have appealed.

The principal ground urged for reversal is that the court erred in not confining plaintiff to proof of absolute ownership of the property

in question, and in permitting it to show its right to possession based upon the facts already stated. The case of *Silsby v. Aldridge*, 1 Wash. St. 117, 23 Pac. 836, is cited and relied upon by appellants. In that case the plaintiff brought replevin, and his complaint alleged that he was the owner of the property involved in the action. The answer denied plaintiff's ownership, and, upon the trial which followed, the plaintiff was permitted, over the objection of defendants, to put in evidence a chattel mortgage executed by a third person to the plaintiff, covering the property. We quote from the opinion: "The testimony on the part of the plaintiffs showed that the mortgage debt was not yet due, and that the mortgage had not been foreclosed. It did not appear that the mortgaged property had ever been in the possession of the plaintiffs, but it had remained in the possession of the mortgagors until a short time previous to the commencement of the action. \* \* \* In our judgment, the chattel mortgage, under the statutes of Washington, did not convey to the holders any title to the property in question." And the court held that there was a failure of proof, and not a mere variance, and for that reason reversed the cause. But the present proceeding is a summary one, under the statute which provides (section 491, 2 Hill's Code) that, "when any other person than the judgment debtor shall claim property levied upon or attached, he may have the right to demand and receive the same from the sheriff or other officer making the attachment or levy, upon his making an affidavit," etc. No answer or other pleading is required upon the part of the officer. The statute further provides that "the person claiming the property shall be plaintiff and the sheriff and plaintiff in the execution defendants." This court, in *Chapin v. Bokee*, 4 Wash. St. 1, 29 Pac. 936, says, of the proceeding authorized by this section, that: "It is a proceeding somewhat summary in character, and no pleadings other than the affidavit mentioned, if that is to be considered one, seem to have been contemplated. It is irregular in any view that can be taken of it. Doubtless, the defendants in such proceedings can contest the claim, and introduce evidence to contradict evidence of the plaintiff. If it had been intended to require them to file an answer, most likely the plaintiff would have been required to file a complaint, and some time would have been specified within which an issue should have been formed in this manner. It would be straining the rules of pleading considerably to hold the affidavit to be a complaint." See, also, *Freeburger v. Gazzam*, 5 Wash. St. 772, 32 Pac. 732. What the statute in question authorizes to be litigated is the "claim" of any person other than the judgment debtor to the property levied upon or attached; and the word "claim," as used in the statute, is sufficiently broad to admit proof of the character relied upon by respondent herein. Inasmuch as no pleadings are required

upon the part of the parties in a proceeding under the statute, it would be contrary to the spirit of the statute to apply the rules of pleading applicable to replevin, and, under sections 217 and 220 of Hill's Code, we would not be warranted in reversing the judgment upon the grounds of alleged variance. Upon the evidence adduced at the trial, we think that plaintiff was entitled to recover. The verdict was right, and the judgment must be affirmed.

HOYT, C. J., and ANDERS, SCOTT, and DUNBAR, JJ., concur.

(16 Wash. 95)

GERMAN SAVINGS & LOAN SOC. v.  
WEBER et al.

(Supreme Court of Washington. Dec. 8, 1896.)

FIXTURES—CHATTELS ANNEXED TO REALTY.

An agreement, between the owner of land and a contractor who brings upon and annexes chattels thereto, that they shall remain personalty, and title thereto remain in the contractor till paid for, is valid, and will prevent the chattels from becoming fixtures, and as such subject to the lien of mortgages on the land, till paid for.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by the German Savings & Loan Society against C. F. Weber & Co. and others to determine whether chattels attached to a building by C. F. Weber & Co., by contract with their co-defendants providing that the chattels should remain personalty, and title thereto remain in C. F. Weber & Co., till paid for, become fixtures, and as such subject to the lien of plaintiff's mortgage. From a judgment for defendants C. F. Weber & Co., plaintiff appeals. Affirmed.

Cyrus Happy, for appellant. Forster & Wakefield and Everett C. Ellis, for respondents.

DUNBAR, J. This case is submitted upon an agreed statement of facts. The facts were about as follows: That on the 27th day of May, 1892, A. M. Cannon and Jennie F. Cannon, his wife, who were the owners in fee simple of certain lots in Spokane Falls, for a valuable consideration executed and delivered to the plaintiff (appellant herein), the German Savings & Loan Society, a mortgage upon said lots, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining. This mortgage was duly recorded on the 2d day of June, 1892, and none of the indebtedness for which it has been given has been paid. That upon a portion of said lots, Cannon and wife erected a building for the purpose of carrying on a banking business. That said building has never been occupied, but that said Cannon contracted with the respondents C. F. Weber & Co., to put in said building what is known as the "standing finish," consisting of window and door sashes,

jambes, and trimmings, wainscoting, entrance doors, side door, two small doors in rear, including glass and hardware, baseboards and wainscoting, mantle piece without tiling and footings,—in all amounting to \$3,667.32. That in pursuance of said contract said C. F. Weber & Co. manufactured and shipped to Spokane said standing finish, and that they then learned that said Cannon was unable to pay for the same; and thereupon the said Cannon and his wife entered into an agreement on the 1st day of July, 1893, with the said C. F. Weber & Co., to the effect, in brief, that C. F. Weber & Co. should retain possession of said property and said buildings, as aforesaid, until they were fully paid for according to the terms of their contract, or until other arrangements were made, satisfactory to the said C. F. Weber & Co., and in the meantime the ownership and possession of said property was to remain with the said C. F. Weber & Co. That under said agreement, C. F. Weber & Co. placed their said property in the bank building. That the glass had been put in the sash, and the sash put in the windows. That the jambes and trimmings had been fastened to the building by screws, and the wainscoting and other finish had been fastened to the building by screws, the wainscoting being screwed to a furring strip running horizontally around the said building at the top of the wainscoting. That the room was only plastered down to the top of the wainscoting, and behind the wainscoting, baseboards, etc., was plain brick. And the agreement further provides that all of said property described in said Exhibit C could be removed without damage or injury to the building other than the loss to the realty, if it should be determined that it is such a part of the realty that the said parties would have no right to remove it. It is the contention of the respondents that C. F. Weber & Co., under the terms of the contract, have the right to remove said property, as shown in Exhibit C, referred to above, by leaving the building in substantially the same condition that it was in before the said property was placed in said building; and the German Savings & Loan Society (the appellant here) claims that said property has become a part of the realty, that it is covered by its mortgage, and that the said parties have no right to remove it. The judgment of the court was in favor of C. F. Weber & Co., and from such judgment an appeal is taken to this court.

The history of litigation on the subject of fixtures and annexations is to the effect that it has always been considered largely a mixed question of law and of fact, depending upon the relations of the parties, the character of the fixtures, and the manner of the annexation, very largely in each particular case. It cannot be denied, however, that the old common law in relation to fixtures being construed as a part of the realty has been greatly modified in modern times by reason of the changing conditions of trade, and for the pur-

pose of protecting traffic in building fixtures. The contention of the appellant in this case is twofold: First, that, as between the parties to this contract, the goods supplied here became a part of the real estate, and that they had no right to stipulate or agree that real estate was personal property, and that such agreement could not be carried into effect by the court; and, second, that, even conceding the efficacy of such an agreement between the parties, the mortgagee in this case could not be bound by the agreement, and consequently his rights would not be affected thereby, and that the question of intention could not be made to apply against his interests. We are satisfied that the trend of modern authority is to the effect that the intention of the contracting parties should be allowed to control; and that intention will control, even so far as the rights of the former mortgage is concerned, subject to the limitation that the fixtures which, outside of stipulation, would have, under the law, been regarded as real estate, can be removed only when such removal can be effected without injury to the real estate or to the building to which they are attached. We think this is the almost unbroken current of modern authority, and is even borne out by most of the cases cited by the appellant. The appellant, on page 10 of his brief, cites the following from Mr. Ewell in his work on Fixtures (page 68): "A limitation to the rights of the parties to change, by their agreements, the status of property from that which the law would assign to it in the absence of a special agreement, has, however, been made in some cases, and the rule has been stated to be that whether an agreement shall preserve the character of personality in things so affixed to the freehold as that, but for such agreement, they would become part of the realty, depends upon their essential character, and the mode in which they are annexed; e. g. whether they can be removed without serious damage to the freehold, or substantially destroying their own qualities and value." Applying this test to the case at bar, it does not appear that any damage would be done to the freehold by the removal of these fixtures,—in fact, it is stipulated that no damage would be done other than loss to the realty of the value of the fixtures,—and they are of such a nature that it seems to us that their value would not be destroyed as merchandise. Therefore, the rights of the mortgagee have not been deleteriously affected by the removal of these fixtures, for the pledging upon which his lien attached has lost nothing in value, and his security has been in no way affected by reason of the entering into this contract between his mortgagor and C. F. Weber & Co. This limitation to contract with reference to fixtures is even severely criticised by Mr. Ewell in the section above, referred to, excepting where it affects the rights of third parties. The author, continuing, says: "Where the

rights of third parties intervene, the propriety and necessity of such a limitation will be very readily conceded; but, as between the immediate parties to the agreement, the limitation seems, to say the least, sufficiently strict; and where, as in the case of a house, the materials might be of value after severance, no more reason is perceived why such an agreement should not be effectual as between the parties than in the case of a fixture that might be removed uninjured, the difference between the two cases being, not one of principle, but simply degree, one of more or less." Mr. Ewell, to sustain this proposition, cites the case of *Ford v. Cobb*, 20 N. Y. 344, also cited by the appellant in this case, where Judge Denio, in rendering the opinion for the court, said: "It will readily be conceded that the ordinary distinction between real estate and chattels exists in the nature of the subject, and cannot, in general, be changed by the convention of the parties. Thus, it would not be competent for parties to create a personal chattel interest in a part of the separate bricks, beams, or other materials of which the walls of a house were composed." Of course it would not, for under such circumstances the realty would be more or less injured or destroyed; and the court in that case proceeds to verify this idea, for it says: "Thus, a house or other building, which from its size, or the materials from which it was constructed, or the manner in which it was fixed to the land, could not be removed without practically destroying it, would not, I conceive, become a mere chattel by means of any agreement which could be made concerning it. So of the separate materials of a building, and things fixed into the wall, so as to be essential to its support. It is impossible that they should, by any arrangement between the owners, become chattels." But the court emphasizes the test which we have above referred to by proceeding to say: "But it is otherwise with things which, being originally personal in their nature, are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, and without the destruction of, or material injury to, the things real with which they are connected, though their connection with the land or other real estate is such that, in the absence of an agreement or of any special relation between the parties in interest, they would be a part of the real estate." And that court cited approvingly *Fryatt v. Sullivan*, 5 Hill, 116, stating that that case was decided upon this distinction. That case was where a certain steam boiler and engine were leased, and the lessees took them and affixed them so firmly to the freehold that they could not be removed without destroying the building in which they were placed. The case of *Ford v. Cobb*, supra, is in point in all particulars, for there, as here, the right of a prior conveyancer was brought in question. *Binkley v. Forkner* (Ind. Sup.) 19 N. E. 755, is a well-

considered case, and there it was held that "where one purchasing machinery gives a chattel mortgage for its price, and orally agrees that it shall be treated as personalty until paid for, and the realty to which it is afterwards attached by him will not be injured by its removal, the machinery will be considered as personal property, as against a prior mortgagee of the realty." And the cases relied upon by the appellant in this case are distinguished in that case. Thus, where the case of *Campbell v. Roddy* (N. J. Err. & App.) 14 Atl. 279, is quoted, the court made use of the following language: "Thus, if, in the course of constructing a house, brick should be placed in the walls, and joists and beams in their proper places, the brickmaker and sawyer would not be permitted to despoil the house by asserting an agreement with the owner that the brick and beams were to retain their character as personalty, notwithstanding their annexation." After citing cases, the court goes on to say: "But when chattels are of such a character as to retain their identity and distinctive characteristics after the annexation, and do not thereby become an essential part of the building, so that the removal of the chattels will not materially injure the building, or destroy or unnecessarily impair the value of the chattels, a mutual agreement in respect to the manner in which the chattels shall be regarded after annexation will have the effect to preserve the personal character of the property between the parties to the agreement." It was held there that "a prior mortgagee cannot occupy the attitude of an innocent purchaser. The interests and rights of the holder of a chattel mortgage upon property which is annexed to real estate upon which there is an existing mortgage must be determined by the practical application of equitable principles to the rights of the respective parties. Whether the chattel mortgage shall be postponed, notwithstanding the agreement between the owner of the land and the mortgagee, must depend upon the inquiry whether or not the preservation of the rights of the holder of the chattel mortgage will impair or diminish the security of the real-estate mortgagee as it was when he took it. If it will not, then it would be inequitable that the latter should defeat or destroy the security of the former. If it will, then it was the folly or the misfortune of the holder of the chattel mortgage that he permitted the property to be annexed to a freehold from which it cannot be removed without diminishing or impairing an existing mortgage thereon." This is only announcing the rule which we announced at the outset,—that an agreement by which fixtures should be considered personal property can be carried into effect if the removal of the same could be effected without injuring the real estate, or, applying it to this case, without diminishing the security of the mortgagee. In *Tift v. Horton*, 53 N. Y. 377, it was held: "Where chattels are annexed to real estate

with the intent that they shall not thereby become part of the freehold, as a general rule the intent will control. To preserve their character as personalty, a concurrent intent on the part of a prior mortgagee of the real estate is not necessary; and neither a prior nor subsequent mortgagee of the lands can claim, as subject to the lien of his mortgage, chattels brought upon and affixed to the lands under an agreement between the owner of the fee and the owner of the chattels that the character of the latter as personal property is not to be changed, and that they are subject to a right of the owner to remove them." This case squarely decides all the points that there are raised in the case at bar. It is a well-considered case, and has been cited by nearly all the cases that have been adjudicated on this subject since its decision. We think it announces the overwhelming weight of authority that the security of the appellant in this case has not been diminished by the agreement which was entered into and executed by the mortgagor and the respondents C. F. Weber & Co., and that there is no reason, which can be sustained by either legal or equitable principles, why the respondents in this case should not have the benefit of the contract which they made with the Cannons. The judgment will be affirmed.

SCOTT, ANDERS, and GORDON, JJ., concur.

(16 Wash. 25)

JONES v. ST. PAUL, M. & M. RY. CO.

(Supreme Court of Washington. Dec. 3, 1896.)

PUBLIC NUISANCE — OBSTRUCTING NAVIGABLE STREAM—PRIVATE ACTION—SPECIAL DAMAGE.

The owner of a steamboat cannot maintain an action for damages for the obstruction of a navigable river, on the ground that it prevented him from navigating it with his boat, his injury differing only in degree, and not in kind, from that of the general public.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by Henry A. Jones against the St. Paul, Minneapolis & Manitoba Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Burke, Shepard & Woods, for appellant. L. C. Whitney and Coleman & Fogarty, for respondent.

HOYT, C. J. It was alleged in the complaint in this action that the defendant, in constructing its bridge across the Snohomish river, so placed its piers that float wood, brought down by a freshet, lodged against them, so as to entirely prevent the navigation of the river; that such river was navigable; that, by reason of the jam caused by the obstruction, the plaintiff, who was the owner of a steamboat which navigated the river, was unable to take his steamboat down such river, and was compelled to keep it tied

up for the period of 12 days, to his damage in the sum of \$1,000. After certain motions to make the complaint more definite and certain had been denied, defendant demurred thereto. Its demurrer was overruled, and the question thus raised is relied upon here as ground for the reversal of the judgment.

If the complaint failed to state a cause of action, the objection raised by the demurrer was not waived by filing an answer to the complaint after such demurrer had been overruled. Our statute specially authorizes the question of the sufficiency of the complaint to be raised even for the first time in this court. Did the complaint state a cause of action? If the defendant was charged with having done anything that was unlawful, it was that it had obstructed the navigation of the river. That the obstruction of a navigable river or any other highway, when unlawful, constitutes a public nuisance, is beyond question. To that effect are all the cases. That the general rule is that a public nuisance must be proceeded against in the name of the public by indictment or information is conceded. It is also conceded that for a public nuisance an action will not lie at the instance of a private party, unless he is specially injured thereby. If the injury which he suffers therefrom is that which is common to the entire public, he cannot maintain an action therefor.

But it is claimed by the respondent that the allegations of his complaint showed that he had been specially damaged. These allegations, however, only showed that he had been damaged by reason of the fact that he could not navigate the river. But the entire public was as fully deprived of that right as was plaintiff. Hence the damage which he had suffered was also suffered by the general public, and the fact that his steamboat was so situated that the injury flowing from the prevention of navigation was different from that which others might have suffered did not make the injury special to him. If the obstruction interfered with navigation, it injured alike every one who desired to navigate the stream. It might as well be claimed that one who was operating two boats, and was therefore incommoded as much again as one who operated but one, was specially injured, as to claim that because the plaintiff's boat was so situated that the damages flowing from its being kept idle were greater than might have been caused to another made his damages special. The difference in the degree of the injury is not that which determines whether or not it is special. The damages are special only when of a different nature from those suffered by the general public. This being so, the complaint failed to allege facts sufficient to show that the plaintiff was specially damaged by the obstruction. It is true, he was prevented from going up and down the river with his steamboat; but such was the effect of the obstruction upon every one desiring to navigate the

stream, and his injury was in common with that of every such person, though its degree, owing to the peculiar business in which he was engaged, might have been different.

To show that the facts stated were not sufficient to entitle plaintiff to recover, we cite: *Small v. Railway Co.*, 15 U. C. Q. B. 283; *Cull v. Railway Co.*, 10 Grant (U. C.) 491; *Blackwell v. Railroad Co.*, 122 Mass. 1; *Blood v. Railroad Corp.*, 2 Gray, 137; *Brightman v. Inhabitants of Fairhaven*, 7 Gray, 271; *Willard v. City of Cambridge*, 3 Allen, 574; *Wesson v. Iron Co.*, 13 Allen, 95; *Brayton v. City of Fall River*, 113 Mass. 218; *Mayor, etc., of Georgetown v. Alexandria Canal Co.*, 12 Pet. 91. The cases which have held that a private action could be maintained for a public nuisance were based upon facts unlike those alleged in the complaint in this action. In every one which we have examined, with a single exception, the obstruction had not in degree simply, but in kind, affected the plaintiff differently from the general public; and in the excepted case the opinion of the court clearly shows that it held the complaint to be sufficient for the reason that, though it was alleged that the nuisance was a public one, it was also alleged that it had been placed in the stream for the express purpose of injuring the business of the plaintiff. We doubt if a single case can be found which holds that damages of the kind sued for in this action can be recovered against one who is maintaining a public nuisance. At least, the great weight of authority establishes a contrary doctrine. The judgment will be reversed, and the cause remanded, with instructions to dismiss.

DUNBAR, ANDERS, and GORDON, JJ., concur.

(16 Wash. 111)

#### STATE v. STRAUB.

(Supreme Court of Washington. Dec. 8, 1896.)

CRIMINAL LAW—APPEAL—FAILURE OF ACCUSED TO PLEAD—OBJECTIONS NOT RAISED BELOW—AMENDMENT OF RECORD—NONJUDICIAL DAYS—RECEIVING VERDICT—JURY—CHALLENGE TO PANEL—INSTRUCTIONS.

1. Where the trial is had on the merits, as if a plea of not guilty had been filed, the failure of accused to so plead is not ground for reversal.

2. An objection that a plea of not guilty was not formally made by defendant cannot be raised for the first time on appeal.

3. The court may amend its record by nunc pro tunc order, so as to make it show that a plea of not guilty was entered by accused.

4. Const. art. 4, § 6, providing that courts shall always be open except on nonjudicial days, and authorizing certain writs to be issued on nonjudicial days, does not prevent the legislature from authorizing courts to receive verdicts on Sunday.

5. On motion by accused for a change of venue, it is not error to refuse an examination ore tenus of the compurgators.

6. The fact that the commissioners selected a less number of persons to act as jurors for the year than required by statute is not ground for challenge to the panel.

7. An instruction that murder in the first degree is the crime mentioned in the information, and is where a person purposely and of his deliberate and premeditated malice kills another, is not objectionable as assuming that the crime of murder in the first degree has been committed.

8. An instruction that: "Malice is deliberate and premeditated when it has been dwelt upon at all in the mind, and when motive or consideration moving to the act has been to any extent mentally weighed; premeditation may be as quick as thought in the mind of man,"—is not erroneous. *State v. Rutten*, 43 Pac. 30, 13 Wash. 203, distinguished.

Appeal from superior court, San Juan county; John R. Winn, Judge.

Richard H. Straub was convicted of murder, and appeals. Affirmed.

Charles F. Repath, for appellant. W. H. Thacker, H. S. King, and Thomas G. Newman, for the State.

DUNBAR, J. Defendant was convicted in the lower court of murder in the first degree, and the death penalty was imposed. An appeal has been taken to this court by a bill of exceptions, and many errors are alleged.

The first assignment is that the trial, verdict, and sentence of death are void and illegal, for the reason that the record fails to show that the defendant ever entered a plea to the information. While it must be confessed that many authorities are cited to sustain this contention, and while, in the earlier history of criminal trials, and especially under the common-law practice, such omission was almost uniformly held to be reversible error, we think, under the system adopted by the Code in this state, that such an omission is purely technical, that it does not affect any of the substantial rights of the defendant, and that, if otherwise properly convicted, the judgment should not be reversed. Indeed, this is the holding of many modern courts under statutes similar to ours. The record shows that the defendant demurred to the indictment; that on October 3d he asked for further time in which to plead, being present both in person and by counsel; that time was given for one day, or until October 4th; that on October 4th the defendant, on being called on to present a plea, again asked for further time, which was granted, and the time extended one day more, or until October 5th. After that he filed a motion for a change of venue, and court adjourned until October 8th. Subsequently the defendant interposed a challenge to the jury, had subpoenas issued for witnesses in his own behalf, introduced evidence in his behalf and testified himself, and in every way, without objection, entered into the trial of the case on the merits; and the case was treated, both by the prosecution and by the defendant, as though a plea had been entered. Defendant availed himself of privileges which he would not have been entitled to on any other theory. The

plea of not guilty is a denial of all material allegations, and simply puts them in issue. According to the record, the whole case was tried upon this theory. Under the instructions of the court the jury understood that every material fact was in issue, and that all of said facts must be proven before conviction could follow. Under such instructions the defendant went into the trial with the presumption of innocence in his favor, and the onus was upon the state throughout the trial, and up to the time of rendition of the verdict, to exactly the same extent as it would have been if the plea had been formally entered. So that the defendant actually had the benefit of the plea of not guilty, though it were not formally entered. It affirmatively appears, then, from the record, that this error, if error at all, was without prejudice; that it was a mere irregularity, which did not affect any substantial rights of the defendant. And the same law which gives him the right to appeal to this court at all provides, in section 1448 of the Code of Procedure, that "the supreme court shall hear and determine all causes removed thereto, in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities." Moreover, under the special provisions of our statute, if the defendant does not see fit to plead after the overruling of the demurrer, it is the duty of the court to enter judgment even without trial, except in cases where it is necessary to ascertain the degree of offense. Section 1282 is as follows: "If the demurrer is overruled, the defendant has a right to put in a plea. If he fails to do so, judgment may be rendered against him on the demurrer, and if necessary, a jury may be impaneled to inquire and ascertain the degree of the offense." Nor does this conflict with section 1290, which provides that, "If the defendant fail or refuse to answer the indictment or information by demurrer or plea, a plea of not guilty must be entered by the court," but rather strengthens the construction given above,—that, if the demurrer is denied, further plea is unnecessary, and the result will be the same as in a civil action where, upon the overruling of the demurrer to a complaint, the defendant refuses to answer. But, under the section just above quoted, the plea of guilty is entered by the court only when the defendant fails or refuses to answer the indictment or information, either by demurrer or plea. In addition to this, this question was not raised in the lower court. Many of the cases cited by the appellant, even if we should hold with them, are where the question was raised upon a motion in arrest of judgment, or a motion for a new trial, where the matter was brought to the attention of the trial court, so that it could be corrected there. But in this case the first mention that is made of this alleged error is in the brief of appellant in this court, and, the motion for a new trial



being especially intended to direct the attention of the trial court to the error complained of, and his attention never having been so directed, under the rule announced in numerous decisions of this court, it is too late to raise it now. A third reason for refusing a reversal for this alleged error is the fact that it appears from a supplemental record, afterwards certified by the court, that the omission to plead was not an omission in fact, but an omission simply of the record. Upon proper notice to correct the record, it plainly appears that the plea was actually made, but failed to be recorded, and the trial court made an order of entry *nunc pro tunc*, showing what the actual facts of the case were, and correcting the record in this respect. Any one of the reasons mentioned above would be sufficient to defeat the motion for reversal on this ground.

The next error assigned is that the verdict and sentence are void because the verdict was received and recorded on a nonjudicial day, viz. Sunday. It is admitted by the appellant that the weight of authority is to the effect that the receiving of a verdict is not a judicial, but merely a ministerial, act, which may be done on a nonjudicial day. It is also conceded that we have a statute in this state expressly authorizing courts to receive verdicts on nonjudicial days. But it is contended that section 6 of article 4 of the constitution, which prescribes the jurisdiction of the superior courts, and especially that portion of the section which provides that "they [such courts] shall always be open except on nonjudicial days," and that "injunctions and writs of prohibition and habeas corpus may be issued and served on legal holidays and nonjudicial days," excludes the idea that anything else can be done by the court on nonjudicial days; and that the court cannot be open on nonjudicial days except in matters of injunction, prohibition, and habeas corpus. We do not think that the constitutional provision is susceptible of this construction; but think, as contended by the respondent, that the provision that courts shall always be open except on nonjudicial days in no wise affects the rule, which would obtain in the absence of any such provision, that they could properly be open on such days for the performance of nonjudicial acts, such as the reception of verdicts. The object of the constitution undoubtedly was not to affect the law which already existed in relation to the disability of courts to transact business on nonjudicial days, but to make a provision that the courts should always be open for business except on nonjudicial days.

The third assignment of error, viz. that the court erred in overruling a motion for a change of venue, is also without merit. This is a matter which is largely addressed to the discretion of the trial court, and an examination of the record fails to convince us that that discretion was abused.

The fourth assignment—that the court erred

in overruling appellants' demurrer to the information—has been passed upon so many times by this court, and is so avowedly presented here for the purpose of saving a right to appeal to the supreme court of the United States, that it is unnecessary to discuss it.

The fifth allegation—that the court erred in denying defendant's motion for an examination *ore tenus* of the compurgators Churchill and Jansen, on the motion for a change of venue—is equally without merit.

It is strenuously insisted by the appellant that the sixth assignment, viz. that the court erred in overruling defendant's challenge to the panel of jurors, should have been sustained. It appears from the record that two members of the board of county commissioners of San Juan county certified a list of names of persons selected by them to serve as petit jurors for 1895, and filed the list on January 15, 1895, with the clerk of the superior court. This list, it is conceded by both appellant and respondent, was selected under the act of 1888, before the change of the law in 1895. It appears that a list of 97 persons was selected to serve as petit jurors, and it is the contention of the appellant that he was entitled to have the jury drawn from a selection of 100 persons, as by the law required. Section 58 of the Code of Procedure provides that every board of county commissioners shall select from the persons in their county qualified to serve as petit jurors the names of 100 persons to serve as petit jurors for the ensuing year; "provided, that if from any cause the county commissioners are unable to select the full number of names in this section provided for, they shall select such less number as they may agree upon." So that the fact that this selection was made of 97 instead of 100 is not prejudicial to the appellant, because the law especially provides that the commissioners shall select a less number if there is occasion so to do. But appellant contends that he is injured because the commissioners did not include in their certificate to the clerk of the superior court the reason why such less number had been selected. We cannot understand how this certificate affects the appellant one way or the other. The alleged error is simply an irregularity in the procedure in which he has no vested right. It is further contended by appellant that he had a right to have the jury drawn from a list of 300 names selected by the board of county commissioners, under the provisions of chapter 78, p. 139, Laws 1895, which is an amendment to the law just above mentioned. But it appears that the selection in this instance was made prior to the passage of the law of 1895; and section 5 of that act plainly indicates that it is the intention of the act that the selection under the old law should remain intact unless for some good reason the county commissioners see fit to set it aside and make a new selection; for the last section of the act asserts as a reason for the emergency clause that in some of the coun-

ties "the number of jurors now authorized to be selected is insufficient to transact the business of the courts." Besides, this court has held, so many times that it seems that we ought not to be called upon to further discuss this character of questions, that these conditions in regard to the selection of jurors are directory, and that no litigant has a vested right in the procedure. Certainly, in the absence of a showing that a material interest had been affected, the judgment would not be reversed for an irregularity, so far as the procedure is concerned.

Assignments 7, 8, 9, 10, 11, and 12 are in relation to the overruling of defendant's challenge for cause to certain jurors. We have investigated these examinations, and think that no error was committed. Where this court has had occasion to reverse judgments for the reason that jurors had been retained over the objection of defendants, they were cases where the jurors had themselves testified that they entertained opinions in regard to the guilt or innocence of the defendant, and where the court or the prosecution, by cross-examination, had led the jurors to state that they could lay aside these opinions, and try the defendant impartially. But in this case it is evident from the examination that the jurors had been led to the expression of an opinion by the adroit questioning of the attorneys for the defense, and in each instance, we think, the challenge was properly refused.

The householder question has already been passed upon by this court, and we will not notice it further here.

We think that no error was committed by the court in overruling the defendant's objection to the question asked witness Nordyke on cross-examination by the state.

The only other assignment which is not involved in what we have already said is alleged error of the court in its instructions to the jury. The appellant finds fault with the court for stating to the jury in its instructions that "murder in the first degree is the crime mentioned in the information in this case, and is where a person purposely and of his deliberate and premeditated malice kills another," on the ground that the language used by the court assumes that the crime of murder in the first degree had been committed. This, we think, is a strained construction to be placed upon the language of the court, and the language is entirely without prejudice in any way to the defendant. The main contention of the appellant on the instructions is that they are in conflict with the announcement made by this court in *State v. Rutten*, 13 Wash. 203, 43 Pac. 30. In that case the language of the lower court was as follows: "Premeditated malice is where the intention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon, before the fatal stroke is given. There need not be any appreciable space of time be-

tween the formation of intention to kill and killing. They may be as instantaneous as successive thoughts. It is only necessary that the act of killing be preceded by the concurrence of will, deliberation, and premeditation on the part of the slayer." This language was criticized by this court for the reason that, in our opinion, it abolished or wiped out the distinction between murder in the first degree and murder in the second degree. The case was reversed, but not for this reason, there having been no exceptions taken to the instructions mentioned, and the criticism was simply a suggestion of the court to guide the judge in the new trial. We are, however, satisfied with what was said in that case, but think the instruction there given can be distinguished from those in the case at bar. Here the instruction on this subject was as follows: "I said a moment ago I would define to you the different terms of 'deliberation,' 'premeditation,' 'purposely,' and 'malice.' I have already defined to you what 'malice' is. 'Purposely,' as used in these instructions, means an intentional doing, with the intent of the party who does the act to do that certain thing. 'Deliberation' is the mental operation of weighing motive or consideration that makes for or against an inclination of the proposed act or line of action. 'Premeditation' is the mental operation of thinking upon an act before doing it, or upon an inclination before carrying it out." And the culmination of this instruction, which is specially objected to by the appellant, is as follows: "Malice is deliberate and premeditated when it has been dwelt upon at all in the mind, and when the motive or consideration moving to his act has been to any extent mentally weighed. Premeditation may be as quick as thought in the mind of man." Although "premeditation may be as quick as thought," this instruction does not do away with the idea of deliberation, which the instruction in the *Rutten* Case did, because it does not connect defendant's premeditation directly with the act, and does not instruct the jury that there need be no appreciable space of time between the formation of the intention to kill and the killing, or that it is no matter how quickly the premeditation is followed by the act of killing, which was the language objected to in the case cited. Premeditation must be as quick as thought, for any conviction or intention that enters into the mind of man enters with the rapidity of thought. It has to enter there at some particular moment. The intention to kill may come instantaneously to the mind; but this instruction does not tell the jury that that intention must be instantaneously carried into execution; or, in other words, so far as the instruction complained of is concerned, this premeditation on the part of the appellant may have been in his mind a week or a month or any length of time before the carrying of it into execution by the killing, and

would not thereby obliterate the distinctions which the law creates between murder in the first degree and murder in the second degree, by eliminating the idea of deliberation.

We think that no error was committed by the court in refusing the instructions asked for by the defendant, as the instructions given completely covered the law of the case, and that no error was committed by the court in its instructions. Finding no error anywhere in the record, the judgment must be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, J.J., concur.

(16 Wash. 16)

PREFONTAINE v. McMICKEN et al.  
(Supreme Court of Washington. Dec. 3, 1896.)  
EXECUTORS AND ADMINISTRATORS—ORDER OF DISTRIBUTION—JUDGMENTS—REQUISITES OF PETITION.

1. A superior court acting as a court of probate, after issuing a decree of distribution of an entire estate, loses jurisdiction of the property distributed, and cannot subsequently direct a different disposition to be made of a portion of the property.

2. A judgment against an executor, as well as against an administrator de bonis non, is not a lien on the property of the respective estates, but is merely the establishment of a claim against those estates, which it is the duty of the personal representatives to pay in the due course of administration.

3. Code Proc. § 1014, provides that, if the executor or administrator shall neglect to apply for an order of sale whenever necessary, any person interested in the estate may make application therefor in the same manner as an executor or administrator. Code Proc. § 1005, provides that, to obtain an order to sell real property, the executor or administrator shall present a petition to the court, setting forth the amount of personal estate that has come to his hands, and how much, if any, remains undisposed of, together with a list and the amount of the debts outstanding against the estate, as far as the same can be ascertained. *Held*, that the petition of a judgment creditor of an estate to sell real estate for the purpose of paying his debt must set out all the facts required by statute to be shown by an executor to obtain an order to sell realty.

Appeal from superior court, Kitsap county; John C. Denney, Judge.

Proceeding by F. X. Prefontaine, as executor of the last will and testament of Margaret Harmon, deceased, against Maurice McMicken, administrator de bonis non of the estate of Sarah M. Renton, deceased, and others, to sell real estate for the payment of debts against the estate. From an order to sell the realty, defendant Mary A. Gaffney appeals. Reversed.

Richard Saxe Jones and Brinker, Jones & Richards, for appellant. Bausman, Kelleher & Emory and Blaine & De Vries, for respondent.

ANDERS, J. This was a proceeding in the superior court of Kitsap county, as a court of probate, to subject to sale certain real es-

tate claimed to belong to the estate of Sarah M. Renton, deceased, for the payment of a debt against said estate, which had been reduced to judgment. The respondent F. X. Prefontaine filed a petition in said court, setting forth in substance, among other things: That on May 12, 1890, Sarah M. Renton died intestate in said county, except as to certain community property previously disposed of by contract between herself and her husband, leaving an estate therein, and that her only heirs at law were her husband, William Renton, and her daughters, Elizabeth W. Sackman and Mary A. Gaffney. That on July 14th following, William Renton, her husband, was appointed and duly qualified as administrator of her estate. That on May 21, 1891, said William Renton, as administrator of said estate, filed his petition in said superior court, praying for a distribution of all the property owned by the said Sarah M. Renton at the time of her death, in proportions provided for in a certain agreement between said William Renton and Elizabeth W. Sackman and Mary A. Gaffney, and stating that the said estate of Sarah M. Renton, deceased, was free from debt; that there were no claims of any kind against the same. That thereafter citations were issued to all persons concerned, in the manner provided by law, and were duly served on the respondents Elizabeth W. Sackman and Mary A. Gaffney, and notice of the hearing of said petition was duly given as provided by law; and that on the 26th day of June, 1891, a hearing was had, "all persons interested being present in person or by attorney," and a decree was entered in accordance with the prayer of the petition, which decree purported to distribute all the property of Sarah M. Renton, deceased, in the manner and in the proportions agreed upon in the contract above mentioned. That the decree provided, among other things, that the said Elizabeth W. Sackman and Mary A. Gaffney should make, execute, and deliver to William Renton, as such administrator, a bond in the penal sum of \$5,000, in accordance with section 1576 of the Code of Washington, conditioned for the payment of any claims or debts that might thereafter be presented against the said estate of said Sarah M. Renton, deceased. That thereafter, and on July 18, 1891, said William Renton died in said Kitsap county, of which he was then a resident, leaving an estate therein. That on December 2, 1891, the respondent John A. Campbell was appointed executor of his last will and testament, and thereupon qualified, and ever since has been and now is the duly qualified and acting executor of said last will and testament. That on said December 2, 1891, Maurice McMicken was appointed administrator de bonis non of the estate of Sarah M. Renton, and thereupon duly qualified, and ever since has been and now is the duly acting and qualified administrator of said estate. That on July 5, 1893, petitioner, as executor of the last will and testament of one Margaret Har-

mon, deceased, recovered a judgment in the superior court of King county against Maurice McMicken, administrator as aforesaid, and John A. Campbell, as executor of the will of William Renton, in the sum of \$2,808.84, with interest and costs. That no part of said judgment has been paid. That prior to the death of William Renton all the personal property belonging to the estate was distributed among the heirs at law of said Sarah M. Renton, and that none of said personal property, and none of the rents, issues, or profits thereof, has ever come into the custody or control of said Maurice McMicken as administrator, and that there is no property in the hands of said McMicken, as such administrator, with which to pay the said judgment. That the petitioner has demanded of the said McMicken that he, as such administrator, should institute proceedings for the sale of sufficient of the real property of the estate of Sarah M. Renton, deceased, to pay the debts thereof, but that he has refused, and still refuses, to institute such proceedings, or to make any payment on account of the said judgment recovered against him as such administrator; and that a sale of the whole or a portion of the real property of said estate is necessary for the purpose of paying the judgment recovered against said estate by petitioner. The petition also sets out a description of the property embraced in the inventory and in the petition for distribution filed by William Renton as administrator of the estate of Mrs. Renton. The petitioner, in his petition, asked for an order of the court, directed to all the respondents, to show cause, in the manner and at the time and place provided by law, why an order should not be issued directed to said Maurice McMicken, as administrator *de bonis non* of said estate, commanding him, as such administrator, to sell the real property of said estate of Sarah M. Renton, or so much thereof as should be necessary to pay the said judgment in favor of the petitioner. The court granted an order directing the parties in interest to show cause why the petition should not be granted, and, at the time and place appointed for the hearing, the appellant, Mary A. Gaffney, appearing by her counsel, objected to the granting of the order prayed for by petitioner, on the following grounds: "(1) That the petition of the petitioner shows upon its face that the court has no jurisdiction of this respondent for any of the purposes prayed for in said petition; (2) that the laws of the state of Washington make no provision for any such proceeding in law or in equity as is set out in said petition; (3) that the said petitioner has a complete and adequate remedy for all the rights asserted and arising from the facts set out in the said petition, if any such there be, independent of the process prayed for in said petition; (4) that the said petition does not state a cause of action against this respondent, nor any right or interest in favor of petitioner as against this respondent; and (5) that, upon the facts

set out in said petition, petitioner is not entitled to the relief prayed for, nor to any other relief whatever." The court overruled these objections, and granted the order prayed for, and from that order this appeal is prosecuted.

The action of the court in overruling the objections above set forth is assigned as error. Neither the regularity nor the validity of the decree of distribution of the estate of Sarah M. Renton is challenged by the petitioner in his petition. On the contrary, the petition shows upon its face that all of the property of that estate was distributed among the heirs of the decedent, and it is not alleged in the petition that the decree has ever been reversed, modified, or annulled. It therefore must, for the purposes of this case, be deemed to be a subsisting decree of a court having jurisdiction of the matter in controversy. If the decree, as alleged, distributed the entire estate, the court lost jurisdiction of the property distributed, after the decree was rendered, for all purposes whatever, except, perhaps, that of enforcing the order. *Wheeler v. Bolton*, 54 Cal. 302. The effect of such a decree is to vest the absolute right and title to the property in the distributees, and therefore the subsequent order of the court, directing a different disposition to be made of a portion of the property, was without authority, and consequently void. In *re Garraud's Estate*, 36 Cal. 277.

The respondents claim, however, that the decree was not final, but was conditioned upon the execution of the bond which was ordered to be given by Mrs. Sackman and Mrs. Gaffney, and also that the court had no authority to enter the decree upon the petition of the administrator, for the reason that the law designates the heir, legatee, or devisee as the person who shall present the petition to the court for a preliminary distribution of the estate. There is no averment in the petition that the decree was conditional, or even that the bond therein ordered was not given, although it is assumed in the briefs of counsel that it was never executed. But if, in fact, the decree was really conditional, and the condition imposed has not been performed, still the court was not justified in ignoring it entirely on the hearing of this petition, and proceeding as if it had never been entered; and the petitioner, having shown by his petition that the property ordered by the court to be sold by the administrator had previously been distributed and set over to the heirs of the decedent, of whom appellant is one, and not having alleged that the decree of distribution had been vacated or annulled by a proper proceeding, cannot now, in this court, be heard to say that the property so distributed still belongs to the estate. Moreover, on the petitioner's own theory that, as matter of fact, the real estate of the decedent was not distributed, for the reason that the bond ordered was not executed, and therefore yet belongs to the estate of

Mrs. Renton, the petition fails to state facts sufficient to entitle him to the relief prayed for, or to authorize the court to make the order of which appellant complains.

It is alleged in the petition that the petitioner, as administrator, recovered a judgment against the executor of the last will and testament of William Renton, as well as against the administrator de bonis non of the estate of Mrs. Renton. The only effect of that judgment was to establish his claim against those estates in the same manner as if it had been presented and allowed by the executor of the one and the administrator de bonis non of the other, and by the court. No execution can issue on such a judgment, and it is not even a lien on the property of the estate. After petitioner's claim was thus established, it became the duty of the personal representatives, against whom the judgment was recovered, to pay the amount thereof in due course of administration. Code Proc. § 990. It is not averred that the executor of the will of William Renton has refused to pay the judgment in due course of administration, or that the estate is, or the executor or his bondsmen are, insolvent, or that the executor will not pay the claim in accordance with law and his duty. Provision is made by the statute for the sale of real estate by an executor or administrator for the payment of the debts of decedents only in cases where there is not sufficient personal estate in his hands for that purpose. Code Proc. § 1005. And it is provided in the section just referred to that, to obtain an order to sell real property, the executor or administrator shall present a petition to the court, verified by his oath, setting forth, among other things, the amount of personal estate that has come to his hands, and how much, if any, remains undisposed of, together with a list and the amounts of the debts outstanding against the estate, as far as the same can be ascertained. By section 1014 it is provided that, "if the executor or administrator shall neglect to apply for an order of sale whenever it may be necessary, any person interested in the estate may make application therefor in the same manner as an executor or administrator. \* \* \*" But whether made by an executor or administrator, or by a person interested in the estate, a petition for the order of sale must set out all the facts required to be shown by the statute. As the judgment in favor of petitioner was at the same time a claim against the two estates mentioned, no real property of either estate could properly be sold for the purpose of paying it without alleging in the petition, and proving, that such a sale was necessary by reason of insufficiency of personal property to pay the debt. As to the condition of the estate of William Renton, nothing whatever is disclosed by the petition. It is true that the petition alleges that there was no personal property in the hands of the administrator de bonis non of the estate of

Mrs. Renton at the time the petition was presented to the court; but it is also true that it avers that there was no property in his hands with which to pay petitioner's judgment; and, that being so, we fail to perceive, even if it be conceded that petitioner might proceed against that estate alone, by what authority or for what reason the learned court made the order directing this administrator to sell specific real estate which, it was alleged, was not in his possession, and which had been, according to the petition, distributed among the heirs of Mrs. Renton by a formal decree of the probate court. Not until this petitioner has exhausted his remedies against the personal representatives against whom his judgment was recovered can he lawfully proceed against the heirs and distributees to collect his claim. 2 Woerner, Adm'n, §§ 577, 579. And he cannot then do so by a summary proceeding, such as he has invoked in this instance. He must resort to an independent action, in which such distributees are made parties defendant, and in which their rights and liabilities may be equitably determined. If the personal representatives are not proceeding according to law in this instance, they, or either of them, may be moved to do so upon a proper application to the court; but an executor or administrator cannot be compelled, by a probate court, to sell real estate which has been distributed by order of the proper court, to pay debts established after such distribution. Manifestly, only property in the hands of the personal representative can be sold by him, and such sale must be made in accordance with the statute.

The order appealed from must be reversed, and the cause remanded to the court below, with directions to sustain the objections interposed to the petition by appellant.

HOYT, C. J., and SCOTT, DUNBAR, and GORDON, JJ., concur.

(16 Wash. 84)

MOUAT v. SEATTLE, L. S. & E. RY. CO.  
et al.

(Supreme Court of Washington. Dec. 7, 1896.)

DEED—CONSTRUCTION—CONDITION SUBSEQUENT—  
ALLEGATION OF BREACH—SUFFICIENCY.

1. A deed of general warranty to a railroad company contained a condition that, "in case said land shall cease to be used for railroad purposes, the same shall revert to the first parties, their heirs and assigns." *Held*, that the deed vested in the railroad company an estate on a condition subsequent, and not on a conditional limitation.

2. In an action to quiet title to land deeded to a railroad company on condition that it should revert to the grantors, their heirs and assigns, in case it should cease to be used for railroad purposes, where the complaint showed that the railroad company entered upon the land and constructed its track over it, and there was no allegation that the track had been removed, a general allegation that for four years or more it had ceased to use or occupy it for railroad pur-

poses was insufficient to show a breach of the condition in the deed.

Dunbar, J., dissenting.

Appeal from superior court, Spokane county.

Action by Gavin C. Mouat against the Seattle, Lake Shore & Eastern Railway Company and others to quiet title. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Adolph Munter, for appellant. Carr & Preston, for respondents.

HOYT, C. J. Plaintiff deeded to the defendant railroad corporation the property the title to which is in controversy, and the object of this action was to remove the cloud caused by this deed, it being claimed that for a breach of the condition therein the title conveyed thereby had reverted to the plaintiff; and upon the construction of this condition the rights of the parties largely depend. It was claimed on the part of the defendants that it was a condition subsequent, the violation of which would subject the estate to forfeiture, while the claim of plaintiff was that the deed granted an estate upon conditional limitation, which terminated immediately upon the happening of the contingency provided for, without re-entry or declaration of forfeiture. The deed was one of general warranty, and was made in consideration of the sum of \$1,000, to be paid by the railroad company, and the condition was in the following language: "This deed is made subject to the condition that, in case said land shall cease to be used for railroad purposes, the same shall revert to the first parties, their heirs and assigns." No general rule can be announced under which it can be determined whether an estate is granted upon condition subsequent or upon conditional limitation, since the question must always be determined in the light of the language of the entire instrument and of the surrounding circumstances, to the end that the intention of the parties may be given effect. A deed will not be construed to have conveyed an estate upon conditional limitation unless the intent is clear that the estate was to terminate upon a breach of the condition. There is nothing in the deed under consideration to show such intent, except that it is provided therein that the land shall revert to the grantors; and, while this alone, under some circumstances, might be sufficient, it could only be so when the contingency which was to constitute a breach of the condition was of such a nature that there could be little dispute as to whether or not it had come to pass. Such was not the nature of the contingency provided for in this deed. What should amount to a cessation of use for railroad purposes was not so clearly defined as to warrant the construction contended for by the plaintiff. If for any reason the railroad should have temporarily removed its track from the premises, even

for the purpose of replacing it with a better one, it might be contended that such removal constituted a breach of the conditions of the deed, for the reason that, while there was no track upon the premises, and it was not otherwise occupied for any of the business of the railroad, it was not used for railroad purposes. Yet it is clear that it was not the intent of the parties that such a temporary cessation to use for railroad purposes should constitute a breach of the condition in the deed. It must follow that what would constitute an abandonment of the property for railroad purposes, within the meaning of the condition in the deed, would be a question of fact, as to which different minds might honestly come to different conclusions. This being so, it is not reasonable to assume that the parties intended that the happening of this uncertain event should, without any action on the part of the grantor, reinvest the estate granted by the deed. It must be held that the deed vested in the railroad company an estate upon a condition subsequent and not upon conditional limitation. This being so, it is settled law that a court of equity will not aid the grantor by declaring a forfeiture on account of the breach of the condition, but will leave him to such remedy as he can have at law. This proceeding, being to quiet title, was of undoubted equity jurisdiction. It follows that the plaintiff was not entitled to relief therein.

There is another reason why the complaint failed to state a cause of action. There was no sufficient allegation of the breach of the condition. The complaint showed that the railroad entered upon the land, and constructed its track over the same, and there was no allegation that the track has been removed; hence it must be presumed to have been still upon the land, and to belong to the railroad company. And, this being so, the general allegation that for four years and more it had ceased to use or occupy it for railroad purposes was insufficient to show a breach of the conditions in the deed. It could not have been intended that, while the tracks were maintained, a failure to constantly keep such tracks in use by having at all times a railroad train thereon would constitute such breach; and, this being so, it must be held that nothing short of a permanent abandonment of the use of the property for railroad purposes would amount to a breach of the condition. It is clear that failure to use it for four years for such purposes would not constitute such permanent abandonment. See *Barlow v. Railroad Co.*, 29 Iowa, 276. Judgment affirmed.

ANDERS and GORDON, JJ., concur.

DUNBAR, J. (dissenting). Conceding, for the purposes of this case, the application of the rule of liberal construction in favor of the grantee, I still think the facts pleaded constituted a cause of action. It is true the condi-

tion does not specify a particular time, but for that reason it must be construed to mean a reasonable time. The assertion of the appellant that the nature of the abandonment is not determined by the length of time during which the land shall not be used for railroad purposes, but is determined by the intention of the railroad company in respect thereto, smothers all investigation of the question at issue. The intention of the company can certainly be determined by its acts, and the failure of the company to use the land for railroad purposes is at least a circumstance tending to prove the intention, and the nature of the abandonment, especially in view of the plain provision in the deed that, in case said land shall cease to be used for railroad purposes, it shall revert. The provision is a plain one, and in my opinion its unexplained violation for four years ought to work a forfeiture of the land conveyed.

(16 Wash. 108)

**MITCHELL, LEWIS & STAVER CO. v. O'NEIL et ux.**

(Supreme Court of Washington. Dec. 8, 1896.)

**CHattel Mortgage — Notice of Foreclosure — SUFFICIENCY OF SERVICE.**

A return of service of a notice of foreclosure of a chattel mortgage, reciting that the notice was served upon the defendant "by delivering to and leaving with \* \* \*, father of said [defendant], at his usual place of abode," is insufficient, in that it does not show that defendant could not be found, or that the attempted service was made at the defendant's usual place of abode.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by the Mitchell, Lewis & Staver Company, a corporation, against Robert O'Neil and Florence O'Neil, his wife. There was judgment for defendants, and plaintiff appeals. Affirmed.

Shank & Smith, for appellant. H. A. Fairchild, for respondents.

SCOTT, J. The defendants purchased a threshing machine of the plaintiff, giving their notes for the purchase price, with a chattel mortgage upon the property purchased, and also a real-estate mortgage upon certain land to secure the payment of the notes. This action was brought to foreclose the real-estate mortgage. Judgment was rendered for the defendants, and the plaintiff has appealed.

The main attack is directed upon the findings of fact made by the trial court, and, while some of them may be open to criticism, it yet seems to us that the judgment of the court was right. One of the contentions between the parties was that the property purchased was not as warranted by the plaintiff. But plaintiff contends that the defendants had not complied with the terms of the warranty as to the giving of notice of defects, etc. It was further contended by the de-

fendants that the defect was a hidden one, and that notice of it was given as soon as it was discovered; but that, in any event, upon the giving of such notice the plaintiff came and took the property. The contention upon the part of the plaintiff was, as against this, that it took the property under proceedings to foreclose the chattel mortgage. It appears that a notice to foreclose the mortgage out of court, under the provisions of sections 1650-1655, 1 Hill's Code, was drawn and signed by the attorneys for the plaintiff, and sent to the sheriff of Whatcom county; that the sheriff took possession of the property, and sold it, after posting notices, etc. But the defendants contended that there was no foreclosure of the mortgage in consequence of the failure of the sheriff to serve upon them the notice prescribed. The return of the sheriff is as follows: "State of Washington, County of Whatcom—ss.: I hereby certify that I received the annexed 'Notice of Sheriff's Sale' on the 16th day of June, A. D. 1895, and thereafter, on the 17th day of June, A. D. 1895, I served one of the said copies upon Robert O'Neil, by delivering to and leaving with ——— O'Neil, father of said Robert O'Neil, at his usual place of residence, in the county of Whatcom, state of Washington; and on said 17th day of June, I posted three of said notices in public places in said county; and on the 28th day of June, A. D. 1895, I sold the machinery described in said notice, at public auction, to Mitchell, Lewis & Staver Co., who was the highest bidder therefor. Dated this 11th day of November, A. D. 1895. J. J. Bell, Sheriff of Whatcom County, State of Washington." The court allowed the defendants to prove that they were residents of, and lived in, Whatcom county during the times in question, and that no notice of foreclosure was served upon them, and that the defendant Robert O'Neil's father, upon whom the substituted service is claimed to have been made, resided at a different place in said county. The plaintiff contends that this proof was inadmissible on the ground that the sheriff's return could not be contradicted. If the return was to be construed to show a service upon the father of Robert O'Neil at Robert O'Neil's usual place of residence, we think that last statement could be contradicted, and that it is not within the rule contended for by the plaintiff. But the return in this case is utterly insufficient to show any authority or right to make the substituted service upon the father of Robert O'Neil. There is no statement therein that the defendants could not be found; nor does it appear that the attempted service upon the father was made at the dwelling house of the defendants. In consequence of a failure to serve the notice, there was no foreclosure of the mortgage under the statute, and it must be held that the sheriff took possession of the property merely as the agent of the plaintiff, and, by selling the property without foreclosing the mortgage, the plaintiff was

not entitled to recover for a deficiency. Jones, Chat. Mortg. (4th Ed.) § 711. The court found that there was no foreclosure of the mortgage, and this finding must be sustained, and that of itself warranted the judgment entered. Affirmed.

ANDERS, DUNBAR, and GORDON, JJ., concur.

(16 Wash. 131)

**CITY OF NEW WHATCOM v. BELLINGHAM BAY IMP. CO.**

(Supreme Court of Washington. Dec. 8, 1896.)

**MUNICIPAL ASSESSMENTS—REASSESSMENTS—NOTICE—OBJECTIONS—PROVING ORDINANCES—PURCHASE BY CITY—HARMLESS ERROR.**

1. Notice of reassessment under Laws 1893, p. 226, § 4, providing that it shall be given by three successive publications in the official newspaper of the city, and that objections to the assessment roll may be filed within 10 days of the last publication, is not so short as to amount to want of due process, it being necessary, in addition and prior thereto, to publish an ordinance providing for the reassessment.

2. One not offering objections to a reassessment for improvements within the time provided cannot offer proof to contest it in a suit to foreclose lien therefor.

3. Under Laws 1893, p. 160, § 5, providing that costs of improvement shall be assessed on all property in the improvement district according to the number of feet of lands and lots fronting thereon, and included in the district, and in proportion to the benefits derived, the assessment must be according to benefits, at the same time having reference to the frontage; and it may be found that all the property is equally benefited in proportion to its frontage.

4. A prima facie case to support judgment for enforcement of lien for reassessment being made by production of assessment roll and the records of an action to enforce the original assessment in which it was held void, and there being no contradictory evidence, admission of ordinances in evidence, if error, is harmless.

5. A party obliged to prove ordinances may introduce certified copies, and, obtaining judgment, charge the other party with costs therefor; it not being necessary to produce originals or show inability to do so.

6. A city authorized by its charter to purchase and dispose of property for the public benefit may, where property is sold for municipal assessments, in the absence of other purchasers, bid up to the extent of its charges against the property.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by the city of New Whatcom against the Bellingham Bay Improvement Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Newman & Howard, for appellant. T. E. Cade, D. W. Freeman, and Kerr & McCord, for respondent.

SCOTT, J. This is a consolidated action of a number of suits presenting similar questions, brought by plaintiff against the defendant, to foreclose liens for street assessments, under the provisions of the act (Laws 1893, p. 226) authorizing the reassessment of costs of local improvements. Plain-

tiff had judgment, and the defendant has appealed.

Some of the findings of fact are excepted to, on the ground that they are not supported by, or are contrary to, the evidence. These findings relate to the ordering of the improvements, letting of the contract, execution of the work, the attempt to levy an assessment therefor according to benefits, and that it had been rendered ineffectual by a decision of the supreme court, the making of the reassessment, the amount due from the defendant, and its nonpayment and delinquency.

It is contended that there was no evidence to support the findings with reference to the first assessment upon which the reassessment is based. The record shows that the original assessment roll, the pleadings, findings, and judgment of the superior court, and the judgment of this court whereby said assessment was held ineffectual and void, were introduced in evidence, and this was sufficient, prima facie at least, to support said findings. See *Town of Elma v. Carney*, 4 Wash. 418, 30 Pac. 732.

The other findings questioned involve, first, the sufficiency of the notice given appellant of the reassessment. The act (section 4) provides that such notice shall be given by three successive publications in the official newspaper of the city or town where such assessment roll is on file; that it shall contain the date when it was filed, and state a time at which the council will hear and consider objections to the roll; and provision is made for the filing of objections at any time within 10 days from the last publication of the notice. It is conceded that notice by publication is sufficient, but the objection urged is that the time prescribed is so short as not to constitute due process of law, and many cases are cited by both sides upon this much litigated question. It is well settled that the legislature has power primarily to prescribe the kind of notice to be given, although it cannot dispense with all notice; and it has also been held that where a notice is not prescribed, if a reasonable notice is in fact given, that is sufficient. *Paulsen v. City of Portland*, 13 Sup. Ct. 750; *Williams v. Mayor, etc.*, 2 Mich. 560; *Catch v. City of Des Moines*, 63 Iowa, 718, 18 N. W. 310; *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 17 W. Va. 812; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663. See, also, as bearing upon this act, *Frederick v. City of Seattle*, 13 Wash. 428, 43 Pac. 364. We are of the opinion, under the authorities, that it should not be held that the notice prescribed in the act which it is conceded was given did not constitute due process of law, as applied to the facts of this case. It appears that the appellant has been contesting the proceedings to collect the cost of these improvements for several years past, and that no hardship has resulted in consequence of the shortness of time prescribed. The no-



tice of the filing of the assessment roll, while it fixed a time within which objections might be filed, was not, in fact, the only notice of the proceedings. The proceedings to reassess the property had been pending for some time. The reassessment could be had only by ordinance, and the ordinance had to be published in the official newspaper; and it appears that the ordinance providing for this reassessment was duly passed and published. It set forth, in substance, the facts relating to the first assessment. Appellant was in a sense a party to the entire proceedings from the beginning, and, although this would not dispense with notice of the reassessment, it should have some bearing in determining the sufficiency of the notice given in considering the length of time allowed for filing objections.

Appellant contends that the court erred in striking portions of appellant's answer, whereby appellant sought to attack the validity of the assessment, on the ground of its not having been made according to benefits; but, as the appellant did not appear and file any objections against the proposed assessment after ample opportunity to do so, we think it was not entitled to offer proof to contest the same in the foreclosure suit on that ground, and that the paragraphs in question were properly stricken. Of course, it must appear that the assessment was according to benefits. Sess. Laws 1893, p. 227. And section 5, p. 160, provides: "That the cost and expense thereof shall be taxed and assessed upon all the property in such local improvement district, which cost shall be assessed in proportion to the number of feet of such lands and lots fronting thereon, and included in said improvement district, and in proportion to the benefits derived by said improvement." While the language here may be somewhat involved, it is apparent that the controlling idea is that the assessment must be according to benefits, at the same time having reference to the frontage of the lots. In this case the council found that the property was equally benefited in proportion to its frontage; and while, in fact, the assessment under that finding was made according to the front foot, it was also made according to benefits.

It is contended that the court erred in admitting certain ordinances in evidence, on the ground that they were not competent proof of the facts therein recited. However this may be, it is not apparent that the court attached any weight to them as proof of the facts recited, and as a prima facie case to support the findings, and judgment was made by the production of the assessment roll and the records of the previous action; and, as there was no contradictory proof, there was no harmful error in this respect in admitting them.

It is further contended that the court erred in taxing an item of costs for copies of ordinances introduced in evidence, on the

ground that the originals must be produced, or an inability to produce them shown before certified copies could be offered, and the other party burdened with costs to that extent if the decision should go against it. It would be most inconvenient to require the production of original ordinances in actions of this kind, and keep them tied up in court pending the determination of the case; and it was proper to use certified copies instead. These ordinances were matters of public record, and were duly pleaded, and proof of them was rendered necessary in consequence of the issues raised by the defendant. Ordinarily, production and proof of such ordinances is not rendered necessary by the pleadings; but the appellant, having denied their existence, has no meritorious ground of complaining as to the manner of proving them.

It is also contended that the court erred in providing in the decree that the city might purchase the lands at the foreclosure sale. Its charter authorized it to purchase, lease, receive, hold, and enjoy real and personal property, and to control and dispose of the same for the public benefit; and the legislature has recognized the right of any municipal corporation to bid in property, in default of other bidders, when sold for special assessments. Laws 1893, p. 379, § 122. It would certainly be a hardship if, in the absence of other purchasers, the city was not authorized to bid up to the extent of the charges against the property. The liens must be foreclosed by an action in court, and this should not be rendered ineffectual in consequence of an inability to sell the land if there should be no other bidders. Affirmed.

ANDERS, DUNBAR, and GORDON, JJ., concur.

(16 Wash. 137)

CITY OF NEW WHATCOM v. BELLINGHAM BAY & B. C. R. CO.

(Supreme Court of Washington. Dec. 8, 1896.)

PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS  
—PRESUMPTION AS TO VALIDITY.

Under Laws 1893, p. 227, §§ 1, 2, providing that "all property benefited" by a street improvement shall be assessed to the extent of its proportionate part of the expense, an assessment against a railroad track and right of way will be presumed valid, the owner not having appeared and objected thereto.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by the city of New Whatcom against the Bellingham Bay & British Columbia Railroad Company to foreclose a street assessment lien. From a judgment for plaintiff, defendant appeals. Affirmed.

Newman & Howard, for appellant. T. E. Cade, D. W. Freeman, and Kerr & McCord, for respondent.

**PER CURIAM.** The facts presented in this case are similar to those in the cases between the city and the Bellingham Bay Improvement Company, recently decided (47 Pac. 236), with the exception that the defendant contends that a railroad track cannot be assessed for benefits in making street improvements; and a number of authorities have been cited upon this proposition by both parties. But the statute upon which this proceeding was had provides "that all property benefited by the improvement shall be assessed to the extent of its proportionate part of the expense thereof." Laws 1893, p. 227, §§ 1, 2. It is not within our province to say that a railroad track and right of way cannot be benefited under any circumstances by the construction of street improvements; and as it may have been benefited in this instance, and the defendant did not appear and object to the assessment, we think the judgment should be affirmed.

(16 Wash. 139)

**KREMER et al. v. WALTON et al.**  
(Supreme Court of Washington. Dec. 9, 1896.)  
**MECHANICS' LIENS — IMPROVEMENTS ERECTED AT  
INSTANCE OF OWNER'S AGENT—LIABILITY  
OF OWNER—PLEADING.**

1. Where a lease, or contract for a lease, provides that the lessee shall erect a building on the premises, the lessor to pay the cost thereof by allowing the lessee to retain the rents, the latter is the lessor's agent, within Act Feb. 21, 1893, § 1 (Laws 1893, p. 32), declaring that every person having charge of the construction of any property shall be the agent of the owner for the purpose of establishing a mechanic's lien. 39 Pac. 374, affirmed.

2. In an action to establish a lien for labor and materials furnished at the instance of the owner's agent, the complaint is sufficient if it state facts from which the agency may be legally implied.

Petition for rehearing. Overruled.

For original opinion, see 39 Pac. 374.

**ANDERS, J.** A rehearing was granted in this case upon the petition of the respondents Ashton and the Willapa Improvement Company, and on the argument it was earnestly contended that the opinion heretofore announced, and which is reported in 11 Wash. 120, 39 Pac. 374, was erroneous, mainly for the reason that it did not appear, from the record, that the labor and material for which the appellants were awarded liens were performed and furnished at the instance of the respondent Ashton, the owner of the lot on which the building in question was erected, or by his agent, as required by section 1 of the act of February 21, 1893 (Laws 1893, p. 32); and, if that be true, it follows, of course, that the decision was wrong, and should now be corrected. It has never been claimed by appellants that they were employed or requested by Mr. Ashton in person to perform the labor or furnish the materials for which they seek to establish liens on his premises. On the contrary,

they have always admitted that they were employed by Johnson, but have insisted all along that Johnson was the agent of Ashton for the purpose of establishing the liens; and the decision of this court turned upon the question of agency between Johnson, the employer, and Ashton, the owner. Now, an agent is generally understood to be a person employed to do an act or acts by another; but, in order that there might be no misunderstanding as to what the legislature meant by the word "agent," as used in the first section of the lien act, above mentioned, they declared therein that "every contractor, subcontractor, architect, builder or person having charge of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this act." It is conceded that Mr. Ashton was the owner of the lot at the time the labor and materials were furnished by appellants, and it is not disputed that Johnson was the builder and person having charge of the construction of the building, nor that the appellants performed the labor thereon and furnished the material therefor mentioned in the respective lien claims which appear in the record herein. It therefore follows, as heretofore intimated, that if, by the terms of the contract between Ashton and Johnson, the building, when erected, was to be paid for by the former, and to become his property, both the building and the lot on which it was erected are subject to the liens in favor of appellants, under the provisions of the statute.

Upon the former consideration of this case, the majority of the court came to the conclusion that, by a fair construction of the contract between Ashton and Johnson, whether viewed as a contract amounting to a lease, or simply as a contract for a lease, the building was to be erected and paid for by Mr. Ashton, not in cash, it is true, but—which amounts to the same thing—in rents, to be retained by Johnson; and upon a further consideration and investigation we are still of the same opinion. The contract in question must be deemed to have been a contract in writing, and was evidenced by the letter written by Mr. Ashton to Mr. Johnson, set out in the opinion of this court, and a telegram from Johnson to Ashton, together with Ashton's reply thereto. About a month after the letter was received by Johnson, he telegraphed to Ashton, at St. Paul, that he had made arrangements for, or secured his money and was ready to proceed with, the construction of the building. To this the respondent Ashton replied "Proceed," or "Go ahead," or words to that effect. Thereupon Johnson employed laborers, contracted for material, and constructed a one-story brick building upon the lot referred to in Mr. Ashton's letter. It was the province and duty of the court to determine the contractual relations between Ashton and Johnson from the contract itself;

and hence this court, in its opinion, said, after alluding to the testimony of Mr. Ashton, upon the trial, that he had no knowledge of the fact that Johnson had entered upon the erection of the building until after the labor and materials for which liens were claimed had been furnished, that "such testimony \* \* \* can have little weight in determining the contract relations between him and said Johnson, for the reason that such relations must be determined by the construction of the correspondence above referred to, regardless of what may have been the intention of the owner." Of course, the court did not mean to say, or to be understood as saying, that the intention of the owner would not be regarded, but simply that such intention must be gathered from the correspondence between the parties, and not from any intention not expressed therein; and, therefore, the apparent contention of counsel that this court found that Ashton did not know that the building was being constructed, and yet determined that it was erected at his instance, is without any substantial foundation. In whatever aspect this contract between Ashton and Johnson may be viewed, we think it fairly appears therefrom that Johnson was authorized by Ashton to construct the building for him on the premises where it was erected; and, that being so, Johnson became his agent, in so far, at least, as to charge the property with liens for labor and material. That a contract may be, in effect, a lease, and at the same time a building contract as to mechanics and material men, is clearly shown by the following cases: *Woodward v. Leiby*, 36 Pa. St. 437; *Leiby v. Wilson*, 40 Pa. St. 63; *Hopper v. Childs*, 43 Pa. St. 310; *Fisher v. Rush*, 71 Pa. St. 40.

We have examined the cases cited and relied on by the respondents, but none of them are directly applicable here, for the reason that the decisions are based upon statutes not identical, in important particulars, with ours. Nor do we think that the complaint failed to state a cause of action. It does not state in express words that Johnson was the agent of Ashton, nor that he constructed the building at the instance of Ashton; but it does state facts from which the law implies the agency of Johnson, and that is sufficient. The disposition heretofore made of this case will be adhered to.

HOYT, C. J., and DUNBAR, J., concur.

(16 Wash. 123)

MOORE et al. v. GILMORE (FISCHER et al., Garnishees).

(Supreme Court of Washington. Dec. 8, 1896.)

GARNISHMENT—JOINT CLAIM—NECESSARY PARTIES—RIGHT OF JOINT CLAIMANT.

1. A joint claim is subject to garnishment, to the extent of the interest of a joint claimant, to satisfy his individual debt.

2. In garnishment to subject a claim owned

jointly by the principal debtor and a third person, the joint claimant should be made a party, under 2 Hill's Code, § 150, providing that, where a complete determination of a controversy cannot be had without the presence of other parties, the court shall cause them to be brought in.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Miles C. Moore and others, executors of the last will of Dorsey S. Baker, deceased, against David Gilmore, and against George W. Fischer and others as garnishees. From a judgment discharging the garnishees, the plaintiffs appeal. Affirmed.

Boyer & Gule and Greene, Turner & Lewis, for appellants. Ira Bronson, for respondents.

SCOTT, J. The plaintiffs brought suit upon a promissory note, and obtained judgment against the defendant Gilmore. While the action was pending, and a few days prior to the rendition of the judgment, they caused a writ of garnishment to be issued and served on the other parties respondent. The garnishees appeared and answered, but did not disclose any liability to the principal defendant. Plaintiffs controverted the answers, and, a jury being waived, the issue came on for trial before the court. The facts showed that some of the garnishees were indebted to Gilmore and one Kirkman as joint claimants; that Kirkman was dead; that, after his death, Gilmore and Kirkman's executors brought suit on said claim against said garnishees, and obtained judgment; that thereafter the plaintiffs brought suit on a bond given, in said action last hereinbefore mentioned, to the plaintiffs, by all of the garnishees, and obtained a judgment against all of them; and that none of the judgments had been paid. On these facts the court discharged the garnishees, and the plaintiffs have appealed.

The question is presented whether, upon a claim against one party, garnishees can be held upon a debt owed such party and another person jointly. The authorities are in conflict upon this point. A number of cases have been cited by the appellants holding that a joint claim may be reached for the individual debt of one of the joint claimants, and some of the text-books are to that effect. *Whitney v. Munroe*, 36 Am. Dec. 732; *Thorndike v. De Wolf*, 6 Pick. 119; *Miller v. Richardson*, 1 Mo. 310; *Fogleman v. Shively* (Ind. App.) 30 N. E. 909; *Perry v. Blatch* (Kan. App.) 43 Pac. 989; *Drake, Attachm.* §§ 566-572; *Am. & Eng. Enc. Law*, p. 1169. There are other cases and text-books, cited by the respondents, holding to the contrary; and a number of cases have been cited by both parties relating to the garnishment of debts due a partnership on a claim against one of the partners. A distinction is drawn in the authorities between debts due joint claimants and those due to a partnership; and in some states, where it is held that joint claims may be reached upon a debt against one joint claimant, it is held that the interest of a single

partner in a partnership claim cannot be so reached. The reasons for this usually given are that a partner has no separable interest in any specific partnership property, and that such property is first liable for partnership debts, and to such claims as may be due the other partners, owing by the partner proceeded against, and that the effect of this is to so involve the proceedings as to render the remedy impracticable of enforcement. If there were no such debts, however, it would seem that this reason ought not to prevail, but with that question we have not to deal in this case.

We shall not undertake to review the authorities cited in detail, but we have examined them, and are of the opinion that the better-sustained rule is that a joint claim may be reached by garnishment to the extent of one of the claimant's interests therein to satisfy his individual debt. The reasons given in those cases holding that a joint debt may not be so reached are not always satisfactory or tenable. A very general one given is that the garnishing creditor can have no greater rights or privileges than the principal defendant or primary creditor of the garnishee. Another one is that the demand cannot be severed, and thus subject the garnishee to the liability of several suits. Also, that the other joint claimant is an interested party, and entitled to half the moneys collected. Aside from the question that the garnishing creditor may always inquire into fraudulent transactions between the principal defendant and the garnishee, for the purpose of placing such defendant's property beyond the reach of his creditors, the law is well settled that a single claim against one party may be severed to the extent of taking only sufficient of it to satisfy the demands of the garnishing creditor. The fact that the garnishee may be authorized to pay the whole demand to the officer, or to turn over the whole property to him, as the case may be, can have no bearing on this; for it might not always be allowable at his option, as in a case where he should be under two garnishments from different courts to recover different claims against the principal defendant. If the law will thus sever a single demand owing by the garnishee to the principal defendant solely, it would seem that the only reason for holding that the garnishee cannot be held to answer for the debt of one, where he owes two or more jointly, would be in consequence of a failure in the law to provide for the protection of the interests of the other joint claimants and the garnishee as against them; and, if such protection is given, the difficulty is obviated.

As the right of garnishment is a statutory one, it is probable that the conflict in the authorities is due in a measure to a difference in the statutory provisions of the several states upon the subject of garnishment. The tendency of legislation, in this state at least, has been to extend rather than curtail the right. The general purpose of the law is to

subject all property of the debtor, over and above his exemptions, to the payment of his debts. Where the right of garnishment is given, it would seem that the question as to whether it would be available in a particular case would be dependent upon two matters. These are that the remedy should be capable of enforcement, and a due protection given to the rights of third parties, who thus become unwillingly involved in such controversies between a creditor and his debtor. It may be said that the law must award such parties, who may well be styled "Innocent parties," ample protection, where they are called upon to respond to some other person than their own contract creditor, as in the case of garnishment. Such questions, of course, must be largely determined by the statutes of the particular state upon the subject of garnishment, and the question arises, what are the statutory provisions of this state relating to these matters? The last act upon the subject of garnishment, which was in force when the proceedings here in question were instituted, will be found in the Laws of 1893, commencing at page 95, and contains very general and liberal provisions. In addition to the usual ones, allowing persons indebted to or holding property of the principal defendant to be garnished, it provides that a joint-stock company or corporation, in which the principal defendant is an owner of shares, may be garnished. There are other provisions of the Code authorizing the garnishment of a sheriff or constable, a judgment debtor, an executor or administrator, or a fund in court. 2 Hill's Code, §§ 306, 307. The law provides that both the plaintiff and the defendant in the principal action may controvert the answer of the garnishee, and provides for a trial of the issue thus formed, and liberal provisions are made as to protecting the garnishee from costs. So it will be seen that the remedy here, at least, is a favored, broad, and comprehensive one, and section 322 of the Code requires that it shall be liberally construed in furtherance of its objects.

There can be no question as to the practicability of the remedy as applied to the facts of this case, and it would seem, therefore, that the only question is, does the law afford sufficient protection to the rights of these garnishees and the other joint claimants? If so, a reasonable construction to effect its evident purposes would require us to hold that a joint debt may be reached to satisfy a demand against one of the joint claimants. But we are of the opinion that the other joint claimants must be held to be interested parties in a proceeding like this, as the relations between the joint claimants and the garnishee will be so materially changed by virtue of the proceeding. It is clear that the garnishing creditor can only enforce collection of the interest of his debtor in the joint claim, and then only to the extent of satisfying his own claim, and a balance

might be left due such debtor from the joint debtor, though less, to the amount of that recovered, than that due to the other joint claimant. It is evident that such a change in the relations of the parties should not be made without giving the other joint creditor an opportunity to participate in the proceedings, and insist upon the payment of the whole claim, and upon his right at that time to his share of the moneys collected. We have no doubt that the joint claimants and their debtor might make any agreement between themselves that was satisfactory to them, as relating to the payment of the balance of the claim after the demands of the garnishing creditor are satisfied; but, for the protection of all parties, the other joint claimants should be brought in, or at least given an opportunity to come in, to the proceeding, to protect their rights, and also to the end that they should be thereby concluded, as against the garnishee, to the extent of the amount recovered of him. From the decisions it looks as though, in some instances, unnecessary hardships are placed upon a garnishee in such a proceeding, where he has no direct interest as between the parties, in requiring him to act at his peril, to see that the garnishment proceeding is properly instituted, and a valid judgment rendered against him, or that, otherwise, a payment thereunder would be no protection to him in an action by the debtor in the principal action. This could be obviated in all cases by making such principal defendant a party to the garnishment proceedings, where he is not one, so that the whole matter could be determined, and the rights of all parties concluded, and the garnishee thus effectually protected.

Section 150, 2 Hill's Code, provides that the court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination cannot be had without the presence of other parties, the court shall cause them to be brought in. This statute not only gave the right or power to bring in the other joint claimants in this instance, but, in our opinion, it should be held as making it obligatory, as such seems to be the intent of the provision. It is true that, in *Marx v. Parker*, 9 Wash. 473, 37 Pac. 675, we said that the court could not, upon its own motion, require a third party to intervene in a garnishment proceeding; but this would not prevent the court from requiring a third party to appear upon the application of either of the parties in court. While the method of bringing such third party into court is not clearly pointed out, it seems to us to be clearly authorized in some manner by this section, and also by section 49, which provides that, where jurisdiction is given, all means to carry the proceeding into effect are also given; and, if the course of proceeding is not specifically pointed out by statute, any suitable process or pro-

ceedings may be adopted which may appear most conformable to the spirit of the Code. This statute was clearly intended for a purpose, and that purpose is apparent. It would clearly apply to a case of this kind, in the absence of any special provision; and it must be held in force, it seems to us, and to cover such a case as this, or it must be held that its provisions are so general as to be wholly inoperative, and we can see no reason for so holding, and thus depriving it of any effect. Provision is also made whereby the other joint claimant could intervene upon his own motion, or, in case there was a dispute as to the fund, provision is made for the payment of the same into court by the garnishee. 2 Hill's Code, §§ 152-156.

Now, while either of the parties could have applied to the court to have the other joint claimants brought into the proceedings, it seems to us that the obligation rested upon the plaintiffs, as they were the moving parties. They might have done this in the first instance, if they knew the facts, by applying to the court for an order, and having suitable process or notice served upon the other joint claimants, requiring them to appear in the proceeding and ask for such relief as they were entitled to, or, in consequence of a failure to do so, to be concluded by the judgment thereafter rendered; or they might have done so afterwards, when the nature of the indebtedness was disclosed. While the defendants in the garnishment proceeding had this privilege, it was not incumbent on them to exercise it; and, as the plaintiffs did not ask to have the matter put in shape so the court could protect the interests of all parties, there was no error in dismissing the proceedings, and for that reason the judgment is affirmed.

DUNBAR and GORDON, JJ., concur.

(16 Wash. 48)

### BAILEY v. TACOMA TRACTION CO.

(Supreme Court of Washington. Dec. 7, 1896.)

STREET RAILROADS — COLLISION BETWEEN TRAINS — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF — RIDING ON PLATFORM — QUESTION FOR JURY — REJECTION OF SPECIAL INTERROGATORIES — DISCRETION OF COURT.

1. Failure of a street-railroad company to provide means for informing the operatives of a car passing over a switch where two tracks unite whether another car, which should have passed that point a few minutes earlier, from the opposite direction, had done so, is negligence.

2. The burden of proving contributory negligence is on defendant.

3. Whether a passenger who, in the absence of any rule forbidding it, rides on the front platform of an electric car, as he and others have been accustomed, and whose fare is there taken, is guilty of negligence which will preclude a recovery for injuries received in a collision with another car, is a question for the jury.

4. The question of submitting special interrogatories is addressed to the discretion of the trial court, and will not be reviewed.

Hoyt, C. J., dissenting.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Harry Bailey against the Tacoma Traction Company to recover for personal injuries. From a judgment for plaintiff, defendant appeals. **Affirmed.**

Doolittle & Fogg, for appellant. M. L. Clifford and Wallace M. Clarke, for respondent.

**DUNBAR, J.** This is an action brought by the respondent against the Tacoma Traction Company for personal damages caused by the alleged negligence of the appellant in operating its electric street-railway cars. Stripped of all verbiage and unnecessary repetitions, the undisputed facts in the case are about as follows: The appellant owns and operates a system of street railways. The system is operated by electricity. The cars start on single trunk lines at a point near the center of the city of Tacoma, running southward a distance of about four miles, to a point called "Hosmer Junction," where the track branches, one line running westward to Edison, a distance of two miles, the other running southward a distance of about twelve miles to Puyallup. The switch at Hosmer Junction was always open to the Edison car, but the Puyallup car had to open and close it when passing the junction either way. By the time schedule in force when the accident occurred, the car going to Edison should have passed the junction at 7:23 a. m., and the car coming to Tacoma from Puyallup would have passed the same point at 7:25 a. m., but two minutes later. On the 4th day of October, 1895, respondent got on the Puyallup car at Fern Hill for the purpose of going to Tacoma. The morning was very foggy. The respondent was smoking, and went on the front platform of the car, seating himself on the stool provided for the motorman. He sat with his back against the front end of the car. After the car had passed the junction at Hosmer, and gone about 400 feet, it met the Edison car, coming at a higher rate of speed than the Puyallup car was moving at, and the two ran into each other with great force. In the collision respondent received the injuries to recover damages for which this suit was brought. It is conceded that there was no provision made by signal, flag, register, or otherwise by which the car coming through the switch on the main track on its way from Puyallup to Tacoma could know whether or not the Edison car, going in the opposite direction, had passed that point. We think this is sufficient to establish the fact of negligence on the part of the appellant without further discussing it. On the trial of the cause below the jury rendered a verdict in favor of the respondent for \$3,000. And right here we may say, in answer to appellant's contention that the verdict was excessive, that under the proofs of injury we are not able to conclude that the verdict was

rendered through passion or prejudice, or from any other motive than a desire to render equivalent damages for the injuries sustained.

The greater part of appellant's very long brief in this case is devoted to a discussion of the proposition that, where the plaintiff in an action for personal damages is per se guilty of contributory negligence, he cannot recover; and the further proposition, in aid of his motion for a nonsuit, that, where the testimony is not sufficient to sustain a verdict, it is the duty of the court to grant a nonsuit. It would seem that it is scarcely necessary to discuss these propositions at any length, inasmuch as they are conceded by all courts where the doctrine of comparative negligence does not prevail, and they are especially conceded by the respondent. On page 7 of his brief he says: "Through fifty-three pages of their brief, from page 39 to 92, inclusive, appellant's attorneys argue, substantially, the proposition that contributory negligence defeats an action for damages for personal injuries; stating it in various forms and phraseology, and citing a very great number of cases. This legal proposition is distinctly admitted by the respondent." So we will not further notice the discussion or the authorities bearing on these points.

The only real question there is in this case is whether the acts of the respondent, as shown by the testimony, constituted contributory negligence per se, or whether such acts, if proven, could, as a matter of law, be said to constitute contributory negligence; and one proposition argued at great length by appellant, viz. that contributory negligence is a mixed question of law and fact, will not be disputed. The authorities cited by appellant to sustain the doctrine that the facts in this particular case constitute contributory negligence per se are so interwoven and indiscriminately mixed with the authorities which are cited to prove the propositions which we have mentioned above, and which are conceded, that it has been with the greatest difficulty and labor that the court has segregated them without investigating the hundreds of cases which are cited in the brief, and which it would be impossible for the court to investigate in detail. Attempting, however, to select the strongest cases cited by appellant in support of its contention, we will specially notice the following:

Commencing with *Gavett v. Railroad Co.* 16 Gray, 501, which is claimed by appellant to be a case which decided the principles involved in this case, there it was decided that "in an action to recover for personal injuries if the facts are undisputed, and fail to show that the plaintiff was in the exercise of due and reasonable care at the time of receiving the injuries, it is the duty of the court to instruct the jury that he cannot recover." It will be observed that in the state of *Massa*

chusetts it was necessary to prove the absence of contributory negligence, and that doctrine obtains in a great many of the states from which cases are cited by the appellant; but in this state the rule is otherwise, the uniform holding of this court having been that contributory negligence is a matter of defense which must be affirmatively shown by the defendant. It was there held that a passenger in a railroad car, who, knowing that the train is in motion, goes out of the car, and steps upon the platform of the station while the train is still in motion, is so wanting in ordinary care as not to be entitled to maintain an action against the railroad corporation for an injury resulting therefrom. This case was where a woman had been called at the station of Salem, was slow about getting to the door to make her exit from the car, and, after the car had started, undertook to swing herself onto the platform, was whirled around, and thrown in between the platform and the car and injured. It is not a case which bears upon the facts in this case at all, as far as we can see, even conceding the justice of that decision as applied to the facts in that particular case. Again, this was a steam-railroad case, and it might be conceded at the outset that the weight of authority is that it is negligence for a passenger to stand on the platform of a steam-railway car while it is in motion, although many of the cases go no further than to hold that it is not negligence per se, but a question of negligence, to be submitted to the jury.

Railroad Co. v. Montgomery, 7 Ind. 474, seems to involve principally the question of whether a railroad company is liable for an injury which may happen to a person who takes passage on a train engaged in transporting gravel, and not engaged in carrying passengers; but that case also decides that in a suit against a railroad company by a passenger for an injury occasioned by a collision it is not sufficient for the company to show that the plaintiff was acting at the time in disobedience to a proper order to secure his safety; it must also appear that the injury was occasioned by such disobedience; and the court concludes its opinion in that case by saying: "The evidence does not inform us what part of this train, or whether any, was thrown from the track. It should have been left to the jury to say whether the plaintiff brought the injury on himself by leaving one part of the train and going to another, instead of laying down the rule that, if he did so, he could not recover,"—substantially holding that the question of contributory negligence in that case was a question of fact to be submitted to the jury, and not a question of law to be determined by the court. We might state, however, that in the case at bar not only was the respondent not acting in disobedience of any order or rule of the company, but he was upon the platform at least by the sanction

of the company, for the undisputed testimony shows that he had been accustomed for three or four years prior to the accident to riding on the platform; that it was the habit of others to ride upon the platform, and that it had become a custom by assent of the car company; that no order or rule against passengers standing on the platform had been posted or published on the car or elsewhere; that the conductor had been in the habit of taking up the fares of passengers on the platform, and that he had that morning taken the fare of this passenger while he was upon the platform. It seems to us that the case above cited is scarcely in point here.

Railroad Co. v. Jones, 95 U. S. 439, is another case of a steam railway, and in that case the plaintiff, who was working for the company, rode home from work on the pilot or bumper of the locomotive, when the train, in passing through a tunnel, collided with a car standing on the track, and he was injured. It was very properly held that such an act was contributory negligence, especially in view of the fact that the plaintiff had been warned against riding on the pilot, and had been forbidden to do so.

The case of Higgins v. Railroad Co., 36 Mo. 418, is where a woman left the seats in a regular passenger car, and repaired to the baggage car, where she was injured. In the state of Missouri at that time there was a statute providing that, "in case any passenger on any railroad shall be injured while on the platform of a car of any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in its train, such company shall not be liable for the injury," etc. This statute is cited by the court, and is the pivotal point on which this case was decided, as it is stated by the court in its opinion that the evidence tended to show that the plaintiff was well acquainted with these regulations. This was also a steam-railway company.

Francisco v. Railroad Co., 78 Hun, 13, 29 N. Y. Supp. 247, held that upon the trial of an action brought to recover damages for personal injuries the absence of contributory negligence on the part of the plaintiff could not be presumed, but that it must be proved; and the verdict of the jury cannot stand upon conjecture, however plausible the same may be, if the plaintiff cannot furnish the requisite evidence to sustain the affirmative burden cast upon him by law. As above remarked, this announcement is opposed to the established rule in this state. It does not appear plainly from the report of that case how the plaintiff was injured, but it does appear that the conductor had given the plaintiff permission to go to the platform. The court, however, finds that no permission had been given him to stand on the steps of the platform, and that he was

standing on the steps without authority; that such a place was dangerous, and that the plaintiff must have known that it was dangerous, when sweeping around curves. So we take it that the passenger was thrown from the car. The court, however, seems to indicate that the standing on the platform is not negligence per se, or negligence at all, for it says in its opinion: "Nor do we think that the defendant assumed any additional risk by permitting the plaintiff to stand on the front platform of the car. The rule is quite universal on railroads not to permit passengers to smoke in cars adapted to all classes of passengers, and, while there is no evidence upon this subject, it is reasonable to infer that the permission of the conductor to the plaintiff to smoke on the platform was in reference to that rule or custom." We hardly think that the facts in that case, or anything that is said in the opinion, could be held to sustain appellant's contention that it is negligence per se to stand on the front platform of a street-railway car.

*Railroad Co. v. Shaffer* (Ind. App.) 36 N. E. 861, is a very short case, and simply decides, without any argument, that it is not contributory negligence for a passenger on a street car to remain on a platform when there is no room inside. There is no indication that the court would have held that it was contributory negligence per se, even if there had been room inside, for it cites *Nolan v. Railroad Co.*, 87 N. Y. 68, and other cases, where the rule is not restricted to cases where the facts show that there was no room inside for the passenger to ride. In this case, however, the question of contributory negligence was submitted to the jury. The jury found that the plaintiff was not negligent, and judgment was rendered for the plaintiff. This judgment was affirmed by the supreme court, and, in concluding its very brief opinion, the court says: "In this case there was evidence which tended to show that the car was crowded at the time, and that there was no room for the appellee on the inside of the car. True, the evidence on this point was conflicting, and perhaps the weight of it tended to establish the contrary. Still this court will not weigh the evidence under such circumstances. Judgment affirmed, at costs of appellant."

The case of *Clark v. Railroad Co.*, 36 N. Y. 135, which is claimed to be parallel to the case at bar, was where the doctrine prevailed that the absence of contributory negligence must be proven; and the court held that, under the circumstances of that case, it could not say that the acts proven were not contributory negligence on the part of the plaintiff. That case, however, is distinguished in *Nolan v. Railroad Co.*, supra, which will be noticed hereafter in support of respondent's view.

*Todd v. Railroad Co.*, 3 Allen, 18, is a case where it was held that a traveler in a railway car cannot recover damages against the

railway company for a personal injury sustained wholly or in part by reason of allowing his arm or his elbow to be outside of the window. As a matter of course, if a passenger absolutely refuses to take notice of the common perils incident to travel, such as the fact that if his arm is put through the window of a car it is liable to be injured by trees or brush or bridge supports, or things of that kind, and is injured in the exercise of such foolhardy and foolish acts, we think there is no court but what would say that he was guilty of negligence per se, and that it would be wrong to hold a company responsible for damages sustained by him. But riding on the platform of a street-railway car is altogether another proposition. Collisions are not expected by passengers. They have a right to presume that the operators of the road, who have the management and control of their cars, will protect them from collisions; and, if a passenger should be held by the law to presume that a collision might occur, it might be very well held that he would be guilty of contributory negligence if he entered the car as a passenger at all.

*Hickey v. Railroad Co.*, 14 Allen, 429, is where a person stepped off of the platform of the smoking car onto the front platform of the passenger car, after the engine and the smoking car had been uncoupled from the rest of the passenger train, and the car, coming down the track unattended by the engine, met with an accident, and the passenger was injured. Under such circumstances it was held that he was guilty of contributory negligence. We think it is not a case in point.

In *Sweeny v. Railroad Co.*, 10 Allen, 368, it was held that if a railroad company had made a private crossing over its track at grade in a city, and allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there was danger, it may be held liable for damages to a person who is induced to cross by a signal from the flagman that it is safe, and is injured by a collision which occurs through the flagman's carelessness. We have examined this case particularly, and fail to see in what respect it supports the contention of the appellant.

And it will be seen that none of these cases support appellant's view. It may be that cases are cited in the brief which do, but, as we have before said, we have been unable, without an investigation of all the cases cited, so many of which are manifestly not in point here, to find them. On the other hand, we might well stop with the decision of this court in the case of *Muldoon v. Railway Co.*, 7 Wash. 528, 35 Pac. 422, where it was held that it was not negligence per se for a passenger to stand upon the front platform of the trail car in a moving cable train, in the absence of any rule of the company against it, and where it has been the custom of passengers to occupy that position. This court recognized the fact that there was more liability



to accidents by standing on the platform of cars that were propelled by powerful agencies than of those moved by horse power; but, notwithstanding that recognition, it laid down the rule above announced, for it said: "Doubtless there is more liability that accidents will occur where the car is propelled by cable than where horses are used, but common experience has not discriminated between the two to the extent of changing the rule. In most cases of this class the question of contributory negligence is one for the jury,"—citing *Mills v. Railroad Co.*, 129 Mass. 351, and *Nolan v. Railway Co.*, 87 N. Y. 63. And it may be well said here that common experience has not discriminated between a car propelled by a cable and one propelled by electricity to the extent of changing the rule; for, while it is probably a fact that electric cars are run at a greater rate of speed than cable cars, yet we think experience shows that accidents are as frequent upon the cable cars as upon the electric cars, owing, probably, to the lack of facilities to easily control the cable cars which exist on the electric cars. We will, however, notice the cases upon which the decision in *Muldoon v. Railway Co.*, supra, was based.

In *Wills v. Railroad Co.*, 129 Mass. 351, under the doctrine before mentioned in regard to the necessity of proving want of contributory negligence, the court directed a verdict for the defendant on the ground that the plaintiff had not offered any evidence sufficient to warrant the jury in finding that her intestate was exercising due care at the time of the accident; and this action of the court was affirmed by the supreme court of Massachusetts. There, the burden being upon the plaintiff to prove that her deceased husband was free from negligence contributing to the injury which he received from the acts of the defendant corporation, the judgment of the court was evidently right, under the circumstances of that case. The circumstances showed, as the court says, from uncontradicted evidence, that the plaintiff's intestate got on the front platform of defendant's car, and remained standing in that place until the car approached a drawbridge on the road, when he sat down on the platform, with his feet on the step. He was told by the driver of the car that he had better not sit in that place, as it was against the rules of the company, and unsafe. He continued, however, to occupy his sitting position on the side of the platform until he fell from the car after it had passed the bridge. The court found that there were notices posted on the under side of the roof of the platforms of this car that all persons were forbidden by order of the directors to be on the front platform, and that the company would not be responsible for the safety of passengers while there. It was held that the street-railway company has the right to make all reasonable regulations for the safety of passengers; that a rule prohibiting passengers from riding on the front

platform is a reasonable regulation; and one who knowingly violates it cannot be said to be free from negligence if the act contributed to his injury. The court, however, stated that the question in most cases was one which should be submitted to the jury.

An investigation of a great majority of the cases cited by appellant, which we have not specially mentioned, where the plaintiff was held to be guilty of contributory negligence, shows that they are cases where he was held to have taken notice of the perils incident to the position which he occupied. For instance, if he placed himself in a position on a platform where the danger of being thrown from the car was increased, he could not hold the company responsible for being so thrown from the car; and most of them are cases of this character, where the plaintiff, by some sudden jolt or lurch of the cars, was thrown from his exposed position. But in the case at bar no element of this kind enters. A great deal is said, and often repeated, by the appellant in its brief concerning the fact that the respondent perched himself upon a stool which was placed on the front of the car for the use of the motorman. But the injury complained of was not sustained by any peril flowing from the particular position on the stool. The testimony shows that a gate on the side of the car on the platform next to where the respondent sat was fastened, so that he could not be thrown off the car on that side. Other passengers stood between him and the gate on the other side. And the fact was that he was not thrown off at all, but was injured on the stool where he sat; while another passenger, who was not on the stool, but stood on the platform by his side, was killed in the accident. So that we think all the discussion concerning the stool may be eliminated from the case.

The other case cited by this court in *Muldoon v. Railway Co.*, supra, viz. *Nolan v. Railway Co.*, 87 N. Y. 63, is squarely in point, so far as the circumstances are concerned, in this case, excepting that it involved a horse car instead of an electric railway car, and with the further exception that plaintiff's peril was more or less incident to his position, and one which a reasonable person might be presumed to contemplate. Plaintiff took passage on defendant's street cars, and there were vacant seats inside. He rode upon the platform, smoking, because, as he testified, it was the custom of the line to permit smoking there. While so riding, the conductor took his fare, and the driver suddenly whipped one of his horses, which plunged under the blows, occasioning a jar which, coming without warning, threw plaintiff off the car. In an action to recover damages the court held that the evidence was sufficient to justify the submission of the question as to negligence on the part of the defendant and contributory negligence on the part of the plaintiff to the jury. This case, as the one at bar, came up on a motion for a nonsuit, and the court said: "It is further claimed that no negligence of the

defendant was shown. It must be freely confessed that the evidence, taken all together, is very unsatisfactory but that is not the question here. It comes up in the form of a motion for a nonsuit, which was denied, and that ruling must be sustained where the evidence is conflicting, and the inferences to be drawn are doubtful." This case, while deciding as we have indicated, distinguishes many of the cases cited by the appellant in the case at bar, notably *Clark v. Railroad Co.*, *supra*, and *Gavett v. Railroad Co.*, *supra*.

In *Seigel v. Eisen*, 41 Cal. 109, it was held that the fact that the plaintiff was standing on the rear platform of a street car, with his hand on the railing, when his hand was injured by defendant's dray as it passed the rear of the car, was not, as a matter of law, such negligence as contributed to the injury.

In *Meesel v. Railroad Co.*, 8 Allen, 234, it was held that the riding upon the outside platform of a car was not such a want of ordinary care as to prevent a recovery for an injury sustained by being thrown therefrom.

*Archer v. Railway Co.*, 87 Mich. 101, 49 N. W. 488, decided that riding upon a platform was not per se negligence, citing *Upham v. Railway Co.*, 85 Mich. 12, 48 N. W. 199, where it was held that it was within the power of street-railway companies to prohibit passengers from riding upon the platform of the cars, or to give notice that those who ride there must do so at their own risk, or to limit the number of passengers which each car shall carry, and require them to ride inside of the cars; and that, until they adopt some such regulations, and notify the public, it is but reasonable to hold them liable for injuries resulting from their own negligent acts to their patrons who were themselves in the exercise of reasonable care, whether riding upon the platforms or within the cars; and the court, in its opinion in that case, in discussing this proposition, very pertinently says: "In the presence of the fact that passengers are permitted to ride upon these platforms constantly, can courts hold them to be dangerous per se? If the railroad companies considered them dangerous places, would they not take some means to notify passengers not to ride there, or to inform them that they did so at their own risk? It is certainly reasonable to presume that they would. That they do not consider them dangerous is further apparent from the fact that when their cars are full they stop them to take on more passengers, and thus invite them to ride upon the platforms. This appears to be their constant custom. It is evident that the public do not consider these platforms places of danger, from the fact of their constant use. It is, therefore, difficult to see upon what reason it can be held that they are dangerous, and that persons who ride there assume all the risks, and thereby relieve such companies from all liability except for gross, willful, and wanton misconduct."

In *Maguire v. Railroad Co.*, 115 Mass. 239, it was held specifically that standing on the front platform of a horse car, when there is

room inside, is not of itself conclusive evidence that the person injured by the negligence of the driver of the car was not in the exercise of due care.

*Fleck v. Railway Co.*, 134 Mass. 480, is a case where a passenger in a street car left his seat, and sat upon the rear platform, upon which there was an accumulation of ice, rendering the platform slippery, expecting that the car would stop so that he could alight, and neglected to take hold of the rail. The car jolted, and he was thrown off. It was held that the question of whether he was guilty of such negligence as to preclude his maintaining an action for the injuries thereby received was a question of fact for the jury, and not of law for the court.

*Railway Co. v. Lee*, 50 N. J. Law, 435, 14 Atl. 883, is a case where a party sat on the foot board of a car, and came in contact with another person standing on the footboard of another car, which met the car in question, and was pulled off and injured. The court, in conclusion, says: "If the question of contributory negligence was raised by the case, it was one for the jury, and there was no error in refusing a nonsuit, and submitting that question to them."

*Railway Co. v. Boudrou*, 92 Pa. St. 475, is a well-considered case. There the plaintiff, who was riding upon the rear platform of a crowded street car, was struck by the pole of a car following, and seriously injured. It was held that in riding in this place he was not guilty of contributory negligence; that, although the accident would not have happened if he had not been in that position, yet the position was but a condition and not the cause of the injury; and in that case the supreme court of Pennsylvania went so far as to hold that the court properly withheld from the jury the question of contributory negligence. "The learned judge," says the court, "taking a different and correct view, very properly charged that the plaintiff could not recover if the injury resulted from any negligence on his part; that, if the jury should find that the plaintiff was negligent in standing on the rear platform, and yet find that the collision could not have happened but for the negligence of the driver of car 14, plaintiff's negligence was remote, and not a bar to his recovery. His reasons given, as leading to that conclusion, are unanswerable. The large number of passengers in this city who voluntarily stand on the platforms because there is neither sitting nor standing room in the cars, do not, and ought not, anticipate that they will be run over by following cars. Their position has no tendency to induce the driving of one car into another. Whatever the degree of their negligence in riding on the platform, and the risks they take in so doing, every one knows that, so long as he remains there, he is in no danger of being run down by a car, unless from its heedless handling. When the plaintiff was struck, his post was a condition, but not a cause, of his injury. It neither lessened the speed of the car he was on nor increased that of the other." That reasoning could very intelligently be applied to the

facts in this case. The position of the respondent on the platform really had nothing to do with bringing about the collision, and, as was said by the Pennsylvania court, "was a condition, but not a cause," of the accident.

A great deal is said by the appellant concerning the fact that it was a foggy morning, and that knowledge of the fact that accidents were liable to occur should be imputed to the passenger. The deduction is that it was the duty of the passenger to look out for collisions, and place himself in a position so that he could escape the effect of a collision either by a favorable position in the car or by leaving the car precipitately. We think there is no force in this reasoning. It is the company's duty to take into consideration the increased perils which are engendered by reason of the condition of the weather, and it must guard against additional hazards. If the passenger must be presumed to anticipate a collision on account of climatic conditions, then he would be guilty of contributory negligence if he traveled in the car at all under such conditions, and was injured while sitting on a seat. He has a right to presume that those who have the management of the operation of the cars will exercise more care under the conditions existing at the time of this accident as shown by the testimony than on brighter days, and when there was no obstruction by reason of fog or ice or otherwise. It was the most culpable negligence on the part of the appellant to arrange its transportation in such a way that one of these cars was to pass this junction only two minutes ahead of the other, and that there was no way by which the officers of the Puyallup car could tell whether the Edison car had passed the junction, or whether it was yet on the road, subject to meet the Puyallup car at any time. No passenger should be presumed to presume that the company would be guilty of such unwarranted negligence and utter disregard for the lives and safety of its passengers as to fall to take these ordinary precautions. The respondent in this case had a right to rely upon the vigilance of the appellant in conducting its business so that a collision would be avoided. There was nothing fortuitous or unforeseen occurred; no hidden defects in bridges, or displacement of rails by outside agencies, or anything of that character. It was simply a heedless plunge onto the road between Hosmer Junction and Tacoma without knowing that the road was clear. As we have before stated, if, by reason of his position on the platform instead of in the seats in the body of the car, the respondent had been thrown from the car, a peril which would be incident to his position, and which he might reasonably be presumed to have taken into consideration when he assumed that position, a very much stronger case of contributory negligence would be presented. But, under all the authorities, the occupancy of the front platform of the car, in the ab-

sence of any rule forbidding it by the company, in the face of the custom shown, and of the fact that the fare was accepted from the passenger by the conductor while in that position, cannot be held to be contributory negligence per se. On the subject of contributory negligence in this class of cases, see, also, *Railway Co. v. Walling*, 97 Pa. St. 55, and *Railway Co. v. Gallagher*, 108 Pa. St. 524. The appellant, in its reply brief, noticing these last two cases, says that in neither case did the plaintiff select a high stool to sit upon, but was in a position in which he could look out for himself. As we have before indicated, the stool which was occupied by the respondent does not affect the question of contributory negligence one way or the other.

Many instructions were offered by the appellant, which were refused by the court, and we think properly. There were 14 long instructions, with a great deal of rehearsal and repetition, and the giving of those asked by the appellant would certainly have tended to confuse the minds of the jurors, rather than enlighten them. Such points as there were in the instructions were on the line of the contention of appellant that the acts proven constituted negligence per se. The court properly instructed the jury, the essential part of the instruction, so far as the contested questions in this case are concerned, being: "You are instructed that the fact that the plaintiff was riding on the front platform of the car at the time of the accident does not in itself make him guilty of contributory negligence; but you are to determine whether or not he was guilty of contributory negligence in the particular instance by all the facts and circumstances connected with the action as shown by the testimony." This is the pivotal question in the case, and we think the instruction was correctly given.

Some 25 special interrogatories were prepared by the appellant, which it asked to have submitted to the jury. The court refused the motion to submit, and such refusal is urged here as reversible error. These interrogatories, like the instructions, are to a great extent repetitions in substance, presented in different language. But, if they were not, this court has held that the question of submission of special interrogatories is addressed to the discretion of the trial court, and will not be reviewed here. *Pencil v. Insurance Co.*, 3 Wash. St. 485, 28 Pac. 1031. The judgment will be affirmed.

SCOTT, GORDON, and ANDERS, JJ., concur. HOYT, C. J., dissents.

(5 Cal. Unrep. 557)  
LIVINGSTON et al. v. WIDBER, Treasurer.  
(S. F. 370.)

(Supreme Court of California. Dec. 28, 1896.)

MANDAMUS—DEFENSE.

Where, pending an appeal by a city treasurer from an order directing him to pay certain

coupons out of certain moneys paid in under protest, the action by the property owners, who paid in the money, to recover the same, is determined against them, the defense, to the issuance of the writ, of the pendency of such action, is unavailable.

In bank. Appeal from superior court, city and county of San Francisco; James M. Seawell, Judge.

Proceeding by one Livingston and others against one Widdber, treasurer, etc., for a writ of mandate. There was a judgment for petitioners, and defendant appeals. Affirmed.

Harry T. Creswell, for appellant. E. B. & George H. Mastick and Freeman & Bates, for respondents.

PER CURIAM. The plaintiffs sought by this proceeding a writ of mandate commanding the defendant, as treasurer of the city and county of San Francisco, to pay certain coupons of the Dupont street bonds. The defendant pleaded as a defense to the proceeding that the moneys in his hands belonging to the Dupont street fund had been paid in under protest, and that the parties paying the same had instituted an action, entitled "Davis v. The City and County of San Francisco," which was then pending in this court, and undetermined, for the recovery of the moneys so paid, and that for this reason he was entitled to retain the same until the determination of that action. The superior court, however, rendered judgment awarding the writ, from which he appealed. Since the appeal was taken, the action of Davis v. City and County of San Francisco, has been determined by this court against the plaintiff therein (46 Pac. 863), by which the defense alleged in the present action has become unavailing. The judgment is affirmed.

(115 Cal. 437)

GOGGIN v. D. M. OSBORNE & CO. (S. F. 503.)

(Supreme Court of California. Dec. 29, 1896.)

MASTER AND SERVANT—PERSONAL INJURY—DEFECTIVE APPARATUS—QUESTIONS FOR JURY.

1. In an action for personal injuries, where it appears that an elevator had been undergoing repairs; that afterwards defendant, employer, told plaintiff that the elevator was repaired, and directed him to load some machinery on it, and take it to a lower floor; that in adjusting a load it was necessary for employes to enter the elevator; and that while plaintiff was so employed the stay ropes broke,—it is a question for the jury whether plaintiff knew that the elevator was dangerous at the time and for the purpose in which he was using it.

2. It was a question for the jury whether defendant had exercised reasonable care to make the elevator safe for the purposes in which plaintiff was required to use it.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by James H. Goggin against D. M. Osborne & Co. for personal injuries. From a judgment in favor of plaintiff, and from an

order denying a new trial, defendant appeals. Affirmed.

Wilson & Willson, for appellant. Sullivan & Sullivan, for respondent.

BRITT, C. Plaintiff had a verdict and judgment in this action for damages on account of personal injuries suffered by him while in the employ of defendant, a corporation, which injuries he alleged to be the consequence of defendant's negligence. The immediate occasion of such injuries was the fall of a platform freight elevator or hoist used by defendant for transporting goods between the several floors of its warehouse, plaintiff being precipitated with the same from the third story to the basement of the building. It is insisted for reversal that plaintiff is clearly shown by the evidence to have been guilty of contributory negligence; that he knew the elevator to be dangerous to passengers, and that a rule of the establishment forbade employes to use it except for the carriage of freight; that, having such knowledge, he should have descended by a stairway, but was in fact using the elevator for his greater convenience in that particular when the accident occurred. Negligence of plaintiff was not pleaded in the answer, and he contends that it is, therefore, unavailable as a defense. We do not find it necessary to consider the question of pleading. There was evidence that the elevator was often out of order, and that for two days next preceding the accident by which plaintiff was injured it had been undergoing repairs; that when these were completed defendant's local manager—the same person who had promulgated the rule above mentioned—told plaintiff that the elevator was "fixed," and directed him to load certain machinery on the same at the third or uppermost floor of the building, and descend to a "deck" between floors, and take thence other freight; that the common—and plaintiff testified the only—way of reaching the deck was by means of the elevator when this was in use; that in adjusting the load it was usual and necessary for employes to go upon the elevator; that plaintiff did so on this occasion, and, while he was thus on the same in obedience to said directions of the manager, the sustaining ropes broke, and it fell. One Beghul, who saw the accident, testified that the elevator broke down while the loading was in process; the testimony of plaintiff himself in this regard (if the point be material) is not entirely clear; but, though it is apparent that he intended to descend on the elevator, there is nothing in his testimony or in his complaint inconsistent with said statement of Beghul. There was also evidence that any regulation against using the hoist to ride on was frequently disregarded by the defendant's servants of all grades of employment, from the said manager down. Granting, now, the contention of appellant that the evidence shows without material conflict that the hoist, to the knowl-

edge of plaintiff, had been dangerous for use as a passenger elevator, and he had received warning against making such use of it, yet in view of the statement of the manager, after the last repairs, that it had been "fixed," his orders to plaintiff relative to moving the freight, the fact that to use the elevator at all plaintiff must get on the same, and the other matters which we have briefly stated, it seems to us very clear that it became a question for the jury whether plaintiff knew that the apparatus was dangerous at the time and for the purpose in which he was employing it when it broke, and so assumed the risks consequent upon such use; and, what is much the same proposition, it cannot be said as matter of law that a person of ordinary prudence would have refused to use the elevator in the manner plaintiff did. *Fernandes v. Railway Co.*, 52 Cal. 45; *Whalen v. Railroad Co.*, 92 Cal. 669, 28 Pac. 833; *Van Praag v. Gale*, 107 Cal. 438, 40 Pac. 555; *Davis v. Pacific Power Co.*, 107 Cal. 575, 40 Pac. 950.

The further point is made that defendant was not negligent, because, counsel say, immediately before the accident it caused all repairs to be made on the elevator which were deemed necessary by an expert. This view does not seem wholly consistent with the argument that the elevator was dangerous, and known on all hands to be so. But the inquiry in this behalf was whether defendant had used reasonable care to make the elevator safe for the purposes in which plaintiff was required to employ it; and here also was a case made for the consideration of the jury. It was in evidence that the hoist was of a class of "rather poor elevators," and that there were defects in the same, known to the manager, which may have contributed to the accident, and which were not repaired at all. The expert himself testified that the elevator as repaired by him was unsafe for passengers, and that he so informed the manager. We recommend that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(115 Cal. 441)

SPAULDING v. WESSON et al. (S. F. 41.)  
(Supreme Court of California. Dec. 29, 1896.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT  
—CREATION OF LIEN—WANT OF JURISDICTION.

1. Under a street-improvement act which gave the board of supervisors authority to order the improvement of public streets only, an order of the board for the grading of a street which was for the greater part held in private ownership, was ineffectual to create a lien on any of the abutting lands, though some of the owners, prior to the order, had dedicated to the public the street in front of their premises.

2. Where a municipal corporation had no jurisdiction to make an order for the improve-

ment of a street, because at the time it was for the greater part held in private ownership, such jurisdiction could not be established by a subsequent dedication of the street to public use.

In bank. Appeal from the superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by one Spaulding against one Wesson and others to recover a street assessment. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

J. C. Bates, for appellants. W. H. H. Hart (D. H. Whittemore, of counsel), for respondent.

HARRISON, J. Action to recover a street assessment upon certain land in San Francisco. Judgment was rendered in favor of the plaintiff, and the defendants have appealed.

One of the defenses to the suit is that at the time the resolution ordering the work was adopted by the board of supervisors the street therein described had never been dedicated to public use, and was not a public street, but was held in private ownership. The resolution ordering the work to be done was passed August 13, 1877, and provided for grading Union street from Larkin street to the westerly line of Franklin street. The court found that at that date the board of supervisors had acquired jurisdiction to order said work, and the whole of it, to be done. This finding is attacked by the appellant upon the ground that it is not supported by the evidence. Union street, between Larkin and Franklin streets, is situated in that portion of San Francisco which is embraced within what is known as the "Laguna Survey." In 1848, Leavenworth, then alcalde of the town of San Francisco, made grants of several 100-vara lots in the vicinity of the lagoon, and the tract covered by these grants has since been called the "Laguna Survey." The lots thus granted were contiguous to each other, without any intervening streets. Upon the map which was made under the Van Ness ordinance, and validated in 1858 (St. 1858, p. 56), various streets, including this portion of Union street, were projected through the land covered by this survey; but it was held in *Scott v. Dyer*, 54 Cal. 430, that by the Leavenworth grants the grantees became the absolute owners of the lands granted, and that no portion of these lands could be appropriated to the use of the public as a street, except upon making compensation therefor.

At the trial of the present case evidence was offered to the effect that the defendant Wesson became vested in 1872 with the title to the 100-vara lot No. 15 that had been granted by Leavenworth in 1848. This 100-vara lot embraced the premises of the defendant described in the complaint, and also a portion of Union street fronting thereon. Wesson testified that he remained in possession of the property until the grading was completed, and

did not in any way part with his title to the land until he made a conveyance to the city in 1891 of that portion of Union street which was embraced in his 100-vara lot; and it was admitted on behalf of the plaintiff that at the time the above order for the improvement of Union street was made certain individuals were vested with the title to portions of the street which were embraced within grants in the Laguna survey made by Leavenworth. It was also shown that until the time when the work of grading the street was begun under the contract entered into by virtue of the order, Union street was closed by fences running across it at several points. The street-improvement act under which these proceedings were had gave to the board of supervisors authority to order the improvement of only public streets, and when it was shown that the greater part of Union street between Larkin and Franklin was held in private ownership, and had not been dedicated to public use, it was clear that the order for its grading, and all the proceedings taken thereunder, were without authority, and were ineffectual to create a lien upon the adjacent lands. *Spaulding v. Bradley*, 79 Cal. 449, 22 Pac. 47, involved an action upon the same assessment as the present, to foreclose a lien upon a lot directly across the street from the lot described in the complaint herein, and upon evidence substantially the same as that presented in the present case it was held that the plaintiff had no right of recovery.

Evidence was introduced on behalf of the plaintiff for the purpose of showing that by reason of certain conveyances in which the lot described in the complaint had been bounded by Union street, that portion of the street had been dedicated as a public street; but, even if it be conceded that these conveyances had that effect, it would not render the assessment valid. A dedication of the street in front of this lot by the owners would not have the effect to dedicate other portions of the street which were held by different owners. The improvement of the street from Larkin to Franklin street was an entirety, and, unless the board of supervisors had jurisdiction to order the grading of the whole of that portion of the street, no portion of the expense could be made a lien upon the defendants' lot. The entire cost of the grading was by the act to be assessed upon the entire frontage, and each lot at a rate per front foot sufficient to cover the total expense of the work. There was no authority to charge the defendants' lot with the burden of any portion of the expense of grading private property adjacent thereto which lay within the lines of the street, and an assessment which included such charges would be invalid. *Partidge v. Lucas*, 99 Cal. 519, 33 Pac. 1082; *Ryan v. Altschul*, 103 Cal. 174, 37 Pac. 339.

There was also evidence tending to show that Wesson and other property owners knew of the grading of the street while it was being done, and made no objections thereto; and

also that after the grading was completed fences were placed along the sides of the street, and it was thrown open to public use; but, as these acts were subsequent to the time when the order for the grading was passed by the board of supervisors, they cannot be considered. Unless there was jurisdiction in the municipality to make the improvement at the time the order was passed, such jurisdiction could not be established by a subsequent dedication of the street. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

(115 Cal. 512)

FRICK et al. v. CITY OF LOS ANGELES.  
(L. A. 135.)

(Supreme Court of California. Dec. 31, 1896.)

MUNICIPAL CORPORATIONS — CONTRACTS WITH —  
FORMAL REQUISITES—CHARTER.

1. Los Angeles City Charter (St. 1889, p. 506) § 207, requiring contracts with the city to be in writing and signed by the mayor or some other person authorized thereto in behalf of the city, does not violate Const. art. 11, § 6, which declares that such charters "shall be subject to and controlled by general laws," merely because it prescribes certain forms in addition to the essentials provided by the Code for contracts in general.

2. Equity will not declare a city bound by a contract not executed in accordance with the requirements of the charter, when the other party has suffered no damage except the conjunctural loss of profits.

3. The charter of Los Angeles is a "statute," within Civ. Code, § 1622, providing that all contracts may be oral except when required by statute to be in writing.

"Commissioners' decision." Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by William A. Frick and others against the city of Los Angeles to recover damages for breach of contract. A demurrer to the complaint was sustained, and plaintiffs appeal. Affirmed.

R. J. Adcock and Clarence A. Miller, for appellants. W. E. Dunn and Albert Crutcher, for respondent.

BRITT, C. Plaintiffs claim damages in this action for the alleged prevention of performance on their part of the stipulations contained in a certain paper writing, which they say is a contract between themselves and the defendant for the construction of a public sewer. It is declared by section 207 of the city charter (printed with the Statutes of 1889, at page 506) that "the city of Los Angeles shall not be, and is not, bound by any contract, or in any way liable thereon, unless the same is made in writing by order of the council, the draft thereof approved by the council, and the same ordered to be, and be, signed by the mayor or some other person authorized thereto, in behalf of the city." It is not in terms alleged in the complaint that the city entered

into a contract with plaintiffs expressed by said paper writing, but the pleader set forth the proceedings taken by the parties looking to the creation of such a contract. It thus appears that plaintiffs signed the instrument, and that the council—in which is vested the legislative power of the city—took the several steps required of it by the above-quoted portion of said section 207 in order to impart validity to such instrument as a municipal contract, and ordered the mayor to sign the same on behalf of the city; but it is not shown that it ever was so signed. The court sustained a demurrer to the complaint and dismissed the action.

Plaintiffs' main contention is that the provision of the charter requiring contracts of the city to be in writing and signed by the mayor, or some other person authorized thereto, in behalf of the city, is in conflict with the general law of the state concerning the manner of creating contracts, and therefore void under the clause of the constitution (article 11, § 6) declaring that such charters "shall be subject to and controlled by general laws." Numerous sections of the Civil Code are supposed to be thus contravened,—as section 1550, declaring the essentials of a contract, capable parties, their consent, etc.; section 1582, allowing acceptance of a proposal to be communicated in any reasonable and usual mode; section 1622, providing that all contracts may be oral except such as are by statute required to be in writing; and the like. Without examining all the propositions on which plaintiffs found their somewhat elaborate argument, we may admit that the charter provision under view required some ceremony for the formation of a contract and the manifestation of the city's consent thereto, in addition to the essentials of like obligations described and declared in the general law devoted to the subject of contracts. So has the law of such corporations time out of mind. Such formalities are fixed by the charter as the particular method by which the municipal officers must accomplish the object of bringing the city into a contract, but do not on that account add to or take from the constituents of a valid contract declared by the general law. Section 223 of the charter declares void any indebtedness (with certain exceptions) contracted by the city in excess of \$2,000,000. The Code imposes no such limitation on the freedom of contracts. Yet we suppose there is no conflict between the charter and the Code in this particular. Section 62 requires the sureties on the bonds of city officers to be owners of real estate in the city or county of Los Angeles. No such restriction on the right to become a surety is contained in the Code sections relating to the competence of parties to contracts, or in those which treat specially of the law of suretyship. But it will hardly be contended that on this account the qualification required of such sureties is void. As to the provision of section 1622, Civ. Code, that all contracts may be

oral except when required by statute to be in writing, if we concede that it has relevancy to the controversy here, we are yet clearly of opinion that the charter, as an instrument of government, and in its political provisions, is a "statute," within the meaning of that section. It is undoubtedly a law, though of local operation. The constitution declares it to be the organic law of the city. Article 11, § 8. It is of course a written law, and for very many purposes the terms "statute" and "written law" are used indifferently. See *And. Law Dict.* tit. "Statute"; 1 Bl. Comm. 85, 475.

It is urged that, "in equity," the instrument must be regarded as though the mayor had signed it. Nothing appears in the complaint tending to bring the case within any principle on which equity aids or ignores the defective execution of an instrument. The charter provided the mode in which the city could become bound, and certainly equity will not decree that it shall be bound in some other way in favor of parties who have suffered no detriment except the conjectural loss of profits they might have made by performance of the contract if it had become obligatory on the city. *Pavement Co. v. Broderick* (Cal.) 45 Pac. 863; *Gas Co. v. Toberman*, 61 Cal. 200; *Zottman v. San Francisco*, 20 Cal. 90. The judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(5 Cal. Unrep. 558)

BARNHART v. EDWARDS et al. (Sac. 150.)

(Supreme Court of California. Dec. 28, 1896.)

MORTGAGE—PAROL EVIDENCE—PAYMENT OF TAXES  
—FORECLOSURE—ASSIGNMENT OF ERRORS  
—CONVERSION BY PLEDGEE.

1. Where a conveyance was made as security for certain money advanced, parol evidence is inadmissible to show that, by agreement with the attorney of the grantor, the effect of the instrument was changed so as to also secure future advances.

2. An instrument by which land was conveyed to secure advances which provided for the repayment of all taxes upon the lands conveyed did not invalidate the agreement under Const. art. 13, § 5, providing that contracts for payment of taxes upon the "money loaned" should be void.

3. An instrument conveyed certain lands to secure, among other matters, a loan of \$2,500, secured by a pledge of certain wheat. *Held*, in an action to foreclose the lien, that, as the note was expressly named as one of the debts secured, it was incumbent on defendant, if he would avoid liability therefor, to plead the facts by virtue of which the land had been exonerated from this liability.

4. An assignment that the court erred in finding that a certain sum was due from defendant to plaintiff is not a specification of the "particulars" in which the evidence is insufficient to sustain the finding.

5. Where wheat pledged is taken from the possession of the pledgee in attachment against the pledgor, and the litigation in relation thereto is conducted by the attorneys of the pledgor,

the pledgee cannot be charged with conversion when the attachment is sustained.

6. Certain land was transferred to plaintiff to secure a loan. At the time of the transfer, it was under a lease which the lessee subsequently assigned to plaintiff. *Held*, by thus getting possession, plaintiff became the mortgagee in possession, and was liable to defendants only for the income and profits received from the land.

Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by Barnhart against J. T. Davis, Edwards' administrator, and others. Judgment for plaintiff. Defendant Davis appeals. Modified.

P. J. Hazen and Nicol & Orr, for appellant. Jas. A. Louttit and Minor & Ashley, for respondent.

HARRISON, J. E. C. Vancil, the intestate of the defendant Edwards, executed to the plaintiff, April 23, 1879, a conveyance of certain lands in the county of San Joaquin, as a security for the payment to him of certain sums of money. The transaction was evidenced by a conveyance absolute in form, and a separate defeasance in the nature of an agreement for the sale of said land to the grantor for the considerations therein named. These considerations consisted, however, entirely of moneys paid out or expended by the plaintiff, and the conveyance of the lands to the plaintiff was intended only as a security for their repayment. The present action is in the nature of a foreclosure, and was brought to obtain judgment against the estate of the grantor for the amount of such payments alleged to be still unpaid, and for the sale of the land in satisfaction thereof. The defendant Mordecai A. Vancil is the son of E. C. Vancil, but is also known by the name of John T. Davis, and under that name has appealed from the judgment rendered in favor of the plaintiff, and also from an order denying his motion for a new trial. The appeal from the judgment was heretofore dismissed upon the motion of the respondent (111 Cal. 428, 44 Pac. 160), leaving only the appeal from the order to be considered. The grounds upon which the appellant urges a reversal of the order are that the court erred in holding that certain advances made to him by the plaintiff were secured by the mortgage, and also that certain items were chargeable against the plaintiff in his account with the mortgagee, and should have been deducted from the advances made by him for which the security was given.

1. The advances of the plaintiff which the appellant contends are not secured by the mortgage consist of four items, viz.: The sum of \$100, paid to Hughes, April 25, 1879, at the request of Davis, upon the claim that it was owed by him; \$250, paid to Davis, June 7, 1880, for which he gave the plaintiff the note of E. C. Vancil; \$100, paid to Davis on his note, April 22, 1881; and \$291.60, paid for a note of Davis, purchased from Long,

August 2, 1881. The sums of money for whose repayment the security was given, as expressed in the instrument of defeasance, are the following: The \$2,300 named in the deed of conveyance as its consideration, and which was used in paying certain debts against Davis in the city of Stockton; a note for \$2,500 that had been executed by Davis to the plaintiff, and for which certain wheat had been pledged as security; the costs and expenses, including attorney's fees, incurred, and that might be incurred, in certain litigation concerning said wheat; and all taxes that the plaintiff should pay on the land. It is very clear that any moneys that might be thereafter paid to Davis, or advanced by the plaintiff for his benefit, are not included in these items, or in the purpose for which the security, as expressed in the instrument, was given. It was, however, contended by the plaintiff that there was a parol agreement between the parties to the transaction that it should be security for such advances as the plaintiff might thereafter make to Davis; and, against the objection of defendants, evidence was introduced for the purpose of sustaining this contention. That such evidence was improperly admitted is evident from the provisions of section 2,922, Civ. Code, as well as from the general rule that parties to a written instrument are presumed to have incorporated therein all the terms of their agreement, and that its contents cannot be varied by parol. But, irrespective of this rule, we are of the opinion that the plaintiff failed to show that it was intended by the parties that these advances should be secured by the instrument. Judge Budd, by whom the instrument was drawn, testified that, as far as he could remember, he embodied therein all the agreements of the parties as they were stated to him, and that the instruments were read and explained to them before they were signed; and he was unable to say that they gave him any instruction that the mortgage was to be security for subsequent advances to Davis. Davis himself was not present at Budd's office when the instruments were drawn, and the plaintiff testified that he helped dictate the deed and heard the agreement read after it was prepared, and that no dissatisfaction was expressed; and he does not testify that it was agreed, or that it was the intention of the parties, that it should be a security for such advances. The effect of the instrument could not be changed by any subsequent parol declaration by Vancil's attorney of the object of the instrument, or by the fact that the plaintiff made the advances upon his assurance that they should be thus secured.

2. The agreement for the repayment of all taxes upon the land described in the instrument of defeasance does not fall within the purview of section 5 of article 13 of the constitution. This provision does not invalidate an agreement by the mortgagor to pay the taxes upon the "land" mortgaged, but is limited



ited to the taxes upon the "money loaned," or the "mortgage, deed of trust or other lien." By section 4 of the same article the mortgage is, for the purposes of assessment and taxation, to be treated as an interest in the property affected thereby, but only such value as there may be to the property so affected after deducting the value of the security is to be taxed to the owner of the property; the value of the security is to be assessed and taxed to its owner. It does not appear that any of the taxes paid by the plaintiff were upon the security, or other than those which were assessed upon the land after deducting the value of the security. If the defendant would claim the right to rely upon the provisions of section 5, it was incumbent upon him to show the existence of the circumstances under which the provision may be invoked.

3. At the time of the execution of the mortgage, the wheat that had been given in pledge for the payment of the \$2,500 note had been attached in an action against Davis, and taken from the possession of the plaintiff. This wheat belonged to Vancil, and had been pledged by Davis to secure his own note; but by the instrument of April 23, 1879, Vancil ratified the transfer by Davis to the plaintiff. Davis also testified that all the business done by him since 1876 had been done by him under his name of Davis, but for Vancil; and it was also shown that, prior to the commencement of the present action, Vancil had conveyed to Davis all real and personal property owned by him in the state. Prior to the execution of the instruments of April 23, 1879, the plaintiff had brought a suit in replevin for the wheat, and judgment in that action was thereafter rendered against him, and the wheat sold in satisfaction of the judgment in the suit against Davis, wherein it had been attached. It is contended by the appellant that it was the duty of the plaintiff to defend the possession of the wheat, and that, by reason of his failure so to do, the court should have charged him with its conversion, or with its value above the amount for which it was pledged to him. No such issue is, however, presented by the answers of the defendants; and it does not appear from the record that any proposition of this nature was submitted to the court below. In his assignments of errors of law, the plaintiff has specified that the court erred "in charging defendant and the premises mortgaged with the \$2,500 secured by pledge of the wheat sued for in the case of *Barnhart v. Fulkerth* (29 Pac. 50)"; but, as this note was expressly named in the mortgage as one of the debts secured by it, it was incumbent upon the appellant, if he would avoid liability therefor, to set forth in his answer the facts by virtue of which he would claim that the land had been exonerated from this liability. The further assignment that the court erred in finding that the sum of \$7,668.12 is due from the defendant to plaintiff cannot be considered as a specification of the "particulars" in which the

evidence is insufficient to sustain this finding. But, disregarding the absence of an issue upon this proposition, we are of the opinion that it sufficiently appears from the record that the court did not err in refusing to charge the plaintiff with the loss of this wheat. After the plaintiff had introduced evidence of the amount yet unpaid upon the obligations for which the security was given, if the defendants would reduce this amount it was incumbent upon them, whether authorized by the pleadings or not, to offer evidence sufficient in law to be available for such reduction, from which the court could determine the amount by which the reduction should be made. The defendants offered in evidence the findings by the court in the replevin suit of the plaintiff, that, prior to the attachment in the suit against Davis, the sheriff had tendered to the plaintiff the sum of \$2,600, and the plaintiff testified that he received \$2,500 from that suit. In the findings herein, he is charged with \$2,540, as of November 19, 1892; and it seems to be admitted in the briefs of counsel that this was for the tender made by the sheriff when the wheat was taken. There is, however, no evidence in the record of the value of the wheat, or of the amount for which it was sold by the sheriff. Unless it had some value beyond the amount for which the plaintiff has been charged in his account, there is nothing with which he should have been charged, and it was for the defendants to show that it had such value. The plaintiff cannot be charged with a conversion of the wheat. It was taken from his possession by the arm of the law, and the record fails to show any affirmative act of his by which it was lost to the defendants. On the contrary, it appears that the litigation was conducted by the attorneys of Davis, who was the agent of Vancil, and acting for him, and by whose advice the plaintiff declined to take the money when tendered him. The defendant cannot invoke in this action, as conclusive upon the plaintiff, any findings made by the court in the replevin suit, in which he was not a party.

4. In October, 1876, the land conveyed to the plaintiff was leased to Hughes for the term of five years, at a rent of \$1,500 per annum; and in September, 1880, Hughes made an assignment of this lease to the plaintiff. It is contended by the appellant that, by reason thereof, the plaintiff, as assignee of the land, became liable for the rent thereby reserved for the succeeding year, and should be charged with this amount in his account. As has been said with reference to the wheat transaction, this was a defense which must be affirmatively established by the defendants in order to render it available; and the record fails to show that the court erred in not holding that it was established. Although there was testimony that Hughes did, in fact, make an assignment of the lease to the plaintiff, yet at that date the plaintiff was the legal holder of the title to the land, and was,

in fact, the landlord of Hughes; and the transaction was intended to be, and did in reality constitute, a surrender of the term by which the plaintiff, as landlord, was restored to the possession of the leased premises. The plaintiff testified in reference to this transaction: "Hughes could not carry on the ranch. He threwed it up, and, at Davis' request, I carried it on. Hughes assigned the lease to me, and I took a new lease at the same time." By thus getting possession of the land, the plaintiff became a mortgagee in possession, and was liable to the defendants for only such income and profit as he may have received from the land. He testified that he never collected any rent from Hughes, and it appears that he has fully accounted for all the income and profits derived from the land during the time he was in possession.

The superior court is directed to deduct from the amount which it has found due to the plaintiff, as set out in finding 7, the items of \$100, paid to Hughes, April 25, 1879; \$250, paid to Davis, cash, on note June 7, 1880; \$100, paid to Davis, cash, on note April 22, 1881; and \$291.60, paid for note to Long, August 2, 1881, with whatever interest has been allowed by reason of said items, and to make a corresponding amendment of its conclusions of law. The order denying a new trial will thereupon be affirmed. Judgment will then be entered in accordance with the findings as thus corrected.

We concur: VAN FLEET, J.; McFARLAND, J.

(115 Cal. 454)

HANKINS et al. v. OTTINGER et al. (S. F. 382.)

(Supreme Court of California. Dec. 31, 1896.)  
CONTRACTS—WAGERS—PREMIUMS ON HORSE RACES  
—ENTRANCE MONEY.

1. Competing for premiums offered by an association on horse races is not competing for bets or wagers, and an agreement between two owners of horses to pool all premiums and stake moneys awarded on their horses, and to divide the same equally, is valid.

2. The payment of entrance money to an association as a fee for the privilege of competing in a horse race in which a premium is offered by the association, does not make the transaction a wager as between the competitors.

Department 1. Appeal from superior court, city and county of San Francisco; William R. Daingerfield, Judge.

Action for breach of contract. From a judgment in favor of plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Davis & Hill, for appellants. Rothchild & Ach, for respondents.

VAN FLEET, J. It is contended that the contract sued on was without consideration, in that it was a mere wagering venture, which was void as against public policy, and not enforceable in a court of law. The con-

tract, as alleged and found, was substantially this: The plaintiffs and the defendants, both owning race horses, and having them entered in certain stake races about to be given by the Pacific Coast Blood Horse Association and the California Jockey Club, made the agreement between themselves that they would pool all premiums and stake moneys offered by said associations on said races, which should be awarded to either or any of their said horses, and divide the same equally,—one-half to the plaintiffs and one-half to the defendants. It was found that one of the defendants' horses was awarded a purse so offered, amounting to \$5,480, which defendants now refuse to divide. At common law a wager made in respect to matters not affecting the feelings, interests, or character of third persons, or the public peace, or good morals or public policy, was valid, and its payment could be enforced; but if it was of a kind to affect the interests or character of third persons, or was in relation to a matter which militated against good morals or sound public policy, it was void, and no action in affirmance of such a contract could be maintained. Whether betting on horse races was of a character to fall within the latter class at common law is a matter about which there is elsewhere some contrariety in the adjudged cases. But, so far as this state is concerned, the question has been directly settled in the case of *Gridley v. Dorn*, 57 Cal. 78, where it was held that such contracts are void, as contravening good morals, and cannot be enforced by the courts. It is well settled, however, that a bet or wager, such as comes within the rule of public policy and good morals invoked in that case and by the appellants here, is where the parties competing themselves each put up or bet a certain sum or valuable thing, which is to be taken by the winner and forfeited by the loser on the turn of the event. *Alvord v. Smith*, 63 Ind. 58; *Harris v. White*, 81 N. Y. 532. Such a contract will not be affirmed by the courts, but the parties will be left for redress to their own code of ethics. But the contract presented for consideration was not such a contract. It related solely to purses or stake moneys to be paid by the associations offering them, and covered nothing which the parties themselves might see fit to hazard. There was no wager or bet of their own money to be lost by one and taken by the other, but only that of a third party offered for their competition. This did not constitute the transaction a wager. "There is a clear distinction," say the supreme court of judicature of Indiana in *Alvord v. Smith*, supra, "between a wager or bet and a premium or reward. In a wager or a bet there must be two parties, and it is known before the chance or uncertain event upon which it is laid is accomplished who are the parties who must either lose or win. In a premium or reward there is but one party until the act or thing or purpose for which it is offered has

been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known till after the event. The two need not be confounded." That was a case where the winner of a purse offered by a trotting association on a race sued to recover the amount upon the association refusing to pay; the defense of the latter being that the purse was a mere wager, which did not constitute a valid consideration for their promise. It was held that the winner could recover. The distinction between a bet or wager and a premium or purse is thus given in *Harris v. White*, supra: "A bet or wager is ordinarily an agreement between two or more that a sum of money, or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them on the happening in the future of an event at the present uncertain; and the stake is the money or thing thus put upon the chance. There is in that this element that does not enter into a modern purse, prize, or premium, viz.: that each party to the former gets a chance of gain from others, and takes a risk of loss of his own to them. 'Illegal gaming implies gain and loss between the parties by betting, such as would excite a spirit of cupidity.' *People v. Sergeant*, 8 Cow. 139. A purse, prize, or premium is ordinarily some valuable thing offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered; and, if he abide by his offer, that he must lose it, and give it over to some of those contending for it, is reasonably certain." It is betting or wagering on the event of races which is regarded by the law as immoral, and which it undertakes to discourage by refusing its countenance in the way of legal redress to enforce such compacts. Trials of speed between horses, commonly denominated "horse races," are not in themselves, and apart from the improper purposes they may be made to subserve, discountenanced by the law. Nor is the giving of purses or premiums by associations or individuals, not themselves competing, for the purpose of encouraging such contests, regarded as contrary to good morals or forbidden. Were these things unlawful, our state and district agricultural societies, which are fostered and encouraged by the laws of the state, would be compelled to forego one of their most popular and attractive features. The offering of a purse or premium for the fastest race horse is not distinguishable in principle, however it may be otherwise regarded, from the giving of a premium for the best qualities in other respects in the horse, as for draught or breeding purposes, or for the best breed of bulls or cows or other domestic animals. In the one case it encourages the breeding of the animal for his qualities of speed; in the other, it brings out the

best draught horse or brood mare, or the most desirable breed of cattle, sheep, or hogs. And competing for such premiums or offerings, whatever may be their designation, is not competing for a bet or wager. As suggested in *Alvord v. Smith*, supra: "Under our statutes (1 Rev. St. 1876, p. 48) encouraging agriculture and authorizing public fairs, premiums are offered for the best draught horse, saddle horses, trotting horses; the best stock for this or that purpose. These premiums are certainly not wagers. As well might we call an insurance policy a wager, because it is to be paid on an uncertain event, as to call a premium a wager, because we do not know who will be entitled to it until the event happens. We see no difference, indeed, in principle between a premium offered by an authorized corporation and one offered by a private partnership. Neither are wagers, nor are they unlawful." In the present case the evidence shows that the amount found to have been won by defendants was all money offered by the associations. The fact that the latter added to the \$5,000 purse the amount of the entrance money, to be divided between the first, second, and third horses in the race, did not tend to impart to the transaction the character of a wager between the competitors. This entrance money had been paid to the associations by the various persons desiring to compete in the race, respectively, not as a wager or bet, which might be withdrawn before the event, but as a fee for the privilege of entering in the race, which became and was the property of the association as much as was the principal purse of \$5,000. It constituted, in no proper sense, a bet or wager between the parties.

The objection that the evidence does not sustain the finding that defendants were partners in the transaction is untenable. Under the evidence, the court was fully justified in finding the existence of that relationship; and also that Ottinger was authorized to enter into the agreement in behalf of the partnership. The order denying a new trial is affirmed.

We concur: HARRISON, J.; McFARLAND, J.

(115 Cal. 487)

# HOWLAND v. OAKLAND CONSOLIDATED ST. RY. CO. et al.

(S. F. 468.)

(Supreme Court of California. Dec. 31, 1896.)

WITNESSES—CROSS-EXAMINATION—CURING ERROR BY INSTRUCTION—TRIAL—COMMENT ON WEIGHT OF EVIDENCE—OPINION EVIDENCE.

1. Where the condition of the brakes on defendant's car at the time of the accident was in issue, it was prejudicial error to permit plaintiff to ask a witness for defendant, on cross-examination, whether he had not been told that T., the motorman in charge of the car, "had testified [on a former trial] that these brakes were out of order," since it brought to the attention of the jury, and assumed as a fact, without other proof, that T. had so testified.

2. Such error was not cured by a subsequent instruction to disregard as evidence any statements of counsel as to what testimony was given on the former trial.

3. In an action for personal injuries, it was improper for plaintiff's attorney to question him, on direct examination, in regard to injuries received in another accident occurring shortly before the trial, on the plea of explaining an apparent nervousness in plaintiff's manner.

4. It is error, in denying a motion to strike out certain testimony, to suggest that it may "stand for what it is worth."

5. A particular objection to evidence, not specified in the court below, cannot be urged on appeal.

6. Where the opinion of an expert is asked on facts not detailed in the question itself, but appearing in the testimony of another, to which the expert is referred, it must appear that he heard such testimony.

7. A nonexpert witness, who was on the platform of a horse car at the time of the collision, may state whether, had the driver of the car been at his post, the car could have been stopped in time to have avoided the accident.

Department 1. Appeal from superior court, Alameda county; A. L. Frick, Judge.

Action by F. P. Howland against the Oakland Consolidated Street-Railway Company and another. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant railway company appeals. Reversed.

Chickering, Thomas & Gregory and Fitzgerald & Abbott, for appellant. Coogan & Foote and F. E. Whitney, for respondent.

VAN FLEET, J. The action was to recover damages resulting to plaintiff from loss of the aid and services of his wife, and the comfort of her society, and incidental medical expenses incurred, by reason of personal injuries suffered by the wife through the negligence of the defendants. Plaintiff had judgment against both defendants, and the Oakland Consolidated Street-Railway Company appeals therefrom, and from an order denying its motion for a new trial, assigning as erroneous certain rulings in the admission of evidence and in the giving of an instruction, and that the damages are excessive. Several of these rulings we regard as so obviously and prejudicially erroneous as to demand a new trial.

1. The injuries were the result of a collision between an electric motor car, in charge of the servants of appellant, and a horse car of its co-defendant, at a point where their roads cross; the wife, a passenger on the car of appellant, being thrown therefrom by the shock, and hurt. One of the controverted questions in the case, growing out of the issue of appellant's negligence, was as to the condition of its car at the time of the accident; the claim of the plaintiff being that it had negligently permitted the brakes on the car to become so far out of repair that they were inadequate to stop or check its speed in time to avoid the collision. Charles Cunningham, a witness on behalf of this defendant (appellant), had testified on

his direct examination that at the date of the accident he was a car repairer for said defendant, and that the brakes on the car were in good condition on the day of the accident. On cross-examination, after some questions, intended to elicit the fact that the witness knew the car or brake was in bad order, he was asked: "Q. Well, you knew it was, didn't you? Don't you know that you were dragged out of bed, and brought in from the car house out there, in a suit of overalls, after Mr. Tyler had testified that this car was not in good condition, fifteen months afterwards?" The Tyler referred to in the question was not a witness in this case, but it had appeared incidentally that he was the motorman in charge of appellant's car at the time of the accident, and had given testimony in another action, previously tried, brought by this plaintiff and his wife, jointly, against the same defendants, to recover damages suffered by the wife from the personal injuries received in the same accident. The question was objected to on several grounds; among others, as incompetent, as containing an improper assumption of fact,—"that there is no evidence of a statement by Tyler in the former case in this case." The court ruled: "There is nothing in this question as to what Mr. Tyler's testimony was. He may answer the question." The witness having answered that he did not know whether Mr. Tyler had testified in the former case before he did or not, because he did not hear his testimony, this question was asked: "I understand you didn't. But didn't the superintendent of the road tell you that Mr. Tyler had testified that these brakes were out of order, and that you were to come and testify that they were in good condition?" This question was also objected to, as bringing before the jury a statement of a third party, not under oath. The objection was likewise overruled, and the witness answered. Appellant, having reserved an exception to these rulings, now urges that they were erroneous, and that the objectionable matter embraced in the questions which was thus permitted to find its way into the case was of a character to greatly prejudice the appellant's case with the jury.

The questions were clearly improper for any purpose. Neither Tyler nor his testimony in the previous case had been mentioned by the witness, and the questions were, therefore, not intended nor were they admissible, as cross-examination of anything stated by the witness; while they involved not only an attempt to impeach the witness upon a collateral issue, which was in itself improper, but what was, under the circumstances of the case, a more serious objection, they brought to the attention of the jury, and assumed as facts, things not in proof bearing upon one of the most material issues, and of a character highly calculated to improperly affect their consideration. As suggested by appellant, the jury could hardly

have failed to get the impression from these questions that Tyler had testified in the former case that the brakes were out of order; and, as the jury had been made aware of the fact that Tyler was the motorman in charge of the car at the time of the accident, they would naturally suppose that he of all others ought to know what the condition of the brakes was. It is true that the trial judge said, in answer to the first objection, that the question did not disclose what Tyler's testimony had been, but in this suggestion he was manifestly in error. Respondent in fact makes no serious effort to evade the objection that the questions were improper, but he contends that, if any impression was made thereby upon the jury, it must have been removed by the comments of the judge made at the time of the ruling and afterwards in his instructions. But while, under some circumstances, errors of this character are susceptible of being thus obviated, we do not think that anything said by the judge in the present instance was justly calculated to wholly remove from the minds of the jury the evil effect of these questions. The jury were told, in effect, that they should not consider as evidence any statements of counsel as to what testimony was given on the previous trial, and that the evidence was not admitted for that purpose; but they were not instructed that there was no competent evidence before them of what the evidence on that trial was; and, as the judge admitted these questions, and several others containing the same objectionable suggestions, over defendant's exception, without clearly defining the purpose for which they were admitted, the jury, notwithstanding what was said by the court, may well have been left with the impression that the matter objected to was competently before them for consideration. In such a case we think the just and safe rule is that followed in *People v. Ah Len*, 92 Cal. 282, 28 Pac. 286, where it was held that the only certain way of avoiding an error of similar character, where it does not clearly appear that it was rendered harmless, is by granting a new trial.

2. During plaintiff's examination by his counsel as a witness in his own behalf this occurred: "Q. Mr. Howland, you appear to be somewhat nervous this afternoon. Have you recently suffered an accident? A. Well, I struck a collision up here in the tunnel about a month ago. Q. You were on the train that collided at the mouth of the tunnel?" (To which question counsel for the Oakland Consolidated Street-Railway Company objected on the ground that it was incompetent, irrelevant, and immaterial; which objection was by the court overruled and an exception duly taken by said defendant.) Counsel for Plaintiff: I want to show the witness is suffering from an injury not connected with this case. Counsel for Defendant: That is all? It is immaterial where he

obtained the accident. Counsel for Plaintiff: Let us see. Let the court pass upon it. Q. You were running as a postal clerk about a month or so ago, were you not? A. Yes, sir. Q. The postal car is next to the engine, isn't it? A. Yes, sir. Q. Were you on either of the trains which collided at the mouth of the tunnel near Altamont, in this county, about a month ago? (The same objection was made to this and overruled.) A. Yes, sir. The Court: Of course, gentlemen of the jury, you will understand the question is not admitted as in any wise affecting the rights of either of these defendants, but simply in explanation of the manner of the witness upon the stand, if there has been anything peculiar in his manner. I don't know whether there has. Counsel for Plaintiff: You were on that train? A. Yes, sir. Q. Did you receive any injury? (This question was objected to for like reasons, and overruled.) A. Yes, sir. Q. Been treated for it since? Some spinal trouble, isn't it? (This was also objected to and overruled.) Counsel for Defendant: I do not know the object of this. There has been nothing peculiar in Mr. Howland's manner, that I have discovered. I do not see the idea of proving that this gentleman has been in another accident. The Court: I think it has gone far enough. Counsel for Plaintiff: Certainly, and I have stopped. The Court: I understood the purpose in asking this question is to explain to the jury the witness appears to be nervous. The jury have a right, in attaching certain weight to the testimony of witnesses, to determine what weight they should give it; to take into consideration his manner and appearance." We have stated the matter thus fully the better to show its objectionable character. This whole examination was improper, as bringing specially and prominently into the case a fact in itself wholly irrelevant to the issues, which, in view of the nature of the action, was well calculated to excite the sympathy of the jury in behalf of plaintiff in his misfortune, and possibly induce a verdict in excess of that warranted by any proper evidence in the case. Conceding that the plaintiff was entitled to explain the cause of anything unusual in his manner or conduct on the stand, the course pursued was wholly unwarranted, and should not have been allowed. At most, a statement in general terms of the cause of his apparent nervousness, if that fact was manifest, was all plaintiff was entitled to make on his direct examination. A party has no right for any such purpose to virtually cross-examine his own witness, and bring in irrelevant matters. Moreover, it would seem from the suggestions of the court that there was no occasion for any inquiry upon the subject.

3. It was likewise improper for the judge, in denying plaintiff's motion to strike out certain testimony of appellant's witness Mulverhill, to suggest that the testimony might "stand for what it is worth." Although evi-

dently not so intended, the expression was liable to be taken by the jury as an intimation that in the opinion of the court the evidence was of little consequence. If proper to remain for the consideration of the jury, the evidence was to be weighed solely by the latter.

4. The particular objection now urged to the hypothetical question put to Dr. Stratton was not specified in the court below, and cannot be here considered for the first time. *Howland v. Railway Co.*, 110 Cal. 513, 42 Pac. 983. Had it been made, it should have been sustained. Where the opinion of an expert is asked upon facts not detailed in the question itself, but the witness is referred to the testimony of another for such facts, it should appear that the witness had heard the testimony.

5. We think the court should have allowed the question asked of the witness Perry as to whether, had the driver of the horse car been at his post, the car could have been stopped to avoid the collision. The witness was on the platform of that car at the time, and saw the situation, and the question was one upon which any man of mature and ordinary judgment was competent to express an opinion. *Rog. Exp. Test.* (2d Ed.) § 3. An ordinary horse car is not run or controlled by any such intricate force or mechanism as an electric, steam, or cable car, and the question, therefore, did not fall within the rule of *Howland v. Railway Co.*, supra, as involving the skill or experience of an expert.

The remaining exceptions need no particular notice. The instruction complained of has been shown to have been unobjectionable as given, by an amendment to the statement filed since the argument; and the objection to the verdict as excessive may not again arise. The judgment and order are reversed.

We concur: HARRISON, J.; McFARLAND, J.

(115 Cal. 464)

WRIGHT v. DEL NORTE COUNTY.  
(S. F. 310.)

(Supreme Court of California. Dec. 31, 1896.)

COURTS—EQUITABLE JURISDICTION.

An action to recover for alleged services rendered by the plaintiff as a member of the county board of education, where the amount claimed is not within the jurisdiction of the superior court, presents no equitable issues bringing it within the general jurisdiction of the court "in all cases in equity."

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; Jas. E. Murphy, Judge.

Action by S. G. Wright against Del Norte county. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

A. J. Bledsoe, for appellant. L. F. Cooper, Atty. Gen. Fitzgerald, and Henry E. Carter, Deputy, for respondent.

BRITT, C. Action to recover of the county of Del Norte the sum of \$215, claimed as compensation for alleged services rendered by plaintiff as a member of the county board of education. The superior court held that it had no jurisdiction of the cause of action, and on this ground sustained a demurrer to the complaint. The sum involved being less than \$300, the only head of jurisdiction exercisable by the superior court, to which plaintiff assigns the right of that court to entertain the action, is its original jurisdiction "in all cases in equity,"—it being said that the cause is "in the nature of a suit in equity." We have been unable to discover that it possesses any qualities of such a suit. Whether mandamus lies to compel the county board of supervisors to allow the claim, or whether an action thereon may be maintained in the justice's court, are questions not necessary to be now considered, and upon which, in the absence of fuller argument, we think no opinion should be expressed. The superior court has no jurisdiction of the present action, and the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(115 Cal. 445)

Ex parte DAVIS. (Cr. 243.)

(Supreme Court of California. Dec. 29, 1896.)  
JUDICIAL NOTICE—COMPLAINT—CITY ORDINANCES  
—MUNICIPAL COURT.

In prosecutions before municipal courts for violation of municipal ordinances, the ordinance violated need not be pleaded, as municipal courts take judicial notice of them.

In bank. Application on the part of L. H. Davis for a writ of habeas corpus. Petitioner remanded.

Geo. P. Burke and Sullivan & Sullivan, for petitioner. David F. Maher, for respondent.

PER CURIAM. The petitioner was convicted in the recorder's court of the city of Watsonville upon a complaint charging him with keeping open a saloon in said city for the sale of intoxicating drinks, between the hours of 12 o'clock at night, and 5 o'clock the following morning, "All of which [so the complaint charges] is contrary to the form of the ordinance in such cases made and provided, and against the peace and dignity of the people of the state of California." It is claimed that the imprisonment of petitioner in pursuance of said conviction is unlawful, because the complaint charges no offense, and that it charges no offense because it does not plead the ordinance by title, date of passage, or in any manner except in the general terms above quoted. The argument in support of this position is that the ordinances of municipal corporations are private statutes; that courts do not take judicial notice of private statutes;

and, consequently, that they must be pleaded and proved like other material facts.

It is true, as a general proposition, with reference to proceedings in the courts of superior or general jurisdiction, that municipal ordinances are regarded as private statutes, and must be pleaded and proved. In this state, however, even in the superior courts, it is sufficient to refer to them by title and date of passage, whereupon the court must take judicial notice of them. Pen. Code, § 963. But when the proceeding is in a municipal court, instituted for the express purpose of enforcing the municipal ordinances, and vested with full jurisdiction for that purpose, the rule ought to be, and is, different. In such case the ordinances are the peculiar law of that forum, and it is bound to take notice of their existence. To such laws it holds the same relation that the superior courts hold to the laws enacted by the legislature, and may notice their provisions because they are among the things which, as to it, are established by law. Code Civ. Proc. § 1875, subd. 2. The following authorities bear out this view: *City of Solomon v. Hughes*, 24 Kan. 211; *City of McPherson v. Nichols* (Kan. Sup.) 29 Pac. 679; note to *Lanfair v. Mestler*, 89 Am. Dec. 668, 669; *State v. Leiber*, 11 Iowa, 407; *Town of Laporte City v. Goodfellow*, 47 Iowa, 572. These cases show that the practice in municipal courts with respect to municipal ordinances constitutes an exception, and a proper and necessary exception to the rule invoked by the petitioner. The complaint, therefore, was sufficient if there was an ordinance prohibiting the acts charged; and as to that we must presume in this proceeding, which raises only the question of jurisdiction, that there was such an ordinance, of which the recorder's court took judicial notice. Prisoner remanded.

(5 Idaho, 130)

## GREEN v. STATE BOARD OF CANVASSERS.

(Supreme Court of Idaho. Dec. 24, 1896.)

### AMENDMENT TO CONSTITUTION.

Under the provisions of section 1, art. 20, Const. (providing for the amendment of the constitution), where a majority of the electors voting upon that question vote in favor of the amendment the same is ratified, although the votes thus cast are not a majority of the votes cast at the general election for state officers.

(Syllabus by the Court.)

Application by Kate Green to review the action of the state board of canvassers on the canvass of votes cast on the amendment of the constitution granting equal suffrage to women.

W. E. Borah, Miles W. Tate, and Hawley & Puckett, for plaintiff. Atty. Gen. Parsons and Johnson & Johnson, for defendants.

HUSTON, J. The constitution of the state of Idaho contains the following provisions in regard to amendments of that instrument:

### "Article 20. Amendments.

"Section 1. Any amendment or amendments to this constitution may be proposed in either branch of the legislature, and, if the same shall be agreed to by two-thirds of all the members of each of the two houses, voting separately, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals; and it shall be the duty of the legislature to submit such amendment or amendments to the electors of the state at the next general election, and cause the same to be published without delay for at least six consecutive weeks, prior to said election, in not less than one newspaper of general circulation published in each county; and, if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this constitution.

"Sec. 2. If two or more amendments are proposed, they shall be submitted in such manner that the electors shall vote for or against each of them separately.

"Sec. 3. Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this constitution, they shall recommend to the electors to vote at the next general election for or against a convention; and, if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session provide by law for calling the same; and such convention shall consist of a number of members not less than double the number of the most numerous branch of the legislature.

"Sec. 4. Any constitution adopted by such convention shall have no validity until it has been submitted to, and adopted by, the people."

The legislative assembly of the state of Idaho, at its third session, submitted to the people, under said constitutional provisions, the following amendment of the constitution: "Shall section 2 of article 6 of the constitution of the state of Idaho be so amended as to extend to women the equal right of suffrage?" The vote as returned by the canvassing board upon said question was as follows: "For proposed amendment extending to women the equal right of suffrage: For, 12,126; against, 6,282." And upon this return said board declares said amendment not adopted; and petitioner brings her action for a review of the action of said board of canvassers in this behalf.

The only question submitted to us for decision is as to the construction to be given to the last paragraph of section 1 of article 20, above quoted: "And, if the majority of the electors shall ratify the same, such amendment or amendments shall become a part of this constitution." The question presented is by no means a novel one. In fact, so able and experienced a jurist as Judge Thomas

M. Cooley admits (Const. Lim., 6th Ed., p. 747, note 1) that "it must be confessed that it is impossible to harmonize the cases." An examination of the large number of authorities cited by counsel in the argument of this case accentuates the statement of Judge Cooley, and perhaps we shall not be obnoxious to the charge of evading a duty which so eminent a jurist declares to be hopeless. We confess ourselves unable to appreciate the argument which would make the language of section 1 of article 20 and section 3 of said article synonymous or expressive of the same intention. If they were, as counsel for defendants contend, intended to mean the same thing, why was not the same language used? We know of no rule of construction, nor has our attention been called to any, that would warrant us in arbitrarily saying that the language used in the two sections was intended to mean the same thing. On the contrary, the reason seems to us to be the other way. We can understand why the makers of the constitution should apply a different and more stringent rule in the adoption of a call for a constitutional convention from what they would in the matter of a mere amendment. It is true, the amendment under consideration is one of vast importance, but so, likewise, are the other amendments submitted at the same time. With the character or importance of the amendment we have nothing to do in this consideration. Was the amendment adopted as required by the terms and provisions of the constitution? To hold that it was not is virtually to say that no amendment of the constitution is practicable. In fact, counsel do not strenuously contend for a construction involving such a conclusion, but rather insist that the words "majority of the electors," in section 1, should be construed to mean the same as the words "majority of all the electors voting at such election," in section 3. Even the authorities cited by counsel do not go to such an extent or sustain such a conclusion.

For us to go into an analysis of all the authorities cited and read upon the argument would accomplish nothing. We have carefully examined them all, in the light of the able arguments of counsel, and we find ourselves unable to base our conclusions upon any apparent weight of authority. We must decide this case upon the provisions of our constitution as the same appear to us, and, so doing, we are compelled to say that the construction contended for by the petitioner is the correct one. Experience has shown that it is almost, if not quite, an impossibility to secure an expression from every elector upon any question, and, above all, upon a question of an amendment of the constitution; and it is equally difficult to ascertain the actual number of electors at any given time. To rely upon the vote cast upon some other question at the same election

would be entirely unsatisfactory, and such a construction is, we think, at least impliedly negated by the provisions of section 3. While it is true that some 10,000 or more electors would seem to have been entirely indifferent upon the question of the adoption of this and the other amendments, still all were—must have been—fully advised as to the importance of the questions submitted, and should their indifference be taken as conclusive of their opposition to the amendments? Upon what rule of honesty or righteousness can this be claimed? Is it not more reasonable, as well as more righteous, to say that in a matter about which they manifest such indifference their silence shall be taken as assent? We hold that the amendment under discussion is adopted, and has become a part of the constitution of the state of Idaho.

SULLIVAN, J., concurs.

MORGAN, C. J. (concurring). At the last general election in the state of Idaho, which occurred in November, the following question was submitted to the electors of the state, to wit: "Shall section 2 of article 6 of the constitution of the state of Idaho be so amended as to extend to women the equal right of suffrage?" The vote of the electors on the proposed amendment was as follows: For said amendment, 12,126; against said amendment, 6,282. The question submitted to this court is: "Under the provisions of the constitution and laws of this state, does this amendment become a part of the constitution?" No question of like importance has been submitted to this court during its existence. If decided in the affirmative, it nearly doubles the qualified voters of the state. It demands careful investigation and considerate judgment. It may not be improper, therefore, for me to give my reasons for concurrence in the judgment of this court.

The question of the policy or practicability of such a radical change in the fundamental law of the state, in regard to the qualification of electors, not being an issue in this cause, I do not propose to discuss. The proposition that the language of the constitution with reference to amendments thereto makes it practically impossible to secure any such I shall also dismiss, with the statement that it is not the province nor within the authority of this court to change or modify its provisions by judicial decision.

The provisions of our own constitution, and of others similar thereto, with reference to the votes necessary to carry any proposition, may be properly divided into three classes:

First. Those which require a majority or two-thirds of all the votes cast at a general or special election. Of this class is section 3 of article 8, regarding county and city indebtedness, which requires "two-thirds of the qualified electors thereof voting at an election to be held for that purpose"; that is, two-thirds of the qualified electors of such county or city. Also of the same class is sec-



tion 1 of article 12, which provides "that cities and towns may become organized whenever a majority of the electors at a general election shall so determine." So is also section 3 of article 20, which provides that when it shall be deemed necessary to call a convention to revise or amend the constitution, which shall be called if a majority of all the electors voting at said election shall have voted for a convention, etc. The language of these sections is clear and unmistakable. It needs no construction, and it is only necessary to count the ballots cast at any such election and those voting for the proposition, to ascertain if a majority of all those voting at said election were in favor of the proposition.

Of the class of cases cited in support of this proposition are *St. Joseph Tp. v. Rogers*, 16 Wall. 664, in which case the fourteenth section of the act required only a "majority of the legal voters of such township voting at such election." Of the same tenor is the case of *People v. Warfield*, 20 Ill. 165, in which it is held that the phrase "majority of the voters of a county" is held to mean a majority of those voting at the election. Also, *People v. Garner*, 47 Ill. 246; *People v. Wiant*, 48 Ill. 263; *Cass Co. v. Johnston*, 95 U. S. 360; *State v. Linn Co. Court*, 44 Mo. 504; *State v. Renick*, 37 Mo. 270. From this class of cases we have, perhaps, sufficiently quoted. They differ from the language of our constitution in the particular under discussion in this: that in those cases the law or constitution, as the case may be, positively and in terms requires a majority or two-thirds of all the voters of a particular district or of the state, while our constitution requires a majority of the electors. They are not in point except as giving the reasons for the decisions, which differ somewhat in the different cases. In some cases the reason given is that it is a practical impossibility to ascertain how many legal voters there may be at the time of the election in any given city, county, or state. This reason applies with equal force in the case at bar. There is no necessity for qualifying the word. It is impossible to ascertain how many voters there are in the state at any election. There may be many voters in the state who did not vote for governor, for instance, who did not vote for the presidential electors; and there may have been many voters who voted for attorney general, who voted neither for governor nor presidential electors. The impossibility of the task is apparent at once. But, say the defendants, this is what the constitution requires, and, if it means anything except a majority of the electors voting upon the proposition, the former is what it does mean. However, they say this provision is satisfied by considering the number voting at this election, as the whole number of electors. But we know this is not true, and we have no warrant for such construction, either in the words of the particular section, the context, or in reason.

The second class of cases are those which require a majority of all the qualified voters of a particular district, county, city, or of the qualified voters of the state. This provision would seem to be too plain to need any construction, or to lead to any difference of opinion. The courts, however, in quite a number of cases, have construed this provision to be satisfied by a majority of the votes cast upon the proposition, while others have construed it according to the strict letter of the constitution or law, as the case may be. Of the latter class are the following cases, cited by counsel for defendants, to wit: *State v. Brassfield*, 67 Mo. 331 (in which case the constitution of Missouri states that a county, city, or town shall not be authorized to become a stockholder, etc., unless two-thirds of the qualified voters of such county, city, or town, etc.); *Hawkins v. Board*, 50 Miss. 735. The same provision is in the constitution of Mississippi (article 12, § 14). *Cocke v. Gooch*, 5 Helsk. 310. "No part of a county shall be taken off without the consent of two-thirds of the qualified voters in such part." Const. Tenn. art. 10, § 4. *Duke v. Brown*, 96 N. C. 127, 1 S. E. 873. Same provision in the constitution of North Carolina (article 7, § 7). These decisions are not in point, for the provisions in the various constitutions are all of the second class, as quoted above, and are radically different from our own provision in section 1, art. 20. The decisions are instructive, however, as indicating the trend of the opinions held by the various courts of the country upon this subject. Of precisely the same tenor is the constitution of Illinois, as quoted in *People v. Brown*, 11 Ill. 478. Also statute of Illinois, as construed in *Chestnutwood v. Hood*, 68 Ill. 132. It required a "majority of all the legal voters of the county." In *People v. Town of Berkeley*, 102 Cal. 298, 36 Pac. 591, also, the constitution required, in terms, a "majority of the electors voting at a general election." It would manifestly be a bootless, and certainly a very monotonous, undertaking, to follow through all the decisions upon a precisely similar provision of statutes and constitutions. They are substantially the same.

The third class are those which require a majority vote in the affirmative, without the specifications attached to the other classes. In this class the term "plurality of votes" is spoken of as being sufficient or insufficient to adopt a constitutional amendment, both in brief of defendant and in some of the decisions of the courts. The term must have been used inadvertently, as there can be no plurality of votes unless there are three or more candidates, or three ways of voting upon a proposition, as a plurality is the number of votes received by one candidate, in excess of those received by either one of two or more other candidates, and not a majority over both. There can be no plurality where there are but two candidates, or but two ways of voting on a proposition, as upon a

constitutional amendment. Section 2 of article 18 of the constitution of Idaho requires two-thirds of the qualified electors of a county, voting on the proposition at a general election in favor of removal, to remove a county seat. Section 3 of article 18, relating to the division of counties, requires a majority of the qualified electors of the territory proposed to be cut off voting on the proposition at a general election to divide a county. Section 3 of article 20 (the next section of the same article), in which is the provision under discussion, requires, in order to call a convention to revise or amend the constitution, that "a majority of all the electors voting at said election, shall have voted for such convention, at the next general election." Evidently, it was not the intention of the framers of the constitution to require either one of these conditions to secure an amendment to the constitution. If it had been, they would have so expressed it, and at a time when the different methods of making the constitution were fresh in their minds; but they did not do so, and therefore we must conclude they did not intend it. It may be said, however, that, if they had intended that only the votes cast for and against this amendment should be considered, they would have so expressed it, as in section 9 of article 7, in section 1 of article 8, and section 2 of article 10. While they have not used the same words in sections 1 and 2 of article 20, we contend they have substantially said so. Section 2 of article 20 provides that, "if two or more amendments are proposed, they shall be submitted in such manner that the electors shall vote for or against each of them separately." Here is a positive direction that the elector shall vote either for or against the proposition. This is followed by the statute, section 57, p. 75, 1 Sess. Laws Idaho, providing that, when the question of a constitutional amendment is to be submitted to the people, a space of half an inch shall be left opposite the words "Yes" and "No," printed upon the ballot, on which the voter is to make a cross opposite the answer he desires to make. This was followed by an amended section 57, p. 95, 3 Sess. Laws Idaho, in which it is provided that a circle half an inch in diameter shall be made opposite the words "Yes" and "No," when the same or a similar question is to be submitted, in which the voter is to make a cross opposite the answer he desires to make.

In Senate Joint Resolution No. 2, approved January 21, 1895, the same legislature provided that the following question shall be submitted to the electors of the state: "Shall section 2 of article 6 of the constitution be so amended as to extend to women the equal right of suffrage?" In accordance with the constitution and the statute, the question was submitted with the words "Yes" and "No" printed in separate spaces, with a circle of the required size opposite each, in one of which each voter who desired to express an opinion on the question was required to make

a cross. Why should the constitution and two different legislatures provide that those who desired to vote against the proposition should make a cross opposite the word "No" if these votes were not to be counted, and why should they be counted if all those who did not vote at all were to be counted as having voted "No"? There is no answer. The constitution and the statutes say: "All you electors who believe that equal right of suffrage should be extended to women stand up, and be counted." 12,126 voters stand up, and are counted in the affirmative. The constitution and statutes say with equal distinctness: "All you qualified electors who believe that the equal right of suffrage should not be extended to women stand up and be counted." 6,282 stand up and are counted. 18,408 votes in all cast upon the question. But, say the defendants, there were about 10,000 qualified voters in the state who did not vote at all on the question, that should be counted as having voted "No." Why should they be counted in the negative? The constitution does not require it, neither do the statutes. These electors either have no opinion on the subject, or they have none that they care to express. Why should they be counted as having voted in the negative, when they did not vote at all on the subject? There is absolutely no reason, unless the constitution or the statutes require it, and we have seen they do not.

The supreme court of Maryland, in *Walker v. Oswald*, 11 Atl. 711, in construing an act of submission of the question of high license to the voters of a county, wherein it is provided that the act shall take effect if a majority of the voters of said county shall determine by their ballots in its favor, holds that those voters absenting themselves, and those who, being present, abstain from voting, are considered as having acquiesced in the result, and that the measure is adopted if it receives a majority of those voting upon it, even though it fail to receive a majority of the votes cast upon some other subject. *Cass Co. v. Johnston*, 95 U. S. 369. The supreme court of Minnesota, in *Dayton v. City of St. Paul*, 22 Minn. 400, construes the following provision of the constitution of the state: "And if it shall appear in a manner provided by law that a majority of the voters present and voting shall have ratified such alterations or amendments, the same shall be valid to all intents and purposes as a part of the constitution." The court declares that "the amendment is ratified if it receives a majority of all the votes upon it, although not a majority of the votes cast at the election." The court says further that "it is the general rule in affairs of government that an election or a voting, whenever called for, is to be determined by the votes of those who vote to fill the office which is to be filled, or for or against the proposition which is to be adopted or rejected, and not by counting on either side those who do not vote at all." And this, in my opinion, is the true rule, as those who express no opinion

should not be counted as having expressed any on either side. This is a government by the people who have opinions, and are willing to express them. Representatives are elected both in congress and the legislature. Officers are elected, constitutions are framed, and laws enacted, and, of right, ought to be, by these men, and by these only. See, also, *Taylor v. Taylor*, 10 Minn. 107 (Gil. 81). In *State v. Barnes* (N. D.) 55 N. W. 883, the court says: "Congress passed an enabling act permitting North Dakota to call a convention, formulate a constitution, submit it to the people, at the same time submit separate articles which required for their adoption a majority of the legal votes cast." The supreme court held that an article which was submitted under this clause, and received a majority of the votes cast upon this question, was adopted, although it did not receive a majority of the votes cast for governor. The language is much stronger than in the case at bar. In *People v. Clute*, 50 N. Y. 461, the court says: "It is the theory and practice of our government that a minority of the whole body of qualified electors may elect to an office when a majority of that body refuse or decline to vote for any one for that office. Those who are absent from the polls, in theory and practical result are assumed to assent to the action of those who go to the polls; and those who go to the polls, and do not vote for any candidate for an office [that express no opinion], are bound by the result of the action of those who do; and he who receives the highest number of earnest, valid ballots is the one chosen to the office." The supreme court of Kansas, in *Board v. Winkley*, 29 Kan. 36, says that "at a general election for county or township officers, if a majority of the votes cast are for a bounty for the growing of hedges, the county commissioners shall declare the law to be in full force and effect." Held that, if a majority of the votes cast upon that question are for the proposition, it is legally adopted, notwithstanding it failed to receive a majority of all the votes cast at the election for township officers. In the case of *St. Joseph Tp. v. Rogers*, supra, the thirteenth section of the act then under consideration provided that where elections may have already been held, and a majority of the legal voters of any township or incorporated town were in favor of the proposition, then, etc. It will be noticed that this language is much stronger than the language under discussion in this case; as in section 1, art. 20. Const., the language is that, if a majority of the electors shall ratify the same, it shall become a part of the constitution, etc.; and in the above cause (*St. Joseph Tp. v. Rogers*) the court held that a majority of the legal voters of the township voting at the election was sufficient to authorize the subscription, although all the voters voting on both sides were together but a minority of all the legal voters of the township. In *People v. Warfield*, 20 Ill. 165, the court further says: "If we go beyond this, and inquire whether there are other voters of the county who were detained from the election by ab-

sence or sickness, or voluntarily absented themselves from the polls, we should introduce an interminable inquiry, and invite contest in elections of the most harassing and baneful character, if we did not destroy all the practical benefits of laws passed under those provisions of the constitution."

Here, then, are a number of decisions which declare that, when a constitution or statute declares that a proposition requires a majority or two-thirds of all the voters of a given locality, such provision is satisfied if the proposition receives a majority or two-thirds, as the case may be, of all those voting, taking no account whatever of those, be the number large or small, who fail to vote. It is admitted that if a special election was authorized and held on this question, and it appeared that 3,000 votes or a less number were cast for the proposition, and 1,500 against it, it would be legally adopted. This is a distinction without a difference, as in this case the amendment is voted on separately, precisely the same as it would be if no other question was presented, or no officers were to be elected, and the vote taken and reported to the canvassers separately in the same way it would have been had this been the only question before the electors for their decision.

To recapitulate, then: Neither the constitution nor the statutes require either a majority of all the qualified voters of the state, or a majority of all the votes cast at the election. It is clear that the decided weight of authority in such cases is that the proposition is decided in the affirmative if it receives a majority of all the votes cast upon the question. By many of the courts it is considered that those who absent themselves from the polls, or, being present, do not vote upon the question, assent to the will of the majority who do vote upon the question. By this court it is held that those who have no opinion on the subject, or none that they care to express, not having voted on either side of the question, should not be counted upon either side. As to this question they are not qualified voters.

For the reasons stated, I concur with opinion expressed by Mr. Justice HUSTON.

(23 Colo. 253)

RIALTO MINING & MILLING CO. v.  
LOWELL et al.

(Supreme Court of Colorado. Nov. 16, 1896.)  
COMPLAINT — ACTION TO FORECLOSE MECHANICS' LIENS.

Under Mills' Ann. St. § 2894, which permits the assignment of claims for which mechanics' liens may be enforced, and allows all the claims held by one claimant to be included in one statement for a lien, where a plaintiff served the notice and filed the statement for a lien required by statute, including therein several claims, it was not necessary in his complaint in an action to foreclose that he should allege the service of the notice and filing of the statement in each separate cause of action set out, but one allegation of such facts was sufficient.

Appeal from district court, Gilpin county.

Action by Benjamin F. Lowell and others against the Rialto Mining & Milling Company to foreclose mechanics' liens. Decree for plaintiffs, and defendant appeals. Affirmed.

A number of persons claiming liens upon defendant's mining property for materials furnished therefor and for labor performed thereupon joined as plaintiffs in this action to foreclose these liens. The complaint contains 18 separate causes of action. To each one of these defendant filed a separate demurrer on the ground that it did not set forth facts sufficient to constitute a cause of action. These demurrers were overruled by the court, and, the defendant electing to stand by the same, the court thereupon heard evidence in support of the complaint, and made findings of fact in favor of the plaintiffs, and rendered a decree of foreclosure as prayed for. To reverse this decree the defendant has appealed to this court.

Talbot & Dennison, for appellant. Chase Withrow, E. W. Hurlbut, and J. McD. Liveasy, for appellees.

CAMPBELL, J. (after stating the facts). Counsel for the appellant concede that the first five causes of action are good. The others are said to be defective in this: that in neither thereof is there averred that the lien claimant served upon the defendant a written notice of his intention to file a statement of lien, or that he actually did file such lien with the county clerk, as required by our statute (Sess. Laws 1893, p. 318, § 3). As these preliminary steps must be taken before a lien attaches, it is said that they must be alleged in the complaint, the point being that each cause of action must be good in itself without reference to, or aided by, any other cause of action in the complaint. It appears from the complaint that the first five causes of action were for liens claimed by the respective claimants for materials furnished or for labor performed by themselves. The causes numbered consecutively from 6 to 13 were in favor of Florence Sullivan; one of which accrued to Sullivan for services which he himself performed, and the other seven were upon claims which had been assigned to him by other persons for the purpose of this foreclosure, which our statute permits. The causes of action numbered consecutively from 14 to 18 were in favor of Peter Daly as plaintiff; one of which was for services performed by him, and the other four he asserted as assignee. An examination of the complaint shows that Sullivan, as plaintiff, did not, in each of these eight causes of action, make the averment that he served upon the defendant the notice, or filed with the county clerk the statement, required by the statute. But at the end of the statement of the thirteenth cause of action are found allegations to the effect that the said seven liens so assigned to Sullivan were

assigned to him before the service of notice and filing of statement, and that thereafter, and within the statutory time, he did serve upon the defendant a written notice, and filed with the clerk the statement required, in each of which he combined with the claim accruing to him in his own right all the said claims which had been theretofore assigned to him.

Our statute (Mills' Ann. St. § 2894) permits an assignment of claims before or after the filing of the statement referred to; and also permits any claimant, whether assignee or otherwise, to include all the liens he may possess in any one statement. Where, therefore, several causes of action are declared upon in one complaint in favor of one and the same plaintiff, whether the liens are possessed by him as assignee, or in his own right, and where, after the assignment, he has served the written notice and filed the statement required by the statute, and has included therein all of said claims owned by him, and for which he has brought suit, it is not necessary to aver in each separate cause of action arising out of said liens that he served the written notice and filed the statement, but it is sufficient if, either at the beginning or the end of the complaint relating to said causes of action, there is a general statement or averment of the service of the notice and filing of the statement.

The causes of action accruing to the plaintiff Peter Daly are in the same situation as those in favor of the plaintiff Sullivan, and the same rule is applicable. It follows that the judgment below was right, and it is therefore affirmed. Affirmed.

(23 Colo. 247)

SINGER MANUF'G CO. v. CONVERSE  
et al.

(Supreme Court of Colorado. Nov. 16, 1896.)

CONTRACT FOR LEASE OF PERSONALTY—SIGNATURE BY LESSOR—REPLEVIN—PURCHASE WITHOUT NOTICE—PLEADING.

1. The signature of a lessor to a lease of an article of personal property is not essential to its validity, where the article is delivered to the lessee thereunder.

2. Where a sewing machine was delivered by plaintiff to R., under a written agreement which by its terms was a lease, and was by R. transferred to defendant, an answer, in an action by plaintiff to recover the machine, which alleges that the contract under which plaintiff delivered the machine was in fact one of conditional sale, and that defendant, when purchasing it, had no notice of any claim or right of plaintiff therein, is demurrable, where no contract outside of that embodied in the writing is alleged, and it is not alleged that plaintiff was ignorant of its terms, nor that R. had complied with the conditions, so as to become the owner of the property.

Error to Arapahoe county court.

Action by the Singer Manufacturing Company against John C. Converse and others. Judgment for defendants, and plaintiff brings error. Reversed.

The complaint alleges that the Singer Manufacturing Company was the owner of a sewing machine, which, on the 10th of December, 1892, it delivered to one Eva Redd, under and in pursuance of the following instrument in writing: "Lease. This certifies that I, Mrs. Eva Redd, \* \* \* have received of the Singer Manufacturing Company \* \* \* one Singer sewing machine, \* \* \* with apparatus belonging thereto, all in good order, and valued at seventy dollars, which I am to use with care, and keep in like good order, and for the use of which I am to pay as follows: Five dollars cash on the delivery of this agreement, the receipt whereof is hereby acknowledged, and accepted as payment for the rent of the first month only, and then at the rate of five dollars per month, payable in advance, on the 10th day of each month hereafter, for six months, at its agency in Denver City, Colo., without notice or demand. But if default shall be made in either of the payments, or if I shall sell or offer to sell, remove or attempt to remove, the said machine from my aforesaid residence, without the written consent of the Singer Manufacturing Company, then, and in that case, I agree to return the same, and that it or its agent may resume actual possession thereof; and I hereby authorize and empower the said the Singer Manufacturing Company, or its agent, to enter the premises wherever the said machine may be, and take and carry the same away, hereby waiving any action for trespass or damages therefor, and disclaiming any right of resistance thereto, and also waive all right of homestead or other exemptions under laws of said state, as against this obligation. Witness my hand and seal, this 10th day of December, 1892. Mrs. Eva M. Redd. [Seal.]" It is further alleged that said Eva Redd paid only the sum of five dollars for the first month for said machine, and has wholly failed to pay any rent for the succeeding months as stipulated; that, after the delivery of the machine by the plaintiff to said lessee, she sold and mortgaged the same to the Star Loan Company without plaintiff's knowledge or consent, and thereafter the said mortgagee wrongfully sold and delivered the same to the defendants in this action. To the complaint alleging this state of facts, there was filed an answer, in general terms denying the right of the plaintiff to recover, in which answer, however, the defendants admitted that, when said machine was delivered to Eva Redd, she executed and delivered to the plaintiff the so-called lease or instrument in writing set out in the complaint. They claimed, however, that the same was not signed by the plaintiff, and did not then fully express the agreement actually made between the plaintiff and said Redd in reference to the sewing machine. The true nature of the transaction between plaintiff and said Redd, instead of a lease, was said to be a conditional sale of the sewing machine to said Redd upon the installment plan, it being agreed between them that

said Redd should pay for the machine in payments of five dollars a month, and, when she had fully made all of the six payments provided for, said Redd was then to become the absolute owner of the machine without further or other transfer or conveyance, and, in case of a failure so to pay, the vendor was authorized to resume possession of the property, according to the terms of the said instrument set out in the complaint. It was then alleged that, while the said Redd was in possession of the machine, and while she was not in default to the plaintiff, she borrowed of the Star Loan Company a certain sum of money, to secure the payment of which she executed a chattel mortgage upon this machine, and that afterwards, upon violation of the terms of the chattel mortgage by said Redd, the mortgagee took possession of the mortgaged property, and, in accordance with the terms of the chattel mortgage, made a sale of the mortgaged property to the defendants in this action. It is further alleged that neither the said mortgagee nor any of the defendants, at the time they acquired their rights, had knowledge or notice of any claim on the part of the plaintiff to said sewing machine, but they, and each of them, bought the machine in good faith, for value, without knowledge or notice of plaintiff's right or claim thereto. To this answer the plaintiff filed a demurrer on the ground that it constituted no defense. This was overruled by the court, and, the plaintiff electing to stand thereby, the court gave judgment for the defendants. To reverse this judgment plaintiff prosecutes this writ of error.

R. H. Gilmore, for plaintiff in error. Whitford & Lindsley, for defendants in error.

CAMPBELL, J. (after stating the facts). The answer denies that the plaintiff is the owner or entitled to the possession of the machine in controversy. It also denies that the defendants had any knowledge or notice of the plaintiff's claim thereto when they purchased. The answer, however, must be taken in its entirety. That the plaintiff was once the owner is admitted. The answer further admits that the plaintiff delivered the machine to Redd, and that, upon such delivery, she executed and delivered to the plaintiff the instrument in writing set out in the complaint. Upon its face this is a lease, and nothing else. But defendants say that plaintiff did not sign the writing, and therefore the transaction between the plaintiff and Redd did not amount to a lease. Plaintiff's signature was not essential thereto. It delivered the machine, and thereby performed its part of the contract, and the execution of the writing by Redd alone, and its delivery to the plaintiff, made the same a binding obligation upon her. If, then, this writing correctly evidences the transaction, it was a lease, and the lessee had no authority to sell or convey title to the leased property, even to a bona

fide purchaser without notice of the lessor's rights.

But the answer further alleges that the transaction as set forth in the complaint was not a lease, but a conditional sale, and that the title did not pass to the conditional vendee until she paid the full purchase price. Nevertheless, the defendants say, they are entitled to the property, because, without notice of this claim of the plaintiff, they bought the machine, relying upon the indicia of ownership arising from the possession held by said vendee. Whether their claim concerning the nature of the transaction between plaintiff and Redd is based upon their construction of the writing denominated a "lease," or whether it is founded upon another and distinct agreement in terms constituting the transaction a sale, is somewhat difficult to determine, if we take into consideration merely one or more separate allegations of the answer. But, taking the pleading as a whole, and considering that it admits the delivery of the machine by plaintiff to Redd under the terms of the so-called lease, and also alleges that, if Redd failed to pay as stipulated, the plaintiff is authorized to resume possession according to the terms of that instrument, and that no claim is made that there was any transaction between the parties relating to the machine other than that evidenced by this writing, it seems that the former supposition is correct, and that the defendants themselves concede that this so-called lease measures the rights of the parties. This is further manifest from the argument of appellees' counsel, and the citation of authorities by them, that such a transaction, though under the guise of a lease, is, in fact, a sale. If such be the basis for their claim, the judgment below is wrong, for such a construction of this writing is unwarranted, as there is nothing in its provisions or on its face that constitutes the transaction a conditional sale.

On the assumption, however, that the sale was a conditional one, under a distinct agreement therefor (which we think the answer does not sufficiently make apparent), we still think the court erred in overruling the demurrer. A demurrer admits only such facts as are well pleaded. The answer, it is true, denies that the defendants had any knowledge or notice of the plaintiff's claim; but the answer, as has been said, must be taken as a whole. True it is that the defendants deny knowledge when their purchase was made; but they admit, in their answer, that Redd held the property as a conditional vendee, with the title still in her vendor till the terms of the sale were complied with, and that such compliance was not had. While, therefore, they deny generally any knowledge by them of plaintiff's claims of ownership, they specifically aver knowledge of the terms and conditions of the sale. These averments could not have been made, had not the defendants known of the conditional sale and its terms. They failed to negative the fact that

this knowledge existed when they bought; and, while they aver knowledge of the sale and its terms, they apparently seek to escape the consequences thereof by alleging that assurances were given by the conditional vendee that she had complied with those terms. This they cannot do, for they had notice of facts sufficient to put them upon inquiry that would have resulted in their learning that the payments had not been made. Furthermore, in view of these facts, the allegations of general denial must be given no other or different effect than mere conclusions of the pleader, and must yield to the other specific allegations of facts which we hold are equivalent to averments of notice. The case, then, is governed by the doctrine laid down in *Jones v. Clark*, 20 Colo. 353, 38 Pac. 371, which holds that a conditional sale is good as against a purchaser with notice of its terms.

We are asked by counsel for appellant in the case before us to establish the general rule said to be enunciated in *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, referred to approvingly in the *Jones Case*, supra, that "in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction," whether the third persons be bona fide purchasers with or without notice. But, as our construction of the answer is that the defendants have failed to show that they were without notice of the plaintiff's claim, we rest our decision on the doctrine of the *Jones Case*. What we might say, therefore, as to the general rule contended for by the appellant, would be obiter. It follows that the judgment of the district court should be reversed, and the cause remanded, and it is so ordered. Reversed.

(23 Colo. 255)

#### ALLEN v. KING.

(Supreme Court of Colorado. Dec. 7, 1896.)

Error to court of appeals.

Action by Theodore King against Gaines M. Allen. A judgment for plaintiff having been affirmed by the court of appeals (35 Pac. 1061), defendant brings error. Affirmed.

G. M. Allen, in pro. per. C. C. Post, for defendant in error.

PER CURIAM. This case is brought here by writ of error to a judgment of the court of appeals, rendered in the case of *Allen v. King*, 4 Colo. App. 319, 35 Pac. 1061. For the reason set forth in its opinion, the judgment of the court of appeals is affirmed. Affirmed.

(23 Colo. 259)

#### MOLLIE GIBSON CONSOL. MINING & MILLING CO. v. SHARP.

(Supreme Court of Colorado. Dec. 7, 1896.)

CONSTITUTIONAL LAW—STATUTES—TITLE.

Act March 7, 1877 (Mills' Ann. St. p. 1003 et seq.), entitled "An act concerning damages,"

giving a cause of action for the death of a person, caused by the negligent act of another, to persons occupying certain relations to deceased, and fixing the damages in such cases, contains but one subject, sufficiently embraced in the title of the act.

Error to court of appeals.

Action by William Sharp against the Mollie Gibson Consolidated Mining & Milling Company. From a judgment of the court of appeals (38 Pac. 850, 5 Colo. App. 321) affirming a judgment for plaintiff, defendant brings error. Affirmed.

Brown & Smith, for plaintiff in error.

CAMPBELL, J. This case is here upon writ of error to the judgment of the court of appeals affirming a judgment of the district court of Pitkin county in favor of the defendant in error. The action is under our damage act (Mills' Ann. St. p. 1003 et seq.), and was brought by the plaintiff, as the father of William Sharp, deceased, who met his death as the result of the negligent acts of the plaintiff in error in failing to provide in its mine for its employes (of whom deceased was one) a reasonably safe place in which to work. The amount of the judgment is not sufficient to entitle the plaintiff in error to a hearing in this court, but jurisdiction is invoked on the ground that the determination of a constitutional question is necessarily involved.

The act of 1877, upon which the right of the plaintiff depends, is said to be in violation of section 21 of article 5 of the constitution, which provides that "no bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." The act is entitled "An act concerning damages, and to repeal an act entitled 'An act concerning damages,' approved February 8, 1872." It is conceded that sections 1, 3, 4, and 5 are germane to the title, and directly connected with the general subject of damages. Section 2, however, is said to come within the inhibition of the constitutional provision in question. Counsel for plaintiff in error thus state their objections: First, there are in this act two distinct and separate subjects, legislated upon under one title; second, the subject-matter of the act is not clearly expressed in the title; third, the provision of the statute in the creation of a new right is not germane to, or embraced within, the title of this act; fourth, the title is calculated to mislead as to the substance of the enactment. These separately numbered propositions may well be treated together. If the foregoing contentions are true, the act cannot be upheld; and a large number of authorities are cited to this effect. These authorities we have examined, and, without

any attempt to review them, it is sufficient to say that most of them are not at all pertinent to the facts of this case, and but few aid us in the solution of the question before us. Briefly, let us consider the scope and object of this act. For injuries inflicted by the wrongful act of another, and resulting in the death of the injured party, the right to recover damages against the wrongdoer is given to persons occupying certain relations to the deceased. Section 1 applies only to wrongdoers who are common carriers of passengers. Section 2 includes all other wrongdoers. The other sections relate to the time within which actions are to be brought, and the amount of the recovery. For the purposes of this case, it is immaterial whether, as plaintiff in error contends, section 2 creates a new cause of action, or, as maintained by defendant in error, that it merely transmits causes of action which otherwise would abate. To one concerned to know the civil liability in this state of one for wrongful injuries committed upon another, so that the latter dies, whether the inquirer be lawyer or layman, he naturally would expect to get his information from a statute treating of damages. If he found one whose title specifically restricted the legislation to damages for injuries resulting in death, he might well stop there. But he would have no constitutional right to insist that the general assembly should, in the one act, with a limited title, exhaust legislation upon this particular branch of damages. Under the broader and more comprehensive title at the head of the act we are now considering, the same subject-matter, which is but a subordinate branch of the general subject of damages, may properly be treated. The attempt of counsel to separate into two distinct subjects the provisions of this act savors too much of subtlety to meet our approval. It is not susceptible of the construction that the right or cause of action it confers is one subject, and the awarding of damages for the violation of that right is another and distinct subject. If any such division of this subject into two branches can be made at all, and if, in any sense, they are different, nevertheless they are directly connected, one with the other. Each is germane to the general subject of damages, and the two are altogether congruous, and naturally connected.

That all the provisions of this act are clearly expressed in the title seems to us too plain for argument, as do the conclusions which we have reached upon the other phases just considered. In support, however, of these conclusions, are the principles clearly established in the following, among many other, authorities we might cite: *Clare v. People*, 9 Colo. 122, 10 Pac. 799; *Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142; *Edwards v. Railroad Co.*, 13 Colo. 59, 21 Pac. 1011; *In re Breene*, 14 Colo. 401, 24 Pac. 3; *Catron v. Commissioners*, 18 Colo. 553, 33

Pac. 513; *Airy v. People*, 21 Colo. 144, 40 Pac. 362; *Cooley, Const. Lim.* (6th Ed.) 170 et seq.; *State v. Miller*, 100 Mo. 439, 13 S. W. 677; *Jonesboro City v. Cairo & St. L. R. Co.*, 110 U. S. 192, 4 Sup. Ct. 67; *Carter Co. v. Sinton*, 120 U. S. 517, 7 Sup. Ct. 650; *Richards v. Land Co.*, 4 C. C. A. 290, 54 Fed. 209; 23 Am. & Eng. Enc. Law, 349; *Donnersberger v. Prendergast*, 128 Ill. 229, 21 N. E. 1. We may further observe that the act in question seems to be copied from the statutes of Missouri (chapter 49, Rev. St. 1889). So, also, section 21 of article 5 of our constitution is taken from the constitution of Missouri (section 28, art. 4). The validity of this statute upon the ground here asserted seems never to have been questioned either in Missouri or (previous to this case) in this state, although in both states many important cases have arisen under it, and been carried to the highest courts. This, of itself, of course, is not controlling; but where, as in this case, a statute so often relied upon has been so long unquestioned, it is significant as indicating the general understanding of the profession as to its soundness, and is of more or less weight because of such long acquiescence in determining its validity upon the contested ground. *Improvement Co. v. Phelps*, 47 Mich. 290, 11 N. W. 167; *Cooley, Const. Lim.* (6th Ed.) 81; *Frey v. Michie*, 68 Mich. 323, 36 N. W. 184.

There are other questions assigned and argued by counsel, to which we have given careful attention. In the opinion of the court of appeals, reported in 5 Colo. App. 321, 38 Pac. 850, is found an elaborate discussion thereof. With the conclusions there reached we are in accord. Further consideration of such alleged errors is therefore unnecessary. The constitutional question not having been thoroughly considered by that court, for the reason given by President Judge Bissell in the opinion, that the final determination of such a question did not rest with that tribunal, we have confined our discussion to that feature of the case. It follows that the judgment of the court of appeals should be affirmed, and it is so ordered. Affirmed.

(23 Colo. 292)

**CASCADE ICE CO. v. AUSTIN BLUFF  
LAND & WATER CO.**

(Supreme Court of Colorado. Dec. 7, 1896.)

**PLEADING—AMENDMENT—APPEAL AND ERROR—  
REVIEW.**

1. In an action involving the prior appropriation of the water of a stream, permitting defendant during the trial to file an amended answer, which pleaded with more particularity the priorities claimed, and set up a prior adjudication of such priorities, was not error, though a replication to the original answer had been filed.

2. A finding of fact on conflicting evidence will not be disturbed on appeal.

Error to district court, El Paso county.

Action by the Cascade Ice Company against the Austin Bluff Land & Water Company to enjoin the diversion of the water of a stream. There was a judgment in favor of defendant and plaintiff brings error. Affirmed.

T. A. McMorris, for plaintiff in error. Colburn & Dudley, for defendant in error.

GODDARD, C. J. On the 31st day of December, 1890, the Cascade Ice Company instituted this action against the Austin Bluff Land & Water Company to enjoin the diversion of certain water from West Monument creek, in the county of El Paso, state of Colorado, and, for cause of action, alleged that it was an incorporated company, duly organized and existing under and by virtue of the laws of the state of Colorado, and was engaged in the business of cutting, storing, and dealing in ice; that it was the owner of two reservoirs, constructed and used for the purpose of receiving and holding water for the formation of ice; that, for the purpose of supplying the reservoirs with water, it had appropriated the water of West Monument creek, and had diverted and used said water for the purposes aforesaid, by means of ditches and seepage from the stream; that the defendant company, by means of a pipe line constructed after plaintiff's appropriation of the water, wrongfully diverted all the water of said creek, and totally deprived plaintiff of all the water flowing therein, as well as the seepage water theretofore appropriated by it. The defendant answered, denying all the allegations of the complaint, except the averments of incorporation of the respective companies, and, for a further defense, averred that long before the construction of the reservoirs and feeders mentioned in the complaint, and before the plaintiff performed any physical act towards diverting and using any water therefrom, several ditches had been constructed, through which all the water flowing in West Monument creek had been appropriated and applied to beneficial uses; that, through divers conveyances from the original appropriators, the defendant became the owner of the ditches and said water rights, and entitled to the use and enjoyment of all the water in the creek, except when the flow exceeded 22.18 cubic feet per second of time; that, after it became such owner, the defendant constructed a pipe line heading in said creek, for the purpose of conveying the water to which it was entitled by virtue of said water rights, and applying the same to irrigation and other beneficial uses; and that at no time had it conveyed through its pipe line more water than it was lawfully entitled to. The plaintiff, in its replication, denied that the purpose and use of the water, as set out in the answer, was for a beneficial and useful or lawful purpose, but for purposes of speculation only, and averred that, by rea-



son of being confined and carried through defendant's pipe, the water theretofore accustomed to flow down the creek, after use by the original appropriators for irrigation (and which surplus water was appropriated by plaintiff in 1887), is prevented from flowing down and reaching the plaintiff's reservoirs, as it might and would do but for such wrongful diversion.

The court below found the issues joined upon the pleadings in favor of defendant, and that the plaintiff failed to maintain a cause of action by virtue of the law and evidence in the case, and denied its prayer for relief. The correctness of these findings is challenged principally on the ground that, the original appropriations, by virtue of which plaintiff claims the right to the water flowing in West Monument creek, being for the irrigation of agricultural lands, the use was not constant, and, when used, by percolation and seepage, a portion flowed back into the stream, and passed on to plaintiff's reservoirs, and to which plaintiff had acquired a right; that by reason of the appropriation of the water to a different purpose, through defendant's pipe line, the flow of such surplus was prevented, and plaintiff's rights thereby infringed. Upon this issue testimony was introduced by the parties in support of their respective claims; that introduced on the part of plaintiff tending to show that at all times the entire flow of water in West Monument creek was diverted through defendant's pipe line, and that of defendant being to the effect that at no time, except on two occasions, during the summers of 1889 and 1890, had its pipe line taken the entire flow of the stream, and that there was very little, if any, difference in the flow of the creek below their settler before and after the construction of its pipe line, during the months that plaintiff required water. The court below having found in favor of defendant's version upon this conflicting testimony, under the well-settled rule we must accept its finding as conclusive upon this review.

Plaintiff had introduced its evidence, and rested; and the court permitted defendant to file an amended answer, over objection. This ruling is assigned as error, upon the ground that the amendment was allowed during the trial, without any showing, and without imposing any terms. It rests largely in the discretion of the trial court to allow or refuse to allow amendments to the pleadings; and unless it is apparent that that discretion has been abused, to the prejudice of the party complaining, its action will not be interfered with by a reviewing court. *Dyer v. McPhee*, 6 Colo. 174; *Buddee v. Spangler*, 12 Colo. 216, 20 Pac. 760. In the latter case the court say: "It has been frequently held by the supreme court of California, under statute in relation to amendments from which our statute on the same subject was taken, that it is a matter of discretion with

the court to allow or to refuse to allow an amendment to a pleading. \* \* \* The fact that the matter set up in the amendment was known to the appellee when he filed his amended answer does not show such laches as will authorize this court to say that there was an abuse of such discretion by the court." The answer, as amended, pleaded with more particularity the priorities claimed by the defendant to the use of the water flowing in West Monument creek than they were pleaded in the original answer, and set up a prior adjudication of such priorities. The record also discloses that plaintiff's replication to the original answer was filed without leave of court, after trial had proceeded for some time. The court allowed the amendment, reserving the question of costs and terms to be determined at the conclusion of the trial. We think the court committed no error in allowing the amendment.

The foregoing assignments being the only ones discussed by counsel for plaintiff in error, the judgment must be affirmed. Affirmed.

(23 Colo. 223)

#### ROLAND v. PEOPLE.

(Supreme Court of Colorado. Dec. 7, 1896.)

##### CRIMINAL LAW—FORMER JEOPARDY.

Defendant was tried on an information containing two counts. The first charged larceny of a heifer, the property of T. The second charged larceny of a heifer, the property of some person unknown. The jury were instructed that, "upon the first count, the state has failed to make out the ownership as in the information alleged, and therefore need not be considered by you. \* \* \* You are therefore instructed that you must acquit the defendant on the first count of the information." The court submitted the following form of verdict: "We, the jury, find the defendant guilty, as charged in the information, on the second count," etc. The jury failed to agree, and were discharged. The defendant was again put upon trial on both counts of the information, and found guilty on the first count. *Held*, that the plea of former jeopardy was good.

Error to district court, Otero county.

Action by the people of the state of Colorado against Lou A. Roland for larceny. Defendant was found guilty on the first count. Motions for new trial and in arrest of judgment were overruled, and defendant was sentenced to the penitentiary. Defendant brings error. Reversed.

John R. Dixon, for plaintiff in error. Byron L. Carr, Atty. Gen., and F. P. Secor, Asst. Atty. Gen., for the People.

GODDARD, J. Lou A. Roland was informed against in the district court of Otero county for the crime of larceny. The information contained two counts. The first count charged him with the larceny of one heifer, of the value of \$15, the property of Towers Bros. The second count charged him with the larceny of one heifer, of the value of \$15, the personal property "of some person,

the owner of which to said district attorney is unknown." The case was first tried at the April term, 1894. Upon this trial the court, *inter alia*, instructed the jury as follows: "The court instructs the jury that upon the first count the state has failed to make out the ownership as in the information alleged, and therefore need not be considered by you in this case, and leaves to your consideration only the charge that is given in the second count of one unknown." "You are instructed that there is no legal evidence in this cause to show ownership of the heifer described in the information in Towers Bros. You are therefore instructed that you must acquit the defendant on the first count of the information." And submitted to the jury the following forms of verdict: "We, the jury, find the defendant guilty, as charged in the information, upon the second count, and the value of the property taken to be \$——." Or: "We, the jury, find the defendant not guilty." The jury failed to agree, and were discharged. The case was again set for trial at the April term, 1895, whereupon the defendant interposed a plea of former jeopardy, setting forth therein the record of the proceedings of the April term, 1894, a copy of the instructions of the court withdrawing the first count of the information from the jury, and directing an acquittal thereon, concluding with a prayer for judgment that he ought not to be put further to answer said first count of the information. This plea was overruled, and the defendant was again put upon trial upon both counts of the information, was found guilty upon the first count, and recommended to the leniency of the court. Motions for a new trial and in arrest of judgment were overruled, and he was sentenced to confinement for one year and six months in the state penitentiary.

The record contains several other matters upon which error is assigned, but it is unnecessary to specify or consider them, since it is apparent from the foregoing statement that the error committed by the court below in overruling the plea of former jeopardy to the first count of the information necessitates a reversal of the sentence. This ruling is sought to be upheld upon the theory that but one offense was charged in the information,—that the two counts, being based upon the same act, charged the same offense,—and, although the defendant was in jeopardy upon the first trial, such jeopardy was suspended by reason of the failure of the jury to render any verdict, and such failure left undetermined, and consequently at issue on the subsequent trial, the fact of the larceny, as charged in both counts. We think this claim is without merit. Counsel for the people are mistaken in their assumption that the same offense was charged in both counts. It may be true that the same act or transaction furnished the subject-matter of the offense charged in both. Nevertheless, the offense as charged and set forth in each was different.

While our Criminal Code (section 1452, Mills' Ann. St.) permits the joinder in one indictment or information of several charges against a person for the same act or transaction,—that is, several cognate offenses growing out of the same transaction may be charged in separate counts,—yet, when so charged, each count, to be valid, must be independent of the others, and in itself charge the defendant with a distinct and different offense. As stated by Mr. Bishop, in his work on Criminal Procedure (section 426): "Every separate count should charge the defendant as if he had committed a distinct offense, because it is upon the principle of the joinder of offenses that the joinder of counts is admitted." In conformity to this principle, the two counts in the information in this case charge distinct offenses against the defendant; and the proof necessary to sustain a conviction upon one would fail to establish the offense as charged in the other. If we may assume that the same heifer is referred to in both, and each is based upon the same transaction, yet proof that would sustain a conviction upon the first count would be clearly inadequate to sustain a conviction upon the second count, and vice versa. The ownership of the property stolen must be alleged, and proved as alleged, or the defendant is entitled to an acquittal. Rap. Lar. § 144. The larceny of a heifer, the property of Towers Bros., is a different offense than the larceny of a heifer belonging to some one else; and hence the two counts in this information, although predicated upon the same act of taking, might and did charge different and distinct offenses. Section 18, art. 2, of our bill of rights protects a person against a second jeopardy for the same offense. That the defendant was put in jeopardy upon the first trial for the offense charged in the first count of the information, admits of no doubt; and that the action of the court below in withdrawing that count from the consideration of the jury, on account of the insufficiency of the evidence to sustain a conviction of the offense therein charged, was equivalent to an acquittal of the defendant thereof, is well settled by the current of authority. In *Mount v. State*, 14 Ohio, 295, a case similar to the one at bar, the supreme court of Ohio used the following language: "There can, we think, be no question of the right of the state, after the jury are sworn, to abandon any count, or all the counts, of an indictment, even against the defendant's consent; but abandonment cannot be held to be anything more than the expression of the opinion from the legal authority of the state on the insufficiency of the evidence to produce conviction in the case made; and it is equivalent to an acquittal. It justifies, and requires from the jury, with the sanction of the court, a verdict of not guilty; and the prisoner may of right demand it. An abandonment, therefore, of a criminal prosecution, after the jury is sworn, is tantamount to an acquittal, and the

effect is the same; and no error is perceived by us in the exercise of this right by the state in reference to the third count." *People v. Webb*, 38 Cal. 477; 1 Bish. Cr. Law (7th Ed.) § 1015; *Bell v. State*, 44 Ala. 393; *Whart. Cr. Pl. & Prac.* (9th Ed.) § 491; *Weinzorflin v. State*, 7 Blackf. 186; *People v. Ny Sam Chung*, 94 Cal. 304, 29 Pac. 642; *Hall v. People*, 43 Mich. 417, 5 N. W. 449; *Cooley, Const. Lim.* (6th Ed.) 399. The right of the defendant to invoke the foregoing constitutional provision in bar of the second trial upon the first count of the information was clear, and the court erred in overruling his plea of former jeopardy. For this reason the judgment and sentence are reversed, and the cause remanded, with directions to the court below to discharge the defendant. Reversed and remanded.

(23 Colo. 359)

### HUME v. ROBINSON et al.

(Supreme Court of Colorado. Dec. 21, 1896.)

REVIEW ON APPEAL — ASSIGNMENT OF ERRORS — MECHANICS' LIEN — PERSONAL JUDGMENT.

1. A case may be reviewed on the record proper, though no bill of exceptions was preserved.

2. An objection that a necessary party was not joined cannot be considered unless assigned as error.

3. In a suit to enforce a mechanic's lien, a personal judgment against the owner in favor of a subcontractor with whom no privity of contract was alleged is void, though the owner appeared and took part in the litigation.

Error to county court, Arapahoe county.

Action by George W. Robinson and William B. Robinson, co-partners as Geo. W. Robinson & Son, against William O. Hume and others, to foreclose a mechanic's lien. From a judgment for plaintiffs and for defendants other than said Hume, the latter brings error. Affirmed in part, and reversed in part.

W. M. Duff, for plaintiff in error. W. C. Kingsley and J. B. Willsea, for defendants in error.

GODDARD, J. This is an action by Geo. W. Robinson & Son against William O. Hume, the plaintiff in error, Alfred H. Allen, and Hughes Bros., their co-defendants in error, to foreclose a mechanic's lien upon lot 42, block 12, Sherman's subdivision in the town of South Denver, for and on account of brick furnished and used in the construction of two buildings upon said lot, and for a personal judgment against defendant Allen. The complaint avers that Hume, the owner of the property, entered into a contract with one Williams for the erection of the buildings; that Allen entered into a contract with Williams to furnish materials and do the brickwork, and that Robinson & Son, under a contract with Allen, furnished him with brick of the agreed value of \$168, which were used in said buildings; that a lien therefor was duly filed; that the other defendants claimed to have liens upon the same premises,—and

prays for a personal judgment against Allen, and for foreclosure of the lien. In his cross complaint the defendant Allen avers that Hume entered into a contract with Williams for the erection of these buildings, and that he entered into a contract with Williams whereby he agreed to do the brickwork on the buildings for the sum of \$351.75, which work was completed, and accepted by Williams and Hume; that no part of the same has been paid; the filing of a lien, in compliance with the statute,—and prays for a personal judgment against Williams for the sum of \$351.75, with interest, and for foreclosure of his lien, that the property be sold, etc. The other defendants, Hughes Bros., in their cross complaint aver that at the request of Hume, the owner, they furnished certain lumber and building materials, of the aggregate value of \$347.46, and the filing of a lien therefor; pray a personal judgment against Hume, and a foreclosure of their lien upon the property. The defendant Hume filed a general denial to all of these averments. Upon the issues joined, the cause was tried to the court. The evidence introduced upon the trial is not preserved by a bill of exceptions. The court found the amounts to be due the respective parties as alleged, and, in addition to decreeing a lien against the property for such amounts in favor of the parties, rendered a personal judgment against Hume in favor of each for their respective amounts.

The case is presented here upon the record proper, and numerous errors are assigned, but, no exceptions having been taken or reserved on the trial in the court below, most of them cannot be considered on this review. In fact, it is insisted by counsel for defendants in error that, for want of exception, duly reserved, to the findings and judgment of the court below, no error, however apparent from the record, can be considered, and in support of this claim cite several of the decisions of this court; but none of the cases cited, nor any decision of this court, supports this contention. Those cases are to the effect that unless an exception is taken, and duly preserved, to the judgment of the court below, this court cannot review the evidence; but none of them go to the extent of holding that an exception is necessary to enable this court to review cases upon the record proper. As was said in the case of *Burton v. Snyder*, 21 Colo. 292, 40 Pac. 451: "The jurisdiction of this court is frequently exercised to review cases upon the record proper, in the absence of a bill of exceptions; and, by the sections of the Code referred to, the motion interposed in this case is properly a part of such record. It will, of course, be conceded that the taking of an exception, and preserving the same by bill, is necessary to a review of the evidence, or upon the law as applied to the evidence; and the Colorado cases go no farther than this." It is apparent upon the face of this record that the judgment of the court below, in so far as it awarded a personal judgment

against the plaintiff in error in favor of Allen and Robinson & Son, was unwarranted, under the issues joined by the pleadings, and consequently the court had no power or jurisdiction to render it. The want of jurisdiction to render the judgment complained of is open to challenge at any time. As observed in the case of *Jones v. Davenport*, 44 N. J. Eq. 33, 13 Atl. 652, "the principle is authoritatively settled that a decree or judgment on a matter outside of the issue raised by the pleadings is a nullity, and is nowhere entitled to the least respect as a judicial sentence." The only exception to be noted to this doctrine is where the defendant appears, and takes part in the actual litigation of the matter determined, in which event he will be bound by the judgment, although outside of matters put in issue by the pleadings. Otherwise, the rule is universal that the judgment is inclusive only of matters so put in issue. *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773; *Id.*, 43 N. J. Eq. 211, 10 Atl. 385; *Munday v. Vail*, 34 N. J. Law, 418. But this exception could not apply in this case, notwithstanding the plaintiff in error appeared, as it cannot be presumed that any question of his personal liability to these defendants in error was submitted or determined, since from the very nature of the action no such liability could exist, there being no privity of contract between them and him. While, therefore, the court in this case had jurisdiction of the subject-matter and of the persons, it was without jurisdiction to render the judgments mentioned. So much of the judgment as adjudicates the claim of Hughes Bros. is not subject to this objection, since, from the allegations of their cross complaint, a personal liability against the plaintiff in error upon a personal agreement on his part is shown.

Counsel for plaintiff in error argues at some length another objection appearing upon the face of the record, viz. that Williams, the principal contractor, is not made a party to the action. We are precluded from considering this objection for the reason that no assignment is predicated upon this ground.

For the reasons stated, the judgment of the court below in favor of Hughes Bros. is affirmed, and that in favor of Alfred H. Allen and Geo. W. Robinson & Son must be reversed, and the cause remanded, with directions to grant a new trial upon the issues joined between them and the plaintiff in error. Reversed and remanded.

(23 Colo. 314)

#### RITCHEY v. PEOPLE.<sup>1</sup>

(Supreme Court of Colorado. Dec. 7, 1896.)

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS—APPEAL—HARMLESS ERROR—EVIDENCE—SUFFICIENCY OF OBJECTIONS.

1. On a trial for a murder it was error to charge that defendant, in every case, must retreat to the wall before he is entitled to resort to self-defense. *Boykin v. People* (Colo. Sup.) 45 Pac. 410, followed.

2. Such instruction was prejudicial error, though no attempt was made to apply it to the facts in the case, and in another instruction on the doctrine of retreat the jury was told, in terms favorable to defendant, that the doctrine was inapplicable to the kind of case which was there stated defendant's evidence tended to establish. *Campbell, J.*, dissenting.

3. That difficulty attends the examination of a deaf mute is no reason for excluding his testimony.

4. Where some of the evidence of a witness is competent and material, a motion to exclude the evidence of the witness because it is incompetent is properly denied, though some of it is incompetent.

Error to district court, Boulder county.

J. J. Ritchey was convicted of murder in the second degree, and he brings error. Reversed.

Patterson, Richardson & Hawkins, for plaintiff in error. Byron L. Carr, Atty. Gen., and Calvin E. Reed, Asst. Atty. Gen., for the People.

CAMPBELL, J. At the October, 1895, term of the district court of Boulder county, the defendant, J. J. Ritchey, was informed against for the murder of B. E. Rhodes, in said county, on the 11th day of May, 1895. He was tried at the same term, convicted of murder in the second degree, and sentenced to confinement in the penitentiary for a period of 20 years. To reverse the judgment upon this writ of error, his counsel rely upon three alleged errors of the district court. The defendant admitted the killing, and justified under a plea of self-defense. He was the owner of a tunnel and a mine in Boulder county, which were under lease by him to the deceased, Rhodes, and McOlelland Brown. A forfeiture of the lease was claimed by the defendant for a failure by the lessees to comply with certain covenants, for the breach of which the lessor, by the terms of the lease, might declare a forfeiture, and re-enter and take possession. The lessees denied this forfeiture. On the morning of the 11th of May, 1895, during the temporary absence of the lessees, and at an early hour in the day before they began work, the defendant, in company with three or four of his employes, peaceably entered upon the premises, and took possession. When Rhodes arrived a short time thereafter, it appears that he learned of what the defendant had done; and upon his endeavor to go into possession himself, and oust defendant and his assistants, and while deceased and defendant were alone in the tunnel, and out of sight of the witnesses, the altercation arose in which Rhodes lost his life, at the hands of Ritchey. So far as the record discloses, there is no living witness to the shooting except the defendant himself; and his testimony is that in the endeavor to oust the defendant, and regain possession for himself, during the controversy the deceased violently assaulted the defendant with a rock and a knife, and in order to repel the assault, and save his own life, which he then believed to be in peril, he (the defendant) fired the shot that killed Rhodes. While, upon one hand, under the

<sup>1</sup> For opinion on rehearing, see 47 Pac. 384.

hypothesis that the jury might believe the evidence introduced in behalf of the people tending to show that defendant sought out and provoked the difficulty, that he might have a pretext for the killing, an instruction would have been proper the effect of which was to deprive the defendant of his plea of self-defense, nevertheless there was evidence before the jury, produced in defendant's behalf, which made pertinent instructions by the court defining the law pertaining to the right of self-defense; especially where, at the time in question, the defendant was in a place where he had a right to be, and while he was engaged in a lawful business, and in defending his person and property. It was necessary, therefore, for the jury to be correctly instructed upon the law of the case, upon the supposition that they might believe the evidence introduced in behalf of the defendant.

The first contention of plaintiff in error is that the evidence was insufficient to justify the verdict. In view of the fact that there must be a retrial of this case, we decline to enter upon a discussion of the evidence further than to say that, after a careful examination of the record, we find no reason for disturbing the judgment upon this ground.

Another of the errors assigned is that the court improperly received the testimony of Patrick Casey, a deaf mute, and also, after its admission, erred in not granting the defendant's motion to withdraw it from the jury. The method of examining this witness was by submitting to him written questions, to which he replied in writing, and the questions and answers were then read to the jury. His testimony in part related to alleged conversations had between him and the defendant, in which Casey swore that the defendant, some time prior to the homicide, threatened to shoot the deceased. No objection was made to this testimony as it was given, and not until the district attorney had practically closed his examination in chief. Then counsel for the defendant moved the court to withdraw all the evidence given by the witness, and based their application upon three grounds: First, that no exact time was fixed when the threats were made; second, because of the difficulty of examining the witness; third, because it appeared that the conversation between Casey and the defendant during which these threats were made, was through and by the medium of written questions and answers; and, before a witness is permitted to testify as to the contents, it should first be shown that the written questions and answers are not to be had in court. The court overruled the motion. That difficulty attends the examination of a deaf-mute is no reason why his testimony should be excluded. Contrary to the assertion of counsel, the time of the conversation at which the threats were said to have been made, the record shows, was specifically stated. Assuming, but not so deciding, that such por-

tions of the testimony of Casey as purported to recount the conversation which he had with the defendant concerning the threats were reduced to writing, and hence were inadmissible until proof of loss of the original writing was made, it does not necessarily follow that the court erred in refusing to grant defendant's motion to strike out the testimony. Casey had given important testimony as to other matters. In his testimony, defendant claimed that, in the previous November, his trunk had been broken open, and from it, among other things, was stolen a knife. This knife was found in the tunnel near where Rhodes was killed, a few minutes after the homicide; and the defendant testified that it was with this knife that Rhodes made the felonious attack upon him, and that with it Rhodes had in several places cut the defendant's shirt, in the attempt to inflict upon him bodily injury, just before the defendant resisted the assault by firing the fatal shot. When Casey was upon the stand, he testified that defendant had this knife in his possession, and at his house, and on his person, long after November, and until shortly before the homicide, and that during this period of time he (Casey) had often used this knife to sharpen pencils and to trim his nails. It must be borne in mind that this motion went to the entire evidence. If any portion of it was admissible, the motion ought not to have been granted. That the evidence relating to the knife was properly admitted is beyond controversy. The court, therefore, was not obliged to subdivide the defendant's motion, and its ruling rejecting the same was right. Upon the foregoing the court is unanimous.

The remaining error argued pertains to the giving by the court of instruction numbered 18, which is in words as follows: "A person may repel force by force in defense of his person, habitation, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either; and if a conflict ensue in such case, and life is taken, the killing is justifiable, but in case of assault it must be proved that the assault was eminently perilous, and, unless there be an apparent manifestation of a felonious intent, no assault will justify killing the assailant. A party is not compelled to flee from his adversary who assaults him, but before he can justify the homicide, the assault must be so fierce as to not allow the party assailed to yield without manifest danger to his life or enormous bodily harm. In such case, if there be no other way of saving his own life, or saving himself from great bodily harm, he may, in self-defense, kill his assailant." This concerns the right of self-defense, and, in part, goes to the doctrine of retreat. With much vigor, counsel for plaintiff in error assert that the vice in this instruction is so glaring that the act of the court in submitting it to the jury was error most harmful. This instruction finds recognition in the authorities. 2 Thomp. Trials, § 2163; State v. Kennedy,

20 Iowa, 569. The doctrine attempted to be stated by the trial court in this case is laid down in the Iowa case, *supra*, and thence copied into Judge Thompson's valuable work on Trials. The learned author, however, makes certain changes and omissions in the language, and, as thus modified, the trial court here gave the instruction which counsel insist but accentuates the error contained in the original. Counsel contend, and this court has already so decided, that this instruction, whether expressed as in the Iowa case or in the language of Judge Thompson, is not, unless taken with certain well-understood exceptions, a correct statement of the law as sustained by the weight of modern authorities. *Babcock v. People*, 13 Colo. 515, 22 Pac. 817; *Boykin v. People*, 22 Colo. 496, 45 Pac. 419. The portions of this instruction as above italicized by counsel with particularity indicate the objectionable features. Down to the semicolon, the first sentence seems to be predicated upon section 1186 of Mills' Annotated Statutes (Gen. St. 1883, § 719), wherein the homicide, in the specified cases, is declared to be justifiable where the deceased manifestly intends to commit a known felony upon the defendant. The rest of the sentence, down to the first period, introduces the element of assault, as embraced in section 1188 of Mills' Annotated Statutes (Gen. St. 1883, § 721), and, in effect, states that, before the defendant is justified in killing his assailant, not only must the assault be eminently perilous, but there must be an apparent manifestation of a felonious intention upon the part of the assailant. Under section 4 of article 18 of our constitution, a felony means any criminal offense punishable by death or imprisonment in the penitentiary, and none other. The criticism upon this particular part of the instruction is that although, under the latter section of our statute, a person may kill his assailant if all the other necessary elements are present, not only to save his own life, but, as well, to prevent his receiving great bodily harm, the jury are, nevertheless, told that if the assailant intends merely to inflict upon the defendant great bodily harm (which, under our statute, is nothing but a misdemeanor, and punishable by fine or imprisonment in the county jail), the defendant may not resort to self-defense, and may do so only when the assailant intends to commit upon the defendant a crime of the grade of felony. If by the use of "felonious" is meant that the crime which the assailant intends to commit must be of the grade of a felony, this instruction is erroneous. If, however, the court meant merely that the assault must be accompanied by the intent to commit a crime, or with a criminal intent, it was not, in this respect, faulty. The only proper and safe practice, and one that removes all doubt, in a case like the one before us, in an instruction upon this point, is to state that the defendant not only may resort to self-defense if absolutely necessary to save his own life, but

also to prevent his receiving great bodily harm. The second and third sentences, however, are the ones which demand more serious consideration. The use of the word "enormous," instead of the word "great," is disapproved in *McDonald v. State*, 89 Tenn. 161, 14 S. W. 487; and the case was reversed upon that ground. It was there said that "enormous" is a word of richer, deeper color than the word "great," and its use naturally had a tendency to lead the jury to believe that something more than great bodily harm must be apparent. As in the last sentence of the instruction the court here uses the word "great" as apparently synonymous with the word "enormous" (which has authority in *Webst. Dict.*), it is possible that the jury were not misled. It is appropriate for us, however, in connection with this and the preceding point, to add with our approval the following language of the court in the *McDonald Case*, *supra*: "When the path is plain and well marked by long and consistent travel, it is always safe to pursue it, while it is always dangerous to undertake to make a new one to the same end, or to qualify old, unbroken, and well-understood expressions of what the law is."

But the vital objection to this instruction, in our view, is that it seems indiscriminately to apply to the facts of the case the common-law doctrine of retreat to the wall. Had the court, in apt language, limited this doctrine to that class of cases to which it has been held applicable (in which the case as made by the people might be included), the objection made here by the plaintiff in error would not be tenable. But where, as here, in the form of an abstract proposition of law, in terms as relevant to the case made by the defendant as to a case where the provocation was but a mere assault, the jury are instructed that the defendant, in every case, must retreat to the wall before he is entitled to resort to self-defense, the error is manifest. We have so lately had occasion to determine and enunciate the rule in this jurisdiction, and to discriminate between the classes of cases wherein the doctrine is, and wherein it is not, applicable, that we merely refer to the *Boykin Case*, *supra*, with our approval of what is therein said. As to the last proposition, the members of this court are agreed that instruction numbered 18 was an incorrect statement of the law. My brethren are of the opinion that it was prejudicial error, for which the judgment should be reversed. In the latter conclusion the writer of this opinion does not concur. His reasons are: Plaintiff in error, by reason of not having, as the writer believes, properly objected and preserved exceptions to the giving of the objectionable part of this instruction, and not having properly assigned error to the said ruling, is not in a position to question the same. Were this not so, still this instruction is but an incorrect statement of the doctrine in the abstract. No attempt is made to apply it to the facts of this case,

either as made by the people or by the defendant. In instruction No. 34 is to be found an instruction upon the doctrine of retreat, in which the jury are explicitly told, in terms as favorable to the defendant as he could ask, that the doctrine is inapplicable to the kind of case which is there stated the defendant's evidence tends to establish; and so, while the law in the abstract was incorrectly given, its application to the facts of the case, which defendant's evidence tended to establish, was correctly made. My brethren, however, are of the opinion that the error was prejudicial, and that, by the giving of this instruction, the jury may have been, and probably were, misled, or their minds confused, to the extent that the error found in instruction No. 18 contributed to the verdict which they returned. The judgment, therefore, based upon this verdict, must be reversed, and the cause remanded for a new trial. Reversed.

(23 Colo. 276)

## JONES v. PEOPLE.

(Supreme Court of Colorado. Dec. 7, 1896.)

JURORS—CHALLENGE FOR CAUSE—EXPERT EVIDENCE—HARMLESS ERROR—HOMICIDE—INSANITY AS A DEFENSE—INSTRUCTIONS—MANSLAUGHTER.

1. A challenge for cause is properly sustained where the juror states that, in case certain facts appear, he doubts his ability to be governed by the instructions of the court, or to act impartially.

2. A juror in a homicide case may be asked whether the fact that defendant's wife and deceased were unduly intimate, should it appear, would influence his verdict.

3. Error in allowing a physician, on re-direct examination, to give an opinion as to defendant's mental condition, based on evidence of what occurred immediately before and after the shooting, instead of on a hypothetical statement of facts, was harmless, where the witness had previously expressed a like opinion in answering hypothetical questions, and the facts were practically conceded.

4. An instruction that the jury should consider evidence as to the insanity of defendant's father and aunt only in case they entertained a reasonable doubt as to defendant's own sanity at the time of the homicide is erroneous, since it practically told the jury that they could not consider such evidence unless defendant was entitled to acquittal without it.

Error to district court, Arapahoe county.

James C. Jones was convicted of murder in the second degree, and brings error. Reversed.

At the April, A. D. 1891, term of the district court of Arapahoe county, plaintiff in error was indicted for the murder of one Thomas J. Strawn. The case was first tried in 1892, but the result of that trial does not definitely appear from this record. It sufficeth to know that a new trial was awarded, and the defendant again put upon trial in June, 1893. The second trial resulted in a verdict of "guilty of murder in the second degree," upon which a sentence of imprisonment in the penitentiary for life was imposed. From this judgment a writ of error was sued out from this court. The remain-

ing facts sufficiently appear in the opinion of the court. The writ of error was at one time dismissed for failure of prosecution, but it was recently reinstated upon stipulation, and the cause submitted upon printed briefs.

David G. Taylor, for plaintiff in error. Byron L. Carr, Atty. Gen., and Calvin E. Reed, Asst. Atty. Gen., for the People.

HAYT, C. J. (after stating the facts). The killing of the deceased is admitted by the defendant. It is claimed that it was done at a time when the defendant was insane, such insanity having been caused in part by a shock, produced by information reaching him, going to show that his wife was unduly intimate with the deceased; that he was predisposed to insanity by heredity, and that the knowledge of his wife's infidelity, acting upon a mind weakened by this infirmity transmitted from his father, dethroned his reason, and rendered him incapable of distinguishing between right and wrong.

The first assignments of error relate to questions propounded to jurors, with reference to the effect upon them, in the discharge of their duties as jurors in the case, if such intimacy should be established by the evidence. The nature of such examination will appear from the following, taken from the transcript: "J. H. Lyon, being duly sworn to answer questions concerning his competency to sit as a juror upon the trial of the cause, testified as follows, among other things: Direct examination by Mr. Benson: 'Q. If it should appear that the wife of defendant and the deceased were unduly intimate, would that fact influence you in rendering your verdict, or could you disregard that fact, if such fact should be proven, and, under the instructions of the court, render a fair and impartial verdict, notwithstanding that fact?' The Court: I want to explain to the juror, before answering these questions, that under some circumstances the law does make a difference in cases of this kind. What the law is, and what the evidence will be, neither you nor I at this time know, or are presumed to know, because we have not heard it; but we want to know, and all that we want to know now is, whether, after you have heard the evidence, you will be governed by the instructions of the court as to what the law is in applying such evidence, or whether you will have a bias or prejudice that will prevent you from properly weighing the evidence, and being governed by the law. You may answer this question with this explanation. A. It would not.' Thereupon, E. B. Green, another juror, being duly sworn to answer questions concerning his competency to sit as a juror in the trial of the cause, testified, *inter alia*, as follows: 'Q. If it should appear that the wife of the defendant in this case and the deceased were unduly intimate, could you and would you, notwithstanding that fact, return a verdict based wholly and solely upon the evidence and the instructions of the court

in this case? A. It would influence my mind. Q. Would it influence your mind to such an extent that you would disregard the instructions of the court? A. I would try very hard not to disregard the instructions of the court, but I doubt my ability. Q. You would doubt your ability if such fact were proven? A. Yes, sir. Q. Then you doubt your ability, if such fact were proven, to act as a fair and impartial juror in the trial of this case? A. I do. I think, that fact being proven, I doubt my ability. Q. And if such fact should be proven, you could not serve as a fair and impartial juror in the trial of this cause? A. I say I would do the best that I could, but I doubt very much if I could get that off my mind. (Challenged by the prosecution for cause. Objection sustained, and juror excused, to which ruling of the court defendant duly excepted.) There was no error in sustaining this challenge. In this state it is the duty of the court to declare the law in the trial of criminal, as well as civil, cases, and it is for the jury to determine the facts in accordance with the instructions of the court. The examination of jurors upon this evidence is for the purpose of obtaining a fair and impartial jury for the trial of the issues between the parties; and where a juror announces in advance that he will not be governed by the instructions of the court, or if it appears doubtful as to whether such instructions will be controlling with him, as to the law of the case, it is the duty of the court to excuse such juror. Similar questions were propounded to the juror Lyon and others, who were not challenged for cause. Such questions were proper, not alone for the purpose of informing the parties to the end that they might intelligently exercise their right to challenge for cause, but for the stronger reason that counsel were entitled to be fully informed of the state of mind of the jurors with reference to the matter, in order that the parties should be fully advised in exercising the right of peremptory challenges.

A number of assignments of error are based upon the admission and rejection of evidence. The most important of these brings up for review the ruling of the trial court upon the redirect examination by the state of Dr. Eskridge, a medical expert, upon the question of sanity. The question objected to is as follows: "Q. You have heard what Mr. Jones' acts were immediately before the shooting, and immediately after, and what he said immediately after. A. Yes, sir. Q. Did the defendant, upon that occasion, so far lose control of himself as to commit that act involuntarily, and without any power to control himself? (Objected to by the defendant. Objection overruled, and exception noted.) A. I see no evidence of the loss of self control there." It is urged by counsel for the prisoner that it was necessary for Dr. Eskridge, in order to answer this question, to determine what the facts were. The answer to this objection is found in the examination of this

witness immediately preceding this interrogatory. It appears from the transcript that the witness had been examined at length by the district attorney and by the defense. Such examination had proceeded strictly in accordance with well-established rules, and the opinion of the witness was only sought upon questions hypothetically put. In the course of the examination, the district attorney had detailed every circumstance that had transpired immediately before the shooting and immediately thereafter, according to the theory of the state with reference to the evidence. When the witness was turned over to the defense, he was subjected to a thorough cross-examination, conducted with great skill and ability. In the course of this examination, hypothetical questions were propounded, in which every possible hypothesis of the case in favor of the defense upon the evidence was gone over. An examination of these questions, as propounded by the district attorney and by the defense, discloses a wonderful unanimity with regard to the facts occurring immediately before and immediately after the shooting. In so far as these matters are concerned, the facts may be said to be uncontroverted, and the question and answer objected to, when viewed in the light of the foregoing, must be held to have referred to the conceded facts; and although the question and answer, if considered separate and apart from the remainder of the examination of Dr. Eskridge, would appear to be highly improper, when viewed in connection with his antecedent examination, it seems clear that no harm could have resulted. In substance, the witness had several times expressed a like opinion in answering hypothetical questions, and the error in the question and answer objected to must, under the circumstances, be considered as immaterial. *McCarty v. Com.* (Ky.) 20 S. W. 229.

At the trial certain acts of the defendant at the time of the shooting were put in evidence for the purpose of showing that he was insane at the time of firing the fatal shot. So, also, it was in evidence that the defendant's father had been insane for a number of years, becoming so violent at one time as to require his incarceration in an insane asylum for a number of months. Evidence was also introduced for the purpose of showing that an aunt of the defendant was insane for a time. This evidence was competent to show hereditary insanity in the family, and therefore proper for the jury to consider, with the other evidence in the case, as an aid in passing upon the mental condition of the defendant at the time of the homicide. Upon this evidence the court instructed the jury, against the objection of the defendant, that "evidence of insanity of the defendant's father and aunt is to be considered and weighed by you only in case you should entertain a reasonable doubt as to the defendant's own sanity at the time he committed the offense of which he stands charged." The court had previous-



ly correctly instructed the jury that the defendant was presumed to be of sound mind at the time of the homicide, unless the contrary appeared from the evidence; but if, upon the whole evidence, the jury entertained a reasonable doubt as to the sanity of the defendant at the time of the commission of the homicide, they should give the defendant the benefit of such doubt, and return a verdict of acquittal. 2 Bish. Cr. Proc. § 673; Hopps v. People, 31 Ill. 385; People v. Wilson, 49 Cal. 13; State v. Bruce, 48 Iowa, 530; State v. Crawford, 11 Kan. 32; State v. Wilner, 40 Wis. 304. The correctness of the foregoing instruction as to reasonable doubt being conceded, the incorrectness of instruction No. 7 is manifest, for in it the jury are told that the insanity of the defendant's father and aunt is not to be taken into consideration unless they entertain a reasonable doubt of the defendant's sanity. This was grievous error. It, in effect, deprived the defendant of the benefit of the testimony introduced with reference to the mental condition of his ancestors, for, in the absence of this evidence, he was entitled to an acquittal if the evidence left a reasonable doubt of his sanity, while, by the instruction, the insanity of his father and aunt was only to be considered in case of such reasonable doubt appearing from other evidence; in other words, under the instruction, this evidence could only be considered in case the defendant was entitled to an acquittal without it, in which event it would, of course, be unnecessary. The defendant was thereby deprived of the only possible benefit of such evidence. For this error the judgment must be reversed.

In view of a new trial, we will briefly refer to the law governing homicides of this nature. The killing of an adulterer, deliberately and upon revenge, is murder; but where a man finds another in the act of adultery with his wife, and kills him or her in the first transport of passion, he is only guilty of manslaughter. 1 Whart. Cr. Law, § 459; Sawyer v. State, 35 Ind. 80; State v. Holme, 54 Mo. 153; State v. France, 76 Mo. 981. With a single exception, these rules of law are supported by all the authorities. Whart. Cr. Law (10th Ed.) § 459; Bish. Cr. Law, § 708. Contrary to the above, in Biggs v. State, 29 Ga. 723, it was held that the defendant was excusable for shooting in the morning a man who, during the previous night, had attempted to commit adultery with his wife; but this was under peculiar circumstances, which the court seems to have deemed sufficient to show a renewal of the offense in the morning. These circumstances were simply that the party, in the morning, took a seat near the defendant's wife at a breakfast table, at a public hotel. The decision is not grounded upon any recognized principle of the law, and it has been repudiated by the best authorities. 1 Whart. Cr. Law (10th Ed.) § 496; 1 Bish. Cr. Law, § 708.

Judgment reversed.

(23 Colo. 266)

WATERBURY et al. v. FISHER.

(Supreme Court of Colorado. Dec. 7, 1896.)

PARTITION — TENANTS IN COMMON — REFUSAL OF SALE,

An original bill by a tenant in common prayed for a sale of the land and an accounting. A demurrer was sustained on the ground that plaintiff was not entitled to such sale, and plaintiff assigned no error. An amended complaint, stating substantially the same facts, was filed, and prayed for a partition, if practicable, and, in the alternative, for a sale and accounting. The court found partition practicable, and granted such relief. *Held*, that a refusal of a sale and accounting, to which the evidence showed plaintiff was only to be entitled in case of a sale by him of the land, was proper. 38 Pac. 846, 5 Colo. App. 362, affirmed.

Error to court of appeals.

Action by Lyle C. Waterbury and others against Miers Fisher. From a decree of the court of appeals (38 Pac. 846, 5 Colo. App. 362) for partition, plaintiffs bring error. Affirmed.

Doud & Fowler, for plaintiffs in error. Oscar Reuter, for defendant in error.

PER CURIAM. As originally framed, the complaint in this action was for specific performance of a contract concerning real estate. There was asked a decree of sale, and an accounting, and a division between the plaintiffs and the defendant, according to their respective interests, of the profits, if any, to be realized from the sale of said property, which consisted of Denver city lots, alleged to be owned by the parties to this action as tenants in common. To the complaint there was interposed a demurrer upon the ground that the facts set up did not entitle the plaintiffs to a sale and an accounting. This demurrer was sustained by the court, evidently upon the theory that the specific relief (*viz.* a sale and an accounting) the plaintiffs were not entitled to under the facts alleged in the complaint, although they might be entitled to a partition, if slight amendments thereto were made. We are not required to pass upon this action of the court, by which, in one aspect, it apparently held that a demurrer lies to the prayer of a complaint, for the plaintiffs acquiesced in the ruling, and adopted the theory suggested by the court, and so filed an amended complaint, differing in no substantial respect from the original, in which they specifically asked that the court make a partition of the property. In addition to this, they further asked, if partition was found not to be practicable, that there be a sale and an accounting, although, by acquiescing in the decision upon the demurrer, and voluntarily amending their complaint, they abandoned their right to assign error to the ruling of the court withholding this alternative relief. Upon issues joined under the amended complaint, answer, and replication there was a hearing before the court, which made findings in favor of the plaintiffs, and, under our statute,

referred to three commissioners the matter of the partition. Thereafter, the commissioners reported that a partition was practicable, and that each party was entitled to a designated portion of the property. This report was confirmed by the court, and upon the same a decree was entered dividing the property between the parties as the commissioners recommended. The plaintiffs, being dissatisfied therewith, took the case by appeal to the court of appeals, where the judgment of the lower court was affirmed. See *Waterbury v. Fisher*, 5 Colo. App. 362, 38 Pac. 846. To this judgment the plaintiffs prosecute their writ of error in this court. Their principal grievance in the trial court, in the court of appeals, and here is that when the district court set off to the defendant his share of the property it should have ordered a sale thereof, and a division of the profits, if any, of such sale between the parties according to what the plaintiffs say was the contract between them.

It will be observed that this particular form of relief was what the plaintiffs asked in their original complaint, but to which, under the allegations of that pleading, the court held they were not entitled. It is clear from the evidence set out in this record that by the agreement of the parties the plaintiffs were entitled to this additional relief only in case of a sale, and that, inasmuch as they were tenants in common with the defendant of this property, in the absence of an agreement to the contrary it was as much their duty to make a sale thereof as it was the duty of the defendant. Indeed, we have no doubt that, in accordance with their agreement, it was made the special duty of the plaintiffs and their assignors themselves to make this sale, upon which alone rested their right to a share in the profits. It is equally clear from this record that it was owing to the long neglect of the plaintiffs that such sale was not made. Considering this fact in connection with the finding and decree of the court that partition of the property was practicable, and that being the very relief which the plaintiffs in the first instance in the amended complaint asked, it would be inconsistent relief to order a sale of that portion of the property set off to the defendant, and an allotment of a portion of the profits, if any, to the plaintiffs.

This case was brought into this court before the promulgation of rule 41 of this court, which requires, in cases brought here by appeal from, or writ of error to, any final judgment of the court of appeals, a new assignment of errors and briefs to be filed. Neither of these things was done in this case, and we are therefore not advised whether the defendant in error still insists upon his cross errors assigned in the court of appeals; but, if he does, we are satisfied that they were correctly resolved against him in that court. Upon the whole case, after a careful examination of the entire record, in connection with the decision of the court of appeals, we are of

opinion that the judgment of the latter court in all respects was right, and it is therefore affirmed. Affirmed.

(23 Colo. 300)

#### NEWMAN v. PEOPLE.

(Supreme Court of Colorado. Dec. 7, 1896.)

CRIMINAL LAW—VERDICT—SUFFICIENCY—BRIBERY—PLEADING AND PROOF—VARIANCE—DEFENSE.

1. An information consisted of four separate counts, which were not numbered, and the court quashed the first two. Defendant pleaded not guilty to the remaining counts. In its instructions the court referred to those counts as No. 1 and No. 2, and stated what they respectively charged against defendant. *Held*, that a verdict finding defendant "guilty as charged in the first and second counts of the information" was not void, as finding him guilty under the two counts that were quashed.

2. An information against a sheriff charged that he corruptly agreed not to seize and take before a judicial officer gambling devices. The proof showed a vague understanding between defendant and the gamblers from whom the money was received that defendant was not to close the gambling houses. *Held*, that there was no variance.

3. In a prosecution against a sheriff for accepting a bribe, it was no defense that the offense, if any, was procured to be committed by the prosecuting witness who gave the bribe.

4. It was no defense that defendant was ignorant of the existence of Mills' Ann. St. § 1343 (Gen. St. § 849), making it his duty to seize gambling devices, and take them before a judicial officer, especially where it appeared that he knew that gambling was a crime, and what his duty was as to executing the laws against gambling.

5. Mills' Ann. St. § 1343 (Gen. St. § 849), makes it the duty of sheriffs, etc., when it comes to their knowledge that any person has in his possession devices used for gambling, to seize and take them before some judge or justice of the peace, who shall inquire as to such devices, and, if they are used for gambling, he shall destroy the same; and that all persons having possession of such devices shall be conveyed before some judge or justice of the peace, and committed for appearance, etc. *Held*, that an objection that such statute is unconstitutional because authorizing the judicial officer to destroy the property does not raise the constitutionality of the provision relating to the seizure by the sheriff, and the proceeding against the person in whose possession the property is found; since, if the former provision is void, the latter may still be operative.

6. In a prosecution of a sheriff for accepting a bribe for omitting to seize gambling devices, the sheriff cannot raise the constitutionality of the provisions of the statute authorizing the judicial officer to destroy the property seized. *Gilchrist v. Schmidling*, 12 Kan. 263, applied.

Error to district court, Park county.

Michael H. Newman was convicted of bribery, and brings error. Affirmed.

The plaintiff in error was the sheriff of Lake county, Colo. In the district court of that county he was proceeded against under an information consisting of four separate counts, the first two of which charged him, as sheriff, with bribery, under section 1274, Mills' Ann. St. (Gen. St. 1883, § 791), and the last two under section 1302, Mills' Ann. St. (Gen. St. 1883, § 818), with receiving money at two different times for omitting to perform a duty appertain-

ing to his office as sheriff, in that, for the consideration named, he agreed to omit, and did omit, to seize and take before some judge or justice of the peace of Lake county certain gambling devices belonging to George L'Abbe, which the latter had in his possession to the knowledge of the defendant; which duty so to seize and take was imposed upon him, as sheriff, under section 1343, Mills' Ann. St. (Gen. St. 1883, § 849), which is as follows: "It shall be the duty of all sheriffs, coroners, constables, police officers of cities, and other officers charged with executing the laws of this state, whenever it shall come to the knowledge of any such officer that any person has in his possession any cards, tables, checks, balls, wheels or gambling devices of any nature or kind, used or kept for the purpose of gambling or playing at any game of chance; or that any cards, tables, checks, balls, wheels or gambling devices used or kept for the purposes aforesaid may be found in any place, to seize and take such cards, tables, checks, balls, wheels, or gambling devices, and convey the same before some judge or justice of the peace of the county in which the same may be found; and it shall be the duty of such judge or justice of the peace to inquire of such witnesses as he shall summon to appear before him in that behalf, touching the nature of such gambling devices, and if such judge or justice shall ascertain that the same are used or kept for the purpose of gambling or playing at any game or games of chance, it shall be his duty to destroy the same. It shall be lawful for officers in executing the duties imposed upon them by this section to break open doors for the purpose of obtaining possession of any such gambling devices; and all persons having possession of any of the articles aforesaid shall be conveyed before some judge or justice of the peace of the county in which they may be found, and held or committed for appearance at the next term of the district court to answer to any indictment or information which may be preferred against them or any of them." Soon after the defendant was apprehended, the venue of the case was changed to the district court of Park county, where all subsequent proceedings occurred. The defendant moved to quash all of the counts of the information, and the court sustained the motion as to the first two counts, and overruled it as to the last two. Thereupon the defendant was arraigned, and pleaded not guilty to the counts in the information remaining after the first two were quashed, and upon a trial before a jury was convicted, and by the court sentenced to imprisonment in the county jail for six months, and his office declared vacant. He prosecutes his writ of error to that judgment and sentence.

Patterson, Richardson & Hawkins, for plaintiff in error. Byron L. Carr, Atty. Gen., Calvin E. Reed, Asst. Atty. Gen., J. W. Taylor, and A. P. Rittenhouse, for the People.

CAMPBELL, J. (after stating the facts). That the defendant corruptly received money

for omitting to perform this official duty, if such it was, the record leaves no room for doubt. But he contends, *inter alia*, that the statute imposing this duty is unconstitutional. A number of errors have been assigned, but only those will be considered which have been argued by counsel. They are: First, that the judgment was pronounced upon counts of the information which had been quashed; second, that the defendant was convicted under an unconstitutional statute; third, that there was a variance between the evidence and the information; fourth, that the offense, if any, was instigated and procured to be committed by the prosecuting witness; fifth, that there was error in certain instructions.

1. The verdict of the jury was in these words: "We, the jury, find defendant guilty as charged in the first and second counts of the information." The contention of counsel for plaintiff in error is that this verdict is absolutely void and of no effect, because it finds the defendant guilty under the two counts of the information that were quashed. If the record accompanying this verdict were not considered, the argument might be plausible. The four counts in the information were not numbered 1, 2, 3, and 4, though they were separately set forth. When the two coming first (which appropriately might be designated counts No. 1 and No. 2) were quashed, there were but two remaining, and the information then stood as though it had always contained but these two, which, as related to each other and to the information, were as 1 and 2. The defendant pleaded not guilty to them after the court disposed of the motion to quash, and in its instructions to the jury the court referred to these counts as No. 1 and No. 2, and in connection therewith stated what they respectively charged against the defendant. In this view, neither the court nor the counsel nor the jury was misled, and no prejudice could possibly result to the defendant.

2. The variance alleged is that, whereas the charge was that the defendant corruptly agreed to omit to seize and take before a judicial officer gambling devices, the proof, at most, showed nothing but a vague understanding between the defendant and the gamblers from whom the money was received that he, the defendant, was not to close the gambling houses. The distinction which counsel endeavor to make is too unsubstantial and refined for courts to recognize in the administration of the criminal law. It is not to be expected that an arrangement of the sort which the sheriff undoubtedly made with the gamblers would be explicit as to details, or reduced to writing. The understanding necessarily would be somewhat general in its nature; and from the facts in evidence in this case we consider that there is no material variance between the allegation and the proof, and think the fair inference, which the jury was entitled to draw, was this agreement contemplated that the sheriff was to omit to perform those acts which reasonably or necessarily would

tend to close the gambling houses, or to interfere with the carrying on of gambling. To seize these gambling devices was one effective and statutory way to close the houses, and we have no doubt from the evidence that the sheriff's corrupt agreement included his omission to do the very thing charged, and that the jury were abundantly justified in so finding.

3. An attempt is made to bring this case within the doctrine of *Connor v. People*, 18 Colo. 373, 33 Pac. 159, and *Saunders v. People*, 38 Mich. 213, wherein it was held that the crime of larceny was not committed where the taking was instigated or suggested to the defendant by the owner, or agent of the owner, of the property, for the reason that nonconsent of the owner must be shown; in which cases it was also announced that courts should not give their sanction to the prosecution of persons who committed the acts charged against them at the instigation of others, although the object thereof was to effect their arrest while the act was being committed, and to capture old offenders. Counsel here seek to extend this doctrine to a crime in the nature of bribery, where the object of the bribe giver was to gain some advantage for himself, and to hold over the sheriff, as a club, this receipt of money, in case he should thereafter attempt to interfere with the former's unlawful practices. We think this cannot be done. To constitute bribery, the act of at least two persons is essential,—that of him who gives and him who receives. The minds of the two must concur; and, as to the point now before us, it is immaterial whether the giver makes the first advances or gives the money to get some personal advantage to himself. In fact, in most, if not all, of the cases the very object of the giving of a bribe is to obtain for the giver, or the one for whom he is acting, some supposed advantage or gain for himself.

4. No useful purpose would be subserved in discussing the instructions. We have carefully examined the evidence and the instructions given by the court and those refused which defendant submitted, and find that the court's rulings thereon were substantially correct. The point made that defendant did not, at the time he received the money, know of the existence of this particular statute, counsel admit would be no defense under an indictment for failure to do the thing required; but, where the charge is receiving money for an agreement to omit to perform that duty, evidence by the defendant of his ignorance of this statute is material as tending to sustain his claim that he never made an agreement not to perform the duty imposed by the statute. An instruction asked by defendant covered this theory, and was refused. This ruling was not, under the facts, erroneous. While defendant may not have known of this specific statute, he is conclusively presumed to know

that gambling is a crime, and the record shows that he did know it, and, in general, that his official duty was to execute the laws against gambling. His transaction with the gamblers is conclusive that he knew what his duty was in this respect. Certainly he knew that gambling was unlawful, and that the gamblers would not give him money to prevent interference with their practices unless it was within his power, and a part of his duty, to do the things which this statute declares he shall do.

5. But the principal question in this case, and by far the most important one, is as to the validity of section 1343, *Mills' Ann. St.*, which prescribes the duty of the sheriff. If the prosecution rests solely upon this section, the force of the objection urged against it is perceived when it is conceded that, unless it was the official duty of the sheriff thereunder to seize and take before a judicial officer these gambling devices, he was guilty of no offense under section 1302. In passing upon the acts of a co-ordinate department of government, courts always shrink from the exercise of their unquestioned power to declare such acts in violation of the fundamental law, and enter upon such a consideration with reluctance and hesitation. In all cases of doubt, the presumption in favor of the constitutionality of an act is indulged. *Cooley, Const. Llm. c. 7, p. 192 et seq.* With respect to the defendant we observe that one occupying the important office of sheriff, so weak or corrupt as the defendant confessedly is, who unblushingly receives money for omitting to perform his official duty, though entitled to the full protection of the law of the land when prosecuted for his misconduct, does not specially commend himself to any court as one in whose behalf it should give a strained construction of a statute. This section is said to be unconstitutional, because, by an arbitrary edict of a judicial officer, private property, not a nuisance per se, may be taken and destroyed without any notice to its owner, and without giving him his day in court, or an opportunity to be heard upon the question whether it has been used for an unlawful purpose, which use only justifies its forfeiture and destruction; hence, would violate the fourteenth amendment of the federal, and section 25 of article 2 of the state, constitution. As authorities for this contention, the plaintiff in error cites the following: *Lowry v. Rainwater*, 70 Mo. 152; *Craig v. Kline*, 65 Pa. St. 399; *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 878; *People v. Copely*, 4 Cr. Law Mag. 187; *State v. Robbins*, 124 Ind. 308, 24 N. E. 978; *Chauvin v. Valiton*, 8 Mont. 451, 20 Pac. 658; *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455; *State v. Snow*, 3 R. I. 64; *Greene v. James*, 2 Curt. 187, Fed. Cas. No. 5,766; *Wynehamer v. People*, 13 N. Y. 378; *Phelps v. Racey*, 60 N. Y. 10; *Poppen v. Holmes*, 44 Ill. 360; *Burdett v. Allen*, 35 W. Va. 347, 13 S. E. 1012; *Windsor v. McVeigh*, 93 U. S. 274; *Peck v. Anderson*, 57 Cal. 251;

8 Am. & Eng. Enc. Law, 1081; Cooley, Const. Lim. c. 16; Loesch v. Koehler (Ind. Sup.) 41 N. E. 326. In the case last cited the petition for rehearing, pending when the opinion, as above, was published, was overruled, and the opinion reported in 43 N. E. 129. The defendant in error cites the following: Attorney General v. Justices of Municipal Court of City of Boston, 103 Mass. 456; Com. v. Gaming Implements, 119 Mass. 332; Weller v. Snover, 42 N. J. Law, 341; Shivers v. Newton, 45 N. J. Law, 469; Campau v. Langley, 39 Mich. 451; Railroad Co. v. Hemphill, 35 Miss. 17; Davidson v. New Orleans, 96 U. S. 97; Mugler v. State of Kansas, 123 U. S. 623, 8 Sup. Ct. 273; Wap. Proc. in Rem. §§ 23, 24, 65, 68, 72, 110, 140, 231, 238. The cases upon which plaintiff in error mainly relies are Lowry v. Rainwater and State v. Robbins, *supra*. Their weight as authority is much weakened by the disapproval of their doctrine expressed by the supreme court of the United States in its affirmance of the decision of the court of appeals of New York in *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499. The reasoning of that august tribunal would seem to be against the position sought to be maintained by plaintiff in error here. However that may be, in our opinion this question is not properly in this case. Before stating the reasons for our conclusions, we refer to one contention so persistently urged by the attorney general, which is, even if the statute in the particular noted is unconstitutional, the defendant cannot set up its invalidity, because, by receiving money for omitting to enforce it, thereby recognizing its validity, he is estopped to allege the contrary, when prosecuted for its violation. In cases of embezzlement it has been held that it is no defense that the principal had no title to the money or thing embezzled, and in a late case (*State v. O'Brien*, 94 Tenn. 79, 28 S. W. 311) this doctrine of estoppel has been expressly held to extend to criminal cases. See, also, 2 Bish. Cr. Law, § 367; 1 Whart. Cr. Law (9th Ed.) § 1038. Whether, upon principle, this doctrine is applicable to the case at bar, we need not determine, for the decision may be placed upon what we regard safer grounds, which we now proceed to consider.

While the specific objection goes only to that provision of the section authorizing the judicial officer to destroy the property, and not to the seizure thereof by the sheriff, or the proceeding before the examining magistrate against the person in whose possession the property is found, it is said that the two latter provisions are so interwoven with the former that, if it is inoperative, they fall with it. Particularly is this said to apply to the seizure of the property. If the different provisions of a statute, or a single section, are so connected as that one cannot be enforced without support from the others, all fail; but the rule is familiar, as stated by Judge Cooley: "If, when the unconstitutional portion is stricken out, that which remains is complete

in itself, and capable of being executed in accordance with the apparent legislative intent wholly independent of that which was rejected, it must be sustained." Cooley, Const. Lim. (5th Ed.) 212. See, also, *Tripp v. Overocker*, 7 Colo. 72, 1 Pac. 695; *Commissioners v. Owen*, 7 Colo. 467, 4 Pac. 795; *People v. Jobs*, 7 Colo. 475, 4 Pac. 798, 1124; *In re Canal Certificates*, 19 Colo. 63, 70, 34 Pac. 274. This section has in view at least two distinct and separate objects: (1) The destruction of gambling devices; (2) the prosecution and punishment of their guilty owner or user. To these may be added a third,—the seizure of such implements. In the last analysis it is true that the one general object of the entire act against gambling, consisting of several sections, is the protection of public morality; but there are subsidiary objects contemplated by the different sections of the act. We cannot agree with counsel that the main object of this section is the destruction of gambling devices. While its ultimate object may be to prevent gambling, to this end the punishment of the person unlawfully in possession of or using gambling devices contributes quite as effectually as does the destruction of the implements themselves. In the eye of the law, both are a means to the same end, each equally potential. One object is accomplished by means of a proceeding in the nature of a proceeding in rem, civil in character; the other under a criminal prosecution. Neither depends or is contingent upon the other. The one proceeding may fail; the other succeed. One clause prescribes the duty of an executive officer; the other that of a judge or justice of the peace. It is clear that the provisions of this section do not depend one upon the other. Were we, therefore, to concede (which we do not) that the second subdivision of the section, relating to the destruction of the property, is invalid, it is clear that the first and third, relating to seizure of the gambling implements, and to proceedings against the person, are independent and distinct provisions, both of which, if otherwise constitutional, may be enforced in accordance with the apparent legislative intent, altogether without reference to the clause providing for destruction. Except as involved in, or as incidental to, the main objection argued, there is no contention here that the seizure would be "unreasonable" under section 7 of article 2 of our constitution; but, if there were, we think that section does not prohibit the legislature from authorizing an executive officer, who sees or knows that a crime is being perpetrated, to seize and take into his possession the things with which it is being committed.

But we are here met by this argument: Inasmuch as the general assembly provided that the gambling devices seized should be brought before a justice of the peace, and by him destroyed, it would not have authorized a seizure had it supposed the latter provision would be inoperative, and therefore the seizure clause must also fail. In answer to this ar-

gument we reply: Neither the sole object of the seizure under the statute, nor (as we think) the chief object, was that the property might be destroyed. Equally as important a purpose would be subserved by its production at the trial of the guilty owner, there to be used as evidence against him. We must give to this statute a reasonable construction, and presume that the sheriff will perform with equal impartiality his duty to seize the implements, and his duty to take before the examining magistrate the person having possession of them. We so construe the section in this respect as to require the sheriff to take before the same magistrate the seized devices and their owner or user. In this view the clause directing the seizure of the implements is, and should be, enforceable without regard to the clause authorizing their destruction. Indeed, were this statute not in existence, it would be, as we have already intimated, the official duty of the sheriff, when he knows or sees that a criminal offense is being committed, without warrant, and upon view, to arrest the offender, and to seize and take into custody the subject of the crime, or the thing which aids the offender in its commission, and bring before an examining magistrate, there to be proceeded against according to law, not only the person arrested, but also the things seized. 1 Bish. Cr. Proc. § 210 et seq.; *State v. Robbins*, supra; 2 Hale, P. C. 90; 1 East, P. C. 307; 2 Hawk. P. C. 133; *Cro. Eliz.* 656. This common-law right and power, being thus reinforced by the provisions of the statute, make manifest the duty of the sheriff to seize gambling devices, and bring them, with their owner, before the same magistrate. That this statute also directs that the judicial officer may destroy the property does not invalidate the provision concerning the seizure, even if the former direction is inoperative, for the reasons already stated. But, in another view, the sheriff is not in a position to question the validity of the act, so far as it prescribes the duty of the judicial officer. As we understand the rule, no person can attack the constitutionality of a statute whose right it does not affect, and who, therefore, has no interest in defeating it. *Cooley, Const. Lim.* (5th Ed.) 197; *Airy v. People*, 21 Colo. 144, 40 Pac. 362. Expressed differently, it is, we think, a fair deduction from the authorities that, in advance of a determination by a court of competent jurisdiction, a ministerial or executive officer cannot, for himself, pass upon the constitutionality of a statute, except in so far as it directly prescribes his official duties, or confers some power, or imposes some liability, upon him, or prescribes the range of his official conduct. When called upon to act, the sheriff might properly determine for himself the constitutionality of that provision directing him to seize gambling devices, and the judicial officer, in a proper case, may raise the constitutional objection to that clause relating to his office.

Let us apply these principles to this case:

In seizing this property the sheriff incurs no liability for any subsequent destruction thereof by the judicial officer. He takes no part in the proceeding prescribed for the latter. He has no interest in it. It prescribes no duty for him, nor does it relate to his official conduct. The act of the justice in no wise affects the sheriff, and, if the former unlawfully destroys the property, he, and not the sheriff, is responsible to the owner. The owner may or may not attack the constitutionality of the section purporting to give to the magistrate power to destroy; but certainly the sheriff may not raise that question to relieve himself of the duty to seize. A case very much in point as to this feature, as well as upon several other phases of the case at bar, is *Gilchrist v. Schmidling*, 12 Kan. 263. The court had before it an ordinance prohibiting the running at large of animals in the nighttime. It directed the marshal to take up and impound any animal found running at large contrary to the provisions of the ordinance, and, so long as in his possession, to provide necessary sustenance for it. At any time after the expiration of six days from the date of impounding, the animal was to be sold at public sale upon three days' previous notice of the time and place of sale, and, after deducting the costs, expenses, and charges allowed by the ordinance, the excess was to be paid into the city treasury, and, if called for within ninety days by the owner, and upon proof of his ownership, the excess was to be paid to him; otherwise it was forfeited to the city. There was a further provision that the owner, at any time before the sale, might regain possession by paying to the marshal his fees and charges incurred up to that time in the taking up and impounding of the animal. In the case before the court the marshal (*Gilchrist*) took up and impounded two heifers belonging to *Schmidling*. Before the sale the owner demanded possession of the marshal. The latter refused to give over the animals until his fees for taking up and impounding were paid, with which condition the owner refused to comply. He thereupon replevied the animals, claiming that the ordinance was unconstitutional, as depriving him of his property without due process of law. Upon the particular branch of the case last under consideration by us the court says: "These fees immediately became a lien upon the cattle, and can only be discharged by payment; and the owner has no right to the possession of his cattle until he makes this payment, and discharges this lien. This is as far as this case goes, and this far the law and the ordinance must be valid beyond all doubt. No sale was attempted to be made in this case, and no fees were charged except for taking up and impounding the cattle. Whether the officers could have made a valid sale of the cattle if they had not been replevied, it is not necessary now to determine; but yet we think they could." Further in

the case the court says: "But we need not speculate as to what would be a valid sale. All we need decide here is, whether the ordinance authorizing the city officers to take up and impound cattle running at large in the nighttime, and making the fees for taking them up and impounding them a lien on the cattle, and giving the officers the right to the possession of the cattle until the said fees are paid, is valid. We decide this question in the affirmative." So, in the case at bar, the section of the statute under consideration consists of separate and distinct parts, each of which may be a step in the general procedure. In so far as the statute authorizes the seizure of this property, it is unquestionably valid, and this is the part that concerns the duty of the sheriff. Whether the power of the judicial officer to destroy is constitutional, arises when the question is raised by an owner whose property has been destroyed; but we need not determine it now, for it is not involved in the disposition of this case. The foregoing decision is clearly authority for the conclusion we have reached as to the last proposition, and also that the provisions of the statute are separable and distinct. Upon the whole case we are satisfied that the rulings of the court were correct; that the defendant, after a fair trial, was shown to be clearly guilty of the crime charged against him; and that the judgment should, therefore, be affirmed, and it is so ordered. Affirmed.

(23 Colo. 295)

CITY OF HIGHLANDS v. RAINE.

(Supreme Court of Colorado. Dec. 7, 1896.)

REPLICATION--JUDGMENT ON PLEADING--DEFECTIVE SIDEWALK--CONTRIBUTORY NEGLIGENCE.

1. A motion for judgment on the pleadings will not lie because of the alleged insufficiency of a replication in not designating the count of the answer it was intended to deny; Code, § 60, providing that the sufficiency of a replication may be attacked by demurrer or by motion.

2. It is not contributory negligence per se to use a sidewalk with knowledge of its defective condition, but such negligence is a question for the jury to determine from the evidence.

Appeal from district court, Arapahoe county.

Action by John Raine against the city of Highlands for personal injuries. There was a judgment in favor of plaintiff, and defendant appeals. Affirmed.

This action is brought to recover damages for injuries alleged to have been sustained by the plaintiff from falling upon a defective sidewalk on the south side of Agate avenue, in the city of Highlands. The complaint avers that on the evening of February 13, 1893, between the hours of 8 and 9 o'clock, the plaintiff, while walking along upon said sidewalk, by reason of the defective, uneven, and sidling condition of the walk, and without any fault or negligence on his part, slip-

ped and fell, striking his knee upon the edge of the walk, thereby sustaining serious and permanent injury. The answer of the city specifically denies the allegations of the complaint, alleges contributory negligence on the part of plaintiff, and avers that the injury was occasioned by a prior accident, and not from the fall on the sidewalk. To this answer plaintiff replied, denying each and every allegation of new matter. The defendant moved for judgment upon the pleadings, which was denied; and thereupon the case was tried to a jury. Upon the conclusion of plaintiff's testimony, defendant interposed a motion for nonsuit, which was overruled, and the defendant then introduced its testimony. The jury returned answers to special questions submitted upon request of defendant, and a general verdict in favor of plaintiff, assessing his damages at \$3,000. Motion for a new trial was overruled, and judgment rendered upon the verdict. From this judgment the city prosecutes this appeal.

L. E. Kenworthy and B. C. Hilliard, City Atty., for appellant. Stuart D. Walling, for appellee.

GODDARD, J. Numerous errors are assigned, but those that are sufficiently specific to require notice challenge only the rulings of the court below in denying the motion for judgment on the pleadings, motion for nonsuit, and in giving and refusing certain instructions. The ground upon which the motion for judgment upon the pleadings was predicated was the insufficiency of the replication in not designating the count of the answer it was intended to deny. Section 71 of our Code of Civil Procedure provides: "The replication may be general in terms, denying all new matter set up in the answer." Section 60 provides that the sufficiency of a replication may be attacked by demurrer, or by motion. Defendant failed to so challenge it, and the defect, at most, being a formal one, could not be reached by a motion for judgment on the pleadings. Orman v. Mannix, 17 Colo. 564, 30 Pac. 1037. The motion for a nonsuit was based upon the claim that the testimony introduced in behalf of plaintiff disclosed such contributory negligence on his part as to preclude a recovery, notwithstanding the fact that defendant was guilty of negligence in the premises; and the objection to the instructions complained of is based upon the same ground, it appearing from the evidence that the sidewalk was in a defective condition, and had been so for a long time prior to the time of the accident, in that it was uneven and slanting inwardly from the street for a distance of some 40 feet, so that the same was some 9 inches lower at the inner than at the outer edge; that on the night in question it was wet and slippery, in consequence of a slight fall of snow. It also appears that plaintiff was acquainted with this condition



of the walk, and had occasionally walked over it before. About 8 o'clock on the evening of the accident, he was going on business from his home on the south side of Agate avenue, to a place further down on the same side of the street. The night was somewhat cloudy. He describes the manner in which he attempted to pass over the defective piece of sidewalk, and how the injury resulted. On cross-examination he stated: "The walk on the opposite side of the street is not good and not bad. You can get along with a fair degree of safety. I was walking on the upper outside edge of the walk. I deemed it safer on the high than on the low side, and concluded to walk on it. I had then in mind the dangerous condition of the walk. I knew the incline was there. Had known of it two years. \* \* \* I was over it once a week. Perhaps some weeks was over it two or three times." It is insisted by counsel for the city that, it thus appearing from plaintiff's testimony that he was familiar with the defective condition of the walk, his attempt to pass over it was not consistent with reasonable prudence and the exercise of proper care on his part to avoid danger. In other words, that by using the walk, with prior knowledge of its defective condition, the act of plaintiff constituted negligence per se. We do not think, under all the conditions disclosed by the testimony, that it can be said, as a matter of law, that the conduct of plaintiff constituted negligence per se; but that, under the circumstances, it became a question for the jury to determine whether, in view of the nature of the defect, and the degree of danger to be apprehended from its existence, the ease or difficulty of avoiding it by using other portions of the street, the plaintiff exercised that degree of care and caution that an ordinarily prudent and careful person would use in the same situation. The court below adopted this view, and denied the motion for nonsuit, and, upon the close of the testimony, instructed the jury that the fact alone of prior knowledge of the condition of the sidewalk on the part of plaintiff would not prevent his recovery, if from all the facts and circumstances in evidence, taking into consideration his knowledge and familiarity with the walk, he exercised ordinary care and caution to avoid the injury.

The rule of law as laid down by the court below on this subject finds very general support in the adjudged cases. While knowledge of the existence of a defect or obstruction is a very important element in determining the question of contributory negligence, it is not alone decisive, unless the defect or obstruction is so great and obviously dangerous that a man of ordinary prudence would not attempt to pass over it. As was said in the case of *Town of Poseyville v. Lewis*, 126 Ind. 80, 25 N. E. 593: "It is well settled that, while knowledge of a defect is always an important fact to be con-

sidered in determining the question of contributory negligence, that fact of itself does not, by any means, always prove that the plaintiff was in fault. The decisions in other states are in harmony with our own." And in *Kavanaugh v. City of Janesville*, 24 Wis. 618, a case very much in point, by reason of the similarity of the facts therein to those of the case at bar, it is said: "Nor do we think there is any ground for saying that she [plaintiff] was guilty of negligence because she attempted to pass along the walk there, well knowing its dangerous condition. She was passing along, with due caution (as we must assume after the verdict of the jury), one of the public streets of the city, which was defective and out of repair. She had passed there many times before safely, notwithstanding its dangerous condition; and, because she attempted to do so again, we are asked to hold, as a matter of law, that she was guilty of negligence that directly contributed to the injury. This we cannot do." Among the many cases to the same effect are: *Lowell v. Watertown Tp.*, 58 Mich. 568, 25 N. W. 517; *City of Flora v. Naney*, 136 Ill. 45, 26 N. E. 645; *Smith v. City of St. Joseph*, 45 Mo. 449; *Snow v. Provincetown*, 120 Mass. 580; *Templeton v. Town of Montpelier*, 56 Vt. 328; *Holloway v. City of Lockport*, 54 Hun, 153, 7 N. Y. Supp. 363; *Loewer v. City of Sedalia*, 77 Mo. 431.

We think the court below fully and fairly instructed the jury upon the law of the case, and committed no error in refusing the instructions asked by defendant. If it failed to sufficiently define the meaning of the terms "ordinary negligence" and "contributory negligence," it is the fault of the defendant in not asking for such instruction, mere nondirection not being available as error. *Brown v. People*, 20 Colo. 161, 36 Pac. 1040.

We think the special findings of the jury are consistent with and support the general verdict; and that both are sustained by the clear weight of evidence. A careful review of the record discloses no error prejudicial to the rights of defendant. The judgment of the court below is therefore affirmed. Affirmed.

(23 Colo. 113)

#### COURVOISIER v. RAYMOND.

(Supreme Court of Colorado. Sept. 21, 1896.)

PERSONAL DAMAGES—GUNSHOT WOUND—JURORS—HYPOTHETICAL QUESTIONS—EVIDENCE—INSTRUCTIONS.

1. To be a ground of challenge, under *Sess. Laws 1889*, p. 220, § 1, which provides that "the fact that any juror in any district or county court shall have served as a juror of the regular panel, or as talesman, in either of said courts at any time within the year next preceding shall be a sufficient excuse for such juror from service in the same court, and may also be ground for challenge for cause to such individual juror," the service a second time within the year must be in the same court.

2. Hypothetical questions to experts may be framed on an assumption of what the evidence



tends to prove, where that assumption is within the probable or possible range of the evidence.

3. In an action for personal damages resulting from a gunshot wound, evidence is inadmissible that some one not a party to the pending action had been convicted of throwing a stone and hitting defendant on the night of the shooting.

4. It was not error to refuse evidence that the immediate vicinity of defendant's house had been the scene of frequent robberies and disturbances shortly prior to the shooting, as tending to justify defendant's action.

5. As, under Sess. Laws 1889, pp. 64, 65, exemplary damages are allowed for personal injuries in a civil action for assault, the financial condition of defendant may be shown.

6. In an action for personal damages resulting from a gunshot wound, where defendant seeks to justify by showing that the circumstances surrounding him at the time were such as to lead a reasonable man to believe that his life was in danger, in that a riot was in progress, and that he supposed a person approaching was one of the rioters, and did not know that he was a police officer till he had shot him, it is error to instruct that, if the jury believe "that, at the time defendant shot plaintiff, plaintiff was not assaulting defendant, then your verdict should be for plaintiff."

Appeal from district court, Arapahoe county.

Action by Edwin S. Raymond against Auguste Courvoisier for personal damages. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Edwin S. Raymond, appellee, as plaintiff below, complains of Auguste Courvoisier, appellant, and alleges that on the 12th day of June, A. D. 1892, plaintiff was a regularly appointed and duly qualified acting special policeman in and for the city of Denver; that, while engaged in the discharge of his duties as such special policeman, the defendant shot him in the abdomen, thereby causing a serious and painful wound; that in so doing the defendant acted willfully, knowingly, and maliciously, and without any reasonable cause. It is further alleged that, by reason of the wound so received, plaintiff was confined to his bed for a period of 10 days, during which time he was obliged to employ, and did employ, a physician and nurse, the reasonable value of such services being \$100, which sum the plaintiff had obligated himself to pay; that the wound rendered him incapable of performing his duties as special policeman for a period of three weeks. It is further alleged that the injury caused the plaintiff great physical pain, and permanently impaired his health. Plaintiff alleges special and general damages to the amount of \$30,150, and asks judgment for that sum, with costs. The defendant, answering the complaint, denies each allegation thereof, and in addition to such denials pleads five separate defenses. These defenses are all, in effect, a justification by reason of unavoidable necessity. A trial resulted in a verdict and judgment for plaintiff for the sum of \$3,143. To reverse this judgment, the cause is brought here by appeal.

Oscar Reuter and William Young, for appellant. F. J. Hanges and S. S. Abbott, for appellee.

HAYT, C. J. (after stating the facts). It is admitted, or proven beyond controversy, that appellee received a gunshot wound at the hands of the appellant at the time and place designated in the complaint, and that, as the result of such wound, the appellee was seriously injured. It is further shown that the shooting occurred under the following circumstances: That Mr. Courvoisier, on the night in question, was asleep in his bed, in the second story of a brick building, situate at the corner of South Broadway and Dakota streets, in South Denver; that he occupied a portion of the lower floor of this building as a jewelry store. He was aroused from his bed, shortly after midnight, by parties shaking or trying to open the door of the jewelry store. These parties, when asked by him as to what they wanted, insisted upon being admitted, and, upon his refusal to comply with this request, they used profane and abusive epithets towards him. Being unable to gain admission, they broke some signs upon the front of the building, and then entered the building by another entrance, and, passing upstairs, commenced knocking upon the door of a room where defendant's sister was sleeping. Courvoisier partly dressed himself, and, taking his revolver, went upstairs, and expelled the intruders from the building. In doing this he passed downstairs, and out on the sidewalk, as far as the entrance to his store, which was at the corner of the building. The parties expelled from the building, upon reaching the rear of the store, were joined by two or three others. In order to frighten these parties away, the defendant fired a shot in the air; but, instead of retreating, they passed around to the street in front, throwing stones and brickbats at the defendant, whereupon he fired a second, and perhaps a third, shot. The first shot fired attracted the attention of plaintiff, Raymond, and two deputy sheriffs, who were at the tramway depot across the street. These officers started towards Mr. Courvoisier, who still continued to shoot; but two of them stopped, when they reached the men in the street, for the purpose of arresting them, Mr. Raymond alone proceeding towards the defendant, calling out to him that he was an officer, and to stop shooting. Although the night was dark, the street was well lighted by electricity, and, when the officer approached him, defendant shaded his eyes, and, taking deliberate aim, fired, causing the injury complained of. The plaintiff's theory of the case is that he was a duly-authorized police officer, and in the discharge of his duties at the time; that the defendant was committing a breach of the peace; and that the defendant, knowing him to be a police officer, recklessly fired the shot in question. The

defendant claims that the plaintiff was approaching him at the time in a threatening attitude, and that the surrounding circumstances were such as to cause a reasonable man to believe that his life was in danger, and that it was necessary to shoot in self-defense, and that defendant did so believe at the time of firing the shot.

The first error argued brings up for review the action of the district court in overruling a challenge interposed by the defendant to the juror Gibbons. The ground of this challenge will appear from the following: "Q. Have you served as a juror within the year last past? A. I was called a few weeks ago on one case in the county court. Q. As a talesman? A. Yes, sir. The Court: When did you serve, Mr. Gibbons? A. A few weeks ago. The Court: Since the 1st of January? A. Yes, sir." The statute relied upon to support the challenge reads as follows: "The fact that any juror in any district or county court shall have served as a juror of the regular panel, or as talesman, in either of said courts at any time within the year next preceding shall be a sufficient excuse for such juror from service in the same court and may also be ground for challenge for cause to such individual juror." Sess. Laws 1889, p. 220, § 1. The statute limits the exception to service a second time within the year in the same court, and we think it was likewise intended to thus restrict this ground of challenge for cause. This has been the uniform practice under the statute, and we think it must be upheld as the obvious meaning of the act.

The second error assigned is upon the overruling of defendant's objections to certain hypothetical questions propounded by plaintiff to medical experts. These questions called for the opinion of the witnesses as to the natural result of the wound received by plaintiff. It is claimed that the questions do not describe the wound with sufficient certainty, and that the evidence of the extent of the injury is not sufficient to form a basis for any hypothetical questions, or for expert opinions upon the probable effects of the wound. We think the objections to these questions were properly overruled. The questions contain such a description of the wound as is easily understood by the lay mind, and the answers show that it was fully understood by the experts. The questions are framed upon the assumption that the evidence tended to prove certain facts. This assumption, being within the probable or possible range of the evidence, is permissible. *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577.

The third assignment of error challenges the refusal of the court to permit witnesses for the defendant to testify as to whether or not, as a result of a criminal prosecution, one of the participants was convicted of "throwing a stone and hitting Mr. Courvoisier that night." The objection to this question was properly sustained. If proof of such conviction was

admissible, the record is the best evidence thereof, except in the instances specified by statute (*Mills' Ann. St. § 4822*); but, as this action is between other parties, even the record is not admissible in this case. It was attempted to prove, by the witness Reed, who was at the time marshal of the town of South Denver, that the neighborhood in the immediate vicinity of defendant's house had been the scene of frequent robberies and disturbances shortly prior to this shooting. This evidence was offered for the purpose of justifying the defendant's action. It is claimed that conduct which would cause no apprehension in a quiet and peaceful neighborhood would naturally and reasonably excite alarm if disturbances and breaches of the peace were frequent. We think, however, the court was justified in refusing this evidence. Its tendency is to raise collateral issues, and thereby divert the attention of the jury.

Under the fourth assignment of error it is claimed that evidence of the financial standing of the defendant was not admissible. If the jury believed, from the evidence, that the shooting was done with malice, or that the injury was the result of a wanton and reckless disregard of plaintiff's rights, and not in necessary self-defense, exemplary damages might have been awarded; and, wherever such damages are permissible, the financial condition of the defendant may be shown. In a number of cases, commencing with *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. 119, it has been held that, in civil actions for injuries resulting from torts, exemplary damages, as a punishment, were not permissible, if the offense is punishable under the criminal laws. These decisions were based upon the common law. In 1889 the legislature provided, by statute, that exemplary damages may be given in certain cases. Before the passage of this act the question was one upon which the courts disagreed, but the statute has now settled the practice in this state.

The next error assigned relates to the instructions given by the court to the jury, and to those requested by the defendant and refused by the court. The second instruction given by the court was clearly erroneous. The instruction is as follows: "The court instructs you that if you believe, from the evidence, that, at the time the defendant shot the plaintiff, the plaintiff was not assaulting the defendant, then your verdict should be for the plaintiff." The vice of this instruction is that it excluded from the jury a full consideration of the justification claimed by the defendant. The evidence for the plaintiff tends to show that the shooting, if not malicious, was wanton and reckless; but the evidence for the defendant tends to show that the circumstances surrounding him at the time of the shooting were such as to lead a reasonable man to believe that his life was in danger, or that he was in danger of receiving great bodily harm at the hands of the plaintiff, and the defendant testified that he did so believe. He swears that his house

was invaded, shortly after midnight, by two men, whom he supposed to be burglars; that, when ejected, they were joined on the outside by three or four others; that the crowd so formed assaulted him with stones and other missiles, when, to frighten them away, he shot into the air; that, instead of going away, some one approached him from the direction of the crowd; that he supposed this person to be one of the rioters, and did not ascertain that it was the plaintiff until after the shooting. He says that he had had no previous acquaintance with plaintiff; that he did not know that he was a police officer, or that there were any police officers in the town of South Denver; that he heard nothing said at the time, by the plaintiff or any one else, that caused him to think the plaintiff was an officer; that his eyesight was greatly impaired, so that he was obliged to use glasses; and that he was without glasses at the time of the shooting, and for this reason could not see distinctly. He then adds: "I saw a man come away from the bunch of men, and come up towards me, and as I looked around I saw this man put his hand to his hip pocket. I didn't think I had time to jump aside, and therefore turned around and fired at him. I had no doubts but it was somebody that had come to rob me, because, some weeks before, Mr. Wilson's store was robbed. It is next door to mine."

By this evidence two phases of the transaction are presented for consideration: First. Was the plaintiff assaulting the defendant at the time plaintiff was shot? Second. If not, was there sufficient evidence of justification for the consideration of the jury? The first question was properly submitted, but the second was excluded by the instruction under review. The defendant's justification did not rest entirely upon the proof of assault by the plaintiff. A riot was in progress, and the defendant swears that he was attacked with missiles, hit with stones, brickbats, etc.; that he shot plaintiff, supposing him to be one of the rioters. We must assume these facts as established in reviewing the instruction, as we cannot say what the jury might have found had this evidence been submitted to them under a proper charge. By the second instruction, the conduct of those who started the fracas was eliminated from the consideration of the jury. If the jury believed, from the evidence, that the defendant would have been justified in shooting one of the rioters, had such person advanced towards him, as did the plaintiff, then it became important to determine whether the defendant mistook plaintiff for one of the rioters; and, if such a mistake was in fact made, was it excusable, in the light of all the circumstances leading up to and surrounding the commission of the act? If these issues had been resolved by the jury in favor of the defendant, he would have been entitled to a judgment. *Morris v. Platt*, 32 Conn. 75; *Patten v. People*, 18 Mich. 318; *Kent v. Cole*, 84 Mich. 579, 48 N. W. 168; *Hig-*

*gins v. Minaghan*, 76 Wis. 298, 45 N. W. 127. The opinion in the first of the cases above cited contains an exhaustive review of the authorities, and is very instructive. The action was for damages resulting from a pistol-shot wound. The defendant justified under the plea of self-defense. The proof for the plaintiff tended to show that he was a mere bystander at a riot, when he received a shot aimed at another; and the court held that, if the defendant was justified in firing the shot at his antagonist, he was not liable to the plaintiff, for the reason that the act of shooting was lawful under the circumstances. Where a defendant, in a civil action like the one before us, attempts to justify on a plea of necessary self-defense, he must satisfy the jury, not only that he acted honestly in using force, but that his fears were reasonable under the circumstances, and also as to the reasonableness of the means made use of. In this case, perhaps, the verdict would not have been different, had the jury been properly instructed; but it might have been, and therefore the judgment must be reversed. Reversed.

(23 Colo. 226)

#### DENVER & R. G. R. CO. v. SIPES.

(Supreme Court of Colorado. Nov. 16, 1896.)

MASTER AND SERVANT—ASSIGNABLE DUTY—NEG-  
LIGENCE OF FELLOW SERVANT—VICE  
PRINCIPAL—INSTRUCTIONS.

1. Where a railroad company had furnished a safe switch, and had exercised the requisite care in selecting the conductor and brakeman whose duty it was to operate it, the company was not liable for an injury to an employé on one of its trains, caused by the negligence of a conductor in leaving open a switch that it was his duty, under the rules of the company, to see closed.

2. The rule of the company making it the conductor's personal duty to see to the proper adjustment of the switches used in operating his train did not make him a vice principal of the company.

3. Where the complaint charges defendant with two acts of negligence, and there is error as to the submission of one of the issues, a general verdict for plaintiff cannot be sustained.

Error to district court, Arapahoe county.

Action by Hattie Sipes against the Denver & Rio Grande Railroad Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

This is an action brought by Hattie Sipes to recover damages for the death of her husband, George Sipes, who was killed on the night of May 7, 1890. His death was caused by the derailing of an engine upon which he was engaged in the line of his duty as fireman, while in the service of the defendant company. The accident occurred near a place called "Fountain," where the company, in the operation of its road, had a side track for the purpose of allowing its trains to pass. The engine upon which deceased was employed was pulling a passenger train going south. A few moments prior to the arrival of his train a freight train going north had reached this point, and had

gone onto the side track for the purpose of allowing the passenger train to pass. In order to enable it to do so, the forward brakeman on the freight train had opened the switch at the south end of the side track, and left it to be closed by the rear brakeman, who, being at the time asleep in the caboose, neglected to do so. The fireman of the freight train had covered the headlight on his engine to indicate to the coming passenger train that all was right. The red light customarily kept in the caboose of the freight train had been left several days previous at the company's shops to be repaired, and which, by the rules of the company, when displayed, signified danger, and was a signal for any approaching train to stop. The passenger engine passed the freight train, ran into the open switch, and Mr. Sipes was killed. Verdict and judgment in favor of plaintiff for the sum of \$5,000. To this judgment defendant prosecutes this writ of error.

Rule 117 of the company provides: "Conductors will be held responsible for the proper adjustment of the switches used by them and their trainmen, except where switch tenders are stationed." Inter alia, the court instructed the jury as follows: "(3) If you find that under the rules of defendant that were in existence at that time, and by which its trains were operated, that it was the duty of the conductor of the freight train going north to see that the switch was closed at the side track on which he placed his train, and that said conductor had exclusive charge and control of said freight train, and had command and control of the train hands on said train, and that he failed to see that said switch was closed, but negligently left it open, or negligently allowed it to be left open, and on account of such negligence of said conductor the accident occurred which resulted in the death of said George Sipes, then the negligence of the conductor would be the negligence of the defendant company, and the defendant cannot claim protection on the ground that said conductor was a co-servant or fellow servant of said George Sipes." And refused the following, asked by defendant: "(7) The trainmen upon the freight train were fellow servants with the deceased, who was fireman on the other train, and for their negligence the defendant is not liable to this plaintiff." Upon the giving and refusing of these instructions defendant assigns error. Error is also assigned to the giving of other instructions touching the liability of the company for failure to furnish customary signal lights, which, in our view of the case, it is unnecessary to consider upon this review.

Wolcott & Valle and H. F. May, for plaintiff in error. Stuart & Murray, for defendant in error.

GODDARD, J. (after stating the facts). It is undisputed that the switch at the south end of the side track was negligently left open by the employés of the company, and that the derailment of the engine upon which the deceased was employed was caused there-

by. It may also be conceded that under the rules of the company the conductor in charge of the freight train was responsible for that neglect. The question, therefore, of the liability of the company for such neglect on his part, is squarely presented, and the correctness of the law given by the court below upon this branch of the case is the principal question presented for our determination; and that is whether a railroad company is liable for the injury to an employé on one of its trains, caused by the negligence of a conductor on another train in leaving a switch open that it was his duty to see closed. The solution of this question depends upon whether the default on his part consisted in a dereliction of duty imposed by law upon the company, or is one the performance of which it may delegate to another. If the former, the company is liable; if the latter, the rule that exempts the employer from liability for the negligence of a fellow servant applies. The personal duties that the law imposes upon the master are well defined and understood, and are such as relate to the furnishing and keeping in repair of reasonably safe machinery and appliances for carrying on his business; a reasonably safe place in which to render the service, and the exercise of reasonable care in the selection of competent co-workmen; in brief, such acts as pertain to construction, preservation, and management, as distinguished from the work of operation. *Railway Co. v. Needham*, 11 C. C. A. 56, 63 Fed. 107. The master having properly performed these duties, the risk that the machinery and appliances will be carefully operated by his co-employés is assumed by the servant. This rule is stated by Mr. Bishop in his work on *Noncontract Law* (section 665) as follows: "As between master and servant, the duty of planning a business, and all duties pertaining to the safety of the service,—such as the place to work, the implements and machinery, the plans and rules after which the work is to be conducted, the choosing of the fellow servants, and whatever else is within the same reason,—must be discharged either by the master in person, or by a vice principal for whose neglects and other wrongs therein he will be responsible as for his own. On the other side, the running of the business with and in pursuance of the plans, rules, appliances, helps, and helpers thus provided—in other words, the execution of the work—is of the assignable sort, rendering all persons engaged therein fellow servants; so that, if the master used due care in selecting his servants, he will not be responsible to one for an injury produced by the negligence or other default of another." In this case there is no claim that the company failed in its duty to furnish a safe and sufficient switch, or to exercise the requisite care in selecting the conductor and brakeman whose duty it was to operate it; but, on the other hand, it appears that through their neglect to properly

adjust it the injury was caused. It is insisted, however, that under the doctrine announced in *Railroad Co. v. Discoll*, 12 Colo. 520, 21 Pac. 708, and *Railway Co. v. Naylor*, 17 Colo. 501, 30 Pac. 249, the conductor occupied the position of vice principal, or alter ego of the company; and hence his negligence in this particular instance was the negligence of the company. We do not think that the rule therein announced supports this conclusion. In those cases the negligence that caused the injury consisted in the failure to properly perform a duty that the law imposed upon the company, and not in the negligent performance of an assignable duty, as in this case. In the case before us, the accident is not attributable to the negligence of the conductor in the discharge of a duty in his capacity as the company's representative, but to his failure to see that a brakeman properly attended to his duty. The rule of the company making it his personal duty to see to the proper adjustment of the switches used in operating his train did not change the rule of law which governed the relations of the parties concerned, or take the handling of switches out of the category of assignable duties; and if, in the absence of such a rule, the company would not be liable for the negligence of a switch tender or a brakeman whose duty it is to perform such service, the adoption of such a precautionary measure, intended to better insure the performance of such duty by the brakeman, would not impose such a liability. *Miller v. Southern Pacific Co.*, 20 Or. 285, 26 Pac. 70. The specific act in connection with which the negligence occurs is the criterion by which the liability of the company is fixed, rather than the rank of the servant who performs the act. As was said in *Railway Co. v. Naylor*, supra: "The mere fact that the servant whose negligence produces the injury is superior in rank to the servant injured, does not alone fix the master's liability. The general powers vested in the superior servant, and the character of the specific act in connection with which his negligence occurs, are considerations rarely, if ever, omitted in pursuing the inquiry. The accepted general rule is that where the negligent agent or servant can fairly be said to take the place of the master, and represent him, so as to become in reality a vice principal, and the negligence occurs in the discharge of his representative duties, the master's liability may attach." As was also said in *Drainage Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 214: "The better rule, as we extract it from the best-reasoned cases, is that for the acts of the vice principal, done within the scope of his employment, and such as properly devolve upon the master in his general duty to his servants, the master is liable; while for all such acts as relate to the common employment, and are on a level with the acts of the fellow laborer, \* \* \* the master is not responsible. In other words,

47 Pac.—19

the test of liability is the character of the act, rather than the relative rank of the servants." Our conclusion is that the negligence of the conductor in leaving the switch open was that of a fellow servant of the deceased, and for which the company is not liable. *Railway Co. v. Needham*, supra; *Naylor v. Railroad Co.*, 33 Fed. 801; *Roberts v. Railway Co.*, 33 Minn. 218, 22 N. W. 389; *Harvey v. Railroad Co.*, 88 N. Y. 481; *Slattery's Adm'r v. Railroad Co.*, 23 Ind. 81; *Walker v. Railroad Co.*, 128 Mass. 10; *Miller v. Railway Co.*, supra; *Brown v. Railroad Co.*, 68 Cal. 171, 7 Pac. 447, and 8 Pac. 828.

But it said that, if the court erred in its instructions upon this point, such error is without prejudice, since the company is, in any event, liable for its failure to furnish a proper signal lamp. To this we cannot agree. The complaint charges two acts of negligence upon the company,—the failure to furnish the cupola light, and the failure of the conductor to close the switch. Both issues were submitted, and, the verdict of the jury being general, we cannot say upon which it was founded. Upon the testimony, the jury might have found that the absence of the signal light in no way contributed to the injury, but that it resulted solely from the negligence of the conductor in leaving the switch open. "A general verdict upon distinct issues raised by several pleas cannot be sustained if there was error as to the admission of evidence, or in the charge of the court, as to any one of the issues." *State v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. 278. For the reasons given, the judgment of the court below must be reversed, and the cause remanded. Reversed.

(23 Colo. 210)

JOSEPH HOLMES FUEL & FEED CO.  
et al. v. COMMERCIAL NAT.  
BANK OF DENVER.

(Supreme Court of Colorado. Oct. 31, 1896.)

CORPORATION—ALLEGATION OF CORPORATE CAPACITY—PROOF—TRANSACTIONS WITH CORPORATION—BILLS AND NOTES—EXTENSION OF TIME—EVIDENCE.

1. In an action in the name of a national bank, an allegation that "the plaintiff is a national bank, doing business under the act of congress," is a sufficient averment of the corporate character of the plaintiff.

2. In an action in the name of a national bank, where the complaint alleged that "the plaintiff is a national bank, doing business under the act of congress," and stated the cause of action to be on notes executed by the defendant to the bank, an admission by the defendant that the notes were executed as alleged is an admission of the corporate character of the bank.

3. In an action upon notes due to a bank, evidence that a short time before the notes became due, and after the bank had closed its doors, the president stated that, if the bank reopened, an arrangement would be made for a renewal, but that the bank had not reopened, was insufficient to support a plea that the bank had agreed to an extension of time on the notes.

Appeal from district court, Arapahoe county.

Action by the Commercial National Bank of Denver against the Joseph Holmes Fuel & Feed Company and others. There was judgment for plaintiff, and defendants appeal. Affirmed.

This is an action brought by the Commercial National Bank of Denver against the Joseph Holmes Fuel & Feed Company, E. R. Barton, and James Matthews, upon two promissory notes. The complaint avers, *inter alia*, that "the plaintiff is a national bank, doing business under the act of congress, and that defendant the Joseph Holmes Fuel & Feed Company is a corporation existing and doing business as a Colorado corporation"; sets out the two notes in *hæc verba*, their execution in the name of the defendant company, and their indorsement by E. R. Barton and James Matthews. To this complaint the defendants filed a joint and several answer, in which they admit the execution of the notes, and deny each and every other allegation of the complaint, and, for a further defense, aver that the plaintiff bank extended the time of the payment of each of the notes for the period of six months from and after the time of their maturity, and that such period had not elapsed at the commencement of the suit. The plaintiff, by its replication, traversed the second defense. The cause was tried to a jury, and upon the trial it was stipulated and agreed that the notes in controversy were executed by the defendant company, and that the names of James Matthews and E. R. Barton were written upon the back of the notes at the time they were delivered and accepted by the plaintiff; and thereupon the plaintiff rested. E. R. Barton, on behalf of defendants, testified that, as president of the defendant company, he had a conversation with Mr. Dow, the president of the bank, a short time before the notes became due, and after the bank had closed its doors, relative to the renewal thereof; and that Mr. Dow stated, in substance, that, as soon as they opened the bank, they would arrange for a renewal, upon the payment of the interest due. It further appears that the bank did not again open. By direction of the court, the jury found a verdict in favor of the plaintiff for the sum of \$3,150.38, the amount of the principal and interest due upon the notes. Judgment was entered upon the verdict for that amount. The defendants bring the case here on appeal.

Sullivan & May and John T. Bottom, for appellants. Doud & Fowler, for appellee.

GODDARD, J. (after stating the facts). The ground principally relied on for reversal is the want of allegation and proof of the corporate existence of the plaintiff bank. We think this claim is without merit. The action is brought in the name of the Commercial National Bank of Denver, and the complaint avers that the plaintiff is a national bank, doing business under the act of con-

gress. The national bank act (section 5136, Rev. St. U. S.) provides that a company organized pursuant to its terms shall be a body corporate. It is held in many of the cases that; if a corporation sues by a name which imports a corporation, it is not necessary to specially aver corporate existence. *Seymour v. Thomas Harrow Co.*, 81 Ala. 250, 1 South. 45; *Railroad Co. v. Gaster*, 20 Ark. 455; *Willson v. Machine Co.*, 55 Ga. 672; *Sayers v. Bank*, 89 Ind. 230; *Smythe v. Scott*, 124 Ind. 183, 24 N. E. 685; *Commercial Bank of New Orleans v. Newport Manuf'g Co.*, 1 B. Mon. 13; *Bank v. Capps*, 32 Neb. 242, 49 N. W. 223; *Bank v. Donnell*, 40 N. Y. 410; *Stanly v. Railroad Co.*, 89 N. C. 331; *Lewis v. Bank*, 12 Ohio, 132; *Bank v. Knowlton*, 12 Wis. 624. The allegation in the complaint that the plaintiff is a national bank, and doing business under the act of congress, imports a corporation, and, in effect, avers that it is a corporation. Furthermore, the admission of the execution of the notes by defendant company to plaintiff bank in its corporate name was an admission of its corporate existence and power to enter into the contract. *Insurance Co. v. Needles*, 52 Mo. 17; *Insurance Co. v. Bowman*, 60 Mo. 252. And many of the cases hold that, having dealt with plaintiff in its corporate capacity, they are estopped from denying its legal existence. *Jones v. Bank*, 8 B. Mon. 122; *Bank v. Trimble*, 6 B. Mon. 599; *Depew v. Bank*, 1 J. J. Marsh. 378; *Mackenzie v. Board*, 72 Ind. 189; *Society v. Perry*, 6 N. H. 164.

We believe it is universally held that the execution of a note to a corporation, by its corporate name, is sufficient *prima facie* evidence of the existence of the corporation. The admission of the execution of the notes sued on, and their introduction in evidence, therefore established, *prima facie*, the existence of the plaintiff corporation; and the defendants introducing no evidence rebutting such proof, and the testimony of the witness Barton entirely failing to show a valid agreement on the part of the president of the bank to extend the time of payment, the court properly directed a verdict for the plaintiff, and the judgment is accordingly affirmed. Affirmed.

(23 Colo. 195.)

#### BRUENING v. DORR et al.

(Supreme Court of Colorado. Oct. 31, 1906.)

#### IRRIGATION—WATER RIGHTS—PERCOLATING WATERS.

Where the water of a spring flows through a definite channel, or by percolation, into a running stream, of which it is the chief source of supply, injunction will lie, at the suit of a prior appropriator of the water rights in such stream, to restrain a diversion of the water of the spring by the owner of the land on which it is situated.

Error to district court, El Paso county.

Action by J. M. Dorr and others against John H. Bruening. There was judgment for plaintiffs, and defendant brings error. Affirmed.

This is an action brought to restrain the unlawful diversion of certain water claimed by defendants in error by virtue of a prior appropriation. The complaint, *inter alia*, avers: "That plaintiffs are the owners and in possession of a certain water ditch, in said county of El Paso and state of Colorado, generally known as the 'Robbins Ditch,' that commences and heads in a natural stream or water course known as and called 'Cheyenne Slough,' \* \* \* and was constructed about April 1, 1868; \* \* \* that said Cheyenne slough is formed from natural springs that flow naturally down into the creek bed of said slough, and from rainfall and the waste irrigation waters from lands above said slough; that said springs have existed from time immemorial, and are the main source of the water supply in times of drouth, and flow naturally into the creek bed of said slough, which is, and ever has been, a natural water course, or stream, in which flows a current of water, in a natural channel, between well-defined banks, and that the current of water flowing therein is, and ever has been, constant and continuous, and is one of the tributaries to Cheyenne creek; \* \* \* that plaintiffs and their predecessors have, at all times when necessary to supply their ditch with water to its capacity, dammed the natural bed of said creek, and taken all the water from said springs through said creek for the purpose of irrigation and domestic purposes; \* \* \* that this right covers all the waters in said springs and said slough, when necessary to fill the capacity and water rights of said Robbins ditch." And it further alleges, in substance, that in a proceeding duly instituted in the district court of El Paso county for the adjudication of priority of water rights between ditches taking water from said Cheyenne slough, the plaintiffs' ditch was awarded the first priority of water, to its full capacity, from the waters of said slough. It avers: That, on or about the 21st day of November, 1888, the defendant Bruening made subsequent appropriations of water from said Cheyenne slough, its tributaries and natural springs, which were subject to the prior rights of the Robbins ditch, and filed the same as the "Younger Spring Ditch"; and on the 15th day of June, 1889, made another appropriation of the water as "Younger Spring Ditch Enlargement," whereby the waters of said slough are being diverted and carried out of their usual and accustomed channel, so that they no longer flow into the Robbins ditch. By means of said Younger Spring ditch the defendant is now taking, and at different times since 1889 has taken, diverted, and appropriated, the natural spring waters of said Cheyenne slough, the property of plaintiffs, and which said plaintiffs are entitled to have flow down the channel of said creek into their ditch. That the ditch constructed by defendant is a permanent structure, and that he threatens and intends to continue to divert said waters, and will permanently divert the same, and prevent them from flowing into plaintiffs' ditch, unless restrained. That by reason of such diversion the

plaintiffs were unable to irrigate their growing crops during part of the years 1888, 1889, and 1890, and were greatly damaged thereby. By his answer the defendant specifically denies the allegations of the complaint, and by way of a special defense avers that, by and through his Younger ditch, he takes the water of springs which rise upon his own land, and conveys them for irrigation purposes upon his own land. On the trial of the cause a jury was impaneled to assist the court in the determination of the facts involved, and by agreement of the parties were placed in charge of a sworn bailiff and permitted to view the premises, and to which certain interrogatories were submitted. These interrogatories, and the answers thereto, together with the general verdict returned, are as follows: "Q. Is the spring in question one of the natural sources of supplies for the waters of said stream? A. Yes. Q. Did the construction of the Younger Spring ditch, and the manner of its use, diminish supply of water of said stream at a point above plaintiffs' headgate for year 1889? A. Yes. Q. Has the water supply of said stream been increased by the construction of the reservoirs of the defendant? If so, in what proportion? A. No. Q. Did the opening of the spring and the construction of the reservoirs, as they now exist, increase the flow of water from said spring? If so, you will state by your verdict in what proportion. A. No increase. We, the jury, find the issues joined in favor of the plaintiffs and against the defendant, and assess their damages at \$5." The court below found the issues in favor of plaintiffs, and rendered a decree enjoining the defendant from diverting the waters flowing from the springs in question, and from preventing their flow into the Cheyenne slough, to the extent of the amount of the prior water right of the Robbins ditch. Error is assigned upon this finding and decree, and to the giving of the following instruction: "The court instructs the jury that the natural supply of water of a stream, including seepage from springs therein and adjacent thereto, the waters of which flow or seep into said stream, become the property of the first appropriator of water from said stream, without regard to the owner of the land upon which such spring is located. This, at least, would be the law as to all appropriators of water from a stream fed by springs prior to the 17th day of April, 1889, or 90 days thereafter."

T. A. McMorris, for plaintiff in error. J. M. Dorr, J. K. Goudy, and V. A. Elliott, for defendants in error.

GODDARD, J. (after stating the facts). The principal question of fact in issue, and upon which evidence was mainly introduced, was whether the source of the water in controversy consisted of springs, or only a bog or swampy piece of ground, and whether there was a natural stream flowing therefrom into the creek or slough, or simply a seepage or percolation of water through the intervening soil,—the contention of plaintiff



in error being that, if a spring is not fed by a visible stream of water flowing from beyond into it, but from water arising out of the earth, and is without an outlet through any definite channel, such water is no part of any natural stream, but is the property of the owner of the land upon which it stands, and not the subject of appropriation under the constitution and statutes of this state, and that, no matter if, by percolation or seepage, the water passes into and constitutes the source and supply of a natural stream, an appropriator from such natural stream obtains no right to the water that will prevent the owner of the land from diverting it for his own use. In support of this claim he relies upon the well-recognized doctrine that percolating water, existing in the earth, belongs to the soil, is a part of the realty, and may be used and controlled to the same extent by the owner of the land. But we cannot perceive the applicability of this principle to the facts in this case. The reasons that exempt percolating waters from the rule of law that controls waters running in well-defined channels are not disclosed thereby. There is no uncertainty as to the existence, quantity, and flow of the water in question, whether it passes through or over the intervening land. It appears, from the evidence, and the express finding of the jury, that the spring in question is one of the natural sources of, and furnishes a continuous and regular supply to, the stream that flows down Cheyenne slough, and its waters constitute a portion of the water right acquired by plaintiffs, through their prior appropriation from that slough; and there is evidence on the part of plaintiffs to the effect that the water flows from the spring in a well-defined channel. Mr. Dorr testified: "The main spring was \* \* \* quite a large spring. It looked like it ran about two feet wide, and two or three inches deep, and flowed about twenty-five feet, into the creek. As to banks that contained the water, from the spring into the creek, there was a depression, filled with big rock, a depression of about two feet below what was the bed of the valley that the spring flowed in from its source into the creek bed." Mr. Wolfe, on behalf of plaintiffs, testified: "The spring had no banks when I first saw it,—just came out, and ran down over the rocks and gravel, then. The water ran down into a kind of ravine. It was a little channel." Mr. Matthews testified: "The springs seemed to be in a kind of marshy or springy piece of ground. Right along the hill above this creek or slough, and between this and the slough, was a hard piece of ground, where the water did not seem to go through at all, but seemed to collect higher than the spring, and come down for a short distance. Then there was a small depression where it ran into the slough. The stream was, as near as I can recollect, perhaps nearly a foot wide, and perhaps two or three inches deep

in the center, where it was running down; and at other places it would seep out along the bank into the creek. The pitch of the stream was quite rapid. It ran quite rapid." While there is testimony somewhat contradictory, in that some of the witnesses state that the water passes from the spring or bog into the stream, by seepage through the ground, and not over the surface, yet the weight of testimony clearly sustains the averment of the complaint that a portion of the supply of the water of Cheyenne slough comes from these springs, and flows naturally down into the creek bed of said slough.

But, if it be assumed that the conditions are as claimed by plaintiff in error, and that the water passes from where it heads in the spring or bog by seepage into the slough, we find in none of the decisions cited any rule announced that would warrant defendant in diverting the same to his own use, as he has undertaken to do. Nearly all the cases in which the diversion of percolating water has been upheld are cases where the diversion was incidental to the legitimate use of the land, in digging wells, working mines, etc., and not the result of a direct intent to cause such diversion. The only exception we have found is the case of *Railroad Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, which, in its facts, is clearly distinguishable from the case under consideration. The facts of that case were, in brief, that the railway company, in 1880, made an excavation or reservoir in a marsh, situated on land then belonging to the state, and by a pipe conveyed the water that collected therein to its station, and applied it to the various uses of the company. In 1888 Dufour acquired title to the land. He made a tunnel into an adjoining hill, and dug a ditch in connection therewith upon this land for the purpose of procuring water for irrigation and for his sheep. This act on his part resulted in the water collecting in his ditch, and the plaintiff's reservoir becoming dry. Action was brought to restrain the defendant from diverting this water. The court below expressly found "that said spring [reservoir] in the complaint described was, on the 7th day of October, 1886, and for a long period of time prior to that date and ever since such date has been, and now is, fed solely by percolating waters, which seep into said spring from the swamp or wet land surrounding the same, and such spring is not, and never has been, fed by any running stream of water." The supreme court, after setting forth this finding, says: "The finding is amply supported by the evidence, which clearly indicates that no stream of water runs into or from the bog or spring other than is conveyed away through plaintiff's pipe line." And, after discussing the law applicable to percolating water, the court uses this language: "Considered alone, this finding is not sufficient; \* \* \* for it is not inconsistent with the fact that a natural



stream of water flowed from the spring, which might be the subject of appropriation. But the finding that the spring was fed by percolating waters, taken in connection with the additional finding that the digging of the trench or ditch by defendant was for useful purposes, upon his own land, and above the spring, inflexibly directs the course of the judgment to the respondent. \* \* \* If respondent's alleged diversion had been located by appellant at a point below the spring, and upon a natural stream flowing therefrom, then the principle of law involved would have been entirely different from that now presented." The court also cites approvingly *Trustees, etc., of Village of Delhi v. Youmans*, 50 Barb. 16. In that case it is expressly said: "If the defendant's excavation or ditch drew the water from the plaintiff's spring, instead of stopping the flow of water from defendant's land to such spring, then the defendant would be liable in this action." In the case before us, it is undisputed that the defendant's diversion of the water was made directly from the springs by excavations made therein, and by a trench leading therefrom, and for the express purpose of appropriating the same to the irrigation of his own land. We cannot find any case wherein such diversion is justified. *Straight v. Brown*, 16 Nev. 317, involved facts very similar to those in the case before us; and it was therein held that the law of percolating waters was not applicable, and the court say: "It would be a mere pretense of protection of the rights acquired by the earlier appropriators of the waters of a creek to say that later appropriators could lawfully acquire rights to the springs which constitute the source of the creek, simply because the means by which the waters are conveyed from the springs to the creek are subterranean, and not well understood."

The further contention of defendant, that there was an increased flow of water caused by the excavations he made in the spring, to which he was entitled, is answered by the finding of the jury, which, being based upon conflicting testimony and a personal examination of the premises, is conclusive of that fact upon this review. Our conclusion is that the court below correctly stated the law in its direction to the jury, and rightly granted the injunction. The decree is accordingly affirmed. Affirmed.

(23 Colo. 245)

#### PERSSE v. GAFFNEY.

(Supreme Court of Colorado. Nov. 16, 1896.)

PLEADING—REPLICATION—CONSTITUTIONAL LAW—  
APPEAL—JURISDICTION.

1. Where a complaint alleges that defendant failed and refused to make a settlement and accounting, the pleading by the answer of an account stated does not require a replication.

2. Though the court err in not requiring a replication, this does not raise the constitutional

question of taking defendant's property without due process of law, so as to give the supreme court jurisdiction.

Error to court of appeals.

Action by D. B. Gaffney against Henry S. Persse. A judgment for plaintiff was affirmed by the court of appeals, and defendant brings error. Dismissed.

H. B. Johnson and J. M. Washburn, for plaintiff in error.

PER CURIAM. This action was originally commenced in the district court of Arapahoe county by D. B. Gaffney against Henry S. Persse. The object of the action was to secure an accounting of a co-partnership business between the parties. As the result of such accounting, the district court rendered judgment against the defendant for the sum of \$1,450 and costs. From this judgment an appeal was taken to the court of appeals. A review in that court resulted in the affirmance of the judgment of the district court. See *Persse v. Gaffney*, 5 Colo. App. 374, 38 Pac. 837. From this latter judgment a writ of error was sued out from this court, and an application made for a supersedeas, which was denied. The writ of error must now be dismissed for want of jurisdiction to review the proceedings of the court of appeals, as the judgment does not relate to a franchise or freehold, and is for less than \$2,500; and the determination of no constitutional provision, state or national, is necessary to a decision of the cause. The jurisdiction of this court is invoked on the ground that a constitutional question is involved, although an examination of the record shows that no such question was raised in the court of appeals. The action is the one ordinarily resorted to to obtain an accounting between partners. The only argument that has been made in which it is claimed that a constitutional question is involved is the brief filed upon the application for a supersedeas, in which brief it is urged that the property of the defendant is about to be taken without due process of law, counsel resting such claim upon the fact that no replication was filed to the defendant's answer. An examination of the pleadings discloses that no replication was necessary. Certain cross demands were set up in the answer, but these were admitted by the plaintiff upon the trial, and allowed by the court; and, if the plaintiff in error relies upon pleading an account stated between the parties, no denial to this is necessary, for the reason that it is averred in the complaint that the defendant failed and refused to make a settlement and accounting of the business of the co-partnership with the plaintiff. Moreover, had a mistake been made in this regard by the district court, this would not present a constitutional question, such as would authorize this court to take jurisdiction. *Baker v. Barton*, 20 Colo. 506, 39 Pac. 65. The writ of error must be dismissed. Writ dismissed.

(23 Colo. 190)

**PLUMMER et al. v. STRUBY-ESTABROOKE MERCANTILE CO.**

(Supreme Court of Colorado. Oct. 31, 1896.)

**BOOK ACCOUNT—ORIGINAL ENTRIES—DEFENDANT'S BOOK—CORPORATE EXISTENCE—EVIDENCE—ATTACHMENT—SUFFICIENT AFFIDAVIT—REOPENING CASE.**

1. Where charges are made in the first instance on slips of paper, and the same day are transferred to a daybook, the book is one of original entries.

2. Where plaintiff's account appears on defendant's book, the book may be introduced by plaintiff as an admission against interest made by defendant.

3. Where a person has dealt with a corporation, recognizing it as such, he cannot deny its corporate existence when sued for such dealings.

4. In an action on an account, plaintiff makes out a case where he introduces evidence from books of original entry for part of the account, and substantiates the entire account by oral evidence, and by the admissions of defendants.

5. An affidavit for attachment states the nature of the action when it alleges that it is for "goods, wares, and merchandise sold by plaintiff to defendants."

6. The reopening of a case for the purpose of allowing additional evidence is within the discretion of the trial court.

Error to district court, Arapahoe county.

Action commenced by attachment by the Struby - Estabrooke Mercantile Company against N. T. Plummer and another. From a Judgment in favor of plaintiff, defendants bring error. Affirmed.

W. J. Weeber, for plaintiffs in error. H. C. Van Schaack, for defendant in error.

**HAYT, C. J.** This action was commenced by an attachment sued out of the district court on the 28th day of December, 1893. The affidavit upon which the writ of attachment is based alleges that there is justly due from the defendants to plaintiff, upon an overdue book account, the sum of \$20,630. It is further stated that the account is for "goods, wares, and merchandise" sold and delivered by the plaintiff to defendants, at their request. A writ of attachment was issued and levied upon certain merchandise, and a complaint was filed, in which the cause of action stated in the affidavit for attachment is set out in the usual form. In due time the issues were completed by the defendants filing a traverse to the affidavit in attachment, and an answer to the complaint. By consent of parties, the issues upon the attachment and the cause upon its merits were separately tried to the court, without a jury. As a result of these trials, the issues upon the attachment were found for the plaintiff, and judgment was rendered in its favor for \$17,400.46. It appears from the evidence that plaintiff below, the Struby-Estabrooke Mercantile Company, was engaged in the wholesale grocery business, in the city of Denver, and that the defendants were retail dealers. The defendants first commenced dealing with the plaintiff in the month of February, 1888, buying from it at that time goods to the

amount of \$6,000 or \$7,000, upon which a cash payment was made of \$3,000, credit being given for the balance for different periods, ranging from 30 days to 4 months, it being then agreed that the defendants were to have credit upon future purchases to the amount of about \$4,000. In pursuance of this understanding, the parties dealt together for a number of years, the account of the defendants gradually increasing in amount, until it aggregated upward of \$20,000. The plaintiff introduced evidence to show that, by agreement, interest was to be charged upon past-due accounts at the rate of 8 per cent. per annum. The defendants deny that there was any agreement for interest; but the uncontroverted evidence shows that plaintiff furnished monthly statements of the account, including therein interest calculated at 8 per cent., which were repeatedly paid by the defendants without objection. In addition to this, the defendants' ledger was introduced in evidence by the plaintiff, and this shows that plaintiff was credited with interest from time to time, as charged. It may be considered as established, therefore, that interest might properly be charged at the rate of 8 per cent. per annum, although plaintiff from time to time threw off a portion of this interest, so that, in the aggregate, it did not amount to more than 6 per cent. per annum. Evidence was introduced by plaintiff, showing that defendants owed it the sum of \$20,630 upon this book account, and that it was all overdue, while the defendants' books showed a balance in favor of the plaintiff of \$20,470.83. The defendants testified that a part of this account was not due, and the court thereupon deducted the amount so claimed not to be due, and rendered judgment for the balance only, viz. \$17,400.46, leaving the amount not due unsettled.

Upon the evidence there can be no doubt but that the defendants owed plaintiff, at the time of the trial, at least the sum of \$17,400.46, the amount of the judgment rendered; and, if the court had adopted plaintiff's version of the transaction, the amount of the judgment would have been largely increased. That the amount was upon a book account, long overdue at the time of the commencement of the action, is established beyond controversy. In these circumstances, the judgment upon the attachment and the main issue must be affirmed. Courts of review do not sit for the purpose of reversing just and proper judgments, although in some cases it may be necessary to award new trials because some of the safeguards have been violated, which universal experience has shown to be necessary to the orderly and proper administration of justice. We will, however, briefly consider each of the several errors argued.

The first is that the lower court erred in admitting in evidence for plaintiff a certain account book, the reasons assigned being that this book was not a book of original en-

try. The proof shows that, according to plaintiff's custom, such sales as were made were put down, when made, in pencil, upon sheets of paper, and shortly thereafter copied into a day book. The fact that the charges were made in the first instance upon slips of paper, and the same day transferred to a day book, does not take away from such day book its character as a book of original entry. 1 Whart. Ev. § 682; 1 Greenl. Ev. § 116; Redlich v. Bauerlee, 98 Ill. 134.

The next assignment of error raises the question of the admissibility of the defendants' ledger as evidence for the plaintiff. This ledger was one of the books kept by the defendants in the ordinary course of business. Plaintiff's account appeared upon it, with others. This was admissible as an admission against interest made by the defendants.

It is next urged that the district court erred in overruling a motion for a nonsuit and in sustaining the attachment for the reason—First, because plaintiff failed to introduce any evidence of its corporate existence; second, because plaintiff failed to introduce evidence of the entire account from books of original entry. In answer to the first objection, it is sufficient to say that the law is well settled, that where a person has dealt with a corporation, recognizing it as such, he is not permitted, when sued for such dealings, to deny its corporate existence. These parties, plaintiff and defendants, at the time of the suit, had been dealing together for a period of six years, during which time bills were rendered by the plaintiff, and paid to it in its corporate capacity by the defendants, and it was unnecessary for the plaintiff to introduce any additional evidence of its incorporation. As to the second ground of objection, while it is true that plaintiff did not introduce evidence from books of original entry for the entire account, he did introduce evidence from such books for part of the account, and substantiated the entire account by oral evidence, and by the admissions of the defendants; and more than this is not required.

There is no merit in the next assignment of error, to the effect that the affidavit in attachment is defective because it does not state the nature of the action, as the affidavit does state the nature of the action, by alleging it to be for "goods, wares, and merchandise sold by the plaintiff to the defendants."

The attachment issue and the issue upon the main case were tried separately, upon different days. Upon the trial of the main issue, plaintiff closed its case, without offering certain evidence which had been received upon the attachment issue. The plaintiff, deeming this evidence important, upon the main issue, sought and obtained permission to reopen its case for the purpose of introducing the same. The defendants were not prejudiced by such action of the court. They had full opportunity to cross-examine plaintiff's witnesses, and to meet such additional evi-

dence by the evidence of their own witnesses. It is always within the discretion of the trial court to permit the reopening of a case for the purpose of allowing additional evidence, and it is the duty of the trial court to thus reopen a case whenever the ends of justice can be advanced thereby.

A number of errors are assigned upon the admission of oral evidence, but, as the evidence objected to could have in no way affected the result, it is not necessary to consider the assignments of error based thereon. The judgment of the district court is right, and must be affirmed. Affirmed.

(23 Colo. 187)

SCHWED v. HARTWITZ et al.

(Supreme Court of Colorado. Oct. 31, 1896.)

STATUTORY NEW TRIAL — NOTICE OF TAX SALE — PUBLICATION ON SUNDAY.

1. An order allowing defendant a new trial on payment of only those costs which accrued after a former trial, which resulted in a judgment for defendant, and which plaintiff had set aside under the statute, is proper, under Civ. Code, § 272, providing that, whenever judgment is rendered in ejectment against either party, the court shall vacate it, and grant a new trial on payment of costs recovered therein.

2. The intention of Civ. Code, § 272, is to give each party, if unsuccessful, a right to one new trial on payment of costs.

3. A notice of a tax sale is in the nature of a service of process, and is void when published only in a Sunday newspaper, where the statute does not authorize service on Sunday.

Appeal from district court, Lake county.

Action by Pauline Schwed against Joseph Hartwitz and another to recover real estate. There was a judgment in favor of defendants, and plaintiff appeals. Affirmed.

This action was instituted under chapter 23 of the Civil Code of 1887, to recover the north 20 feet of lot 20, in block 4, in St. Louis Smelting & Refining Company's Addition to the city of Leadville. At all times while the action was pending in the district court the following provision of the Code was in force: "Sec. 272. Whenever judgment shall be rendered against either party, under the provisions of this chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby, and upon application of the party against whom the same was rendered, his heirs or assigns, the court shall vacate such judgment and grant a new trial in such case, but neither party shall have but one new trial in any case, as of right, without showing cause. And after such judgment is vacated, the cause shall stand for trial, the same as though it had never been tried. \* \* \* " In the district court three trials were had to the court without a jury. The first resulted in a judgment for defendants. This judgment was set aside, and a new trial granted under that statute, upon the plaintiff's paying the costs. The second trial resulted in a judgment for plaintiff, and a new

trial was granted the defendants under the statute. As a result of the third trial, the defendants obtained a judgment, and from this last judgment the plaintiff, Schwed, brings the case here by appeal.

A. W. Stone, for appellant. A. J. Sterling, for appellees. Baldwin & Gunnell, amici curiae.

HAYT, C. J. (after stating the facts). After the second trial, and before the third, plaintiff moved for a writ of restitution, upon the following grounds: (1) Because a new trial was granted upon the payment by the defendants of the costs of the second trial only. (2) One new trial having been granted under the statute, the court was without power to grant another. The first assignment of error is based upon the denial of the foregoing motion. The construction placed by the court upon the statute, as it then existed, was clearly right. It read: "Whenever judgment shall be rendered against either party, \* \* \* the court shall vacate said judgment, and grant a new trial in such case; but neither party shall have but one new trial in any case, as of right." This language clearly shows that it was intended to give plaintiff and defendant, each, if unsuccessful, a right to one new trial, upon the payment of costs. This construction is in harmony with the liberal rule adopted by the courts with reference to trials of title to real property, as well as in obedience to the plain intent of the code provision. Since this action was appealed, the Code has been changed in this respect, so that now the first unsuccessful party is alone entitled to a new trial as of course. The order allowing the defendants a new trial, upon payment only of the costs which had accrued after the first trial, was free from error. The statute makes the payment of costs a condition precedent to the right of a new trial as of course. It is the penalty exacted for such new trial. The first judgment was for the defendants, and, when the plaintiff paid the costs, and took a new trial, that was the end of that particular transaction. The costs so paid were not costs that could thereafter be recovered upon final judgment, and appellant has no just cause of complaint because a new trial was subsequently granted appellees without their refunding the amount so previously paid.

Plaintiff, to support her title, relied upon a certain tax sale. The notice of this tax sale was published only in the Sunday edition of the Herald-Democrat, a daily newspaper published in the city of Leadville. The statute provides that "the treasurer shall give notice of the sale of real property by the publication thereof once a week for not less than four weeks, in a newspaper published in his county, if there be one; \* \* \* and if there be no newspaper published in the county, the like notice shall be given by posting one written notice the above length of time in each election precinct, in which any land to be sold is situate, and one on or near the door of the treasurer's office, as above provided." Mills'

Ann. St. § 3883. The district court decided that the publication in a Sunday edition only was not legal notice, and that all proceedings thereunder were without force or effect. The publication of the notice of a tax sale is in the nature of the service of process. It will not be contended that, outside of a few cases, specially provided for by statute, service of process on Sunday in a civil action would be valid in this state; and the rule that tax sales are invalid, if made upon a notice published only in a Sunday paper, is too well settled to be now open to controversy. If, for any reason, a change is now desirable, the argument for such change should be made to the legislative department, and not to the courts. *Scammon v. City of Chicago*, 40 Ill. 148; *Black, Tax Titles* (2d Ed.) § 210; *Blackw. Tax Titles* (5th Ed.) § 440; *Ormsby v. City of Louisville*, 79 Ky. 199; *Sawyer v. Cargile*, 72 Ga. 290. The only decision we have been able to find apparently to the contrary is in *Hastings v. Columbus*, 42 Ohio St. 585, where it is held that the publication of certain ordinances with respect to street improvements, in a paper published only on Sunday, is sufficient; but this decision is based upon a statute of Ohio, which provides that a summons may be served "at any time." The court says that, under this provision, a service, whether personal or by publication, upon Sunday, is valid. In this state, as a general rule, personal service cannot be made on Sunday; hence, the entire reasoning upon the Ohio law is in favor of the conclusion reached by the district court. Judgment affirmed.

(23 Colo. 264)

## CRISMAN v. JOHNSON.

### HEINRICH v. SAME.

(Supreme Court of Colorado. Dec. 7, 1896.)

TAX TITLE—PLACE OF SALE—LIMITATIONS—RECOVERY OF LAND—JUDGMENT.

1. A tax deed is void where it shows on its face that the sale was had at the office of the county clerk and recorder, instead of the office of the treasurer, as required by Gen. Laws 1877, § 2307.

2. Where a tax deed is void on its face, because it shows that the sale was had at a place other than that designated by statute (Mills' Ann. St. § 3904), requiring actions for the recovery of land sold for taxes to be brought in five years, does not apply.

3. Though a tax deed is void, yet the court, in the judgment for the owner for the recovery of the land, must make provision for the payment to the purchaser of the taxes paid thereon by him.

4. The fact that in a tax deed to lots sold en masse the numbers of the lots are not consecutive, does not show that they are not contiguous.

5. A tax deed is not invalid because it conveys a number of lots.

6. Under Mills' Ann. St. § 3902, making a tax deed prima facie evidence of title, and section 3904, providing that no action for the recovery of land sold for taxes shall lie unless the same be brought within five years after delivery of the tax deed, such an action, based on the ground of the insufficiency of the notice of sale, must be brought within five years.

Appeal from district court, Arapahoe county.

Actions by Albert W. Johnson against Obed Crisman and against John Heinrich. There were judgments for plaintiff in each case, and defendants appeal. Reversed.

These cases were submitted upon the same briefs, and argued together orally to the court. The plaintiff in each case claims title from the government patentee through various mesne conveyances. The defendant in each case claims title by virtue of certain tax sales, and tax deeds executed in pursuance of such sales. These tax deeds are substantially in the form prescribed by statute. The one to Crisman embraces 27 lots, and the one to Heinrich 179 lots, all described as a part of Cottage Hill Land Company's Addition to Cottage Hill, in Arapahoe county, state of Colorado.

The following statutes are referred to in the opinion, the reference in each case being to Mills' Ann. St.:

"3790. It shall be the duty of every person owning or having charge of property in this state subject to taxation, to make and deliver to the assessor, on or before the twentieth day of May in each year, a correct list of the same, as required by law, whether he shall receive from the assessor a notice to do so or not, and every assessment made against property subject to taxation shall be valid in all respects, whether such notice was received or not. And no failure of the owner to have such property assessed, or to have the errors in the assessment corrected, and no irregularity, or error or omissions in the assessment of any property, or in the levying of any tax, shall affect in any manner the legality of any taxes levied thereon, nor affect any right or title to such real property which would have accrued to any party claiming or holding the same under or by virtue of a deed executed by the treasurer, as provided for by law, had the assessment of such property been in all respects regular."

"3902. The deed shall be signed by the treasurer in his official capacity, and attested by his official or private seal, and acknowledged by him before some officer authorized to take acknowledgments of deeds, and when substantially thus executed and recorded in the proper record of titles to real estate, shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed, and also all the right, title, interest and claim of the state and county thereto, and shall be prima facie evidence in all courts of this state in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts: First: That the real property conveyed was subject to taxation for the year or years stated in the deed. Second: That the taxes were not paid at any time before the sale. Third: That the real property conveyed had not been redeemed from the sale at the date of the deed. Fourth: That the property had been listed and assess-

ed at the time and in the manner required by law. Fifth: That the taxes were levied according to law. Sixth: That the property was advertised for sale in the manner and for the length of time required by law. Seventh: That the property was sold for taxes as stated in the deed. Eighth: That the grantee named in the deed was the purchaser or the heir at law, or the assignee of such purchaser. Ninth: That the sale was conducted in the manner required by law."

"3904. No action for the recovery of land sold for taxes shall lie, unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary, notwithstanding; provided, always, that when the owner or owners of such land, sold as aforesaid, shall at the time of the execution and delivery of the deed by the treasurer, be minor or minors, or insane or an idiot, and residing within the United States one year after such disability is removed, it shall be lawful for such person or persons, their heirs or legal representatives, to bring their suit, or action for the recovery of lands so sold, and when the recovery is effected in all cases, the value of the improvements, etc., made on the land so sold, and all taxes paid after the sale thereof, with interest thereon at the rate of fifteen per cent. per annum, shall be ascertained by the jury trying the action for the recovery, and paid by the person or persons recovering the same, before he, she or they shall obtain possession of the land so recovered."

The district court in each case held the tax deeds void, and gave judgment for plaintiff, without making any provision for the repayment to defendants of the taxes upon the premises paid by them, or either of them.

Rogers & Shafroth, for appellants. Edward L. Johnson, for appellee.

HAYT, C. J. (after stating the facts). Are the tax deeds relied upon by the defendants void upon their face? It is admitted that the sale in the Heinrich case was made at the place fixed by the statute, but it is claimed that the sale in the Crisman case was not so made. Both sales were made at the office of the county clerk and recorder of Arapahoe county, this being the county wherein the property is situate, but after the sale in the Heinrich case, and before the sale in the Crisman case, the following statute was passed: "On or before the first Monday in June in each year the treasurer is directed to offer at public sale, at his (the treasurer's) office, in his county, all lands on which the taxes levied the preceding year or any preceding year still remain unpaid; but such sale shall not be void if not made until after the day named." Gen. Laws 1877, § 2307. The only authority by which an officer may levy and sell property for the nonpayment of taxes is such as is conferred upon him by statute. The officer has no title to the property, and the title which the purchaser pro-

cures is, therefore, dependent upon a compliance with the statutory direction or authority, unless this be waived. While there are certain provisions of the statute which are conceded to be directory, others are mandatory; and, where provisions are enacted for the protection of the rights of the owner, these proceedings are mandatory, and should be strictly followed. Among the latter provisions are those designating the place of sale. It appearing upon the face of the Crisman deed that the sale was held at a place other than that designated by the statute, the district court properly treated the deed as void, as the officer was without jurisdiction to sell at such place; and the statute of limitations relied upon in this case cannot avail a party holding under such a deed. *Blackw. Tax Titles* (5th Ed.) § 501; *Gomer v. Chaffee*, 6 Colo. 314. While the judgment of the district court in these respects must be upheld, that court should have made provision for the recovery of the taxes paid upon the property by the plaintiff, and for failure to do so the judgment must be reversed. *Knowles v. Martin*, 20 Colo. 393, 38 Pac. 467.

Although the objection which we have found fatal to the Crisman deed does not apply to the sale in the Heinrich case, many other objections are urged which merit consideration. It is contended that the tax deed in this case is void because, as it is claimed, it recites a sale of a large number of non-continuous lots en masse. This claim is based principally upon the recital in the deed of the sale of a large number of lots, not numbered consecutively. This is undoubtedly some evidence that the lots are not contiguous, but we think it is not sufficient evidence to overcome the presumptions in favor of the validity of the deed, and the regularity of the proceedings, and particularly of the recitals, that the lots were exposed to public sale in substantial conformity with the statute in such case made and provided. It is true, this latter statement is the statement of a conclusion of law, but the deed follows closely the language of the statute in this respect, and the statement, having the sanction of legislative authority, should be given weight by the court. The statute permits the assessment of several adjoining lots if returned by the same person, and does not prohibit the sale in such instances of a number of lots together. It is directed against joining not contiguous lots or tracts of land in one sale; hence, the authorities which have been cited from states having statutory provisions unlike those of Colorado are not controlling here. *Revenue Act of 1870*, § 37; *Mills' Ann. St.* § 3822; *Id.* § 3894. It is not impossible for lots numbered as those in this deed to be contiguous, although the numbers do not run consecutively. It is quite possible that the lots may lie in a body together, notwithstanding such numbers, and we are, therefore, of the opinion that the deed is not, for this reason, void upon its face. A somewhat

similar question was presented to the supreme court of Kansas in *Cartwright v. McFadden*, 24 Kan. 602. There, as here, a number of lots were included in one deed, the only essential difference being that the lots in that case were designated by odd numbers consecutively, viz. 431, 433, 435, etc., while here this regularity of numbers does not exist. In reference to this recital the court says: "This kind of evidence might sometimes, along with other circumstances, furnish the foundation for a finding that the lots are not contiguous; but alone, and against the statutory presumptions in favor of the regularity and validity of the tax deed, and of all the prior proceedings, it cannot sufficiently prove any such fact." We think the reasoning in that case applicable here, the facts in both cases being that the lots were not consecutively numbered, although the uniformity in the numbers there is not to be found in this case; but we deem this difference of no importance, it being once conceded that the fact that the lots are not numbered consecutively in a tax deed does not render the instrument void.

Having determined that the deed to Heinrich is not void upon its face, we may next consider other alleged irregularities intervening in the proceedings, together with the statute of limitations relied upon by plaintiff in error. The curative statutes of this state with reference to the listing and sale of property are sweeping in scope and far-reaching in effect. *Section 3902, Mills' Ann. St.*, provides, among other things, that when a tax deed is regularly executed, it shall be prima facie evidence of certain enumerated facts. It is contended, however, in this case, that while a tax deed is prima facie evidence of every fact enumerated by statute, as to all other essential matters the evidence must be supplied before the deed can be received in evidence. Should we admit the correctness of this contention as a legal proposition, an examination of the statute discloses that it embraces every fact necessary to show a valid assessment and sale of the property, particularly when considered in connection with *section 2261 of the General Laws of 1877*. *Waddington v. Dickson*, 17 Colo. 223, 29 Pac. 177. The deed to Crisman purports to convey 27 lots, and the deed to Heinrich 179 lots, all in *Cottage Hill Land Company's Addition to Cottage Hill*. It is said that a tax deed cannot convey more than one tract or lot. Of this contention it is to be observed that such a requirement would be of no benefit to the owner who is so unfortunate as to have his property sold for taxes, nor to the purchaser at a tax sale. In these cases, instead of two deeds being sufficient, it would necessitate 206 separate instruments. This would involve hundreds of dollars of additional expense for execution and recording, with no possible benefit resulting to any party in interest therefrom. This point was raised in *Waddington v. Dickson*, 17 Colo. 223, 29 Pac.

177, and held to be untenable. Although in that case section 2331 of the Laws of 1877 is not alluded to in the opinion, an examination of this statute discloses nothing that militates against the conclusions there reached,—the object of the section being to make it a duty of the treasurer to issue a deed to the purchaser after the expiration of three years from the date of sale, and not to specify the number of lots or parcels of land that may lawfully be included in any such deed.

Among other defects or irregularities urged to the tax proceedings are the following: Insufficiency of notice of sale; no record shown of meeting of board of equalization; no evidence that the assessor swore to the assessment roll; assignment not of record; qualification of assessor not shown; no record of a meeting of either the state or county board of equalization. It will, of course, be admitted that there are some objections against tax titles that cannot be obviated by statute, as the effect would be to deprive the owner of property without due process of law. Among illustrations of defects of this nature may be enumerated instances where the property sold was not within the jurisdiction of the tax district, or that the sale in fact never took place; but, as a general rule, all questions with reference to tax proceedings, except such as go to the power and jurisdiction of the taxing officers, or the fraud and misconduct of the parties, are barred by the statute. *Black, Tax Titles, § 284.* Of the objections urged in this case, the failure to advertise the proper length of time prior to sale is the most serious, and if this must fail because not taken advantage of before the special statute of limitations had run, a fortiori must all others be overruled. Assuming, but not deciding, that the tax sale was not advertised for a sufficient length of time prior to the sale, we think the statute was designated to cover just such cases. The claimant could have brought suit to set aside the invalid sale at any time before the statute had run, but by failure to do so he has waived his right to attack the sale for this reason. In other words, the lapse of time has made the sale unassailable. This has been expressly held in a number of cases. The statute under consideration in the case of *Allen v. Armstrong*, 16 Iowa, 508, made the tax deed conclusive evidence of due notice of sale, among other things, and the court held that such notice of sale is not essential to the exercise of the taxing power. The legislature might provide for the sale of delinquent taxes upon any day, without requiring any notice whatever; and hence it was competent for the legislature to provide that the omission to give notice should not affect the validity of the sale. The opinion in that case is by Judge Dillon, and was followed in the subsequent case of *Hurley v. Powell*, 31 Iowa, 64. A statute of Minnesota provided that in foreclosure sales "no such sale shall be held invalid or set aside by reason of any

defect in the notice thereof, or in the publication and posting of such notice, \* \* \* unless the action \* \* \* be commenced within five years after the date of such sale," and the court held that the power of the legislature to pass such a statute could not be questioned, provided only that a reasonable time was allowed after its enactment in which to bring suits as to previous foreclosures; and also that the act applies when there has not been a publication for the full time prescribed by statute, and bars a recovery because of a defective notice. The action in that case was in ejectment, brought by one claiming under the mortgagor, by conveyance executed subsequent to the mortgage. *Russell v. Lumber Co. (Minn.) 48 N. W. 3.* See, also, *Mogan v. Carter (Minn.) 55 N. W. 1117.* The statute of this state provides that no action for the recovery of lands sold for taxes shall lie, unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary notwithstanding. As we have already stated, this provision is sweeping in its terms. It is not claimed to be in contravention of any constitutional provision, and it is the duty of the court to give it effect according to the plain intent and letter of the act. By another statute the deed, when recorded, is made prima facie evidence of title; so that, when this deed was placed upon record, plaintiff's cause of action accrued, and the statute of limitations then commenced to run. When our revenue laws are all considered, this construction is neither harsh nor unreasonable, but necessary for the protection of purchasers at tax sales, and to secure the collection of the public revenue. Under the revenue act a considerable time must elapse between the assessment and sale. After sale, a certificate of purchase is issued to the purchaser, and three years must intervene thereafter before a tax deed can issue, and then for the first time does the five-year statute of limitations commence to run, thereby giving upwards of eight years during which the owner may question the invalidity of the tax proceeding without meeting with the bar of this statute. The liberal time given no doubt was deemed sufficient by the legislature to enable the owner to fully protect his interests, and, if he failed to move during all these years, it was deemed but reasonable that he could not thereafter be heard to complain.

It is seldom that a case is presented to the court, showing such gross negligence on the part of the owner of property in the payment of taxes as in this case. The purchaser paid the taxes for 1875, and only became entitled to the tax deed upon payment of the taxes of 1876, 1877, and 1878. During these three years the right of redemption existed, with no attempt at its exercise. The treasurer's deed was executed and recorded in 1879, and for four years thereafter the grantee paid all taxes assessed against the prop-



erty without protest on the part of the original owner. In 1881 the owner executed a quitclaim deed to all interest in the property, but it was not until the tax of 1883 became due, and at a time when the purchaser's title by the payment of another year's taxes would have become absolute under another statute, that the grantee attempted to pay any taxes upon this property. Even then he did not move to set aside the previous sale, or offer to refund the taxes paid by plaintiff, but allowed the matter to rest for more than a year before instituting suit. In these circumstances the plaintiff is not entitled to again resume title to his property. *Waddington v. Dickson*, supra; *Morris v. Bank*, 17 Colo. 223, 29 Pac. 802; *De Foresta v. Gast*, 20 Colo. 307, 38 Pac. 244; *Knowles v. Martin*, 20 Colo. 393, 38 Pac. 467. The judgments must be reversed, and the causes remanded for further proceedings, in accordance with this opinion. Judgments reversed.

(23 Colo. 251)

**RUSTIN v. MERCHANTS' & MINERS' TUNNEL CO.**

(Supreme Court of Colorado. Dec. 21, 1896.)

**TAX SALE — NOTICE — PROOF OF PUBLICATION — PLEADING — CANCELLATION OF TAX DEED.**

1. The form prescribed by Mills' Ann. St. § 3884, for the affidavit of publication of a notice of sale for taxes contains the statement that the copies of each number of the paper in which the notice was published were delivered or transmitted to each of the subscribers of the paper according to the accustomed mode of business of the office, and an affidavit which fails to contain such statement is fatally defective.

2. Where plaintiff alleged the filing of legal proof of a tax sale notice, though not necessary to be alleged, defendant was entitled to show the invalidity of such proof under a denial, where necessary to sustain his cross complaint, without making any affirmative allegation respecting it.

3. Under Mills' Ann. St. § 3885, which requires the affidavit of publication of a notice of a tax sale to be filed and preserved, such affidavit is the only evidence admissible of the facts required to be stated therein, and cannot be supplemented by parol testimony.

4. Where, in ejectment, defendant by cross complaint prays the cancellation of a tax deed submitted by plaintiff, the court can order it canceled, if found to be invalid under the issues, though on other grounds than those alleged; it being a condition of defendant's recovery, under the statute, that he should refund the taxes paid by plaintiff.

Appeal from district court, Boulder county.

Action in ejectment by C. B. Rustin, trustee, against the Merchants' & Miners' Tunnel Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Appellant, C. B. Rustin, as trustee, brought this action in the court below to recover possession of the Little Alice mill site, in Gold Hill and Central mining districts, in Boulder county, Colo. Plaintiff relies upon a certain tax sale and a tax deed to support his cause of action, and sets forth in his pleading the deed, and the several steps taken in the assessment, levy, and sale of the property. He

alleges the publication of the notice of tax sale in the Boulder News, and avers that the proprietor of the paper made affidavit in due form of the publication of said notice, and transmitted the same to the county treasurer, which officer caused the same to be duly filed in the office of the clerk and recorder of the county, as required by statute. Plaintiff alleges that the property was assessed as the "Little Alice Mill Site, Central Mining District, Boulder County," and that in the notice of sale it was described as the "Little Alice Mill Site, Gold Hill Mining District, Boulder County"; that these mining districts adjoin, but that the boundaries are uncertain; that the property is, in fact, partly in one district and partly in the other, and that either description is sufficient to identify it with reasonable certainty; and avers that he has paid taxes accruing subsequent to the sale to the amount of \$629.13. In the answer the defendant denies the averments of the complaint as to those matters leading up to the tax deed, admits that the mill site was subject to taxation and that taxes were not paid, denies plaintiff's title, and by way of further answer and cross complaint asks that plaintiff's tax deed be declared invalid and canceled for the following reasons: (1) That in the notice of sale the property is misdescribed; (2) that plaintiff was a director in the company in possession of the property when the sale was made, and was incapacitated from making a purchase of the property at a tax sale.

It is alleged in the complaint that the proprietor of the paper made and filed with the county treasurer an affidavit of publication of notice of sale. Plaintiff introduced no proof in support of either of these allegations, although they are put in issue by the answer; but, as part of the defense, the following certificate of publication was identified as the one filed in the tax proceeding, and admitted in evidence: "State of Colorado, County of Boulder—ss.: C. Ricketts, being first duly sworn, deposes and says that he is the proprietor of the Boulder News, a newspaper published in Boulder, in the county of Boulder and state of Colorado, and that the annexed notice was published in said paper once each week for five consecutive issues, the first being on the 1st day of May, 1890, and the last publication being on the 29th day of May, 1890. C. Ricketts." Sworn to June 2, 1890. Filed in the office of county clerk and recorder June 2, 1890.

The statute prescribing the form of affidavit to be made by the publisher reads as follows: "3884. \* \* \* Such affidavit may be substantially in the following form, to wit:

"I, —, publisher (or printer) of the —, a — newspaper, printed and published in the county of — and state of Colorado, do hereby certify that the foregoing notice and list were published in said newspaper, once in each week, for — successive weeks, the last of which publication was made prior to the — day of —, A. D. —, and that



copies of each number of said paper, in which said notice and list were published, were delivered by carriers or transmitted by mail to each of the subscribers of said paper, according to the accustomed mode of business in this office.

"Publisher (or printer) of the ———,

"State of Colorado, ——— County—ss.: The above certificate of publication was subscribed and sworn to before me by the above named ———, who is personally known to me to be the identical person described in the above certificate, on the ——— day of ———, A. D. 18—.

"[Seal.] ———."

Upon the conclusion of the evidence of the parties, the court instructed the jury to return a verdict for the defendant, and in the final decree ordered the tax deed canceled, but required the defendant to reimburse plaintiff for the taxes paid by him, with the statutory penalties and interest. To reverse this judgment, the cause is brought here by appeal.

S. A. Giffin, for appellant. Allen & Webster and C. V. Mead, for appellee.

HAYT, C. J. (after stating the facts). There is some controversy with reference to the location of the Little Alice mill site, the subject-matter of this action. It is described in the assessment roll as the "Little Alice Mill Site, Central and Gold Hill Mining Districts"; in the advertisement for sale, it is described as the "Little Alice Mill Site, Gold Hill Mining District"; and in the tax deed as the "Little Alice Mill Site, Gold Hill District"; while in the government patent, through which both parties claim title, it is described as in the Central mining district. The evidence introduced goes to show that there were two mining districts, the Gold Hill and Central, presumably divided by Left Hand creek, which stream runs through the mill site; but it was proved at the trial that there was no record of the establishment of either of the two mining districts named, as required by law. The determination of any question arising by reason of these descriptions is, however, entirely unnecessary, as the judgment of the district court must be affirmed, for the reason that no proper affidavit of publication of the tax notice was made or filed as required by law. The affidavit in evidence is fatally defective, in that it fails to state that copies of each number of the paper in which the notice was published were either delivered by carriers or transmitted by mail to any subscribers, according to the accustomed mode of business of the office or otherwise. In the case of *Morris v. Bank*, 17 Colo. 232, 29 Pac. 802, an affidavit more complete, if anything, than the one filed in this case, was held insufficient, and a tax deed based upon such proceedings was declared invalid; the court deciding that proof of notice by publication must be made in substantial conformity with the statute.

The invalidity of the notice in this case is

not contested, but it is claimed—First, that the court erred in allowing the introduction of the publisher's affidavit against plaintiff's objection; second, that the court erred in not allowing the plaintiff to supplement the written proof of publication by oral evidence. The first of these assignments of error is based upon the pleadings, the appellant contending that, as the cross complaint does not point out this particular defect, the court should not have permitted evidence thereof to be introduced. The argument is founded upon the well-known principle that a cross complaint, like an original complaint, must be complete in itself, and state a cause of action. While this is correct as a legal principle, the answer in this case to this contention of appellant is evident. The plaintiff alleged in his complaint that due and proper publication of the notice of the tax sale was made, and an affidavit of such publication filed, as required by law. It matters not that plaintiff might have filed a sufficient complaint without setting forth the various steps leading up to the execution of his tax deed. He having set forth these matters, and issue having been taken thereon, any evidence which tended to prove or disprove the truth of the allegations thus in issue was proper. The ruling of the court excluding oral evidence to supplement the facts stated in the publisher's affidavit, was also free from error. The statute (section 3885, Mills' Ann. St.) requires an affidavit to be made and deposited with the county clerk and recorder, and to be carefully preserved by that officer. The evident purpose of the statute was to make such affidavit exclusive evidence of a compliance with the statute with reference to notice by publication. This is in accordance with the fundamental rule that, where proof by written evidence is required, oral evidence will not be received, unless in case of loss or destruction of the writing.

In the case of *Martin v. Barbour*, 140 U. S. 634, 11 Sup. Ct. 944 (a proceeding involving the validity of a sale for taxes of property in Arkansas), the statute under consideration required the notice to be shown by the affidavit of one or more publishers or proprietors of the newspaper, setting forth a copy of the notice, etc.; and it is further provided that said affidavit, when duly made, shall be taken and considered as sufficient evidence of the fact of publication, the date and number of insertions, and form of such notice. The affidavit being defective, it was attempted in that case to supply the defect by *ex parte* affidavits; but the court refused to permit this to be done, and held that the statute required record proof, and that nothing could be substituted therefor. In the case of *Gibney v. Crawford*, 51 Ark. 34, 9 S. W. 309, the court had under consideration a proceeding for calling in county warrants, and it held that the statutory authority under which the county court acts must be strictly pursued. The statute made it the duty of the sheriff to make a

written return, and set out in it the manner in which he gave the required notice, the same to be filed, with the affidavit of publication, with the clerk of the county court; and the supreme court decided that the statute in reference to publication obviously intended that the facts should be sworn to in an affidavit and placed on file, and that, in the absence of such an affidavit, no other proof could supply its place. In the case of *Martin v. Allard*, 55 Ark. 218, 17 S. W. 878, a tax sale was under consideration by the court, the statute under which the lands were sold requiring that notice of sale should be recorded with the clerk, with a certificate showing in what newspaper published, the date of publication, etc., and providing that the record so certified shall be evidence of the facts therein contained. The court held that the record alone could be looked to as evidence of the fact of publication. As against these authorities we are cited to the early case of *Thevenin v. Lessee of Slocum*, 16 Ohio, 519. The decision in that case, which was rendered by a divided court, is based upon two statutes, one passed in 1820 and the other in 1822. The tax proceeding was found to be governed by the act of 1822, and, while the act of 1820 provided that a record should be kept of all proceedings relative to advertising, selling, etc., of land upon which taxes were delinquent, the act of 1822, under which the proceedings were held, did not provide for such record. As the court held that the act of 1822 did not require any record to be made of the advertisement or sale, the fact that it held that oral evidence was admissible for such purpose is not to be taken as an argument against the authorities which we have cited. As a general rule, facts which should be of record cannot be proved by parol. This principle was applied by the court in the case of *Morris v. Bank*, supra, and is controlling in the case at bar.

The district court, finding that no sufficient affidavit had been filed, properly instructed the jury to return a verdict for the defendant. It is claimed, however, that the court erred in decreeing a cancellation of plaintiff's tax deed; but we think there was no prejudicial error in this part of the decree. Plaintiff having submitted his tax deed to the judgment of the court, and the same having been found invalid, it could no longer be used in support of his alleged title; and, although its cancellation was asked upon other grounds, it appearing that the defendant was entitled to its cancellation, it was the duty of the court to order it delivered up and canceled; and, as the court amply protected the plaintiff for all the moneys paid out by him upon this tax title, with interest, penalties, and costs upon the same, he is not entitled to complain of this part of the decree. The Code provides that the court shall disregard errors and defects not affecting the substantial rights of the parties. The substantial rights of the parties in this case were determined in the

ejectment suit, and we think the court properly ordered the cancellation of the tax deed as part of its judgment. Moreover, by section 3904, Mills' Ann. St., reimbursement to the purchaser at a tax sale is made a condition to a recovery by the owner in all cases. This is a measure of justice of which the courts must take notice, and the cancellation of the tax deed should be required under this section. It would be illogical and unjust to require the owner to refund the subsequent taxes, and at the same time allow the purchaser to hold the cloud of the tax deed upon his title. *Knowles v. Martin*, 20 Colo. 393, 38 Pac. 467; *Crisman v. Johnson* (Colo. Sup.) 47 Pac. 296. Judgment affirmed.

(23 Colo. 274)

## EMERSON v. SHANNON.

(Supreme Court of Colorado. Dec. 7, 1896.)

## TAX DEED—VALIDITY.

A tax deed of land consisting of several tracts not contiguous, but widely separate in different townships, sold together en masse for a gross sum, is void.

Error to district court, Prowers county.

Action by S. J. Shannon against H. Emerson to remove a cloud from title. There was a judgment in favor of plaintiff, and defendant brings error. Affirmed.

W. T. Rogers, for plaintiff in error. O. G. Hess and P. L. Hubbard, for defendant in error.

HAYT, C. J. Action instituted by defendant in error, Shannon, as plaintiff, against plaintiff in error, Emerson, to remove cloud from title. It is averred in the complaint that plaintiff has the legal and equitable title to, and is in the peaceable possession of, the S. E.  $\frac{1}{4}$  of section 15, township 22 S., range 46 W., situate in Prowers county. It is alleged that the defendant sets up and claims an interest in the premises adverse to the estate and interest of plaintiff, with a prayer that he be required to show his title, to the end that it may be determined to be null and void, as against the title of plaintiff. To this complaint an answer was filed containing—First, a general denial; second, an averment of title in the defendant by reason of a purchase by him of the premises, at a tax sale held on the 2d day of June, 1890, for the delinquent taxes for the year 1889. The action was tried to the court, who found the issue of title for the plaintiff, but required him to pay all taxes which defendant had previously paid upon the property, with interest, costs, and penalties, amounting, altogether, to the sum of \$123.25. From this judgment the defendant brings the case here by writ of error.

The defendant, to maintain his title at the trial, offered in evidence a tax deed, purporting to convey lands sold for delinquent taxes en masse for a gross sum, viz.: The N. E.  $\frac{1}{4}$ , the N. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ , the S.

E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ , the S. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ , and the N. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ ,—all in section 15, township 22 S., of range 46 W.; and the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  section 7, township 23 S., range 46 W. We have just held, in the case of *Crisman v. Johnson* (Colo. Sup.) 47 Pac. 296, that under our statutes it is lawful for the authorities to assess and sell en masse, for delinquent taxes, a number of town lots. Section 3822, Mills' Ann. St., provides for such assessment if the lots are listed by the same person, and section 3894 provides that, "when \* \* \* adjoining lots are offered as the property of the same person, one or more may be sold for the taxes of all." It is not necessary to determine whether, when all our statutes on the subject are considered, it is permissible to sell for taxes several tracts of contiguous acre property, as such a case is not presented, as the description given of the several tracts in the treasurer's deed will only apply to lands that are not contiguous, but widely separated and in different townships. It shows that these noncontiguous tracts were sold together for a gross sum. When this instrument was offered in evidence for the purpose of showing title in the defendant, the court properly rejected the same. The authorities are uniform that such a deed is absolutely void. *Black, Tax Titles*, § 122; *Hall's Heirs v. Dodge*, 18 Kan. 279; *Byam v. Cook*, 21 Iowa, 392; *Farnham v. Jones*, 32 Minn. 7, 19 N. W. 83. Upon the announcement of this ruling, the defendant withdrew the general denials of the answer, and the court thereupon entered judgment for plaintiff, removing the cloud created by the tax deed, upon condition that plaintiff pay all taxes theretofore paid by the defendant upon the property, together with interest, penalties, and costs, thereby fully protecting the rights of the defendant in the premises. The amount of such taxes, penalties, and costs was brought into court, and deposited for the use of the defendant, who refused to accept the same. He is still entitled to this money, but the plaintiff is entitled to have the cloud cast by the tax deed removed. Judgment affirmed.

(8 Colo. App. 471)

FISCHER et al. v. HANNA et al.<sup>1</sup>

(Court of Appeals of Colorado. Oct. 12, 1896.)  
MORTGAGE—FORECLOSURE—INTERVENTION—FINAL DECREE—APPEAL TO WRONG COURT—WRIT OF ERROR—EX PARTE PROCEDURE—BUILDER'S LIEN—SUBSTITUTION OF PARTY.

1. Where property has been reduced to money in the hands of a receiver, and a lien claimant is given an absolute decree for a liquidated amount, and it is given priority over the only decree and judgment adjudicated prior to it, it is a final judgment, from which an appeal lies, though there are other claims which have not been adjudicated.

2. A petition asking the court to set aside and annul former proceedings in the suit of

an intervener and to allow petitioner, who was not a party, to defend, is not a bill of review.

3. Where an appeal is taken to the wrong court, and there dismissed for want of jurisdiction, the time in which a writ of error can be taken out in the proper court is regulated by the general statute fixing the limitation.

4. Where notice of a motion is served on January 16th, to be heard on that date "or as soon thereafter as counsel can be heard," and the motion remains undisposed of until May 23d, it is error for the court to act upon it then without further notice.

5. The provisions of Civ. Code, §§ 23, 24, that a petition to intervene may be filed either before or after issue joined in the principal suit, that service shall be made by serving a copy of the petition of intervention, and that the intervention must be determined at the same time the principal suit is decided, are mandatory; and the court has no jurisdiction to render a judgment in the intervention, where a copy of the petition has not been served (unless there was a voluntary appearance), or after judgment has been rendered in the principal suit.

6. Without a rule to plead and a default entered of record, ex parte proceedings are erroneous.

7. It is error to proceed to trial on the merits without disposing of pending demurrers.

8. Where a party's demurrer is overruled, he is entitled to time to plead to the merits.

9. The superintendence of the construction of a building is "work," within the meaning of Gen. St. 1883, § 2131, which provides a lien for "whoever shall do work or furnish materials," etc., for the construction or repair of a building.

10. In an action to enforce a builder's lien, there is a fatal variance where it is alleged that plaintiff was to receive a commission of 5 per cent. on the total cost of the building for his services as superintendent, "the usual rate which prevails in the city of D.," and the evidence is that the contract was for \$25 a week and the 5 per cent. commission besides.

11. The assignee of a claim secured by mortgage or builder's lien in foreclosure is entitled to be substituted as plaintiff at any time before the decree.

Error to district court, Arapahoe county.

Action by the Colorado Savings Bank against the Metropolitan Theater Company to foreclose a mortgage. E. R. Cooper was appointed receiver, and John B. Hanna intervened. From a judgment on the petition of the intervener, Ferdinand C. Fischer and the Chicago Lumber Company, subsequent lienors, and holders of the mortgage by assignment, and the Colorado Savings Bank, bring error. Reversed.

In March, 1889, John J. Riethman leased certain lots in the city of Denver to William Lockhart Smith for the term of five years. In June of the same year he executed a supplemental lease, extending the time five years, making the term ten years. On the 17th of August of the same year it is alleged that Smith had erected a theater building upon the lots, and applied to the Colorado Savings Bank and obtained a loan of \$10,600; gave his note, executed also by one Charles M. F. Bush as surety; and to secure the payment of said note assigned to John A. Clough, trustee, all his leasehold interest in the property. In December of the same year (1889) Smith sold and conveyed to the Metropolitan Theater Company all interest in the leasehold property, theater building, fix-

<sup>1</sup> Rehearing denied December 14, 1896.

tures, and furniture, subject to the existing lien of the Colorado Savings Bank. On the 31st day of December, 1889, in order to obtain an extension of time for the payment of the money due the savings bank, the theater company assumed to pay the debt due from Smith to the bank, and executed notes falling due from January 1, 1892, to November 1, 1894, aggregating \$10,600, with interest at 7 per cent. In each of said notes it was provided that, if the theater company allowed the taxes or any rates or assessments to become delinquent, all the notes should at once become due and payable. To secure the payment of the notes, the theater company executed a deed of trust to Thomas B. Stuart, trustee, upon the property, real and personal, and the lease. It was stipulated by the theater company that it would pay Riethman all ground rent that should fall due; that it would insure the theater building in favor of the savings bank for \$20,000; that it would pay all taxes against the building; and that, in case it became necessary to foreclose the deed of trust in court, the court should tax a reasonable attorney's fee, which was also to become a lien upon the property. In order to protect its security, the savings bank, on December 31, 1889, advanced the theater company \$1,500, to relieve the property from liens and charges; paid the taxes for the year 1889; paid taxes upon the property for the year 1890, amounting to \$466.50; and paid insurance, \$525; ground rent to Riethman, \$1,575; and other bills,—making the aggregate debt \$19,429.53. Default was made in the payment of all the notes and the advances. On March 28, 1890, the bank commenced suit to foreclose, and also prayed judgment against Smith, Bush, and the theater company. On January 1, 1890, the theater company executed and delivered to Ferdinand C. Fischer a trust deed upon all of its property, subject to the prior rights of the plaintiff, to secure claims held by him and others against the company. On March 28, 1890, E. R. Cooper was appointed receiver of the Metropolitan Theater Company. No service of summons was had upon Smith. The officer returned that he could not be found. On May 7, 1890, defaults were entered against the parties served. On the same day the court entered a decree of foreclosure against the property, and a judgment against the defendants served for \$17,884.96. On the 29th of September, 1890, the court made an order allowing John B. Hanna to intervene. The part of the petition of Hanna as intervener necessary to be considered is as follows: "That about April 11, 1889, Smith entered into an agreement with the petitioner for the latter to superintend the erection of the building for Smith, in pursuance of which he, the intervener, entered upon the employment as superintendent, continuing therein till the completion of the building, April 12, 1890; that Smith agreed to give intervener for services the usual rate or per

cent. of the total cost of the building which prevails in the city of Denver, which were then and now 5 per cent. of the total cost; that the total cost was \$86,000, and the amount due petitioner, \$4,300, no part of which was paid. Prays that he be admitted as a party intervener; that he have judgment against Smith (only) for \$4,300 and interest from May 12, 1890, and for foreclosure of his lien against the leasehold interest of Smith, and as against the interest of each and all parties herein, and derived from said Smith and to the theater building and lots; that his lien be declared superior to the lien of the plaintiff and the defendants, and each of them," etc. On December 20, 1890, the parties entered into an agreement whereby E. R. Cooper, receiver, was authorized to sell the property of the Metropolitan Theater Company for \$30,000 to H. A. W. Tabor, taking his notes for \$25,000, at four months, with interest at 10 per cent., the balance to be paid in cash. An order of court was entered, giving effect to the agreement. Then followed a paper, filed by Fischer, in which occurs the following: "That the company had purchased, and is now owner of, each and every claim of every beneficiary in said trust deed, and petitioner, as trustee under said trust deed, is the representative only of the said lumber company, it being at the present time the sole beneficiary under the said trust deed; that said lumber company hath also purchased by assignment and transfer the claim of the plaintiff allowed under the order and decree of the court, and is entitled to receive the full amount decreed to be due the plaintiff, together with interest thereon." On December 17, 1891, an order was entered discharging the receiver, and transferring to the lumber company the money, notes, etc., and the lumber company executed a bond of indemnity in the sum of \$35,000. On January 16, 1894, intervener served upon the said E. R. Cooper (former receiver) a notice that "on January 16, 1894, or as soon thereafter as counsel could be heard, said intervener would apply to the court to have said cause set for hearing upon the merits." On May 23, 1894, an order was entered setting the cause for hearing June 16th. On June 11, 1894, Fischer and the bank demurred to Hanna's petition of intervention, and alleged as grounds of demurrer: "That it does not appear by the said petition when the said petitioner rendered the last services in petition mentioned, nor that the services rendered by the intervener were such services as, under the law, entitled him to a lien upon said property, nor that the compensation provided for by the supposed agreement between intervener and said Smith was reasonably worth that claimed by intervener; nor that the supposed lien notice was sufficient in law, or that it contained any statement of the total amount claimed by intervener, nor the credits thereon, nor the balance due on account of alleged serv-

ices; nor that the alleged lien notice was in any respect a sufficient lien notice under the provisions of the statute." On June 21, 1894, an order was entered of default of Smith and the theater company. No service had been had on either. June 25, 1894, notice served on the Colorado Savings Bank that on the 27th of June, 1894, the Chicago Lumber Company would apply to the court to be substituted as plaintiff in the above-entitled cause in the place and stead of the Colorado Savings Bank, the said company having succeeded to the rights of the said bank. The motion was served upon the intervener. On June 27, 1894, the Chicago Lumber Company presented and filed its petition to be substituted as plaintiff in place of the savings bank. After stating its legal right to be substituted as the party in interest, and assignee of the claims of the bank, the petition proceeds to review all the proceedings in this case, and point out supposed errors and irregularities in the conduct of the case, by which it was alleged it had been prejudiced, and by which both it and the bank had been prevented from resisting the claim of Hanna, the intervener. The petition was quite lengthy, and was verified by the lumber company's secretary. On June 27th also was filed the following motion, as a part of the former motion, or to sustain it: "On this day comes Ferdinand C. Fischer, sued herein under the name of Frederick C. Fischer, and moves the court to set aside and annul the hearing and all the proceedings had at the hearing of the claim of John B. Hanna, intervener, which hearing was had before the court on June 21, 1894, and to grant to him, as trustee herein, and as one of the defendants aforesaid, a hearing upon all questions of law and of fact which may be properly presented as a defense to said intervener's claim, according to law, and for grounds of this motion doth state and declare the following reasons, viz." The alleged "reasons" embrace four (4) printed pages of statements of alleged irregularities, mixed with argument in support of the motion, which is followed by an affidavit of Fischer of verification, covering six printed pages, reviewing the whole proceeding, and pointing out supposed errors of the court. On the same day, to resist the application, the intervener caused to be filed the counter affidavits of his counsel, H. A. Lindsley and Charles M. Bice, showing the regularity of the entire proceeding, and that the court had not erred; such affidavits covering over six printed pages. These were followed by affidavits of two of the counsel of the bank and the lumber company, insisting upon the irregularities and errors, and covering eleven printed pages. Counsel for plaintiff then applied to the court to have the demurrers to the petition of the intervener set for hearing. The application was denied, and an exception taken. On the same date (June 30th) the motion and petition of Fischer for a rehear-

ing of the case, and to set aside the proceedings theretofore had, was denied, "because it came too late," and an exception taken on the same date. On June 30th the motion of the lumber company to be substituted as plaintiff in place of the bank was denied, and an exception taken. And on the same date (June 30th) the following decree was entered as of the date of June 21st: "At this day, the above-entitled cause coming on regularly for trial on the merits, pursuant to the order of court on the petition of intervention of John B. Hanna, \* \* \* whereupon the court hears the evidence in behalf of the intervener, the said John B. Hanna, and Charles F. M. Bush, testifying in support of the intervener's petition, and no testimony having been offered contrariwise, and no one appearing in behalf of any other party to this proceeding, after due argument by counsel, and the court being fully advised in the premises, doth find: That it appears from the report of the receiver herein, and from the various petitions and orders of court in this cause filed, that the Colorado Savings Bank, plaintiff herein, long since sold and transferred its entire demand to the Chicago Lumber Company, a corporation not a party to this proceeding, and that the said F. C. Fischer, T. B. Stuart, John A. Clough, J. J. Riethman, A. H. Andrews & Co., John B. Hanna, assignee, and the said plaintiff at this time have no interest whatever in this suit, and have no right to contest or resist the intervener's petition herein; and the court doth further find that the defendant William Lockhart Smith, as lessee of the lots described in the petition of intervention, employed the intervener to superintend the construction of the Metropolitan Theater Building on said lots at and for the agreed price of 5 per cent. of the total cost of construction; that the intervener entered upon such employment, and superintended the construction of said theater building continuously from about April 11, 1889, to April 12, 1890; that the total cost of constructing said building was \$86,000, and that the intervener is entitled, under his contract, as compensation for his labors aforesaid, to the sum of \$4,300, together with interest thereon at the rate of 8 per cent. per annum from the 12th day of May, 1890, to this date; that the intervener has received no part of such compensation; that on May 6, 1890, the intervener subscribed and verified his lien statement under the mechanics' lien statute of 1883, wherein and whereby the said intervener claimed a lien on said building and leasehold interest aforesaid, said lien statement complying with the law in every respect, and said lien statement was duly recorded in the office of the clerk and recorder of Arapahoe county, on May 12, 1890, and that intervener's petition herein was filed on September 29, 1890; and the court doth further find and determine that each and every allegation of the intervener's petition is true, and

that the intervener is entitled to a lien on said building and leasehold interest, as set forth in the complaint and in the intervener's petition, and is entitled to have said lien established and foreclosed for the amount aforesaid; and the court doth further find that it was heretofore agreed by all the parties to this proceeding that the receiver herein might sell said theater building and leasehold interest for the sum of thirty thousand dollars, net of all expenses incident thereto, and that all the parties to this proceeding who should hereafter be adjudged entitled to a lien on said building and leasehold interest should, in lieu thereof, be entitled to a lien on said \$30,000, the proceeds of said sale; and said agreement was sanctioned by a decree of court entered herein, and in pursuance of said decree, the receiver sold the same in strict accordance with said agreement and decree. It is therefore ordered, adjudged, and decreed that the said John B. Hanna do have and recover of and from the said William Lockhart Smith the sum of \$5,713.66, and that the right of the said John B. Hanna to a lien on said building and leasehold interest described in his petition is declared and established in the amount aforesaid; that out of the fund arising from the sale of the said building aforesaid the intervener is entitled to satisfaction of the foregoing judgment, and the receiver is hereby ordered to pay forthwith to said John B. Hanna \$5,713.66. And it is further ordered and adjudged that the intervener's lien on the proceeds of the said sale of said building and leasehold interest is hereby established and declared; that in the decrees heretofore entered in this cause, the priority of the claim of this intervener was not determined, and it is now adjudged that, inasmuch as the intervener commenced work long prior to the date of all other claims heretofore reduced to a decree herein, the judgment of the intervener herein is adjudged prior to all claims heretofore adjudicated herein, and is entitled to satisfaction out of the \$30,000 fund before any other claimant thereto. And it is further ordered and adjudged that the intervener recover his costs herein to be taxed." On September 5th following the following order was entered: "At this day comes John B. Hanna, intervener, \* \* \* and it appearing to the court herein that the records of this court in the above-entitled cause, of date June 21, 1894, are silent in respect to the intervener's motion to strike from the files the demurrers of F. C. Fischer and the Colorado Savings Bank, and as to the court's ruling on said motion and on said demurrers: Now, therefore, it is ordered and adjudged that said record of date June 21, 1894, be amended by adding thereto the following order, to wit: 'At this day the intervener, John B. Hanna, appearing by his attorneys, Whitford & Lindsley and Charles M. Bice, and F. C. Fischer and the Colorado Savings Bank, by Benedict & Phelps, their attorneys,

and the cause being regularly called for trial on the merits of the intervener's petition, the intervener moved to strike from the files the demurrers of F. C. Fischer and the Colorado Savings Bank, and, after argument of counsel upon such motion, and as to the sufficiency of the demurrers, and the court being fully advised in the premises, the motion of the intervener to strike from the files the demurrers aforesaid is denied, and the demurrers are by the court overruled; and, the said F. C. Fischer and the Colorado Savings Bank filing no answer or other pleading herein, and asking for no time in respect thereto, the trial upon the intervener's petition is proceeded with.' "

Benedict & Phelps and Horace Phelps, for plaintiffs in error. Clay B. Whitford, H. A. Lindsley, and Chas. M. Bice, for defendants in error.

REED, P. J. (after stating the facts). Motion was made in this court by appellees, supported by briefs and arguments, to dismiss the suit. Appellants filed counter briefs and arguments, and the contention over the motion became almost as formidable as that in the main case upon the merits. This court, finding that the determination of the motion on the grounds presented involved an examination nearly as exhaustive as would be necessary upon the final hearing, denied such motion, and allowed the questions involved to be presented with the other questions involved.

1. The first contention is that the judgment was not final, but interlocutory. The reasoning of counsel in support of such contention is that the fund was a trust fund in the hands of the custodian for the payment of different claims until the fund was exhausted, and that there were two or three other claims of like character, contending for the right to participate in such fund, whose claims had not been adjudicated and determined; and that such adjudications, should they occur, might compel the modification of the decree in this case. This is as I understand the contention of counsel, and if I am not correct I fail to comprehend the grounds. We can find no authority, nor is any cited, where it is held that the finality of a judgment is dependent upon the character of the fund for distribution, whether a trust fund or remaining in the hands of the debtor, as long as it can be reached and applied by the court. We are not informed who the parties are whose judgments might ultimately require a modification of the decree, nor the basis of such claims. Two suits of the same character to enforce liens—those of John B. Hanna and Andrews & Co.—had been adjudicated, gone through the supreme court, and the claimants defeated. It is shown that the building in the construction of which the supposed lien originated was completed April 18, 1890. In the latter part of same year, or

In January, 1891, the property was converted into money, and went into the hands of the trustee. On September 25, 1890, the suit of the intervener was commenced by filing the complaint, where it remained without prosecution until January 15, 1894,—over three years. If there were others with legitimate claims, and more dilatory, who had taken no steps to enforce claims, they should pay the penalty of their negligence. But we fail to see in what respect the decree lacked the elements of finality. Certainly the possibility of some claim subsequently arising could not affect it any more than a judgment against a debtor should be regarded interlocutory because he owed other debts that had not been adjudicated. He was given an absolute decree for a liquidated amount, and it was given precedence over the only decree and judgment adjudicated prior to it. The matter was an absolute finality,—*res adjudicata*,—according to the authorities, unless the trial court had granted a new trial, or the judgment had been reversed by a superior court.

2. The second contention for dismissal is based upon what is denominated as a "plea in bar." It is peculiar, ingenious, and certainly novel. I can best state the contention in the language of counsel of defendants in error: "We assert that the plaintiffs in error waived their rights to a review here (1) by filing a bill of review in the court below, and (2) by not suing out the writ of error within thirty days after the dismissal of their appeal to the supreme court." The legal principle invoked is stated as follows: "All the authorities agree—and it must be so, in the nature of things—that a bill of review is, in effect, an appellate proceeding, and that by adopting that method all others are waived, and the only right of appeal thereafter existing is from the judgment rendered on such bill of review. A party by claiming one remedy waives the other." Several authorities are cited in support of the proposition. This is in regard to the petition or paper filed by Fischer on June 27, 1894, in which he asked the court to set aside and annul the former proceedings in the suit of the intervener, and allow him to defend. The petition was denied as of June 21st, because it "comes too late," and on the same date the petition of the lumber company to be substituted as plaintiff in the main suit in place of the bank was denied. The paper is designated by counsel as a "bill of review." I cannot so regard it. It is certainly not a proceeding in chancery, and, according to the definitions, lacks every essential element of a bill of review. I am glad some name is given to it. It seemed to me a legal non-descript, but upon careful study is found to be nearer a motion and petition for a new trial and an assignment of errors than anything else, and must be so regarded. It is said to be in the nature of an appellate proceeding. I can hardly agree with this, when addressed

to the same court that tried the case. It is said also to be a waiver of all errors at law, but, instead of being a waiver, it seems a very spirited indictment, asserting the errors and judicial crimes alleged to have been committed. But what it is or was appears to be of very little significance in view of the fact that the court refused to substitute the lumber company as plaintiff, and the bank retained the position. Hence the paper was not filed by any party to the case, but by an outsider, a volunteer, and certainly could not operate as a waiver by the plaintiff bank of errors that intervened. After its denial by the court, it was speedily dismissed by the petitioner, so it is said, but I have not learned what was dismissed. To dismiss a motion after a judgment denying it appears rather an unnecessary proceeding, and a novel experiment.

3. It is urged that the failure to sue out a writ of error within 30 days after the dismissal of the appeal by the supreme court was, under section 397 of the Code, sufficient ground for the dismissal of the case in this court. The appeal in the supreme court was dismissed without prejudice for want of jurisdiction. We have always regarded the section in question as only applicable to the suing out of a writ of error from the same court to which the appeal was taken, and, the appeal having been taken to the wrong court, and dismissed for want of jurisdiction, that the time in which the writ of error could be taken out in the proper court was regulated by the general statute fixing the limitation. The motion to dismiss the writ of error will be denied.

The grounds relied upon by plaintiffs in error for reversal are, first, the action of the court in advancing the case, and setting it for final hearing *ex parte*. The case had lain dormant, without any attempt on the part of the intervener to prosecute, for 3½ years. On the 29th of September, 1890, an order of court was made allowing Hanna to intervene. On January 16, 1894, intervener served notice that on that date, "or as soon thereafter as counsel could be heard," the intervener would apply to the court to have the case set for hearing on the merits. The motion remained undisposed of, and no further notice was given. On May 23d the court set the case for hearing on June 16th. The order appears to have been *ex parte*, without the knowledge or participation of opposing counsel. The only paper on file was the petition of intervention and complaint of the intervener. No rule had been entered requiring the adverse party to plead, and no steps taken to put the case at issue, and no default taken for failure to plead. On June 11th the bank and Fischer filed demurrers to intervener's complaint. On June 21st the court proceeded to a hearing of the case upon the merits with the demurrers on file undisposed of. On the 27th of June counsel for plaintiffs in error moved the



court to set the demurrers for hearing, which motion was denied, and on June 30th a decree was entered as of the 21st, in which the court states that it had heard evidence in support of Intervener's claim, "and, no testimony having been offered contrary, and no one appearing in behalf of any other party," etc., proceeds to decree for the Intervener. The notice of January 16th not having been acted upon and having gone over indefinitely, it was error of the court to act upon it without further notice, and in the absence of the adverse party, and set the cause for hearing on the merits on May 23d. *Mallan v. Higenbotham*, 10 Colo. 264, 15 Pac. 352.

One important and controlling fact does not appear to have been called to the attention of the court, and he seems to have entirely overlooked sections 22 and 24 of the Civil Code, which are as follows:

"Any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action between other persons, either in joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant."

"The court shall determine upon the intervention at the same time that the action is decided, subject to the power of the court to determine the order and mode of trial of the several issues. If the claim of the party intervening is not sustained, he shall pay all costs incurred by the intervention."

At the time that the petition to intervene was allowed and filed, there was no suit in which there could be an intervention. The adjudication had been concluded, and a final decree entered, nearly five months previously. In order to an intervention, there must be a suit pending; and before judgment, by section 23 of the Code, the petition to intervene may be filed either before or after issue joined in the principal suit, and by section 24 the intervention must be determined at the same time the principal suit is decided. In *Rockwell v. Coffey*, 20 Colo. 397, 38 Pac. 376, it is stated: "As a general rule, a party will not be allowed to intervene between the trial and the rendition of judgment." There certainly can be no intervention months after the rendition of a final judgment. There is no suit in which the petitioner can intervene. The statute is peremptory. "The court shall determine upon the intervention at the same time the action is decided." The court has no discretion. Our statute is that of California, and differs materially from those of most of the states. It comes from the civil law and Code Napoleon, and was taken from Louisiana. It is a proceeding unknown to courts of common law and equi-

ty in Great Britain and the United States. Speaking in regard to this particular Code, it is said in Pom. Rem. § 416: "We see that intervening rises at once into a proceeding of great importance. It may be resorted to in any and all civil actions, and at every stage in the action prior to the commencement of the trial." And in section 423: "The application [to intervene] must be made before judgment, if made at all." In *Carswell v. Neville*, 12 How. Prac. 445, it was said, on the application of one Dorsey to intervene: "Should Dorsey be made a defendant, it would open up the judgment, and stay proceedings on it. He is too late for such a favor. The case in 3 Code R. 172 [*Fraser v. Greenhill*], relied upon by Dorsey's counsel, is where the application was made before judgment. In this case Dorsey attached as early as February, 1853, and the plaintiff in this suit recovered judgment in August, 1854." The case was decided December, 1854. It is clear that, had the question been raised and presented, it must have been held that the court had no jurisdiction.

Whether the objection was waived by the defendants, or they were precluded from making it by the action of the court, we cannot determine. As the cause must be remanded, attention is called to it; also to the fact that it is asserted by the defendants that copies of the petition to intervene were not served upon the defendants. If such was the fact, the court was without jurisdiction for want of service. The proceeding by intervention is purely statutory, and the provisions of the statute must be strictly and literally followed. It is not contended that any rule to plead was obtained or entered, and that the demurrers were not voluntarily filed. Without a rule to plead and a default entered of record, ex parte proceedings are erroneous. In regard to proceedings by intervention, and that they are governed by the same rules of practice as original suits, see Civ. Code, §§ 17, 23. "The right to intervene is purely statutory, and the statute prescribes the mode of exercising it. An intervention is made by the complainant setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon parties to the action, who may answer or demur to it as if it were an original complaint." *Chase v. Evoy*, 58 Cal. 355. After voluntary delay of the Intervener for 3½ years, it is hard to find any exigency or necessity to advance the case, and railroad it through, in defiance of rules of practice. It is not claimed by appellees that there was any service of the copy of the petition of intervention upon the parties to the original suit, and counsel for appellants under oath state there was no such service. The Code provides that service shall be had by service of the copy of the petition of intervention. To confer jurisdiction, such service is equally as necessary as service of a summons or any other writ in ordinary suits. Failing to make service as pro-



vided by law, the court was without jurisdiction, but for the voluntary appearance and demurrers of the parties. During the entire proceedings and the entry of the decree on June 30th, no judgment appears upon the demurrers. On September 5th, after an appeal was allowed, bond filed, and the case was in the supreme court, an attempt was made to correct or add to the record of the case; the motion on which it was based being as follows: "Wherefore the intervener moves the court that the record aforesaid be corrected so as to show that at the time the said cause was called for trial upon its merits the intervener moved to strike the demurrers aforesaid, and also asked that the demurrers be overruled; that the said motion to strike was overruled, and that the demurrers were then and there overruled; and that the plaintiff and the said Fischer interposed no answer or other pleading, and that they did not ask so to do. The intervener further asks that the foregoing record entries be made as of the date of the trial of the intervener's petition herein,"—which motion was granted. The motion and amendment are peculiar. No date is given when the alleged proceedings were had, nor is there an affirmative statement that any such orders were made and omitted by the clerk, nor was any showing made. The language of the motion upon which the alleged correction was made is: "That at the time the said cause was called for trial upon its merits the intervener moved to strike," etc. There is a striking discrepancy between this statement and the bill of exceptions that should not be allowed to pass without notice. At the commencement of the trial the intervener was sworn; "but the said Fischer and said plaintiff, by counsel, objected to the introduction of any testimony, because demurrers were pending, and no issue of fact was formed. No rule to plead to the intervention had ever been taken, and the only issue before the court was the issue of law voluntarily tendered by the demurrers, which objections the court overruled; to which ruling said Fischer and said plaintiff each severally duly excepted." When the case was upon trial, and the testimony of the intervener was being taken, "Mr. Phelps, on behalf of said Colorado Savings Bank and F. C. Fischer, excepted to the ruling of the court in allowing the introduction of any testimony in support of this claim, because the case is not at issue, in that there are demurrers pending and undetermined on behalf of said Colorado Savings Bank and F. C. Fischer; and also moved the court to strike out all the testimony given by said J. B. Hanna upon the same ground. \* \* \* The Court: My judgment is that the parties are guilty of such laches that there is no appearance here to prevent the intervener from proving up the lien claim,—to which ruling of the court said Colorado Savings Bank and F. C. Fischer, by counsel, then and there duly excepted." And at the conclusion of testi-

mony for the intervener, "Mr. Phelps, on behalf of the Colorado Savings Bank and F. C. Fischer, moved the court to strike out all the testimony of this witness, on the ground that there is no issue on which to predicate it, there being demurrers pending and undetermined in this matter; that no rule was ever entered requiring the parties to this suit to plead to the petition of intervention of J. B. Hanna; and the evidence is, therefore, incompetent and inadmissible,—which motion was by the court denied; to which ruling of the court said Colorado Savings Bank and F. C. Fischer, by counsel, then and there each severally duly excepted." It is hard to reconcile these matters of record with the language of the motion and order, which is: "At the time the same was called for trial, the intervener moved to strike from the files two demurrers directed against his petition. \* \* \* That at the time said motion was interposed the same was argued by counsel for the respective parties, as well also the sufficiency of the demurrers, and the court \* \* \* denied the intervener's motion to strike, and also overruled both of said demurrers;" and it is then stated that, the parties not having filed an answer, nor asked for time, the court ordered counsel to proceed with the trial of facts. It is evident from the above entries in the bill of exceptions, the affidavits of counsel, and the post mortem attempt to correct the record that at the time the trial was had there had been no judgment upon the demurrers. To proceed to trial upon the merits without a judgment upon the demurrers was a grave error, and, if the judgment was one overruling the demurrers, time should have been given to answer. *Gibson v. Smith*, 1 Colo. 7; *De Walt v. Hartzell*, 7 Colo. 601, 4 Pac. 1201; *Corson v. Neatheny*, 9 Colo. 214, 11 Pac. 82; *McDonald & Co. v. Hallicy*, 1 Colo. App. 303, 29 Pac. 24; *Huse v. Moore*, 20 Cal. 115; *Lower Kings River W. D. Co. v. Kings River & F. C. Co.*, 67 Cal. 577, 8 Pac. 91; *Ballance v. Loomis*, 22 Ill. 84; *Hays v. Heatherly*, 36 W. Va. 622, 15 S. E. 223.

It is contended by appellants that the allegations in the petition do not bring the intervener within the provisions of the statute as entitled to a lien. The statute provides a lien for "whoever shall do any work \* \* \* . For the purposes of this act the term 'work' shall be deemed to include labor of every kind whether skilled or unskilled." I see no good reason why the superintendence of the construction of a building is not within the statute without a special designation. It is certainly work and labor. The same question arose in *Taylor v. Gilsdorff*, 74 Ill. 354, and it was found that superintendence was work under the statute. See, also, *Bank v. Gries*, 35 Pa. St. 423; *Mulligan v. Mulligan*, 18 La. Ann. 20; *Stryker v. Cassidy*, 76 N. Y. 50. The language of the statute is clear and comprehensive, and includes all persons who perform labor, whether skilled or unskilled. The person superintending the construction

performs labor as truly as the mason who lays the wall.

It is urged that the complaint or petition of the intervenor was defective under the statute, and insufficient. Whether it was deficient in substance, we do not find it necessary to decide. That it was insufficient appeared clearly subsequently upon the trial, and the proof was so variant from the allegations of the complaint that no decree should have been entered. The petition alleges a single contract, by which it was agreed "that he should be paid the usual rate or per cent. of the total cost of the building which prevails in the city of Denver, which were then and now five per cent. of the total cost"; that the cost was \$86,000, the amount due the petitioner \$4,300, no part of which was paid. The testimony of the intervenor was: "Q. State whether or not, at any time, you had a contract with him in reference to superintending the construction of that theater building. A. I had a contract with him in 1889. Q. What were you to do? A. To erect and superintend the erection of the building. Q. Did you do that? A. Yes, sir. Q. What period did it cover? A. One year. Q. What time did you work? A. Day and night, most all the time. Q. What were you to receive, if the compensation was agreed upon? A. Mr. Smith agreed to give me a salary of \$25 a week and a bonus of five per cent. on the construction. Q. State, if you know, what the cost of constructing that building was. A. It was \$86,000. Q. How much were you entitled to under that contract? A. Forty-three hundred dollars. Q. Have you ever received any part or parts of that \$4,300? A. No, sir; not any of that percentage. Q. State, in reference to this bonus contract, was it a separate and distinct contract from the wage contract? Did you have one or two contracts? A. I had one contract for \$25 a week and a bonus. Q. Was the \$25 contract entered into before the other one? What was it about? A. I was to receive that every week." Redirect examination: "Q. What was your first contract with Mr. Smith,—what was it about? A. My first contract was to build the stage. Q. Was that what you came on from Detroit for? A. Yes, sir. Q. After you came here, was there a difficulty between the superintendent and the people who were building the theater? A. Yes, sir; he had trouble with the stone contractor. Q. Did Mr. Smith apply to you to know if you would superintend the construction of the building? A. Yes, sir. Q. Was that the time he agreed to pay you, in addition to the \$25 per week, 5 per cent. on the cost of construction? A. Yes, sir. Q. The first contract you made was for \$5 per day for constructing the stage? A. Yes, sir. Q. You came on from Detroit for that purpose alone? A. Yes, sir. Q. Subsequently, when he had trouble with his contractor, he employed you to superintend the construction of the building, also? A. Yes, sir. Q. It was then he agreed to pay

you 5 per cent. on the total cost of construction? A. Yes, sir." The evidence establishes a contract for \$25 a week to superintend the construction of the stage, and a subsequent contract of \$25 per week and a bonus of 5 per cent. upon the cost of the building for the superintendence of the construction of the building. He testified, "I had one contract for \$25 a week and a bonus." He afterwards testified: "My first contract was to build the stage. Q. Was that what you came on from Detroit for? A. Yes, sir." Afterwards Mr. Smith had trouble with the superintendent. The intervenor was employed in his place. He testified he commenced work under the contract April 12th, and continued for a year. How long after his employment the new contract was made, is not shown. An alleged contract, only embracing one item of it, is no compliance with the statute. The contract alleged was an employment for a compensation of 5 per cent. only in the cost of construction. The contract proved was for \$25, payable weekly, and 5 per cent. bonus. The statute required the exact contract of employment to be set out, the aggregate of earnings, and credits for all moneys received. According to the petition, the amount earned under the contract was \$5,600, with credits of \$1,300, while the intervenor alleged nothing had been paid upon the contract. The evidence was very meager and unsatisfactory. It is alleged in the petition "that by the contract Smith agreed to give intervenor for services the usual rate or per cent. of the total cost of the building which prevails in the city of Denver." Then follows: "Which were then and now five per cent. of the total cost of the building." It will be observed that no proof whatever was made to establish the usual percentage in the city of Denver. All the evidence given was in regard to a contract of 5 per cent., and that rested upon the allegation without proof. If 5 per cent. was the usual, prevailing compensation of a superintendent, the presumption is that it was the entire compensation; not a bonus in addition to a fixed amount, which the party had agreed to take as full compensation. These matters were unexplained. He had agreed to take for his services \$25 per week; had come on from Detroit to work for that compensation; then claims as a bonus, in addition to that, that he was to receive for the year \$4,300, making \$107.70 per week. The fair presumption is that, if a new contract was made, the old one was abrogated, and the \$25 per week paid should have been deducted, or it should have been shown that his services were worth \$25 a week more than those of other supervising architects. Why the court should have found it necessary to adopt the course pursued, and put defendants in default, is unexplained, with demurrers on file undetermined, no rule entered requiring them to plead, and no default entered of record, and thus preclude all defense. It appears to have been arbitrary and

extraordinary, and certainly so great a departure from the well-settled rules of practice as to vitiate the judgment. The only reason given by the court appears frivolous and trifling. It occurred upon the trial. "Mr. Whitford, on behalf of said intervener, objected to Mr. Phelps making objections here, because he did not represent any party in the case. The Court: My judgment is that the parties are guilty of such laches that there is no appearance here to prevent the intervener from proving up the lien claim." For nearly 3½ years the suit had lain dormant, without prosecution. On May 14, 1894, a motion was filed by the intervener to advance the suit. On May 23d the court set the cause for trial, June 16th, on the merits, regardless of issues and the rights of defendants. On June 21st he found for the intervener, and on the 30th signed the decree as of the 21st. Allowing all the time between those dates as chargeable to the defendants, it only amounts to five weeks. The course pursued seems to be without a precedent. On June 27th a motion was filed to substitute the lumber company as plaintiff in place of the savings bank; denied by the court "as too late." Why it was not filed at an earlier date does not appear, nor why it was too late. The decree was not made until June 30th, and no reason is given, or necessity shown, for antedating it as of the 21st. The fact of the transfer of the claim of the bank to the lumber company was stipulated by the parties December 20, 1890, and on the same date brought to the attention of the court by the sworn statement of Fischer. Under the provisions and requirements of the statute, it was the duty of the court to allow the substitution at any time before decree, when the fact of the change of interest was brought to its attention.

The judgment and decree will be reversed, and cause remanded for further action in accordance with this opinion. Reversed.

(14 Utah, 339)

DWYER et al. v. SALT LAKE CITY  
COPPER MANUF'G CO. et al.

(Supreme Court of Utah. Nov. 10, 1896.)

APPEAL — FINDINGS IN CHANCERY — SECONDARY  
EVIDENCE — MECHANIC'S LIEN — WAIVER.

1. "Where a case is tried in a court sitting as a court of chancery, and the evidence is conflicting, the findings of fact will be conclusive in the appellate court, unless they are so manifestly against the weight of evidence as to demonstrate some oversight or mistake. So, likewise, where the case is tried before a referee, and his findings are confirmed by the court below."

2. "Where a written instrument is traced into the hands of a party, not within the state, secondary evidence is admissible to prove the contents of the instrument, and this without further showing that the original was lost or destroyed. In such case no notice to produce is necessary, and a copy of the instrument is competent evidence."

3. Where a mechanic stipulates with the vendee of premises that he will look to some other person for services performed thereon, or that

all such claims have been paid, he thereby waives his lien on such premises. A mechanic's lien is a privilege conferred by statute, and ordinarily may be waived by express agreement of the party in whose favor it exists. (Syllabus by the Court.)

Appeal from district court, Salt Lake county; S. A. Merritt, Judge.

Action by Daniel Dwyer and others against the Salt Lake City Copper Manufacturing Company and others. Judgment for plaintiffs. Defendant Otto Stalman appeals. Affirmed.

Loofbourow & Kahn and Dickson, Ellis & Ellis, for appellant. Frank Pierce, for respondents.

BARTCH, J. It appears that the Salt Lake City Copper Manufacturing Company was the reputed owner and in the possession of certain land, and that it erected thereon a smelting and copper refining and manufacturing plant. The plaintiffs brought this action to enforce a mechanic's lien against its property, claiming a certain sum of money due them from the company. Abraham Hanauer, trustee, and Otto Stalman, were made parties defendant. Stalman filed an answer and a cross complaint, wherein he alleged that there was due him from the company, for wages as an employé, the sum of \$3,775, and claimed a mechanic's lien therefor on the same property, and sought to enforce it as against the plaintiffs and all other defendants in the action. The company failed to answer, and its default was entered, but the defendant Hanauer answered the cross complaint, denying, for want of information and belief, all the material allegations, and, further answering, alleged that on September 24, 1894, the company executed and delivered to him, as trustee, a trust deed on its property, described in the cross complaint, and other property, to secure the payment of certain promissory notes of the company, aggregating the sum of \$227,200, and claimed that such trust deed was the first lien on the property. Hanauer further alleged that on May 1, 1894, Stalman and the company entered into a written agreement wherein Stalman agreed that all services performed by him on the property prior to April 1, 1894, were performed for one S. M. Green, and that the company was not liable to him for the services performed prior to that date. The cause was tried before a referee; and, in accordance with the findings of fact and conclusions of law reported by him, the court entered judgment in favor of Stalman, and against the company, for the sum of \$964.65, and ordered so much of the premises to be sold as might be necessary to satisfy the judgment. This judgment excluded the sum of \$2,700 of the claim of Stalman, that sum having accrued for services prior to April 1, 1894, and the referee having found that such services were rendered to S. M. Green. This appeal is taken from various orders and decrees, one of which is an order overruling the appellant's motion to modify the findings and report of the referee, and

another an order denying his motion for a new trial.

The referee, among other things, found that the services performed by Stalman on the premises, prior to April 1, 1894, were for Green, and not for the company, and that he was not entitled to judgment against the company, nor to a lien, for the wages earned previous to that date. The appellant insists that the evidence is insufficient to justify or support this finding, and that he was employed by the company, and was entitled to judgment against it, and to a lien for the whole amount of his unpaid wages. Upon an examination of the record, it must be conceded that there is evidence tending to show that the appellant was an employé of the company when his claim accrued, and that it was the owner of the premises in question during the time of his employment, but upon such examination it must likewise be conceded that there is evidence in the record which tends to show that prior to April 1, 1894, Green was the owner of the premises, and about May, 1894, sold the same to the company, and that up to April 1, 1894, the appellant was an employé of Green. Without referring to the evidence in detail, it is clear that there is a substantial conflict therein on the question whether the premises were owned, and the appellant was employed by the company, or by Green, prior to April 1, 1894; and, such being the case, this court will not disturb the findings of fact in question. The rule is well settled in this state that where a case is tried in a court sitting as a court of chancery, and the evidence is conflicting, the findings of fact will be conclusive in the appellate court, unless they are so manifestly against the weight of the evidence as to demonstrate some oversight or mistake. So, likewise, where the case is tried before a referee, and his findings are confirmed by the court below. *Hannaman v. Karrick*, 9 Utah, 236, 33 Pac. 1039; *Short v. Pierce*, 11 Utah, 29, 39 Pac. 474.

At the trial the respondent Hanauer offered in evidence a copy of the contract of May 1, 1894, made between Stalman and the company, wherein he, among other things, agreed "that all work and services by him performed with respect to the erection of said works have been paid for by the said S. M. Green, and that the party of the second part is not liable to the party of the first part in any sum whatsoever, except for salary since the 1st day of April, 1894." To the introduction of this evidence the appellant interposed an objection, on the ground that it was incompetent and immaterial, which was overruled, and it is insisted that the action of the court in overruling the objection was erroneous. It was shown that C. P. Mason had been appointed receiver of the company, and was the legal custodian of its books and paper, and that he had made search for the original instrument, but could not find it. The witness Dey testified that he saw the contract in the hands of one Saks; that the last time he saw it Saks

took it with him; that he tried to secure it for Hanauer's attorneys, but, after sending two telegrams, failed to do so. It also appears from the testimony that Saks was in Europe, and that the original instrument could not be secured. We think the foundation for the introduction of secondary evidence of the contents of the original instrument was sufficiently laid, and that the copy was competent. Where a written instrument is traced into the hands of a party, not within the state, secondary evidence is admissible to prove the contents of such instrument, and this without further showing that the original was lost or destroyed, because where the party into whose possession the instrument is traced, or in whose possession it was last seen, is beyond the jurisdiction of the court, it is neither within the power of the court to compel the attendance of such person, nor the production of the instrument. Nor, in such case, is notice to produce necessary. *Burton v. Driggs*, 20 Wall. 125; *Gordon v. Searing*, 8 Cal. 50; *Manning v. Maroney*, 87, Ala. 563, 6 South. 343; *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786; *Knickerbocker v. Wilcox*, 83 Mich. 200, 47 N. W. 123. Nor was the objection good on the grounds of immateriality, because the evidence tended to establish the fact that the \$2,700 which accrued to Stalman previous to April 1, 1894, had been paid, and that he had waived his lien by express agreement with the company.

The appellant also insists that if Green owned the premises, prior to the 1st day of May, 1894, and on that day conveyed the same to the company, the grantee took them subject to the lien for his services performed on the property to that date. Doubtless, where land is sold during the time of the construction of a building on which liens have attached, such sale does not affect the rights of the employés; but this cannot avail the appellant in this case, because he agreed with the vendee that all work which had been performed by him upon the premises previous to April 1, 1894, had been paid for by the vendor, and thereby discharged the lien, if any had attached. Whether or not a rescission of the contract of May 1, 1894, which contained this agreement on the part of the appellant, was afterwards made, is immaterial, because, if the contract was rescinded, it was not done until after the rights of Hanauer had accrued; and it does not appear that he was a party to the rescission. Where a mechanic stipulates with the vendee of premises that he will look to some other person for the payment of his claims for services performed thereon, or that all such claims have been paid, he thereby waives his lien on such premises. A mechanic's lien is a privilege conferred by statute, and ordinarily may be waived by express agreement of the party in whose favor it exists. 15 Am. & Eng. Enc. Law, p. 114; Phil. Mech. Liens, § 272; *Brown v. Williams*, 120 Pa. St. 24, 13 Atl. 519; *Bailey v. Adams*, 14 Wend. 201.

We do not deem a discussion of the remain-

ing questions presented important, because there appears to be no reversible error in the record. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

(5 Kan. App. 7)

### TAGGERT v. HUNTER.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.)

#### NEW TRIAL—EXCESSIVE DAMAGES.

Where, in an action to recover \$288.56, claimed to be due upon an alleged settlement, the defendant denies any liability thereon, and alleges that the plaintiff is indebted to him upon an open account in the sum of \$560.03, and upon the second trial of said action a verdict is returned in favor of the defendant for \$535.03, and the costs, amounting to \$376.80, upon which judgment was then rendered, the fact that, upon the day a motion for a new trial is being heard, the defendant voluntarily files an unconditional offer to remit \$500 of the amount returned in his favor, and to credit the judgment with such amount, will not be held conclusive evidence that the verdict was excessive, or that it was given under the influence of passion and prejudice.

(Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

Action by David Taggart against J. S. H. Hunter. Judgment for defendant. From an order refusing a new trial, plaintiff brings error. Affirmed.

H. L. Burgess and J. W. Parker, for plaintiff in error. F. R. Ogg, E. C. Owen, and I. O. Pickering, for defendant in error.

CLARK, J. The plaintiff, Taggart, in his amended petition, alleged that he is a farmer residing near the village of Morris, in Johnson county, and that the defendant, Hunter, is a merchant and grain buyer residing in said village; that in the summer of 1890 Taggart stored in the defendant's elevator a large quantity of corn, which the latter sold without his consent and against his direction, and failed and refused to account to him for the highest market value thereof, and sought to charge him with large sums of money said to have been expended in option deals, telegrams, etc.; that on October 29, 1890, they made a full and complete settlement of all matters in controversy between them, by the terms of which the defendant then paid to him, in cash, the sum of \$202.36, and agreed to pay him the further sum of \$288.56 in 30 days from the date of such settlement; but that the defendant had failed, neglected, and refused to pay the same, or any part thereof, and judgment was therefore prayed for the amount of such deferred payment, with interest. The defendant denied generally all the allegations of the amended petition which are inconsistent with the statements, allegations, and express admissions contained in his amended answer, expressly denied the settlement alleged by the plaintiff, and charged that Taggart was indebted to him in the sum

of \$560.03 upon an account, an itemized statement of which he attached to and made a part of his amended answer. This account shows numerous dealings between these parties during the summer and fall of 1890, and indicates a sale to Hunter of the corn mentioned in the petition. Taggart is given credit therefor in the sum of \$1,339.86, and in addition thereto he is credited with \$1,628.32 for wheat, \$133.60 for oats, and \$29 for merchandise returned; while he is debited in said account with the aggregate sum of \$3,645.81, which includes \$293.75 claimed by Hunter to have been paid by him to some St. Louis parties for Taggart as losses upon certain option deals. In addition to the items mentioned in this statement of account, Hunter claimed that Taggart had used his elevator  $1\frac{1}{2}$  months, in which he stored some corn, and that the value of such use was \$45, for which he also prayed judgment. The reply was a general denial. The jury returned special findings of fact, and a general verdict in favor of the defendant for \$535.03, and judgment was rendered in accordance therewith. On the following day a motion for a new trial was filed and subsequently overruled. The plaintiff, Taggart, brings the case here, and alleges that the court erred in not granting a new trial because of alleged errors in its rulings on the admission of evidence offered, and "because of excessive damages, appearing to have been given under the influence of passion and prejudice."

The record shows that the court erroneously permitted a witness for the defendant to testify as to the contents of a certain telegram, but upon cross-examination the original message was introduced in evidence. Certain letters, purporting to have been written by Chamberlin & Co. to Hunter, with reference to certain grain transactions or option deals at St. Louis, were read at the trial without proper identification. The court sustained an objection to the attempt of the plaintiff to testify as to what the defendant's bookkeeper told him with reference to a certain entry on Hunter's ledger, but before he left the witness stand the plaintiff testified that this bookkeeper stated that he could not explain that entry. The court permitted the defendant to introduce in evidence an entry on his ledger, and a corresponding one on his journal, showing that Taggart had been credited with a given sum of money on a certain day; but testimony had already been introduced tending to show the correctness of the subject-matter of such entry, and it is not apparent to this court wherein the substantial interests of the plaintiff were prejudiced by the ruling upon the objection to the introduction of these entries, or of the other evidence to which attention has been called.

He also alleges, in his petition in error and in his printed brief, that the court erred in refusing to grant a new trial, provided the defendant would remit \$500 of the verdict returned in his favor. We cannot say that the damages recovered by the defendant are ex-

cessive, or that they appear to have been given under the influence of passion and prejudice. The plaintiff sued upon an alleged settlement, or account stated, for \$288.56. The defendant denied the settlement, and claimed a balance due him upon an open account. There was evidence introduced tending to support the verdict upon which judgment was rendered. The only thing to which our attention has been directed as indicating that the amount of the recovery was too great is the fact that the defendant offered to remit \$500 thereof, and to credit the judgment rendered in said cause with such amount. While this offer was made on the day the motion for a new trial was being heard, and preceded the ruling of the court upon such motion, there is otherwise nothing in the record to indicate that the offer was not voluntarily made, or that the court even suggested the propriety or advisability of making such offer. The journal entry recites that the case came regularly on for hearing, on the motion of the plaintiff for a new trial, "and thereupon the defendant filed his remittitur of \$500 from the verdict of \$535.03, leaving a balance of \$35.03 due on said verdict, and said motion for a new trial coming on to be heard, and the court having heard the argument of counsel, and being well and fully advised in the premises, doth overrule said motion, to which ruling of the court in overruling said motion the plaintiff duly excepted," etc. It appears, from the record, that this cause had already been submitted to a former jury, but there is nothing to indicate the result of that trial. The evidence in this case covers 300 pages of the typewritten record. The costs at the date of the judgment amounted to \$376.80, and, for aught that otherwise appears, the defendant may have made this offer solely as an inducement to the plaintiff to abandon his effort to secure a new trial, rather than to influence the action of the court in its ruling upon such motion. But, however that may be, the trial court was so well satisfied with the result that he refused to vacate the judgment, and overruled the motion for a new trial. Before this court would be warranted in vacating or modifying the judgment, error must be shown. This has not been done, and the judgment must therefore be affirmed. All the judges concurring.

(5 Kan. A. 68)

#### EVANS v. BAKER.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 9, 1897.)

#### MORTGAGE NOTE — CONSTRUCTION — MATURITY OF DEBT — LIABILITY OF INDORSER — JUDGMENT ON PLEADINGS.

1. A note and a mortgage securing the same, when executed contemporaneously, are to be construed as constituting one contract, and the stipulations of the mortgage with reference to the maturity of the debt because of a failure to pay interest when due will be given effect, so as to cause the note to become due and payable before the time expressed on its face.

2. An indorser of a negotiable note is not bound by a contract, entered into without his consent, between the maker and a subsequent indorsee, which changes the time when the note may mature, and his liability as indorser must be determined and fixed in accord with the original contract of indorsement.

3. It is error to render judgment on the pleadings, without evidence, when material facts upon which such judgment is based are not admitted by the unsuccessful party.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Guthrie, Judge.

Action by Sarah M. Evans against Ceylon P. Baker. Judgment for defendant, and plaintiff brings error. Reversed.

Stebbins & Evans, for plaintiff in error. D. C. Tillottson, for defendant in error.

GARVER, J. The plaintiff in error, plaintiff below, sought by this action to obtain a judgment against the defendant in error, the defendant below, as indorser on a negotiable note, made by Alexander Morris, payable to the order of C. P. Baker, and which, by indorsement, came into the hands of the plaintiff. The note was due three years after its date, October 15, 1888, with interest from date, payable semiannually. After it had been transferred by indorsement from Baker to Truman D. Cook, and on June 26, 1889, Morris executed a mortgage to Cook securing its payment, such mortgage containing the condition that, if any interest was not paid when due, the whole of said note and interest should become due and payable. The interest due October 15, 1890, was not paid, and because of such default proceedings to foreclose the mortgage were commenced. The petition against Baker alleged that payment of the note was demanded of the maker on October 17, 1891, and payment refused, and that due notice thereof was given to Baker as indorser. Baker answered, alleging the execution of the mortgage to secure the note: that it was executed pursuant to an agreement, made when the note was executed, that such mortgage should be given; and that no demand of payment was made or notice of nonpayment given when the note matured. October 15, 1890, in accordance with the conditions of the mortgage for nonpayment of interest. To this answer the plaintiff filed a general denial. On the pleadings, and without evidence, the court rendered judgment for the defendant.

The only question for our determination is whether the defendant was entitled to judgment on the facts admitted by the pleadings. The defendant in error not having furnished us with a brief, we are left to the brief of plaintiff in error for information of the reasons upon which the decision of the trial court was based. The facts of the case may justify a judgment releasing the defendant from liability on this note; but, so far as they stand admitted by the pleadings, we do not think they authorize the judgment rendered. The

only matter argued in the brief of the plaintiff in error is the legal effect of the conditions of the mortgage with reference to the maturity of the debt, as against the express terms of the note. In other words, did the note become due, as to the indorser, Baker, upon the default in the payment of the interest due October 15, 1890? Upon this proposition, we are referred to the case of *McClelland v. Bishop*, 42 Ohio St. 113. In that case, the supreme court of Ohio held that such conditions of a mortgage, contemporaneous with a note which it was given to secure, relate only to the remedy for foreclosure of the mortgage, but do not operate to vary the obligation expressed on the face of the note. To the contrary is cited *Noell v. Gaines*, 68 Mo. 649. It is unnecessary for us to argue the principle involved in these decisions, or to express any opinion as to which is founded in the better reason. The question is not an open one in this state. The supreme court, in *Bank v. Peck*, 8 Kan. 660, distinctly laid down the rule as follows: "A stipulation in a mortgage, that upon failure to pay any part of the moneys secured thereby when due, all shall become due and payable, is valid, and may be taken advantage of by mortgagor as well as mortgagee." To the same effect are *Stancil v. Norton*, 11 Kan. 218; *Ellwood v. Wolcott*, 32 Kan. 526, 4 Pac. 1056; *Association v. Moore*, 40 Neb. 686, 59 N. W. 115. On the authority of these cases, the note matured, as to all parties to it, on the failure to pay the interest due October 15, 1890, if the mortgage was contemporaneous with the note. The note and mortgage together constitute the contract, and govern as to the rights and liabilities of the several parties. But in this case this depends upon a controverted fact. The defendant alleges that the note and mortgage were contemporaneous in legal effect, although reduced to writing at different times; and the reply of the plaintiff joins issue on that allegation. On the pleadings, the court could not, without evidence, assume that the contracts were contemporaneous, and, therefore, to be construed as one. If the mortgage was a subsequent, independent contract, to which the defendant was not a consenting party, it could not have the effect to change the obligation which he assumed by this indorsement, which was to pay the note at the end of three years, according to its purport, if duly presented to the maker for payment at that time, and due notice of nonpayment given. Such an independent contract might otherwise very materially affect the liability of an indorser, but it could not, by changing the time of payment, create an obligation which he never assumed. In that case, the terms of the note govern.

There are other questions which suggest themselves in this case, but, as they do not seem to have been raised in the trial court, and are not mentioned in the brief of plaintiff in error, we shall not consider them. The judgment will be reversed, and the case re-

manded for a new trial on the issues of fact made by the pleadings. All the judges concurring.

(5 Kan. A. 11)

### BRADLEY v. LARKIN.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.)

#### FRAUDULENT CONVEYANCE—ACTION TO SET ASIDE.

Before a creditor will be permitted to attack the validity of a conveyance of real estate made by his debtor, it must be made to appear that his rights have been prejudiced by reason of such conveyance.

(Syllabus by the Court.)

Error from district court, Wabaunsee county; William Thompson, Judge.

Action by C. T. Bradley, surviving partner of the firm of Bradley & Metcalf, against Dennis Larkin, Jr., and others. Dennis Larkin, Jr., alone answered. From a judgment in his favor, plaintiff brings error. Affirmed.

Pulciplue & Alexander, for plaintiff in error. Bertran & Nicholson, for defendant in error.

CLARK, J. This was an action originally brought in the district court of Morris county by Bradley & Metcalf to recover from Dennis Larkin, Jr., Dennis Larkin, Sr., and Martin Larkin upon three promissory notes executed by them to the plaintiffs, and to foreclose a mortgage securing their payment, given by Dennis Larkin, Jr., upon 120 acres of land in Morris county. The case was subsequently taken by change of venue to Wabaunsee county, where the trial was had, and the judgment complained of was rendered. All persons interested in the controversy were made parties to the action in the court below, and were duly served with process; but all, save one, made default. Dennis Larkin, Jr., filed an answer, and therein admitted that on June 4, 1889, he signed the notes and mortgages mentioned and described in the petition, as therein stated, but alleged that the same were given to secure a pre-existing indebtedness incurred by Martin and Dennis Larkin, Sr., and for the payment of which they alone were liable to the plaintiffs; that he was induced to sign the same without any consideration or value to him; that at the date of their execution he was a minor; that he attained the age of majority on June 20, 1889; that within a reasonable time thereafter he, in writing, duly notified the plaintiffs that at the time he signed said notes and mortgage he was a minor, and that he disaffirmed said contracts, and his said acts in signing and executing said notes and mortgage, to which disaffirmance he still adhered. To this answer the plaintiffs replied, denying generally the allegations of new matter therein contained, but alleged that, even if the answering defendant were a minor at the time he executed the notes and mortgage, he was estopped from taking advantage of such defense, owing to his previous conduct, as well as to his failure to



disaffirm his contract within a reasonable time after becoming of age. They admitted the instruments sued on were given for the purpose of securing a pre-existing indebtedness primarily contracted and incurred by Martin and Dennis Larkin, Sr., in favor of the plaintiffs, and alleged that that indebtedness was incurred prior to January 1, 1889; that on January 12th thereafter Dennis Larkin, Sr., and his wife conveyed all the real estate which he then owned, and which was not occupied by him as a homestead, including the land in controversy, to his son, the defendant Dennis Larkin, Jr.; that such conveyance was made without any consideration, and for the purpose of hindering, delaying, and defrauding the creditors of Dennis Larkin, Sr., including the plaintiffs, to whom he was at that time indebted in the sum of \$1,400, and that such conveyance operated to hinder, delay, and defraud such creditors; that these notes and the mortgage were executed by Dennis, Jr., at the instance and request, and with the full knowledge and consent, of the alleged fraudulent grantor to secure such indebtedness due to the plaintiffs, and that in such transaction, Dennis, Jr., acted as the agent and trustee for Dennis, Sr. There was a general finding in favor of the defendant in error. A motion for a new trial was overruled, and judgment was rendered in accordance with the general finding. C. G. Bradley, the sole surviving partner of the plaintiffs below, has brought the case to this court for review.

The evidence is uncontradicted that on June 4, 1889, the date of the execution of the notes and mortgage, Dennis Larkin, Jr., was a minor. Although he alleged in his answer that he became of age on June 20, 1889, it is clear from the evidence that he was born on the 27th day of December, 1868, and that on the 15th day of May, 1890, he notified the plaintiffs that he disaffirmed and repudiated his contract with them, and we cannot say that this was not done within a reasonable time after arriving at his majority. Nor is there any showing that the rights of the plaintiffs were prejudiced by a failure to disaffirm such contract immediately after Dennis, Jr., became of age.

The plaintiff in error complains of the ruling of the court upon the defendant's motion to strike out certain evidence tending to show that Dennis, Jr., was estopped by his conduct prior to the execution of this mortgage from relying upon his minority in avoidance of the contract; but an examination of the record discloses that this evidence was introduced by the plaintiffs below under the erroneous ruling of the court that the burden of proof was upon them to show that the contract sued on had been executed by a person competent to make the same. Thereafter the court properly ruled that under the pleadings the burden of proof was upon the defendant, and accordingly sustained the defendant's motion to strike out the evidence

which had been introduced by the plaintiffs. The defendant then offered proof tending to support the allegations of his answer. When this was done, the evidence which had been stricken out became material, but no offer was made to again introduce it.

Many additional assignments of error are presented, but the real question at issue is as to whether or not the court erred in refusing to allow the plaintiffs to introduce evidence tending to show that the real estate covered by this mortgage was conveyed to Dennis, Jr., for the purpose of hindering, delaying, and defrauding the creditors of the grantor, and that the notes and mortgage sued on were executed at the instance and request and with the full knowledge and consent of Dennis, Sr., to secure the indebtedness due from him to the plaintiffs, which was created before the date of the alleged fraudulent conveyance. In the petition, the plaintiffs allege that Dennis, Jr., is the owner of certain real estate, which he mortgaged to them to secure the payment of their claim, and they seek to enforce that lien; while under the reply the claim is made that Dennis, Sr., conveyed the land to his son, in order to defraud his creditors, and that that conveyance was therefore void; that the real estate therein described in fact belonged to Dennis, Sr.; and that in the execution of the mortgage to the plaintiffs Dennis, Jr., acted as the agent and trustee of Dennis, Sr.; and the prayer of the petition for foreclosure is renewed. If, as contended by the defendant in error, the reply states a cause of action in the nature of a creditors' bill in equity, we perceive no error in the rulings of the court upon the admission of evidence offered by the plaintiffs. The rule is elementary that a conveyance of real estate, made with the intention and for the purpose of defrauding the creditors of the grantor, is nevertheless good as between the parties thereto, and that a creditor of such grantor cannot successfully attack the validity of such conveyance, unless it is made to appear that the rights of the creditor are prejudiced by reason thereof. No such action can be maintained until it has first been ascertained that at the date of the institution of such proceeding the alleged fraudulent grantor was not possessed of sufficient estate, outside of the property so conveyed, which could be seized for the satisfaction of the plaintiffs' claim. If the payment of the amount due the plaintiffs can be legally enforced without resorting to a court of equity to have a trust declared, or a conveyance of real estate set aside as fraudulent, then the question as to whether the deed from Dennis, Sr., to his grantor was made with fraudulent intent on the part of the grantor, or without any valid consideration, becomes immaterial. While the reply is that such conveyance was without consideration, that it operated to hinder, delay, and defraud the creditors of the grantor, and that it was executed for such purpose, there



is no allegation therein that at the time this action was brought Martin and Dennis Larkin, Sr., did not have ample means subject to execution with which to satisfy in full the claims of all their creditors. If, as contended by the plaintiff in error, the real estate in controversy in fact belonged to Dennis, Sr., and the plaintiffs were entitled to establish in this action the facts which they alleged in their reply, we would not be authorized to review the judgment. As the record now stands, this property is not liable for the satisfaction of the plaintiffs' claim. If that property in fact belongs to Dennis, Sr., a reversal of the judgment might very materially affect his rights, and he is not made a party to this proceeding in error. The judgment of the district court must be affirmed. All the judges concurring.

(5 Kan. App. 56)

#### STATE v. EATON.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.)

#### APPEAL—REVIEW—IMPANELING JURY—ILLEGAL SALE OF LIQUORS.

1. Before this court can examine alleged errors occurring at the impaneling of the jury, the proceedings had at that time in the lower court must be preserved in the record.

2. The evidence in this case examined, and found to sustain the verdict.

(Syllabus by the Court.)

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Samuel Eaton was convicted of selling liquor, and brings error. Affirmed.

Henry McGrew, for plaintiff in error. A. C. Miller, for the State.

GILKESON, P. J. The defendant was charged by information containing three counts with the violation of the prohibitory law. Trial had before jury. Defendant acquitted upon the first and second counts, and found guilty on the third, sentenced to pay a fine of \$100, and be imprisoned in the county jail for 30 days.

The defendant urges error in the court in overruling challenges to jurymen, refusal to allow them to answer certain questions upon their examination. These assignments of error we cannot consider. The proceedings had in the lower court during the impaneling of the jury are not preserved in the record. We find 27 pages of typewritten matter with this record, but without identification of any kind; not attached to the record; no evidence that it ever has been, but is entirely independent thereof; nothing to show that the questions and answers written therein were asked or answered in this case or in the trial court; and we cannot notice anything that is outside thereof. The transcript should be complete of itself.

The second contention of defendant is that the court erred in refusing certain instruc-

tions, and we are referred to page 123, bill of exceptions. We have been unable to find any such page. The bill of exceptions consists of 99 pages (the first and second of which only are numbered), and the entire record only contains 117 pages. But if the instructions, as stated in the defendant's brief, were refused, we see no error. "It is proper to refuse an instruction which characterizes a witness as a 'spotter,' and which tells the jury to take his testimony with extreme care and suspicion, when there is nothing in the conduct or demeanor of such witness to reflect unfavorably upon his credibility, except his admission that he made a purchase of intoxicating liquor from one reported to be engaged in the illegal sale thereof, intending, if called upon, to testify thereto." *State v. Keys*, 4 Kan. App. 15, 45 Pac. 727. And we desire to reiterate the comments of Garver, J., in the case last cited, and adopt them as our own: "There is often, in the opinion of the writer, undue agitation about 'spotter' testimony in this class of offenses, and a disposition to magnify an act which may have been inspired by an honest, unselfish desire to detect crime into such proportions as unjustly to prejudice a jury against the most reputable and truthful witness."

The last error urged is as to the remarks of the county attorney in his argument, and we are again referred to a page of the bill of exceptions, viz. 124, which we are unable to find, or any of the argument in the record, and, consequently, cannot consider this assignment. We think the verdict is sustained by the evidence that the defendant had a fair trial, and has no just cause for complaint of the verdict and judgment. The judgment will therefore be affirmed.

(5 Kan. App. 27)

#### BEAL v. DILLON.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.)

#### INSOLVENT CORPORATION—ACTION AGAINST STOCKHOLDER—DEFENSES.

An assignee at law of an insolvent corporation may maintain an action against a delinquent stockholder therein to collect an unpaid subscription to the capital stock of such corporation, and in such action the stockholder may interpose the defense that he was fraudulently induced to become a subscriber to the capital stock through the false and fraudulent representations of the corporation and its officers.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Guthrie, Judge.

Action by C. N. Beal, assignee of the Topeka Manufacturing Company, against H. P. Dillon. Judgment for defendant, and plaintiff brings error. Affirmed.

John T. Morton, for plaintiff in error. Rosington, Smith & Dallas, for defendant in error.

CLARK, J. This is an action brought in the district court of Shawnee county by the plaintiff in error to recover from the defendant in error the sum of \$500. Briefly stated, the essential allegations of the petition are that the Topeka Manufacturing Company is a corporation duly organized under the laws of this state for the purpose of the transaction of a manufacturing, mechanical, mercantile, and agricultural implement business; that its capital stock is divided into 1,000 shares, of the par value of \$100 each; that the defendant, H. P. Dillon, is the owner and holder of 10 of these shares by virtue of an agreement entered into between him and the corporation that he would become such owner, and the subsequent acceptance and retention by him of a certificate for said 10 shares of stock, which was duly issued and delivered to him by such corporation; that the amount paid thereon was only \$500; that the corporation thereafter duly made an assignment for the benefit of its creditors, and that subsequently C. N. Beal became, ever since has been, and now is, the duly chosen, qualified, and acting assignee thereof; that its liabilities greatly exceed its assets; that, in order to liquidate its indebtedness, it is necessary that each stockholder should be required to pay the assignee the amount which, together with any sums theretofore paid thereon, would equal the par value of the stock held by him; and that, upon application therefor, duly made, in which proceeding the necessity for such payment was satisfactorily shown to exist, the district court of the county in which such assignment proceedings were pending made an order requiring each stockholder to pay the balance due upon the shares of stock subscribed, owned by him, prior to a certain date therein mentioned (being more than 60 days after the entry of the order, but which period had elapsed before the commencement of this action), and that in default thereof, the assignee should proceed to collect the same by suit; that the defendant had failed to make such payment; that there remained due and unpaid upon his shares of stock the sum of \$500, for which amount the plaintiff prayed judgment. A demurrer to the petition being overruled, an answer was filed, the material allegations of which are—First, that in consideration of the \$500 paid by Dillon to the corporation, as stated in the petition, the latter issued to him as full-paid the said shares of stock, and then and there released him from any other or further payment thereon, and expressly agreed that the amount so paid should be in full settlement therefor; second, that the right to question or attack the validity of such transaction between the corporation and the defendant, or to recover any further or additional sum upon such stock, did not pass by the deed of assignment; third, that no call for an assessment upon said stock, in excess of the amount which had been paid thereon, as stated in the petition, was ever made by the board of directors of said corpo-

ration, and, fourth, that said corporation, for the purpose and with the intent to defraud the defendant by inducing him to subscribe to its capital stock, made sundry false and fraudulent representations to him as to its solvency, the amount and character of the business then being transacted by it, and the profits resulting therefrom (all of which are definitely set forth in the answer), and that the defendant, believing such representations to be true, was induced to become a subscriber, but that, as soon as he discovered that such representations were false, he wholly repudiated and rejected such subscription. The answer also contains a prayer that judgment be rendered in favor of the defendant for costs. Upon the pleadings so filed, the plaintiff moved for judgment, upon the grounds, as alleged, that the answer admitted the allegations in the petition, and did not state facts sufficient to constitute a defense to the cause of action therein set forth. This motion being overruled, and the plaintiff being desirous of standing on his motion, judgment was rendered in favor of the defendant for costs, and this proceeding in error was instituted by plaintiff. The errors complained of are the overruling of the motion for judgment in favor of the plaintiff on the pleadings, and the rendition of the judgment in favor of the defendant.

Section 2 of article 12 of the state constitution declares that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law." And the legislature, by the enactment of paragraph 1192, Gen. St. 1889, has "provided by law" that, "if any execution shall have been issued against the property or effects of a corporation, \* \* \* and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except upon an order of the court in which the action, suit or other proceedings shall have been brought or instituted, made upon motion in open court after reasonable notice in writing to the person sought to be charged; and upon such motion such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." The defendant in error contends that, as there is no provision of law specifically authorizing an assignee of an insolvent corporation to maintain an action against a stockholder therein to recover from him any part of his unpaid subscription to the capital stock, while the right to maintain such an action is in terms conferred by statute upon each individual stockholder, who shall, by compliance with certain prescribed conditions, show

the necessity for resorting to this particular fund for the payment of his judgment, that the right to maintain an action to recover an unpaid subscription is not assignable, and that the statutory remedy given in favor of the creditor must be held to be exclusive. We think, however, that when one becomes a subscriber to the capital stock of a corporation, he, by that very act, acknowledges himself to be indebted to such corporation in an amount equal to the par value of the stock subscribed to him, and that the same shall be payable "in such manner and in such installments" as may be required by the board of directors, when acting in conformity to the regulations prescribed by the by-laws of the corporation, and that any amount unpaid thereon constitutes an asset of the corporation which passes under a valid deed of assignment. We also think that, should the board of directors of an insolvent corporation fail to discharge their duty by making a call for the payment of such unpaid subscription, a court of equity has ample power in the premises, and upon a proper showing may, unaided by statute, make such call, and direct payment thereunder to the assignee. The statutory remedy afforded a judgment creditor is cumulative and not exclusive, and the court very properly overruled the demurrer interposed by the defendant.

In support of these views we desire to quote with approval from a decision rendered by the Missouri court of appeals. Under the laws of Missouri a stockholder in a corporation is liable for only the amount of stock subscribed by him, and the statute which authorizes a judgment creditor to proceed by motion against an individual stockholder is almost identical in terms with our paragraph 1192, *supra*. *Lionberger v. Bank*, reported in 10 Mo. App. 499, was an action by the assignee of an insolvent bank against his assignor and its board of directors, to compel the making of a call or assessment upon the shares of stock, for the benefit of its creditors, in an amount which, with that already paid thereon, would equal 90 per cent. of its par value. The petition contained the necessary allegations, showing the necessity of raising such amount and refusal of the board to make the call; that certain depositors had recovered judgment against the bank upon which executions had been returned *nulla bona*, and that these judgment creditors had filed motions, under the statute, for an execution against the individual stockholders, which were still pending; that the judgment creditors were the only creditors thus proceeding; and that they were seeking to recover \$25,000, which was due to 600 creditors. The trial court held that no cause of action was stated, and sustained a demurrer to the petition. The law of Missouri, at the date of the subscription to the stock in question, provided that 10 per cent. upon each share should be paid at the time it was subscribed, and that the remainder should be paid "upon such calls, and upon such terms, as the directors may, from time to time, prescribe."

The court of appeals said: "The 90 per cent. retained by each stockholder is a debt to the bank, as much pledged to all parties dealing with the bank for the payment of its indebtedness as the cash in its vaults; and, being the only remaining assets, and being insufficient, equity has jurisdiction to entertain a bill by the assignee, acting on behalf of all the creditors, to recover unpaid subscriptions." That "the title of the assignee is determined by the policy of the law, as declared in the assignment act, which is a ratable distribution of the assets," and that "whatever rights are given by the statute to a judgment creditor who has issued execution and proceeded against any stockholder will remain unaffected by the assignment, and the fact that some creditors may have proceeded to obtain judgment to satisfy their executions by motion against individual stockholders, is no objection to the granting of the relief asked in this proceeding." In answer to the contention of counsel that the statute, by authorizing a creditor to proceed against a stockholder, amounted, in effect, to the offering of a reward to the diligent creditor, and excluded the idea of a common interest, the court said: "But this reasoning starts with the assumption that the remedy given by the statute is exclusive, while the court holds that it is cumulative. \* \* \* The subscribers, in becoming subscribers, intended to hold themselves responsible for the payment of assessments upon their stock when the same should be legally demanded, and the directors, in becoming directors, intended to call in the payments of shares subscribed when the necessities of the corporation required this, in order to enable it to meet its legal obligations. \* \* \* The corporation has made an assignment; and, if we are right in holding that it could assign, and did assign, its claim to these unpaid subscriptions, the right of the assignee of the corporation to apply to a court of equity is not created by the statute giving direct remedy to the creditor against the stockholder, but existed independently of the statute. The direct remedy of the creditor against the stockholder is given by statute, but it is not inconsistent with the right of the assignee."

Does the answer present any legitimate defense to the cause of action set up in the petition? The latter alleges that the corporation was created on or about March 16, 1893. There is no positive allegation as to the date that Dillon became a stockholder, but, as it is sought to construe his agreement that he would become a stockholder, coupled with his acceptance of the certificate for the 10 shares which was issued to him, as equivalent to a subscription to the capital stock, probably it should not be presumed that he became a subscriber therein prior to the date and delivery of such certificate, which was January 28, 1894. This was more than 10 months after the corporation was created, and but little more than 8 months before the assignment was made. There is nothing in the record to indicate that any of the indebtedness which was created by the corpora-

tion after Dillon became a stockholder remained unpaid at the date of the assignment, nor that the rights of any one, either as creditor or stockholder, was in any manner prejudiced by the alleged agreement that Dillon should be required to pay but 50 per cent. of the par value of the stock which was issued to him. For aught that appears in the record, a similar agreement may have been entered into between all of the stockholders. If such were the case, the transaction with Dillon was not a fraud sought to be perpetrated upon the stockholders. If the indebtedness was all created prior to the date that Dillon became a stockholder, no creditor has any cause for complaint concerning this agreement. *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530. If the subscription was induced by false and fraudulent representations of the corporation, as alleged in the answer, why is not such defense allowable in an action brought by the corporation to recover upon the contract of subscription, where there are no supervening equities? *Waldo v. Railroad Co.*, 14 Wis. 575; *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800; *Farrar v. Walker*, 3 Dill. 506, note, Fed. Cas. No. 4,679. The answer alleges that, as soon as the defendant learned that these representations were false, he wholly repudiated and rejected his subscription. This, as between himself and the corporation, he had a legal right to do. We then have here a petition stating a cause of action in favor of the plaintiff. To this petition the defendant answered, by way of confession and avoidance, admitting that he is a stockholder, but alleging that the corporation is estopped from demanding from him the payment of any additional sum upon his subscription, because of its agreement, made at the time he became a stockholder, that the amount then paid should be received in full settlement for his stock, and because the contract of subscription was induced by fraud and false representations made to him by the corporation, and was thereafter wholly repudiated and rejected by him as soon as he discovered that such representations were false. The truth of these allegations is admitted by failure to reply thereto. In fact, the motion for judgment in favor of the plaintiff upon the pleadings amounted, in law, to a demurrer to the answer, which, in like manner, confesses the truth of its material allegations. As the plaintiff elected to stand on his motion, the court properly entered judgment in favor of the defendant for costs, and such judgment will be affirmed. All the judges concurring.

(5 Kan. App. 40)

#### HALE v. ALDAFFER.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.)

ACTION ON NOTE — FAILURE OF CONSIDERATION — RELEASE OF SURETY.

1. When the consideration entirely fails for a note in the hands of the payee thereof, neither such payee, nor a subsequent holder with knowledge of the failure of consideration, can maintain an action thereon against the maker.

2. Where a note was executed in favor of the payee thereof by a principal and his surety, for the purpose of effecting an exchange of real estate with such payee, it cannot, upon the rescission of the contract of exchange, by an agreement made between the principal and payee, without the consent of the surety, be transferred to a third person, in satisfaction of a debt due him from such principal, so as to bind the surety.

Clark, J., dissenting.

(Syllabus by the Court.)

Error from district court, Shawnee county; John Guthrie, Judge.

Action by W. H. Aldaffer against George D. Hale, administrator of Lydia Nichols, deceased. Judgment for plaintiff, defendant brings error. Reversed.

Jetmore & Jetmore, for plaintiff in error.  
W. R. Hazen, for defendant in error.

GARVER, J. The material facts in this case are substantially the same as those involved in the case of *Hale v. Hitchcock*, 3 Kan. App. 23, 44 Pac. 446, the note sued on being the companion note to the one made the basis of the action in that case. Much of the evidence in this case, as well as some of the special findings of the jury, add a coloring to the facts which is absent from the former case; but the essential facts remain the same. W. H. Aldaffer, the defendant in error, and Milton S. Aldaffer, on the one side, and John L. Howard, on the other side, agreed upon a certain exchange and trade of real estate, in which, as a part of the consideration therefor, and to equalize the values of the several properties, the note in suit was executed by Milton S. Aldaffer, as principal, and Lydia Nichols, now deceased, as surety, in favor of John L. Howard, as payee. At this time, Milton S. Aldaffer was indebted to W. H. Aldaffer in a sum equal to the amount of the note, on account of a prior real-estate transaction. Deeds for the several properties were made and exchanged by the parties, and this note and two other notes, aggregating \$600, were delivered to Howard. A few days thereafter, Howard becoming dissatisfied because of the alleged minority of Milton S. Aldaffer at the time he executed his deed, the trade was rescinded, and the deeds thereafter executed were returned to the respective grantors. In this last transaction, pursuant to an agreement between the Aldaffers and Howard, the latter transferred said notes to W. H. Aldaffer, it being agreed between the Aldaffers that they should be taken in satisfaction of the indebtedness of Milton S. Aldaffer to him. This was done without the knowledge or consent of the surety, Lydia Nichols.

On these facts, it must be held that the consideration for the note in suit failed upon the rescission of the contract for the exchange of properties between the Aldaffers and Howard. The jury specially found that Lydia Nichols executed it for no other purpose than to effect the real-estate trade, and that the

only consideration for the transfer of the note from Howard to W. H. Aldaffer was the return of the deeds executed by the former. The mere fact that there may have been a pre-existing indebtedness from Milton S. Aldaffer to W. H. Aldaffer, which to some extent influenced the execution of the note, does not affect the question. The fact remains that the makers of the note promised to pay the amount called for by it to John L. Howard, and the consideration was represented in the value of real estate to be conveyed by Howard. At the end of the several transactions between these parties, the deeds having been re-exchanged, Howard again had his land, and the Aldaffers were again, also, in their original position. It needs no argument to show that, under these circumstances, payment of the note could not have been enforced by Howard; and, having no rights which he could enforce, it follows, necessarily, that he could not transfer to another, who had full knowledge of the facts, rights which he himself did not possess. The assignee in such case acquires only such rights as were possessed by his assignor. *Hatch v. Barrett*, 34 Kan. 223-230, 8 Pac. 129. For these reasons, the motion made by the plaintiff in error for judgment upon the special findings of the jury should have been sustained. The judgment will be reversed, and the case remanded, with directions to enter judgment on the special findings in favor of the plaintiff in error.

GILKESON, P. J., concurs. CLARK, J., dissents.

(6 Kan. App. 57)

LETSON v. ROACH et al.

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 9, 1896.)

ESTOPPEL BY DEED.

W., who had been a member of the Kickapoo tribe of Indians, became a citizen of the United States, and thereafter executed a deed of conveyance, with the general covenants of warranty, for certain Indian lands in which he had an interest, but not the legal title, to one L., not an Indian, and to whom a conveyance of such lands was at the time not authorized by law. Subsequently, the legal title to said lands becoming vested in W. with full power of conveyance, he executed another deed for the same to N., who took with notice of the prior deed. *Held*, that W. and his second grantee were estopped from setting up a title adverse to that attempted to be conveyed by the deed to L.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by Jesse N. Roach and others against W. W. Letson. Judgment for plaintiffs. Defendant brings error. Reversed.

H. M. Jackson, for plaintiffs in error. A. F. Martin, for defendants in error.

CLARK, J. This was an action for the partition of 40 acres of land in Atchison county. 47 P.—21

The suit was originally brought by W. C. McClain and Jesse N. Roach as plaintiffs, but thereafter whatever interest McClain had in the subject-matter of the controversy became vested in Fred Roach and Frank Brown, and by supplemental proceedings they were substituted as parties plaintiff with Jesse N. Roach. From the finding of fact it appears: That under the treaty of May 28, 1863, between the United States and the Kickapoo tribe of Indians, the 40 acres of land in controversy (the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , section 5, township 5, R. 17, Atchison county) was allotted in severalty to one O-ketch-e, a Kickapoo Indian woman. That thereafter said allottee died, leaving Shan-ke-qu, her daughter, as her sole heir. That Shan-ke-qu afterwards died, leaving as her sole heirs her husband, Wy-tah-the, and her daughter, Qua-is. Wy-tah-the was also an allottee under said treaty, and on April 1, 1871, had done all things necessary to be done in order to entitle him to become a citizen of the United States; and on said day he ceased to be a member of said Kickapoo tribe of Indians, and became a citizen of the United States and of the state of Kansas. That on September 19, 1882, the land in controversy was vacant and unoccupied, and on that day A. E. Letson and L. M. Briggs purchased the same in good faith, and for a valuable consideration, from the said Wy-tah-the and Qua-is; and the said land was on that day conveyed to such purchasers by the said Wy-tah-the and Qua-is by deed of full general warranty, in fee simple, duly executed and delivered, and said deed was, on September 28th thereafter, duly recorded in the office of the register of deeds in said Atchison county. That whatever right, title, or interest in or to said real estate the said grantees acquired by virtue of the execution and delivery to them of said warranty deed had, on the day of the commencement of this action, by successive conveyances thereof, become vested in the plaintiff in error. That on January 19, 1888, the United States issued a patent for this land in the name of the original allottee, O-ketch-e. That on August 31, 1889, the said Wy-tah-the, by a deed of full general warranty in form, conveyed said 40 acres of land to W. C. McClain and Jesse N. Roach, the original plaintiffs herein. That all of said several purchasers of said real estate made their respective purchases in good faith and for a valuable consideration, and without notice of any adverse claims thereto, except as was imparted to them by the record of prior conveyances, and by the actual possession of said real estate by A. E. Letson and L. M. Briggs and those claiming under them. From these findings of fact, the court held that the deed from Wy-tah-the and Qua-is to A. E. Letson and L. M. Briggs, dated September 19, 1882, was absolutely void, and that the grantees therein acquired no title to the land in controversy, but that by the purchase and deed from Qua-is and her husband of date August 19, 1886, and the mesne conveyances thereunder, the plaintiff in error acquired all the title which Qua-is had in and to said land, being an

undivided one-half thereof, and that by the purchase and deed from Wy-tah-the of August 31, 1889, and the mesne conveyances thereunder, the defendants in error acquired all the title which Wy-tah-the had in and to said land, being the other undivided one-half thereof; that the parties to this action are tenants in common, and are entitled to a partition of said real estate. Judgment and decree were rendered in accordance with the conclusions of law as so found by the court, and the defendant, Letson, brings the case here, alleging error in the conclusions of law upon the facts as found, and in the rendition of the judgment and decree.

It will be observed that the title of the plaintiff in error is based upon a deed of full general warranty executed and delivered by Wy-tah-the on September 19, 1882, while the defendants in error ground their claim to the same land upon a like deed executed by the same grantor on August 31, 1889. The question then presented is as to whether the deed executed in 1882 transferred title to the real estate therein described, and, if not, then as to its legal effect upon after-acquired interest therein. By article 2 of said treaty of May 28, 1863, it was provided (as to assignments or allotments, and as to the title or right thereby vested in such allottees) that, "when such assignments shall have been completed, certificates shall be issued by the commissioners of Indian affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law such tracts shall be exempt from levy, taxation or sale and shall be alienable in fee, or leased, or otherwise disposed of only to the United States, or to persons then being members of the Kickapoo tribe, and of Indian blood, with the permission of the president, and under such rules and regulations as the secretary of the interior shall provide, except as may be hereafter provided by law." No provision was made by law for the sale of such lands prior to the act of congress of August 4, 1886 (Acts Cong. 1886-87, p. 219). By section 2 of that act it is provided that "where allottees under the aforesaid treaty shall have died, or shall hereafter decease, leaving heirs surviving them, and without having obtained patents for lands allotted to them in accordance with the provisions of said treaty, the secretary of the interior shall cause patents in fee simple to issue for the lands so allotted, in the names of the original allottees, and such allottees shall be regarded for the purpose of a careful and just settlement of their estates, as citizens of the United States and of the state of Kansas." Under section 2448, Rev. St. U. S. 1874, the patent, when issued to a person who had previously died, passes the title to the lands therein to, and the same become vested in, the heirs, devisees, or assigns of the deceased patentee. On September 19, 1882, under said treaty and allotment, the fee title to this 40-acre tract of land was in the United States, while the right

to perpetual and exclusive use thereof was vested in Wy-tah-the and Qua-is in equal parts, to be by them so held until otherwise provided by law. On that day Wy-tah-the attempted to convey such real estate to A. E. Letson and L. M. Briggs. But no title passed to such grantees, as they were not members of the tribe of Kickapoo Indians; and only the United States, or persons who were members of the Kickapoo tribe and of Indian blood, could at that time acquire any interest in said real estate. It is agreed by all parties to this action that, by the provisions of said act of congress, the full legal title to the land in controversy thereby became vested in Wy-tah-the and Qua-is, the sole surviving heirs of O-ketch-e. After that act became a law, Wy-tah-the attempted to convey the land to the grantors of the defendants in error; but the plaintiff in error insists that, as soon as this full legal title became vested in Wy-tah-the and Qua-is, it instantly passed through them and by mesne conveyance, to the plaintiff in error, by virtue of the covenants of warranty contained in the deed of September 19, 1882, and the estoppel thereby created. If he is right in this contention, the court erred in its conclusion of law. Under the findings of fact, Wy-tah-the, on the date of the execution and delivery by him of his deed of general warranty of September 19, 1882, was no longer a member of the Kickapoo tribe. He was no longer a ward of the nation, but was a citizen of the United States, and of the state of Kansas, and was enjoying the full benefits of such citizenship. The same rules should therefore obtain in arriving at a conclusion as to the legal effect of his acts as would be applied to similar conduct on the part of any other citizen. He was at liberty to add to his deed the ordinary covenants of seisin and warranty; and, having done so, Wy-tah-the, and all persons claiming under him: through any subsequent conveyance, are estopped by such warranty from asserting title to said premises as against his former grantees and their heirs and assigns, or from conveying it to any other party. *Jenkins v. Collard*, 145 U. S. 546, 12 Sup. Ct. 868; *Menger v. Carruthers*, 3 Kan. App. 75, 44 Pac. 1096; *Scoffins v. Grandstaff*, 12 Kan. 467; *Armstrong v. Building Co.* (Kan. Sup.) 45 Pac. 67; *Smith v. Williams*, 44 Mich. 240, 6 N. W. 662. The court therefore erred in its conclusions of law, and should have sustained the motion of the plaintiff in error for judgment in his favor upon the findings of fact. The judgment will therefore be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the judges concurring.

(5 Kan. App. 39)

WESTERVELT et al. v. JONES et al.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.)

ACTION ON FOREIGN JUDGMENT—PRESUMPTIONS—DEMURRER.

1. It will be presumed, in the absence of evidence to the contrary, in favor of courts of

general jurisdiction of sister states, that they have the authority they assume to exercise, and that the modes of procedure by them, though different from that established by the laws of this state, are authorized by the laws of the state in which they act.

2. A general demurrer to a petition only raises the question of the sufficiency of the petition to state a cause of action, not the right of the plaintiff to maintain an action for such cause of action, if one exists.

(Syllabus by the Court.)

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Action by John C. Westervelt and others against L. M. Jones and J. L. Jones. From an order sustaining a demurrer to the complaint, plaintiffs bring error. Reversed.

Van Syckel & Littick, for plaintiffs in error. Samuel Maher, for defendants in error.

GILKESON, P. J. In 1885, one H. T. Joplin, in the circuit court of Franklin county, Ill., recovered a judgment against the defendants in error for the sum of \$271.60, which said judgment was afterwards duly assigned of record to the testator of plaintiffs in error, who, in 1891, brought this action upon said judgment. To the petition filed in this case the defendants filed a demurrer, upon the ground that the petition does not state facts sufficient to constitute a cause of action. This demurrer was sustained. The petition sets forth the facts necessary to be alleged in an action of this nature, and as an exhibit thereto, and made a part thereof, the proceedings had in the circuit court of Franklin county, Ill.; and it is contended that the recitals therein contradict the averments of the petition, and, when taken together, show that the Franklin county court had no jurisdiction of the defendants in error at the time said judgment was rendered, by reason of a certain stipulation filed in said court. It appears, from the exhibit, that after certain proceedings had been had in the case of Joplin v. Jones & Jones, the following agreement was presented in open court: "State of Illinois, Franklin County—ss.: In Circuit Court to October Term, 1885. H. T. Joplin v. L. M. Jones, J. L. Jones, and G. C. Ross. Chancery. It is agreed, by and between the plaintiff and defendants, two of the defendants in the above-styled cause, that said defendants are to cause to be conveyed to the plaintiff 200 acres of land, situate in a body, situate in Texas county, Mo., clear of all incumbrances or liens; and they, the defendants above named, agree that a certain judgment rendered in favor of Leonadis Doty and against the plaintiff in this suit, for \$265, rendered at the October term, 1885, of the above-described court, shall be a lien on the following described real estate, to wit: The W. ½ S. E. ¼ and S. E. ¼ S. E. ¼ of section 5, and W. ½ S. W. ¼ of section 4, except three acres in the N. E. corner of the N. W. ¼ of the S. W. ¼,—all in township No. 7 S., R. 1 E., situated in Franklin county, Ill.; and

they agree to assume the payment of the above judgments, and it is further agreed that the above suit, so far as it relates to said J. L. Jones and L. M. Jones, shall be dismissed, as to them, at their costs. Dated this Nov. 11, 1885. H. T. Joplin [Seal], Plaintiff. Lawrence M. Jones [Seal], John L. Jones [Seal], Defendants." And thereupon the court rendered the following judgment: "Whereupon it is ordered, adjudged, and decreed by the court that this cause be dismissed, upon the conditions stipulated in said judgment. It is further ordered, adjudged, and decreed by the court that the said defendants L. M. Jones and J. L. Jones convey or cause to be conveyed to the said complainant, Howell T. Joplin, two hundred acres of land in Texas county, Missouri, mentioned in said agreement. It is further ordered, adjudged, and decreed by the court that the said complainant, Howell T. Joplin, have judgment against the said defendants L. M. Jones and J. L. Jones for the sum of \$271.60,—said judgment to be satisfied upon the payment by the said defendants L. M. Jones and J. L. Jones of the judgment rendered by the court, at the present term thereof, against Howell T. Joplin, in favor of Leonadis Doty; and that said complainant, Howell T. Joplin, have execution against the said defendants L. M. Jones and J. L. Jones for the amount of the judgment, to wit, the sum of \$271.60, together with the costs of this proceeding."

The defendants in error contend that the judgment or decree sued upon shows upon its face that it was rendered after the court lost jurisdiction of the parties and of the cause of action which was before it by a dismissal of the case as to them before said judgment was rendered, and, consequently, the demurrer was properly sustained. We cannot agree with them in this contention. The record shows that at one time the court did have jurisdiction of the defendants in error, and, being a court of general jurisdiction, having once acquired jurisdiction, it will be presumed to exist until the contrary is shown, and "a want of jurisdiction must affirmatively appear, either by the record, or dehors the record, or it will be conclusively presumed." Black, Judgm. § 896. "It will be presumed, in the absence of evidence to the contrary, in favor of courts of general jurisdiction of sister states, that they have the authority they assume to exercise, and that the modes of procedure pursued by them, though different from that established by the laws of this state, are authorized by the laws of the state in which they act." Dodge v. Coffin, 15 Kan. 277; Ward v. Baker, 16 Kan. 32; Comstock v. Adams, 23 Kan. 365. The stipulation is inartistically drawn, but the evident intention of the parties was that Joplin was to have conveyed to him 200 acres of land in Texas county, Mo.; that the court was to secure to him a lien upon the lands in Franklin county, Ill., for the amount of the judg-

ment Doty had obtained against him; and that Jones & Jones were to assume the payment of the judgment. These were the considerations for the dismissal. This is clearly the construction placed upon this stipulation by the Franklin county court, and it acted upon this understanding in doing as it did. It rendered a decree for the conveyance of the Missouri land. It undertook to make the Joneses legally liable to pay the Doty judgment by creating a lien upon the land, in a way that it evidently believed was the only way that it could be effectually done, viz. by rendering a judgment for the amount; and, to protect all the parties, the court further provided that this judgment should be satisfied upon the payment of the Doty judgment. If the court committed error in this, it cannot be considered, or reviewed by a court in which such judgment may thereafter be sued upon. *Freem. Judgm. (3d Ed.)* § 330; *Black. Judgm. § 889*; *Semple v. Wright*, 32 Cal. 659. But, did the court dismiss the case as to the Joneses, or any one else? We think not. The judgment is "that this cause be dismissed upon the conditions stipulated in said agreement." In the judgment the court enforced the terms and conditions of the entire stipulation as it understood it, and had the power to do by the terms thereof. The whole judgment was a single act, done while all the parties were present, and while the court still had jurisdiction. But, suppose we concede that the record shows that the case was dismissed as to the Joneses. The record shows that the court did render a judgment as though it still had jurisdiction of their persons. Then it will be presumed, in the absence of any showing to the contrary, that the court reinstated the case. It certainly had power to do so; and, "being a court of general jurisdiction, the presumption is in favor of the authority which it assumed to exercise." We think there is no conflict between the statements.

The other points urged by defendants in error in their brief we do not consider at this time. The only question raised by the pleadings is upon general demurrer. As we have stated, this only raises the question as to the sufficiency of the allegations of the petition to state a cause of action, not the right of the plaintiff to maintain an action for such a cause of action, if any exists. The judgment of the court sustaining the demurrer will be overruled, and cause remanded for further proceedings.

(5 Kan. App. 17)

**BUSENBARK et al. v. PARK et al.**

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.)

**APPEAL—ASSIGNMENT OF ERRORS—REVIEW.**

1. The rules of this court were adopted to be observed and followed; and counsel wishing errors considered must specifically assign the same in their briefs; this court cannot search for them.

2. The findings of the court in this case are supported by the evidence, and warrant the judgment rendered.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action between Newell P. Busenbark and others against Richard A. Park and others. From the judgment, Busenbark and others bring error. Affirmed.

J. F. Tufts, for plaintiffs in error. W. W. & W. F. Guthrie, for defendants in error.

**GILKESON, P. J.** We are again compelled to call attention to the rules of this court with reference to the form and subject-matter of briefs filed by plaintiffs in error. In this case the brief consists of 17 pages in "Long Primer Type," all of which are styled "Statements of Case and Assignment of Error," which certainly cannot be termed a "Concise Abstract or Statement." And we are unable to find a single specification of error relied upon set out separately and particularly, while the argument is scattered through and upon each and every page. The rule referred to was adopted for the purpose of affording to the court and counsel the fullest opportunities and best means for the consideration and disposition of cases, not mere suggestions to be observed or not, at the pleasure of attorneys; and, where errors are not assigned in the brief of counsel, we cannot search for them, but can only examine the errors alleged. It is true that, if any glaring error to the prejudice of the rights of the plaintiffs in error appeared, we might be constrained to notice it. We have examined the record, which is very voluminous, consisting of nearly 500 pages, with numerous exhibits, and none such appear. The findings of the court are supported by the evidence, and warrant the judgment rendered. The judgment will therefore be affirmed.

(5 Kan. App. 45)

**BROWN v. JENKS.**

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.)

**REPLEVIN—APPEAL FROM JUSTICE—JUDGMENT.**

1. When an action in replevin is commenced before a justice of the peace, and by appeal taken to the district court, the latter court has jurisdiction to render judgment, in case a return of the property cannot be had, for the full value of the property, even though it exceeds \$100.

2. The record in this case examined, and found to contain no reversible error.

(Syllabus by the Court.)

Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by M. W. Jenks against J. C. Brown. Judgment for plaintiff. Defendant brings error. Affirmed.

Asher, Frankey & Tosh, for plaintiff in error. J. K. Cubblison, for defendant in error.



GILKESON, P. J. The facts in this case, as shown by the testimony and found by the jury, are very few. On January 10, 1891, M. W. Jenks borrowed of J. C. Brown \$100, giving his note for \$125, payable in 60 days, and secured by a chattel mortgage on one French coach or hack, one new set of coach harness, one two-seated landau, and one two-seated carryall. On May 7, 1891, Jenks gave a renewal note for this \$125 note in the sum of \$175. In November, 1891, Brown received \$25, and in the following February he received \$75, which amounts were to be credited upon the note, and he also, through a certain real-estate deal, received the sum of \$50, which should be credited; making, in all, a total credit of \$150 upon an actual loan of \$100, with interest at the rate of 10 per cent. per annum for the term of about 13 months. The errors assigned are: (1) In the giving and refusing instructions; (2) the special findings are contrary to all the evidence, inconsistent with each other, and are contrary to the weight of the testimony, and show that the jury totally disregarded the evidence; and (3) that, this case coming into the district court by appeal from justice of the peace court, the judgment could not be for more than \$100, being the limit of jurisdiction in the justice's court.

The instructions are as follows: "(1) The plaintiff claims that at the time of the commencement of this action he had a special ownership in, and was entitled to the immediate possession of, the following described personal property, to wit, one French coach or hack, one new set of harness for the same, one two-seated landau, one two-seated carryall, under and by virtue of a certain chattel mortgage before that time, to wit, on the 7th day of May, A. D. 1891, executed and delivered by the defendant to the plaintiff to secure the payment of a certain promissory note for the sum of \$175, payable on or before July 10, 1891, with interest thereon at the rate of ten per cent. per annum from maturity. The defendant admits the execution and delivery of the note and mortgage mentioned in plaintiff's bill of particulars, but claims that the consideration for such note was usurious, in that it was taken by the plaintiff for an amount in excess of the amount which was paid by the plaintiff to the defendant therefor, and further claims that the amount due from the defendant to the plaintiff upon such promissory note was fully paid before the commencement of this action. (2) The burden of proof is upon the defendant, and he must prove by a preponderance of the evidence every material ingredient of his said claim. By a preponderance of the evidence is not necessarily meant the greater number of witnesses on the one side or the other; but it is that evidence which under all the circumstances in the case is entitled to the greater weight, and is most convincing and satisfactory to the minds of the jurors. In arriving at the weight to be given

to the testimony of the witnesses, the jury has the right to take into consideration the conduct and demeanor of the witnesses while testifying, their manner of testifying, their opportunity for seeing and knowing the things concerning which they have testified, their apparent interest or want of interest in the result of the case, and all other facts and circumstances appearing on the trial which may lead to a proper understanding of the truth of their several statements, and the weight to be attached to their testimony. The jury is the exclusive judge of the facts proven, the weight of the evidence, and the credibility of the witnesses. (3) A mortgagee of personal property, after default in the payment of the amount due upon such mortgage, or after the conditions of said mortgage have been broken, is entitled to the possession of such property; and if the mortgagor, upon demand made therefor by the mortgagee, refuses to surrender such possession to the mortgagee, the mortgagee may maintain an action in replevin for the recovery of such possession; and in this case, if you find from the evidence that at the time of the commencement of this suit there was an amount due from the defendant to the plaintiff upon the indebtedness secured by the chattel mortgage in controversy, and that the defendant, after demand made by the plaintiff for the possession of such property, refused to surrender such possession to the plaintiff, then the plaintiff would be entitled to recover, in this action, such possession, and your verdict should be for the plaintiff for such possession, together with a finding of the amount which you find from the evidence to have been due at the time of the commencement of the action from the defendant to the plaintiff upon the indebtedness secured by such chattel mortgage. (4) I further instruct you that under the laws of this state, if any person contracts for a greater rate of interest than ten per cent. per annum, he shall forfeit all interest so contracted in excess of such ten per cent., and in addition thereto shall forfeit a sum of money equal to the amount of interest so contracted for in excess of the ten per cent. per annum. (5) In arriving at the amount, if any, which was due upon the promissory note secured by the chattel mortgage in controversy in this case, you will take into consideration the amount which the evidence shows to have been paid by the plaintiff to the defendant thereon; and if you find from the evidence that the amount for which such note was given, together with the interest specified to be paid thereon as stated in said note, exceeds the amount paid by plaintiff to or for the defendant therefor, together with ten per cent. interest per annum upon such principal sum, then, as above stated, you will deduct all of such amount in excess of such principal sum, with interest thereon at the rate of ten per cent. per annum, and, in addition thereto, you will further deduct from such principal sum and lawful interest an

amount equal to the amount of interest contracted for, as above stated, in excess of ten per cent. per annum. You will further take into consideration, in determining the amount due upon this note, if any, all moneys which the testimony shows to have been paid by the plaintiff to the defendant therefor, and all sums which the evidence shows to have been paid by the defendant to the plaintiff in payment of the indebtedness evidenced by such promissory note. (6) If you find from the evidence in the case that there was any amount due from the defendant to the plaintiff upon the promissory note secured by the chattel mortgage in controversy at the time of the commencement of this action, and that the plaintiff was at that time entitled to the possession of said property by reason thereof, the form of your verdict will be: [Here follows form of verdict.] (7) If you find from the evidence that there was nothing due to the plaintiff upon the promissory note secured by the chattel mortgage in controversy at the time of the commencement of this action, the form of your verdict will be: [Here follows form of verdict.]"

The special findings are as follows: "(1) What amount of money did the plaintiff pay to the defendant personally, and to parties by his direction, as a consideration for the note executed January 10, 1891? Ans. \$100 (one hundred dollars). (2) Did the defendant, at or about the time of the execution of said note of January 10, 1891, agree to pay plaintiff for his time and trouble in paying the bills and claims paid by plaintiff as a part of the consideration of said note? Ans. No. (3) In case you give an affirmative answer to the last question, then answer how much he agreed to pay for such services. (Not answered.) (4) At the time of the execution of the second note, May —, 1891, how much did defendant owe plaintiff for money paid defendant personally and to his use? Ans. Nothing. (5) How much did he owe for interest at the legal rate? Ans. Nothing. (6) How much did he owe for plaintiff's services? How much did he owe for insurance? Ans. Nothing for services or insurance. (7) It is admitted by plaintiff that defendant made two payments on the last note,—one of \$25, and one of \$75. Did he make any additional payments that should be credited on said note? If so, how much? Ans. \$50 at the time of the real-estate deal. (8) In case you should find that usurious interest formed a part of the consideration of the note executed May —, 1891, then answer how much of said consideration was made up of usurious interest. Ans. Sixty dollars."

We think the instructions clearly, fully, and correctly declare the law of this case, and the conflict therein with reference to the burden of proof is more imaginary than real, and, if it existed to the extent claimed by the plaintiff in error, we fail to see how he was prejudiced thereby; and we have failed to discover any objection or exception taken and

saved by him in the court below to the order of the court granting the defendant the right to open and close. In the refusal of instructions asked, we see no error.

We cannot agree with plaintiff in error as to the special findings. We think they are fully sustained by the evidence. Nos. 4, 5, and 6 are perhaps inconsistent, but under the other findings and the admitted facts it is a matter of simple calculation to determine the correct answers to these questions; and the jury evidently understood these questions to have reference to anything due outside of, or in addition to, the money received when the first note was given. But whatever understanding the jury may have had of these questions, the answers are not important, in view of the answers made to the other questions, stating the amount of money actually paid to Jenks, and the amount repaid by him.

The last contention of the plaintiff in error is not tenable. "A justice of the peace has jurisdiction of all actions of replevin where the property in controversy does not exceed \$100 in value \* \* \* (section 55, Justices' Code); and, for the purpose of fixing jurisdiction of the justices, the value placed upon the property in the replevin affidavit governs \* \* \* (section 62, Justices' Code); and the justice may render judgment for the full value of the property 'in case a return [of the property] cannot be had, and costs of suit' \* \* \* (section 55, Justices' Code)." Now, the district court, in rendering the judgment in this case, followed literally the foregoing sections of the Justices' Code, and therefore no error was committed in rendering the judgment. *Griffiths v. Wheeler*, 31 Kan. 24, 2 Pac. 842. The judgment of the court below will be affirmed.

(5 Kan. App. 42)

COUNTY COM'RS OF WYANDOTTE  
COUNTY et al. v. KANSAS CITY,  
FT. S. & M. R. CO.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.)

UNCONSTITUTIONAL LAW—EFFECT—TAXATION.

An unconstitutional act is not a law. It confers no rights, imposes no duties, affords no protection, and creates no office. It is, in legal contemplation, as inoperative as though it had never been passed.

(Syllabus by the Court.)

Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by the county commissioners of Wyandotte county and others against the Kansas City, Ft. Scott & Memphis Railroad Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Henry McGrew and D. H. Morse, for plaintiffs in error. Wallace Pratt, C. W. Blair, and I. P. Dana, for defendant in error.

GILKESON, P. J. This action was submitted to the court upon an agreed state-

ment of facts. The plaintiffs in error contend that, under this statement, an estoppel was shown. We cannot agree with them in this contention, even if the allegations of the answer constituted an estoppel. Treating the agreed statement as the evidence, which we must, we are compelled to hold that the defense failed through want of proof. But, upon other grounds, must this judgment be affirmed? The law under which these taxes were attempted to be levied and collected has been by the supreme court of this state declared unconstitutional (*Braid, etc., v. Abbott*, 52 Kan. 148, 34 Pac. 416), and also by the federal court (*Parks v. Braid, etc.*, 61 Fed. 436). It therefore can have no operation. "An unconstitutional act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby Co.*, 118 U. S. 441, 6 Sup. Ct. 1121. The judgment will be affirmed.

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**SUN FIRE OFFICE OF LONDON,  
ENGLAND, v. FRASER et al.**

(Court of Appeals of Kansas, Northern Department, E. D. Jan. 9, 1896.)

**INSURANCE POLICY—ASSIGNMENT—PROOFS OF LOSS  
—EVIDENCE OF WAIVER.**

1. Where a policy of fire insurance provides that the policy shall be avoided by an assignment of it without the consent of the company, and the policy is written and indorsed for the benefit of a mortgagee, such condition will not be held to apply to the mere delivery of the policy to an assignee and subsequent holder of the mortgage; and such assignee of the mortgage, at the time the loss occurred, may claim the benefit of the insurance.

2. In an action brought by the insured to recover for a fire loss, where the petition alleges the performance by the insured, on his part, of the conditions of the policy which is put in issue by the answer of the insurer, and upon the trial objection is made to the sufficiency of the proofs of loss, it is proper to permit the plaintiff to show facts constituting a waiver as to any insufficiency of such proofs, although the facts constituting the waiver are alleged for the first time in the reply.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; T. P. Anderson, Judge.

Action by Mary A. Fraser against the Sun Fire Office of London, England, and others. Judgment for plaintiff, and defendant Sun Fire Office brings error. Affirmed.

Morse & Morse, Riggs & Nevilson, and Fyke, Yates & Fyke, for plaintiff in error. Buchan, Freeman & Porter and Jas. M. Rees, for defendants in error.

**GILKESON, P. J.** In this action the court appointed a referee to hear and determine the issues of law and fact, who subsequently made his report, containing his findings of facts and conclusions of law, viz.:

"I find all the allegations of the plaintiff's petition are true, except that the loss sustain-

ed by the destruction of said house by fire was \$975, which I allow, with interest at 6 per cent. per annum from August 26, 1891, which amounts to \$1,028.03, instead of the amount alleged in the petition. I find: That E. J. Camp owned the premises insured, and mortgaged the same of date of January 1, 1890, to the English and American Mortgage Company, Limited, to secure a loan of \$2,000, which was secured by a mortgage upon said premises, and evidenced by a negotiable promissory note, with interest coupons and a general indorsement upon the note and coupons and a guaranty of the English and American Mortgage Company indorsed upon said note, which are all fully set forth in Exhibit No. 3, and the mortgage securing it, together with the assignment of the mortgage to the plaintiff, all set out fully in Exhibit No. 4 of testimony. The English and American Company indorsed on said bond their guaranty, to inure to the benefit of the legal holder thereof, on the date of January 28, 1890, for which see Exhibit No. 3 of evidence. That the premises were partially destroyed by fire June 25, 1891, and the loss sustained is the damage herein allowed. The referee finds: That the English and American Mortgage Company, defendant, made out Exhibit 7 of the evidence as a proof of loss, and mailed the same on August 15, 1891, to Mr. F. M. Benedict, said defendant Sun Fire's agent at Lawrence, Kansas, with letter marked 'Exhibit B of Testimony,' which was received in due course of mail, and no answer or objection was ever made to it, to the English and American Mortgage Company or to the plaintiff, but said Benedict did write to E. J. Camp the objections contained in Exhibit 11, about the date of September 18, 1891. That these objections were never communicated in any way to either plaintiff or the English and American Mortgage Company, nor did they ever have knowledge of them. That the copy of said proof of loss was on the same day, viz. August 15, 1891, mailed by said English and American Mortgage Company to the said defendant company's general office in New York City. That no proof of loss was made by either said Camp or the English and American Mortgage Company or plaintiff, except as above. That Exhibit 13 was written to Mr. Benedict, general agent of said Sun Fire Office, who received the same, but never answered it. That no objection to said proof of loss was made by said Sun Fire Office to either plaintiff or the English and American Mortgage Company. That said Sun Fire Office knew that the bond and mortgage belonged to plaintiff. The said Sun Fire Office, through its general agent, Mr. Benedict, wrote Exhibit 11, and mailed same to said E. J. Camp, and neither plaintiff nor the English and American Mortgage Company had any knowledge of it. Mr. Benedict, as such agent, received from said Camp the letter marked 'Exhibit No. 12,' but never communicated anything regarding it to either plaintiff or the

English and American Mortgage Company. The referee finds, as to this proof of loss, that, if any better proof of loss ought to have been made by either the plaintiff or the English and American Mortgage Company, the same was waived by the conduct of the said company."

"Conclusions of Law. As conclusions of law the referee finds that the mortgage clause attached to the policy, Exhibit A of petition, is a separate and subsequent contract by said defendant Sun Fire Office with the mortgagee for the bettering of their negotiable security secured by said mortgage, without any limitation as to this mortgagee's right to assign the same. That a mortgage being, in Kansas, only a security, conveying no title or interest in the mortgaged realty, such transfer cannot give any right to possession or occupancy or control of the mortgaged premises. It (the mortgage) is given simply as security; and in this case the said mortgage is made to the English and American Company, and grants unto said second party, its successors, legal representatives, assigns, etc., all of the described realty to secure the payment of the loan of \$2,000, etc., being a first mortgage real-estate bond, payable to the order of said party of the second part in five years, etc. Said mortgage also contains the full agreement between the mortgagor and mortgagee insurance against fire: 'Said parties of the first part agree to keep the buildings erected, etc., insured in some insurance company satisfactory to the holder of this bond, etc., and cause the policy for such insurance to be assigned and delivered to the holder of this bond, to be held as collateral security thereto.' With the mortgagee clause attached to the policy of insurance in favor of the mortgagee of such negotiable security, the purpose must be to add to the value of the mortgage as a security, without changing the negotiable character of the same; for, were not this the case, it would have no purpose to fulfill except to detract from its value by either limiting its negotiability or lessening the security if transferred. The language used does not require such a construction. It is this: 'Loss or damage under this policy shall be payable to the English and American Mortgage Company, mortgagee (or trustee), as interest may appear and this insurance as to the interest of the mortgagee only therein shall not be invalidated,' etc. The term 'mortgagee' is used throughout this mortgagee clause, and who is the mortgagee? Is he not the owner of the security secured by the mortgage, and is it not fairly the understanding of the Sun Fire Insurance Company that when they permit the attaching of a mortgage clause under circumstances like this that they intend the policy to accompany the mortgage (and add to its security) into the hands of whoever may become the owner and holder of such negotiable bond? There are no words in the mortgagee clause restricting the assignment by the mortgagee of

his mortgage or debt. The limitation in the policy in clause 12 under the heading, 'This policy shall become void,' etc., is upon the insured solely, and is not to be applied to the mortgagee who acquires his rights under this mortgage attachment, unless the language requires it. This clause is a separate and independent contract for the benefit of the negotiable mortgage security itself, and not for the person or the holder (for the time being) of such security. That such must have been the intention of the parties in attaching this mortgagee clause can hardly admit of a doubt, and, such being our view of the law, I hold that plaintiff, as such assignee of the mortgagee in whose favor the mortgagee clause was allowed, takes the benefit of it, and is entitled to recover the amount found, viz. \$1,028.62, and six per cent. per annum from July 26, 1892."

And the defendant thereupon filed its motion to set aside the report, for the following reasons: "First. The findings of fact made by the said referee are not supported by the evidence in the case, and are contrary to the evidence. Second. Error of law occurring at the trial before the referee, and at the time excepted to by the defendant. Third. Because said referee's conclusions of law upon his findings of fact are erroneous, and not the law of the case." Which motion was overruled by the court, the report confirmed, and judgment rendered for plaintiff for the sum of \$1,028.62. Motion for new trial filed and overruled.

The plaintiff in error contends: (1) The assignment of the policy by the English & American Mortgage Company before the loss, without its consent, avoided the policy. (2) That no proofs of loss were made by the insured (which must mean either Camp or Fraser), and there was no evidence upon which to predicate a waiver. (3) That under the allegations in the petition that due proofs had been made, evidence of waiver of proofs was inadmissible, and therefore the learned referee erred in admitting such evidence, and also in his conclusions of law.

We fail to discover anything tending to show that the policy of insurance was assigned by the English & American Mortgage Company, in the strict sense of the term. It is true, it was delivered to Mrs. Fraser, with the other papers pertaining to the loan, as a part of her security. Would this invalidate the policy? We think not. The policy of insurance was made for the express purpose of indemnity, and unquestionably so understood by the company at the time. The clause was inserted with a view of protecting the mortgage company, mortgagee, or trustee, and so expressly provides. All of the language used in the policy conveys this idea. Even the cancellation clause provides that it shall remain in full force for 10 days, as to the mortgagee, after notice to the mortgagee. Now, who is the mortgagee? The owner and holder of the bond and mortgage, and, in this case, Mrs. Fraser. It is the policy of courts to strictly construe those clauses in an insurance policy

which forfeit the indemnity provided for the assured. We do not think that the term "assignment," as used in the policy, contemplated the mere delivery of the policy to whosoever should become the owner and holder of the bond and mortgage, subsequent mortgagees; and in this case the mortgage company was made a defendant, pleading its guaranty, and asking for the same relief as Mrs. Fraser demanded.

The other contentions are, viz.: (2) "That no proofs of loss were made by the insured, and that there was no evidence upon which to predicate a waiver." (3) "That under the allegations of the petition that due proofs had been made, evidence of waiver was inadmissible." Under other conditions of the pleadings, these might be tenable, but the plaintiff in error overlooks the fact that this was set up as a matter of defense, which the reply not only denies, but assigns the reasons for pleading "due proof," and why they should be held to be such, and inferentially a waiver as to any allegation of sufficiency, viz. "that after said proofs of loss were received by the defendant Sun Fire Office as aforesaid, said Sun Fire Office made no objection to said proof for substance, form, or manner of making the same." We think the referee was correct in construing all of the pleadings together, and the evidence fully sustains his findings upon this proposition.

The policy contains the following conditions or provisions: "Persons sustaining loss or damage by fire shall forthwith give notice of said loss," etc. Now, it will not be contended that Camp had not sustained loss, and he made the proof, verified it, and the mortgage company had guaranteed the loan for which this insurance was an indemnity. They had suffered loss by damage,—indirectly, perhaps,—by a diminution of the security. They prepared and forwarded this proof of loss, which was received by the defendant and by its state agent. The state agent knew the mortgage company had sent it, but paid no attention to that company, but wrote to Camp, and was informed by him of his hostility to the company, and that he would not assist in procuring the insurance; yet never notified the company or Mrs. Fraser, and they, plaintiffs in error, also knew that Mrs. Fraser owned the note, and held the policy.

The remaining question in the case, then, is, "Is the mortgage clause broad enough to indemnify the mortgagee or its assigns?" This we must answer in the affirmative. This clause reads as follows: "Loss or damage, if any, under this policy, shall be payable to the English and American Mortgage Co., as mortgagee (or trustee), as interest may appear; and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property, nor by any foreclosure or other proceedings, or notice of sale relating to the property, nor by any change in the title

or ownership of the property: \* \* \* Provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same." This clause created an independent and a new contract, and must be construed in connection with the mortgage. It is a conveyance for security only, granting to the English & American Mortgage Company, its successors and assigns, all the real estate therein mentioned to secure the repayment of the loan, and contains the usual clause as to insurance, viz.: "Said parties of the first part agree to keep the buildings erected and to be erected on said premises, or any part thereof, insured in some insurance company that is satisfactory to the holder of said bond, in the sum of at least two-thirds of the value thereof, and cause the policy for such insurance to be assigned and delivered to the holder of said bond, to be held as collateral security thereto." This expressly provides that the insurance was taken for the benefit of the holder of the bond, and was to be assigned and delivered to such person. And, as said by the learned referee, "There are no words in the mortgage clause restricting the assigning by the mortgagee of this mortgage debt," and, as the term "mortgagee" is used throughout this clause, and there can be but one answer to the question, who is the mortgagee?—the owner of the security secured by the mortgage—it is certainly the intention of insurance companies, when they permit the attaching of a mortgage clause, that the policy shall accompany the mortgage, and add to its security in the hands of whoever may become the owner and holder of such negotiable bond, unless the clause contains express stipulations to the contrary. The supreme court of this state, in *Insurance Co. v. Coverdale*, 48 Kan. 446, 29 Pac. 682, say: "The mortgage clause was agreed upon for this very purpose, and created an independent and a new contract, which removes the mortgages beyond the control or the effect of any act or neglect of the owner of the property, and renders such mortgagees parties, who have a distinct interest, separate from the owner, embraced in another and different contract. The tendency of the recent cases is to recognize these distinctions, and thus protest the right of the mortgagee when named in the policy; and the interest of the owner and mortgagees are regarded as distinct subjects of insurance." The rule is that "exceptions in a policy should be strictly construed, and when there are two interpretations, equally fair, that which gives the greater indemnity should prevail." And under this rule the courts will, if possible, so construe the contract as to carry into effect the primary purpose for which it was made. This case was carefully tried by the learned referee, and has been reviewed by an able trial judge. We perceive no error in the record, and the judgment will therefore be affirmed. All the judges concurring.

(5 Kan. App. 1)

**HENTZLER et al. v. BRADBURY.**

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.)

**ESTABLISHMENT OF HIGHWAY—PROCEDURE—PRESUMPTIONS—ABANDONMENT.**

1. The presentation of a proper petition, and the giving of the statutory notice of the hearing thereof, under chapter 77, Laws 1859, are conditions precedent to any authority to be exercised by the board of supervisors of a township for the laying out of a public road therein; and if a sufficient petition be not presented, or the required notice be not given, the action of the board establishing a public road must be held to be unauthorized and void.

2. Where the powers of a board are special, and limited to be exercised only on certain conditions, necessary jurisdictional facts must be shown, and will not be presumed.

3. When there is jurisdiction to act, mere errors and irregularities in the subsequent proceedings of a board will not render them void.

4. In the absence of evidence of the width to which a public road was laid out, it will be presumed to have been laid out to the minimum width provided by law.

5. No part of a legally laid out and established public highway will be held to be abandoned from the mere fact that it was actually used for public travel only to the extent of half its legal width, the other half being cultivated by adjoining landowners.

(Syllabus by the Court.)

Error from circuit court, Shawnee county;

J. B. Johnson, Judge.

Action by J. C. Hentzler and others against William Bradbury. Decree for defendant, and plaintiffs bring error. Reversed.

S. B. Izenhart, for plaintiffs in error. Curtis & Safford, for defendant in error.

**GARVER, J.** This case was submitted at the March term of this court, but its consideration and decision have been delayed until this time because of a question of jurisdiction. Being of the opinion that the controversy herein was not one having a money value, within the meaning of section 9 of the act creating the courts of appeals, and, therefore, that this court, within the rule recently announced by us in the case of *Stephens v. Moore*, 46 Pac. 1011, had no jurisdiction, we certified the record in this case to the supreme court, to be heard there; but that court, not agreeing with our views on the question of jurisdiction, returned the case to this court, and it is now here for decision.

By this action, the plaintiffs in error sought to enjoin the defendant in error, as road overseer, from entering upon, and appropriating for a public road, a portion of their lands in Shawnee county. The road overseer justified his action under and by virtue of certain proceedings had before the supervisors of the township in which said land was situated, by which it was claimed a public highway was laid out on and through said lands, under and in accordance with an act of the legislature entitled "An act to provide for the locating and working of highways," approved February 4, 1859. The injunction prayed for was denied by the circuit court of

Shawnee county, and from such decision this appeal has been taken.

This case rests for its proper determination upon the proceedings of the board of supervisors of Topeka township, in Shawnee county. If such proceedings were regular and valid, the plaintiffs' action must fail. The evidence shows that in 1859, and prior thereto, there was a traveled track, or wagon road, running north and south near the half section line through sections 6 and 7, township 12, range 16, in Shawnee county; that about July 9, 1859, a petition, in proper form, was presented, signed by 23 persons, purporting to be resident freeholders of said township, asking the board of supervisors to lay out a public highway, commencing at the north line of said section 6, and running on the half section line through said section, and through a part of section 7; that this petition and the laying out of said road were subsequently considered at different meetings by said board of supervisors, and finally, on December 28, 1859, it was ordered that the prayer of the petition be granted. A survey and plat of the proposed road was subsequently filed. At this time the land over which the road was to be opened was uninclosed, and without obstruction to public travel; but the traveled track thereafter, and up to the time of the commencement of this action, continued, as before, on the west side of the half section line. Subsequently, and probably very soon after the order was made to open the road, a hedge was planted on or near the half section line through section 7, the land on the east side being cultivated, and the public travel confining itself exclusively to the west side of said half section line. In 1891 the road overseer for that district cut down a portion of said hedge, and was about to enter upon the land on the east side of said half section line, for the purpose of appropriating so much thereof as was necessary to open a public road on said half section line, 66 feet wide. The question is whether a public road had been legally established on this line. The record of the proceedings of the board of supervisors, which was introduced in evidence, fails to show any finding that the petition for the road was signed by the requisite number of resident freeholders, or that the statutory notice was given of the meeting of the supervisors to view the proposed road; and no attempt was made upon the trial to supply such omission by other evidence. The presentation of a proper petition and the giving of the statutory notice are jurisdictional. Without them the board had no authority to act. The foundation of its jurisdiction was a petition signed by six or more freeholders residing in the township. As the next jurisdictional step, the statute requires: "Sec. 49. Upon application made to the supervisors for laying out, altering or discontinuing any highway, they shall make out a notice and fix therein a time and place at which they

will meet and decide upon such application; and the applicant shall, at least five days previous to such time, cause such notice to be given to all the occupants of the lands through which such highway may pass, which notice shall be served personally, or by copy left with or at the usual place of abode of each occupant of such lands; and such notice shall also be posted up in three public places in said township, at least ten days before the time of such meeting of the supervisors. Every such notice shall specify, as near as practicable, the highway proposed to be laid out, altered or discontinued, and the several tracts of land through which the same may pass." The statute also provides: "Sec. 50. The supervisors upon being satisfied that the notice required in the preceding section has been duly given, proof of which may be shown, by affidavit or otherwise, as they may require, shall proceed to examine, personally, such highway, and shall hear any reason that may be offered for or against laying out, altering or discontinuing the same, and shall decide upon the application as they shall deem proper." It will be observed that the notice required by section 49 is not merely for the purpose of giving the landowners an opportunity to claim damages, but it is mainly to enable interested persons to appear for the purpose of offering reasons for or against the laying out of the road. The giving of such notice is jurisdictional. *Troy v. Com'rs of Doniphan Co.*, 32 Kan. 507, 4 Pac. 1009; *McCullister v. Shuey*, 24 Iowa, 362; *State v. Anderson*, 39 Iowa, 274. As the board of supervisors had only special jurisdiction, and its powers were limited to be exercised only on certain conditions, the necessary jurisdictional facts must be shown, and will not be presumed. *Com'rs v. Muhlenbacker*, 18 Kan. 129; *Oliphant v. Com'rs*, Id. 386; *Com'rs v. Cartter*, 30 Kan. 58, 1 Pac. 814. A party objecting to the validity of the proceedings of a special tribunal may ordinarily rest upon the record, and, if it fails to show jurisdiction, he has made a prima facie case. *Oliphant v. Com'rs*, 18 Kan. 386-398. But a jurisdictional fact may be shown aliunde, when the record itself does not show the same. *Willis v. Sproule*, 13 Kan. 257-264; *Oliphant v. Com'rs*, supra.

Various objections are also made with reference to other irregularities in the proceedings of the board of supervisors, but, as they are not of a jurisdictional character, we deem them unimportant. When jurisdiction has once been acquired, other facts, as a basis for a final order, may be presumed; and such order cannot be held to be invalid, however erroneous and defective some of the nonjurisdictional proceedings may have been. *Com'rs v. Harper*, 38 Ill. 103; *Pearce v. Town of Gilmer*, 54 Ill. 25. In the absence of evidence of the width established for the road, it will be presumed that it was laid out of the minimum width provided by law, which

in this case would be 66 feet. *Willis v. Sproule*, 13 Kan. 257; *Pearce v. Town of Gilmer*, 54 Ill. 25. If the road was legally laid out and established, the mere fact that the public did not use the same to its entire width would not of itself constitute an abandonment of any portion thereof; and, if it was not a legally laid out and established public highway, the use of the ground on the west side of the half section line would not draw to it the right to use, for a road, other lands outside of that traveled over. Because of the failure of the evidence to show that the board of supervisors had jurisdiction and authority to lay out and establish a public highway over the lands of the plaintiff in error, the judgment will be reversed, and the case remanded for a new trial. All the judges concurring.

(5 Kan. App. 18)

### EMPLOYERS' LIABILITY ASSUR. CORP. v. ANDERSON.

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.)

LIFE INSURANCE—PROOFS OF DEATH—CONCLUSIVE-  
NESS—EXPOSURE TO UNNECESSARY DANGER.

1. While it has been held that misstatements in proofs of death are conclusive of the facts therein contained as against the claimant, unless before the trial the insurer has been furnished with a corrected statement, the strictness of this rule has been relaxed so that it now only applies where the insurer has been prejudiced in his defense by relying on the statements contained in the proof.

2. And, while the disclosure of such facts in a proof of which a defendant might avail himself as a defense to the action might suggest to the company the propriety of refusing payment, it would be no bar to the bringing of a suit.

3. It is not enough to defeat liability under a clause in an insurance policy "that this policy does not cover death occasioned directly or indirectly by voluntary exposure to unnecessary danger" to show that the insured had violated the conditions of the policy with respect to some sort of unnecessary danger, but it must also show that such violation had a causative connection with the injury.

(Syllabus by the Court.)

Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by Carrie F. Anderson against the Employers' Liability Assurance Corporation. Judgment for plaintiff, defendant brings error. Affirmed.

Lathrop, Morrow, Fox & Moore and McGrew, Watson & Watson, for plaintiff in error. C. N. Sterry, O. L. Mellie, and Morgan & Riley, for defendant in error.

GILKESON, P. J. The petition alleges, among other things, that "the said Merrill D. Anderson was killed by external, violent, and accidental means, and that the manner in which he met his death, so far as the same is now known to the plaintiff, was as follows: That in walking to or from a bridge between the towns of Argentine and Armourdale, in said county and state, in the

nighttime, between Aug. 6th and Aug. 7th, \* \* \* said Merrill D. Anderson stumbled or fell into a hole at the east or south end of said bridge, and by the fall thereof was rendered unconscious through blows received on the head and body occasioned solely and only by such fall, and that his head and body become and were in such a condition in said hole that the said Merrill D. Anderson suffocated to death, while there unconscious from such fall. That the outward and visible marks upon his head and body, and the position of said body in said hole, disclosed such facts, which are all the facts which are known to the plaintiff.

\* \* \* That immediately upon said death a written notice thereof, containing full name and address of the plaintiff, with all the particulars which were then within the plaintiff's knowledge, and within thirty days from Aug. 6, 1889, was given to John Lynch, the duly authorized and appointed agent of the defendant, \* \* \* and that thereafterwards, and within seven months from the date of said death, affirmative proof of the death of said Merrill D. Anderson was furnished and delivered to the managers of the defendant for the United States, at Boston, Mass., and attaches copy of policy as an exhibit." The allegations of the answer are: "General denial. Said policy did not insure against death occasioned, either directly or indirectly, by intentional injuries inflicted by the insured or by any other person, and defendant avers that the death of said Merrill D. Anderson was occasioned either directly or indirectly by intentional injuries inflicted upon the said Anderson by some other person. That the policy sued on specifically excepted, and did not cover, injuries of which there were no visible marks upon the body of said Merrill D. Anderson, except the marks upon the neck showing strangulation. That the policy sued on did not cover death resulting either directly or indirectly from voluntary exposure to unnecessary danger; and defendant further avers that the death of said Merrill D. Anderson resulted either directly or indirectly from his voluntary exposure to unnecessary danger." To which was filed a reply of general denial. Forty-two special findings were returned by the jury, and a general verdict in favor of the plaintiff. The plaintiff in error contends that the first proof of death furnished the company is conclusive, and estops party from denying the truth of the statements therein contained, for the reason that it discloses the fact that Anderson was murdered, and therefore no liability of the company, unless there is a showing made of mistake in making such proof, or the discovery of new facts brought to light since the proof was made. This proof of death is as follows:

"State of Kansas, County of Wyandotte—ss.: Affidavit. H. M. Downs, of lawful age, being first duly sworn, deposes and says

that he is now and was the coroner of Wyandotte county, Ks., during the month of August, 1889, and is a practicing physician and surgeon, and that upon the 6th day of August, 1889, he conducted a post mortem examination of the body of Merrill D. Anderson, and subsequently, in his capacity as coroner of said county, held an inquest over the same; and that in his opinion, from the evidence given to the jury at said inquest, and from observation and examination of the body of said Merrill D. Anderson, that is that the said Merrill D. Anderson came to his death through violence inflicted upon his person by parties at present unknown, and that the immediate cause of death was a condition of the lungs known as 'emphysema,' and that this condition was caused by suffocation violently employed; and further the deponent saith not. H. M. Downs, Coroner of Wyandotte Co., Ks.

"Sworn to and subscribed in my presence this 25th day of November, A. D. 1889. John A. Adams, Notary Public. [L. S.]

"My commission expires November 17, 1891.

"(Copy.)

"State of Kansas, Wyandotte County—ss.: An inquisition holden at Argentine, in Wyandotte County, Kansas, on the 7th day of Aug., A. D. 1889, before me, H. M. Downs, coroner of said county, on the body of M. D. Anderson, or a person unknown, then lying dead, by the jurors whose names are hereto subscribed. The said jurors upon their oaths do say that the said Merrill D. Anderson came to his death from injuries inflicted upon his person by persons unknown to the jury. In testimony whereof, the said jurors have hereunto set their hands the day and year aforesaid. [Signed] Jno. Steffins, Rob't McDaniels, F. N. Donaldson, S. Hutchison, K. Earnest, G. W. Simmons.

"Attest, this 14th day of Aug., A. D. 1889. H. M. Downs, Coroner Wyandotte County.

"The State of Kansas, Lyon County—ss.: In the matter of the claim of Carrie Anderson against the Employers' Liability Assurance Corporation, under policy No. 41,236. Carrie Anderson, being first duly sworn on oath, says: That she is the identical Carrie Anderson (formerly Carrie Carter) who was married to Merrill D. Anderson, dec'd, in the county of Lyon and state of Kansas, by R. Seymore, a minister, on July 19th, 1886, a certificate of the record of which marriage is hereto attached. That Merrill D. Anderson, who was murdered on or about the 6th day of August, 1889, at Argentine, Kansas, was at that time my husband, and that he was the same M. D. Anderson mentioned in a certain policy of insurance dated April 15th, 1889, issued on the life of said M. D. Anderson by the said Employers' Liability Assurance Corporation. That I last saw my husband alive on the evening of the 6th day of August of this year, a little after 10 o'clock. He then seemed to be in good



health. He then said that he was going to Kansas City that night, to accompany his cousin Maley Rhodes from Kansas City. I did not again see him until the next day at the undertaker's at Argentine, Kansas. He was marked some by dark looking spots under the eyes, and his eyelashes were burned off. Mrs. Carrie Anderson.

"Subscribed and sworn to before me this 7th day of November, 1889. C. H. Bulkley, Notary Public. [L. S.]

"Com. Expires Apr. 15, 1889."

Conceding that her affidavit is as strong as it is claimed, we do not think it bars her recovery, if an entirely different state of facts is shown to exist. It has been held that misstatements in proofs are conclusive evidence of the facts therein stated, but we think the rule to be as laid down in *Cooke, Life Ins.* 218. It has been held that they (misstatements) are conclusive evidence of such facts, as against the claimant, unless before the trial he has furnished the insurer a corrected statement; but the tendency of more recent decisions has been to relax the strictness of this rule, and the better opinion would seem to be that the rule applies only to where the insurer has been prejudiced in his defense by relying on the statements contained in the proofs. "Although the statements in them [the proofs] will be taken against the insured as admissions against interest, he may show that the statements themselves were without foundation, and inadvertently made." *May, Ins.* (3d Ed.) § 463. We cannot see how the company was prejudiced by this first proof. They admit that they "had inspected the spot, made inquiries in the neighborhood"; and it is shown that their attorney and surgeon was at the inquest, that they received other proof before the trial, had examined it, and in connection with their other information their opinion was in accordance with the opinion expressed in the coroner's verdict; and for these reasons, not on account of any statements made in the proof, they deny liability. Then the affidavit of Mrs. Anderson, when taken in connection with the other portions of this proof, shows conclusively, we think, that it was made on the faith of the result of the inquest, not from actual knowledge. *Bachmeyer v. Association (Wis.)* 52 N. W. 101, affirmed in 58 N. W. 399. "If the proofs also disclose facts of which the defendant could avail itself as a defense to an action on the policy, this would not derogate from the sufficiency of the proofs as proofs of death. But, whilst the disclosure of such facts might suggest to the company the propriety of refusing payment and standing a suit, it would be no bar to the bringing of a suit. Otherwise, no suit could ever be brought until the parties had gone through an extrajudicial investigation, resulting favorably to the assured." *Insurance Co. v. Rodel*, 95 U. S. 237. We think the testimony also shows that the first proof was inadvertently made. The company did

not show that this case came within this exception, and we think the burden of proof as to this is upon it. That this death was the result of a pure accident, we think is clearly established and with sufficient positiveness to overcome the prima facie case made by the first proof, if any suit was made; and among the reasons for so thinking is the admission of the plaintiff in error as to the facts in this case. "It is simply and solely a case where a man is walking along a highway, or standing upon it, and, without any known or explainable cause, falls headlong into a hole or gully."

The next proposition urged in plaintiff in error's brief is: "The court erred in refusing to submit to the jury the question as to whether or not the insured met his death occasioned directly or indirectly, or while engaged in a voluntary exposure to unnecessary danger." The jury found with reference to this as follows: "Q. What time was it when Anderson started for Kansas City, on the night that he met his death? Ans. After 10 p. m. Q. 15. Did his wife try to persuade him from going? Ans. She did. Q. 16. If you answer 'Yes' to the last question, what were her reasons? Ans. She considered it dangerous. Q. 30. On the night of August 6th, 1889, about 10 o'clock p. m., did plaintiff try to dissuade her husband from going that night to Kansas City, Missouri, by telling him that the trip was a dangerous one? Ans. Yes. Q. 31. Was the trip on foot at 10 o'clock at night from Argentine, Kansas, to Kansas City, Missouri, a dangerous one for a person unaccompanied by any one, during August, 1889? Ans. We understand it was. Q. 32. If you answer the foregoing question in the affirmative, did Merrill D. Anderson, on the night of August 6th, 1889, know that such a trip was a dangerous one? Ans. Yes. Q. 33. If you answer the foregoing question in the affirmative, did Merrill D. Anderson, on the night of August 6th, 1889, undertake said trip of his own free will and accord? Ans. Yes. Q. 34. Did Anderson go voluntarily? Ans. Yes. Q. 35. Was it necessary for him to go? Ans. We understand it was. Q. 36. Did he take a razor with him? If so, for what purpose? Ans. Yes, for self-defense. Q. 37. Was the trip a dangerous one at the time and under the circumstances under which Anderson started for Kansas City, Missouri? Ans. We understand it was." While these findings are apparently inconsistent, we think they can be reconciled, and, taken with the other findings in the case, do not show or find that the death of Anderson was caused directly or indirectly while engaged in a voluntary exposure to unnecessary danger. The plaintiff in error lays great stress upon the fact that the deceased took with him a razor for self-defense, thereby admitting that he knew the trip was dangerous; but, under the facts of this case and the findings of the jury, does this make any difference? We think not. The danger admit-

ted by these acts is of a specific kind,—that it was dangerous by reason of meeting with personal encounters (not that it was dangerous on account of the conditions of the roads or streets),—and his razor was taken as a precaution against this danger. If the jury had found that he came to his death by reason of injuries occasioned by the violence of others, or from any kindred cause, this would be a strong circumstance against plaintiff's recovery, but they did not so find. On the contrary, the findings are that he came to his death from an entirely different cause; and there is not one particle of testimony to show that it was in fact dangerous, or considered dangerous by any one, or in what respect it was dangerous, except the request of the wife for him not to go, on account of her fears or belief, and the act of the deceased in taking a razor. We think to avoid a policy for this reason there must be an unnecessary risk taken of some known danger, and this known danger must of itself be the actual cause of the death or injury. "It is not enough to defeat liability to show that the assured violated the conditions of the policy in these respects, but it must also be shown that such violation had a causative connection with the injury." *Jones v. Association* (Iowa) 61 N. W. 485; *Bradley v. Insurance Co.*, 45 N. Y. 422; *Bloom v. Insurance Co.*, 97 Ind. 478; *Griffin v. Association*, 20 Neb. 620, 31 N. W. 122; *Murray v. Insurance Co.*, 96 N. Y. 614; *Insurance Co. v. Bennett* (Tenn.) 16 S. W. 723; *Indemnity Co. v. Dorgan*, 7 C. C. A. 582, 58 Fed. 945; *Insurance Co. v. Osborn* (Ala.) 9 South. 869; *Miller v. Insurance Co.* (Tenn.) 21 S. W. 43; *Collins v. Insurance Co.* (Iowa) 64 N. W. 778; *De Loy v. Insurance Co.* (Pa.) 32 Atl. 1108.

The hypothetical question put to Dr. C. L. Burk may be objectionable; yet it is not sufficiently so to cause a reversal in this case.

That the court erred in refusing certain instructions. We think the court fully and ably declared the law in this case in the instructions given, and on the other objections urged by plaintiff in error we see no error.

One other proposition we will consider; that is, that the last proof of loss was not received within the seven months. This has not been urged with much force, and the theory of the trial of this cause in the court below totally ignores it as a defense. We think, however, that the court was justified in giving the instruction it did with reference thereto. The correspondence with the company absolutely shows that they did not deem it as a defense. The judgment will be affirmed.

(19 Mont. 70)

#### SLOAN et al. v. GLANCY.

(Supreme Court of Montana. Jan. 2, 1897.)  
WATER RIGHT — APPURTENANCE — CONVEYANCE — NONUSER — ABANDONMENT — FINDINGS.

1. Where the proprietors of a water right, without proceeding in eminent domain, make

an agreement whereby a landowner gives them permission to construct the ditch over his premises, in consideration of the use of sufficient water to irrigate that part of his land lying below the ditch, the water being essential to its proper cultivation, the landowner's interest in the ditch becomes appurtenant to the land lying below the ditch, and hence passes with a conveyance of it, without being expressly described in the deed.

2. Without an intention to relinquish one's interest, the mere nonuser of a water right is not an abandonment.

3. Where an immaterial fact, about which there was little evidence, has not been found by the jury, and the party insisting on the finding is given the privilege of introducing further testimony upon the point before the court adopts the findings of the jury, and the offer is declined, the party cannot complain.

Appeal from district court, Fergus county; Dudley Du Bose, Judge.

Suit by T. A. Sloan and others against John Glancy to enjoin the use of water from an irrigating ditch. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Suit by plaintiffs against the defendant to enjoin him from interfering with the plaintiffs' use and enjoyment of the waters of an irrigating ditch described in the complaint and situate in Fergus county. The plaintiffs have been in possession of certain agricultural lands in Fergus county for years prior to the commencement of this suit. In 1884 the plaintiff Culnan and one Howell, the grantors of plaintiffs B. McDonnell and T. McDonnell, appropriated 1,000 inches of the waters of Big Spring creek. The plaintiffs allege that this appropriation was by means of a ditch which tapped Big Spring creek, and that the plaintiffs B. and T. McDonnell, as grantees of Howell, now own said Howell's interest in said ditch and water. It is next alleged that about May 31, 1890, the plaintiffs Sloan, Culnan, Clegg, E. McDonnell, B. McDonnell, and T. McDonnell appropriated an additional 1,500 inches of the waters of said stream, by means of enlarging the ditch first above described, and that plaintiffs have used the waters flowing through the above-mentioned ditch until interfered with by the defendant; that about August, 1892, and since then, defendant has deprived the plaintiffs of the use of the waters aforesaid, and caused them injury and damage. The defendant denied that Sloan, one of the plaintiffs, was one of the original appropriators of the water first mentioned in the complaint, or that Howell was the grantor of plaintiff Ed. McDonnell, or that Ed. McDonnell has any interest in the said ditch as grantee of Howell. He also denied the alleged appropriation of May 31, 1890, of an additional 1,500 inches of water; denied the capacity of the ditch constructed to be sufficient to convey 2,500 inches of water, or any greater amount than 1,000 inches; denied any wrongful diversion on his part, or any damage through any action of his, to the plaintiffs or any of them. The defendant

affirmatively set forth that he and his grantors owned a certain piece of agricultural ground adjacent to Big Spring creek, and that 50 acres of his lands lie upon the northerly side of the creek, between the creek and the ditch of plaintiffs, and below the ditch; that the plaintiffs Culnan, Clegg, and McDonnell, together with John W. Howell, appropriated certain waters of Big Spring creek by means of that certain ditch, described in the complaint; that at the time of such diversion and appropriation one Joel A. Harris, defendant's grantor, owned and was in possession of the ground now owned by defendant; that the plaintiffs' said ditch is constructed across the lands owned by this defendant and formerly owned by said Harris; that at the time of the appropriation of the water in 1884, and before the construction of the ditch by plaintiffs across the lands of the defendant, and in consideration of their being allowed to construct and maintain the said ditch across the said lands, the plaintiffs Culnan, Clegg, and Ed. McDonnell, and Howell, the grantor of said plaintiffs B. and T. McDonnell, agreed with said Harris, defendant's grantor, that Harris should have such an interest in the said ditch and the waters therein as might be necessary to irrigate that portion of defendant's lands lying between the said ditch and the said Big Spring creek,—about 50 acres, more or less; that in pursuance of said agreement the said plaintiffs and the said Howell entered upon the construction and completed the said ditch over and across the said lands of this defendant; that afterwards, in 1886, the defendant bought from the said Harris all his right, title, and interest in and to the above-mentioned lands, together with the appurtenances, and the same were conveyed to the defendant by deed in writing. The defendant alleges that, at the time of the purchase, the plaintiffs Culnan, Clegg, Ed. McDonnell, and Howell promised to convey to the defendant such interest in the ditch and the right to the use in the waters therein as might be necessary to irrigate the 50 acres of ground before mentioned; that in 1887 the defendant took possession of the lands so purchased by him, and commenced to use the waters in the ditch, and has used the same every year since, and for more than 5 years has been in quiet and peaceable possession of as much of the water as was necessary to successfully irrigate his 50 acres of ground. Defendant prayed for a decree adjudging him to be entitled to the use of 75 inches of water flowing in the plaintiffs' said ditch, and that plaintiffs be enjoined from interfering with his right to the use of the same. The replication denied all the new matter set up in the answer. Special issues were submitted to the jury. The jury found that Culnan and Howell appropriated certain of the waters of Big Spring creek in 1884, but that the appropriation did not amount to 1,000 inches. It was also found

that the plaintiffs, in May, 1890, made an additional appropriation by enlargement of the original ditch of Culnan and Howell, but that this appropriation did not amount to 1,500 inches. They found that defendant diverted the water from the plaintiffs' ditch in August, 1892, and thereafter, but that there were no damages done. In answer to the question submitted whether Culnan, Clegg, Ed. McDonnell, and Howell made an agreement with Harris, in 1884, by the terms of which agreement Harris permitted the above-named parties to construct a ditch across the land of Harris in consideration that Harris should have the use of sufficient water to irrigate the land below the ditch, the jury replied, "Yes;" that there was such an agreement made with Thomas Culnan under which Harris was entitled to 37½ inches of water. They found against the defendant upon the issue of adverse possession. Thereafter the court adopted the findings of the jury, after modifying the one relating to the diversion by the defendant, so that the finding was to the effect that the defendant did divert the water, but did not wrongfully divert it. A decree was entered in favor of the defendant, adjudging him the owner of a sufficient interest in the plaintiffs' ditch to convey 37½ inches of water from the point where the water is diverted from Big Spring creek down to the point where the defendant diverts the same upon his lands. The plaintiffs moved for a new trial, upon the ground that the evidence was insufficient to sustain the findings and decision of the court, and upon errors of law. The motion for a new trial was overruled, and from the order overruling the said motion, and from the judgment, the plaintiffs appeal.

W. M. Blackford and F. A. Stranahan, for appellants. Von Tobel & Cheadle, for respondent.

HUNT, J. (after stating the facts). We will not incur this opinion with a lengthy statement of the testimony in the case. A brief recital of the evidence upon which the district court and the jury founded their conclusions is sufficient. From 1883 to 1886 Joel A. Harris owned a tract of land, afterwards sold to this defendant. In 1883 J. W. Howell built a small ditch across Harris' land to irrigate his own garden. In 1884 Thomas Culnan, J. T. Clegg, and E. McDonnell proposed to build another ditch across Harris' land above, but parallel to, the original Howell ditch. About the time that Culnan, Clegg, and McDonnell commenced their proposed ditch, Harris went to them, and, speaking particularly to Culnan, McDonnell, and Howell, objected to their taking out another ditch. Harris told them there was another ditch below, and that they ought to unite on the one ditch and not cut his place up. Culnan explained to Harris that there had been some disagreement between Howell and themselves

concerning the rights in the other ditch, to which Harris replied that he was not going to have his ranch cut up by ditches because of a squabble among themselves. After some further conversation, Harris told them that, if they wished to construct a ditch through his land, he wished what water he needed for the land below the ditch, and that would be all the damages he would ask. They agreed upon this. The appellants now contend that Harris' statement had relation only to the ditch which Culnan, Clegg, and McDonnell were commencing to dig; but the court and jury believed that the point of Harris' objections was to digging two ditches through his land, and that when he referred to uniting upon one ditch he referred to an enlargement of the Howell ditch,—the one from which he could divert the water to his land. It certainly appears that the advice of Harris was acted upon, for the ditch constructed was the old Howell ditch, and it was through the same that water was conducted by the plaintiffs thereafter. In 1886, before and after defendant purchased of Harris, certain witnesses conversed with several of the men who had constructed the enlarged Culnan-Howell ditch, and who owned interests therein. These persons admitted that the purchaser of Harris' land was entitled to irrigate his land lying below the ditch by water from the ditch, thus recognizing the agreement which had been made with Harris, the grantor of defendant, Glancy. When it was suggested to several of the owners that the purchaser would like a title by deed in writing, they said that they had nothing to show themselves, and could not therefore give any title other than the right to go on and use the water as the purchaser might desire, as the water, under the agreement with Harris, went with the ranch, to irrigate whatever land was below the ditch. The defendant, Glancy, testified that two of the persons interested in the ditch had offered him \$75 to relinquish his right to the same, and that another of the plaintiffs had told him, when there was some difficulty about the water in 1887, that when they had put the ditch through Harris' ground they had agreed to give to Harris the necessary water to irrigate what land lay below the ditch as a consideration for the right of way through his premises.

Without further recapitulating the testimony, we think the findings are fully sustained by the evidence, and that it appears the ditch now in use, and concerning which this action arose, is the identical one which was constructed as the result of the agreement between Harris and the plaintiffs, and that frequently after its construction, at divers times and to different persons, plaintiffs recognized the right of Harris, and permitted Glancy to purchase the land of Harris, fully knowing of the agreement that had been made between themselves and Harris. Appellants stand in one of two positions: If they enlarged the Howell ditch without Har-

ris' consent, upon their own showing they were trespassers without legal right to maintain their ditch at all. Hence they would have no standing in a court of equity, seeking to enjoin the right of the use of any water by the person who owned the lands over which they had unlawfully constructed their ditch. *Emerson v. Ditch Co.*, 18 Mont. 247, 44 Pac. 969. On the other hand, if they built the ditch with Harris' consent, such authority was clearly only obtained in consideration of the right of Harris to use enough water to irrigate those portions of his land lying below the ditch; therefore Harris' rights, as well as plaintiffs', should be protected. The construction and use of the Howell ditch by the appellants tend to sustain the existence of the agreement as contended for by respondent, and to prove that it was in pursuance of that agreement, and in consideration thereof, that the plaintiffs were enjoying their rights without having first proceeded in eminent domain. The admissions of the plaintiffs also strengthen this deduction. The facts, like those in *Flickinger v. Shaw*, 87 Cal. 126, 25 Pac. 268, invest the whole transaction with the character of a purchase and sale. The plaintiffs bought, and Harris sold, a right of way for a valuable consideration. And because of the relations of the parties the case is at once distinguished from that of *Fabian v. Collins*, 3 Mont. 215, where the legal relations of the parties were likened to those existing between a landlord and tenant, and where the privilege to use water under a license was held to be one limited strictly to the original parties, not to be sold and transferred by the original licensees. Harris' right to the use of the water to irrigate his land being established, he had a right to convey the same to respondent, Glancy, and the conveyance to Glancy of the land with its appurtenances also conveyed Harris' interest in the ditch and water right, which was necessary to the cultivation, use, and enjoyment of the land, just as fully as if Harris had described it in express terms in the deed itself. This is the established law of this state, and is decisive of respondent's rights. *Tucker v. Jones*, 8 Mont. 225, 19 Pac. 571; *Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. 339.

It is argued that, because the evidence fails to show an actual use of the water for two years by Harris before he sold to Glancy, his right of use or his interest in the ditch and water right did not become an appurtenant. No abandonment was relied upon; nor was it pretended that Harris intended to relinquish his rights at any time after he became possessed of them. On the contrary, he sold his lands to Glancy for a valuable consideration, and that water was necessary to the successful cultivation of the lands is a conceded fact. Mere nonuser of a water right is not an abandonment. The Montana decisions upon that point are collated in *Smith v. Mining Co.*, 18 Mont. 432, 45 Pac. 632. There is nothing in the facts of the case to remove

it from within the general rule that the water was a necessary appurtenance of the principal estate, and that in conveying the latter, as a matter of law and fact, the former was conveyed.

Appellants object to the omission of the court to make findings upon the amount of the respective appropriations in the years 1884 and 1890 of the waters of Big Spring creek flowing through appellants' ditch. This issue became an immaterial one to the main controversy, for no rights of priority between appellants and respondent were involved. The evidence was so meager upon the extent of the exact appropriations that the court and jury evidently found difficulty in making a specific finding. However, the privilege was accorded plaintiffs of introducing further testimony upon the point before the court adopted the findings of the jury, but the offer was declined. Under these circumstances plaintiffs cannot complain.

None of the other errors assigned are well taken. Judgment and order affirmed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

(19 Mont. 30)

**JOHNSON v. PURITAN MINING & MILLING CO. et al.**

(Supreme Court of Montana. Dec. 21, 1896.)

**MECHANICS' LIENS—PRIORITIES—JURISDICTION ON APPEAL — SERVICE OF NOTICE — EVIDENCE — JUDGMENT ROLL IN FORMER ACTION — UNVERIFIED COMPLAINT.**

1. Under Comp. St. 1887, div. 5, § 1374, declaring that liens shall extend to the land on which the improvement is situated, and shall be prior to any mortgage or other lien made subsequent to the commencement of the work; and section 1376, providing that such liens shall attach to the improvement in preference to any prior lien or mortgage on the land, that the person enforcing the lien may have such improvement sold under execution, and that the purchaser may remove the same, etc.,—the mechanic has a lien on the improvements paramount to all other liens whether created before or after the commencement of the work, but his lien on the land itself is superior only to liens accruing after the work was begun.

2. If the improvement is incapable of severance, the lien attaches to the land itself, and is subsequent to a pre-existing mortgage.

3. In a suit to enforce a mechanic's lien, all the defendants were represented by the same attorneys, and made a common defense, claiming no interests adverse to one another. The liens of the mortgagee defendants were held superior to plaintiff's lien, but one of the defendants, who claimed under a prior judgment lien, was defeated, and, on appeal by such defendant and by plaintiff, the same attorneys who represented all the defendants below appeared for them, still claiming that there was no conflict of interests between any of their clients, but additional counsel appeared for the mortgagees, and argued that there was such conflict. *Held*, that the supreme court had jurisdiction, though notice of appeal was not served on the mortgagee defendants by their co-defendant.

4. In a suit to enforce a mechanic's lien, the judgment roll in an action wherein one of the present defendants recovered a judgment, the lien of which he claims is superior to plaintiff's

lien, is admissible, though the complaint therein was not verified.

5. Where, in an action to enforce a mechanic's lien, one of the defendants claims under a judgment recovered by him in a prior suit against the debtor, against whom execution was levied, plaintiff cannot object to the admission of the judgment roll, execution, etc., on the ground that said defendant was not the owner of the judgment at the time the motion and affidavit for execution were filed.

Appeal from district court, Granite county; Theo Brantley, Judge.

Action by Levi C. Johnson against the Puritan Mining & Milling Company and others to enforce a mechanic's lien. From the judgment, plaintiff and defendant James A. Murray both appeal. Reversed on defendant's appeal, and affirmed on plaintiff's appeal.

Levi C. Johnson, plaintiff in this action, alleged 57 causes of action upon liens for materials furnished to the Puritan Mining & Milling Company, defendant, or for labor performed upon the mines of said company. The times within which the materials were furnished and the labor performed in all of the causes of action set forth are between September, 1893, and March, 1894. The plaintiff prayed for judgment against the Puritan Mining & Milling Company, and that the same be declared a lien on said mining claims, and that they be sold to satisfy the judgment. Defendants Hines and wife, Lynch, and the executor of Mary Minuse answered, and denied the several causes of action set up in plaintiff's complaint, and pleaded that they were the owners of a mortgage made to them upon the mining claims of the Puritan Mining & Milling Company on May 21, 1892, to secure certain debts of the corporation. The defendant King also claims to be the owner of a mortgage upon the same mining claims, executed on May 15, 1893. King's mortgage recognizes the former one to Hines, Lynch, et al., so there is no conflict between the interests of these mortgagees. The contention of the mortgagees was that, by virtue of the mortgages, their liens were prior to the plaintiff's. The defendant Murray claimed a one-fifth interest in the mining claims of the Puritan Mining & Milling Company by reason of his being the judgment creditor of one John Ullery, the predecessor in interest of the defendant Puritan Mining & Milling Company. He pleaded that his judgment lien existed by virtue of a judgment obtained in a suit of Murray against Ullery, wherein he recovered judgment in December, 1887, against Ullery, for the sum of \$2,002.81, together with interest and costs, and that on June 29, 1893, under his execution issued upon said judgment, the sheriff sold a one-fifth interest in the mining claims involved in this suit, to him (Murray), and thereafter, on December 30, 1893, the sheriff executed to him a sheriff's deed. By reason of these facts, Murray asserted that his interest in

said mining claims was prior and superior to plaintiff's lien. The plaintiff filed no replication to the answers of the mortgagees, but did reply to Murray's answer, denying the averments of the same. Upon the trial it was agreed by all parties that the materials were furnished, and the labor was performed, as alleged in the complaint. Murray then offered in evidence the judgment roll in the case of Murray against Ullery, filed December 7, 1887, the motion and affidavit for execution, the execution issued on said judgment May 1, 1893, and the deed from the sheriff to J. A. Murray, conveying to Murray the interest of Ullery in the mining claims described in the complaint, filed for record January 4, 1894. The plaintiff objected to the admission of the judgment roll, motion, execution, and sheriff's deed on the ground that the complaint in said judgment roll was not verified, and because it appeared from the papers introduced that J. A. Murray was not the owner of said judgment against Ullery at the time the motion and affidavit for execution were made and filed. The court sustained the plaintiff's objection. Judgment was thereafter rendered in favor of plaintiff for \$8,134.04, and costs, including attorney's fees, which said sums were adjudged to be liens upon the Puritan and Silver Star mining claims, the properties of the Puritan Mining & Milling Company; but the court decreed that the defendant mortgagees, by virtue of their mortgages, had prior and superior liens to those of plaintiff. It was also decreed that the defendant Murray had no lien, and could take nothing of the action.

H. R. Whitehill, for appellants. Smith & Word, Durfee & Brown, and McConnell & McConnell, for respondents.

HUNT, J. (after stating the facts). The only question to consider on the plaintiff's appeal is the specific error that the court ought not to have decreed the mortgage liens of the defendants to be superior to the liens of the plaintiff for materials furnished and labor done upon the mining claims of the Puritan Mining & Milling Company. Section 1370, div. 5, of the Compiled Statutes of 1887 gives a lien to every laborer or other person who does any work and labor upon, or furnishes any material for, any mining claim, quartz lode, building, erection, etc. Section 1374 provides that the lien given by section 1370 shall extend to the lot or land upon which any such building, improvement, or structure as may be referred to in the aforesaid section is situated, and provides, further, that the liens for work or labor done, or material furnished, as specified in the chapter of the statutes referring to liens, shall be prior to, and have precedence over, any mortgage, incumbrance, or other lien made subsequent to the commencement of work on any contract for the erection of such building, structure, or other improvement. Section 1375

declares that any such lien shall extend to all the right, title, and interest owned in the land by the owner or proprietor of the building, erection, or other improvement for whose immediate benefit the labor was done or the materials were furnished. Section 1376 provides that such liens or work "shall attach to the buildings, or improvements or erections for which they were furnished, or the work was done, in preference to any prior lien, or incumbrance or mortgage upon the land upon which said buildings, erections or improvements have been erected or put; and any person enforcing such lien may have such building, erection or improvement sold under execution and the purchaser may remove the same within a reasonable time thereafter."

As we must be governed by the foregoing statutes, we shall be careful not to extend the law beyond the expressed intent of the legislature. Granting that section 1370 is applicable to mining claims, still we cannot find that it or any other statute gives precedence to liens, such as are involved in this action, upon the land upon which the improvements have been made, over liens created by mortgages duly executed before the commencement of the work. The statute does make such liens preferred to any prior lien upon the land by attaching them to the buildings, erections, or improvements for which the labor and materials were furnished, but clearly goes no further. We find no warrant in the language used to imply that it extends such lien to the land itself, while, as conclusive evidence that the construction we put upon the statute is accurate, it is provided that the person enforcing the lien may have "such building, erection or improvement sold under execution and the purchaser may remove the same within a reasonable time thereafter." We are cited by the appellant to the statutes of Iowa, which are substantially like those that obtained in Montana when plaintiff's cause of action accrued. But we find that the United States supreme court, in *Brooks v. Railway Co.*, 101 U. S. 443, has construed the Iowa statutes similar to sections 1374, 1375, and 1376, cited above, and decided that a provision like section 1374, relating to the land on which the improvement is made, gives the laborer a paramount lien only as against other liens and incumbrances created subsequent to the commencement of work on any contract for the erection of such building, structure, or other improvement, and that those made prior to that time were unaffected by it. But the court goes on to say that a section of the Iowa Code like section 1376 of the Montana Code, made a different provision in regard to the lien on the building, erection, and improvement on the land, and thus summed up the statutory law: "The mechanic, therefore, has a lien upon the land paramount to all rights accruing after the commencement of his work, and what he puts upon the land paramount to all other claims, whether created before or after that time. The decisions of the courts of Iowa are to

this effect, and the proposition is not disputed in argument here." This was the view taken of the statutes in *Opera House Co. v. Maguire*, 14 Mont. 558, 37 Pac. 607, where Justice Harwood, speaking for the court, said: "This provision [section 1376] subjects the improvements to the claim of the lienor to secure payment for the labor or material used in the erection of the improvement, by right superior to that of the prior mortgage." See, also, *Montana Lumber & Manuf'g Co. v. Obelisk Mining & Concentrating Co.*, 15 Mont. 24, 37 Pac. 897, and *Murray v. Swanson*, 18 Mont. — 46 Pac. 441. The Montana statutes, in thus giving a lien upon a building or improvement separate from the land in preference to all prior liens upon the land, and by permitting the enforcement of such a lien by sale and removal of the building or improvement, seem to wipe out the common-law rule that buildings attached to the real estate are part of the real estate, not to be severed without permission of prior mortgagees of the land. Commenting upon such statutes, Jones, Liens, § 1373, says: "A lien is given, not on the materials as such, but on the buildings or improvements in the construction of which the materials are used. The operation of the statute, in case there is a prior mortgage of the land, is to dis sever the improvements from the realty by giving a superior lien on such improvements, and conferring on the purchaser the right to remove them."

Now, to apply these controlling rules. Plaintiff has not proved that he has erected a building or structure or put any other improvement upon the mining claims, susceptible of severance and removal. He relies solely upon the contention that, where the improvements are incapable of segregation, the lien is upon the mine itself, and is to be preferred to any prior lien, incumbrance, or mortgage upon the land on which the buildings, structures, or improvements are erected. But we think plaintiff is in error in his construction of the statutes. Many improvements, buildings, or erections placed upon mining claims may be removed from the land itself. There are mills, hoists, pumps, sheds, and other improvements upon which labor may have been done. For all such improvements the liens of the laborers attach to the buildings or improvements in preference to any prior lien, incumbrance, or mortgage, and they may be sold and removed. But where the improvement into which the materials or labor went cannot be removed from the land and sold, the statute in such case has not provided for any preference over a pre-existing mortgage, but rather, by clear implication, declared otherwise. *Getchell v. Allen*, 34 Iowa. 559. It is impossible, for instance, to separate a shaft in a mine from the mining claim upon which it is sunk. The lien in such a case attaches to the land, and the law recognizes that the lienor derives the benefit of such improvement by the enhanced value of the property, but his lien is subsequent to a pre-existing mortgage. *Montana Lumber*

*& Manuf'g Co. v. Obelisk Mining & Concentrating Co.*, 15 Mont. 24, 37 Pac. 897; *Davis v. Alvord*, 94 U. S. 545; *Conrad v. Starr*, 50 Iowa, 470. Whether or not a lien for labor or materials furnished on a mining claim extends to the whole claim, or only to that part of the realty upon which the improvement is made, is not important in this case, because, conceding the truth of that proposition which is laid down in *Smith v. Mining Co.*, 12 Mont. 524, 31 Pac. 72, it does not follow at all that any such lien is to be preferred to the pre-existing lien of a judgment or mortgage. In conclusion, we think that the court correctly fixed the relation of the mortgage liens in the case by awarding them priority over the plaintiff's liens, and in this respect the judgment must be affirmed.

The legal question raised by Murray's appeal is whether or not the district court was correct in ordering that Murray take nothing of the action, and that he have no lien on the property. To the brief of Murray's counsel, and to the authorities cited to the effect that the court did err in ruling adversely to Murray, no brief has been filed by either plaintiff or the mortgagee defendants. The mortgagees, however (except the administrator of the estate of Mary Minuse), did file a brief, contending that Murray's position is adverse to the mortgagees, and that this court has no jurisdiction over the mortgagees' rights so far as they may be affected by any judgment of reversal of the district court's order, because no notice of appeal was ever served upon the mortgagees by appellant Murray. The facts are that, when the case was tried in the district court, Messrs. Durfee & Brown and Smith & Word appeared as counsel of record for all the defendants, and the names of Durfee & Brown appear as having subscribed every answer filed. Throughout the trial no effort was made by the mortgagees to exclude any evidence offered by the appellant Murray. On the contrary, all the defendants being represented by the same counsel, their rights were evidently recognized and understood as between themselves, and were adverse only to the plaintiff, who claimed priority to them all. It was the plaintiff alone who objected to the evidence of Murray's judgment against Ullery, and it was plaintiff's objection only which the court passed upon when it sustained that objection. It was never assumed on the trial, nor does it appear to us under the pleadings or proceedings had, that there is any necessary conflict between the interests of the mortgagees and Murray, and we cannot assume that the counsel for the defendants took the position they did, except with due regard to the wishes and interests of their several clients. When Murray appealed, it was by the same counsel who had represented him and his co-defendants on the trial. One of the said counsel, Mr. Word, argued Murray's appeal to the supreme court. D. M. Durfee, Esq., another of defendants' counsel, argued the appeal in behalf of the mortgagee defend-



ants before this court, and stated at the close of the arguments that he did not contest the appeal of Murray, and did not wish to be understood as doing so for his clients. But Messrs. McConnell & McConnell, who first appear in the case in this court, and who alone are contesting Murray's appeal, state that they are employed by all the mortgagees (except the Minuse estate) to maintain the integrity of the judgment as to them against all parties thereto who seek to disturb it by appeal. The attitude of the several defendants, therefore, is this in the supreme court: The defendants all made a common and friendly fight against plaintiff in the district court. Some of them prevailed; one alone did not. Plaintiff by his counsel, and the unsuccessful defendant by the same counsel who had appeared for all defendants, appeal. In the supreme court, in addition to the original counsel of defendants who resist plaintiff's appeal only, and contend for Murray's rights against plaintiff alone, new counsel appear for the mortgagees. The original counsel still say there is no hostility of interests between any of their clients,—the one appealing and those simply responding to plaintiff's appeal. But the additional counsel for the respondent defendants say to us there is a conflict of interests between defendants, and object to the jurisdiction of this court. Now, if this court is obliged to elect between these discordant contentions, and to decide that it has no jurisdiction over the mortgagees so far as they are affected by Murray's appeal, it would do Murray's rights, if any he has, grave wrong, and must needs do so too in the teeth of the statements of the original counsel of all the defendants that they (the defendants) are not in conflict on this appeal between themselves. Obviously, the mortgagee defendants, who are still represented by the same counsel who tried their case for them in the lower court, should not be heard to say in this appeal, through the mouths of those attorneys familiar with their case from its inception, that they were not and are not in a position adverse to their co-defendant appellant, yet to stultify themselves through other counsel by contending that there is a conflict. We would not listen to such a position if advanced by the original counsel, and we regard it as none the less unsound because advanced by the learned counsel who now first appear for the mortgagees. Besides, to uphold the mortgagees as against Murray would necessarily impute to their senior counsel inexcusable error or gross perfidy of their client's interests. We decline to do this in the absence of a clear showing. Nor should a court tolerate such a shifting of attitudes. Where litigants recognize the equities of one another by uniting to resist the demands of a common enemy, and all are legally entitled to succeed, yet, through error, one is denied all rights, and appeals, we will not sustain the one, and dismiss the other, merely because the district court erroneously excluded the latter from participating in the fruits of the victory which he

helped to gain, and which was awarded his co-defendants. The circumstances of this case make it easily distinguishable from *Bank v. Bokien*, 5 Wash. 777, 32 Pac. 744, cited by counsel for the mortgagees resisting Murray's claims. There it did not appear that all the parties defendant made a common defense in the court below, or that there was a common interest between them; nor were all the defendants before the supreme court by the same counsel who had represented them in the lower court. That decision is therefore inapplicable. We believe we have jurisdiction, and so hold.

Reverting to the rulings of the court, we think it was error to exclude the judgment roll in the case of Murray against Ullery, offered in evidence by Murray on the trial. The judgment roll in that case shows that the action was on a promissory note; that the complaint was filed; that summons was duly issued and properly served; and that, after the statutory time for answering or pleading had elapsed, the default of defendant was entered, and judgment rendered for the plaintiff, as prayed for in his complaint. The complaint lacked any verification, and for this reason the district court rejected the evidence. The object of the verification of the complaint is to insure good faith in the averments of the plaintiff. *Patterson v. Ely*, 19 Cal. 28. The latest writer on Code Pleading (Phil. Code Pl. § 224), says: "With the view to secure good faith and truthfulness in pleading, to confine litigation to matters really in dispute, and to avoid frivolous and false issues, nearly all the codes require pleadings of fact to be verified upon oath. By thus requiring parties to sustain their statements and denials by affidavits of their truthfulness, facts not believed to be true will seldom be alleged on the one hand, and alleged facts believed to be true will seldom be denied on the other hand, and the judicial controversy will thus be limited to such statements and denials as the parties are willing to swear to."

It is also held that the verification is not a part of the pleadings, strictly speaking, and is not necessary to vest jurisdiction. "Like any other formal matter, its absence is waived by a failure to object. And if its entire absence does not affect the jurisdiction, of course mere defects cannot." *Van Fleet*, Coll. Attack, § 251. See, also, *Baylies*, Code Pl. p. 310; Phil. Code Pl. § 225; *Bliss*, Code Pl. § 173. *Maxw.* Code Pl. p. 563, says (as does section 80 of the Montana Code of Civil Procedure of 1887) that jurisdiction attaches to the defendant when he is legally served with summons, regardless of the defects in the petition or verification, and that the omission of the verification "amounts to one of those irregularities which cannot be collaterally called into question." See, also, *Boone*, Code Pl. §§ 34, 81. The Montana Code (section 81, Code Civ. Proc. 1887; section 660, Code Civ. Proc. 1895) defines plead-



ings as "the formal allegations by the parties of their respective claims and defenses for the judgment of the court." It also specifies what the complaint must contain as its allegations; and although the complaint, when made up of such formal allegations, must be verified, the verification is not really a part of any formal allegation of a claim by a party for the judgment of the court. It is an oath of the good faith of the complainant in making his averments, but of itself does not tender an issue or add an allegation to the pleadings. Such, we take it, is the reason of the texts of the authors referred to, which commend themselves to us.

The district court sustained the plaintiff's objection to the admission in evidence, on Murray's behalf, of the judgment roll, motion and affidavit for execution, the execution, and sheriff's deed, on the further ground that it appeared from the papers introduced that Murray was not the owner of the judgment "at the time the motion for execution was made," etc. This appears to have been error. More than five years had elapsed from the date of the entry of the judgment. The execution was issued upon the motion and affidavit of Murray, and after personal notice to the original defendant, John Ullery. The exact date of the filing of the motion and affidavit does not appear, but they were served on the 13th of April, 1893. These proceedings were had in accordance with section 349 of the Code of Civil Procedure (Comp. St. 1887), and were not objected to by Ullery. *Railroad Co. v. Bender*, 13 Mont. 432, 34 Pac. 848. The execution issued in obedience to the order of the court made April 29, 1893. The plaintiff introduced an assignment of the judgment by Murray to Frank E. Corbett, dated May 20, 1892; but in the transcript of the judgment docket, which appears to have been offered in evidence in the case, there is a recital of a reassignment of the judgment to Murray by Corbett, April 10, 1893, prior to the issuance of the execution, which was May 1, 1893. By this evidence it would appear, therefore, as if Murray were presumptively the owner of the judgment at the date of the execution. But the question of ownership is a matter of no importance on this appeal, because the plaintiff, who alone raised that question on the trial, does not ask for its determination, and in his argument and brief relies on but the one specification of error, namely, the ruling of the court declaring plaintiff's lien inferior to the mortgagees'. We understand his position to be that, if his lien is not good against the mortgagees', he cannot insist that it be held prior to the judgment lien; hence the ownership of the judgment is immaterial to him. If the judgment debtor had any reason to show why execution ought not to have issued against him, he had an opportunity to appear after he was served with a copy of the mo-

tion and the affidavit for execution. Can this plaintiff now take advantage of any defect in the proceedings had upon the judgment obtained by Murray against Ullery except by a direct proceeding, or can the judgment defendant alone do so? *Beebe v. U. S.*, 161 U. S. 104, 6 Sup. Ct. 532; *Edgerton v. Edgerton*, 12 Mont. 122, 29 Pac. 966. It would seem that the proper way to issue an execution is in the name of the party in whose favor the judgment has been given, and, if this be true, the execution ought to have issued in the name of Murray under any circumstances. Section 312, Code Civ. Proc. (Comp. St. 1887); *Collins v. Smith*, 75 Wis. 395, 44 N. W. 510; *Freem. Ex'ns*, § 21. If any of these propositions are correct,—and no one has disputed any of them in argument or brief,—it was no concern of this plaintiff who owned the judgment at the time the execution issued, for it was of course by the mandate of execution itself that the sheriff acted.

The judgment of the district court, so far as it affects Murray, must be reversed, and the cause is remanded to the district court with directions to grant a new trial to Murray, proceeding in accordance with the views expressed in this opinion. When the lien of Murray is ascertained in amount, the court should then make a decree establishing the status of his lien towards the liens of the mortgagees, and fixing their respective relations towards one another. In other respects the judgment is affirmed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

(30 Or. 494)

#### In re JOHN'S WILL.<sup>1</sup>

(Supreme Court of Oregon. Dec. 21, 1896.)

WILLS—PROBATE—CHARITABLE TRUSTS—EQUITY—JURISDICTION—TRUSTEES.

1. A will, appointing executors and directing the payment of funeral expenses and the expenses of administration, is entitled to probate, though its other provisions creating a charitable trust are invalid.

2. When the probate court has jurisdiction to direct and control the conduct and settle the accounts of executors (Hill's Ann. Laws, § 895), a proceeding for the revocation of the probate of a will, instituted more than five years after the original probate, may be considered as a prayer for the direction of the executor in the administration of the personality.

3. The fact that the legislature has made provision for the maintenance of public schools in all school districts, without making it, however, compulsory on the district to maintain such schools, does not render invalid a bequest in trust for the maintenance of a public school.

4. Courts of equity have inherent jurisdiction over charitable trusts.

5. A charitable trust for the maintenance of public schools in a city is not invalid, as against the rule of perpetuities, because the will provides for the appointment of trustees 15 years after testator's death, the property in the meantime being given in trust to the executors.

6. A charitable trust for the maintenance in a

<sup>1</sup> Rehearing denied.

city of free schools is not invalid on account of the uncertainty of the trustees, because, 15 years after testator's death, the property in the meantime being given in trust to the executors, they are to be appointed, one each by the incumbent judges of the state circuit court and of the federal district court, and a third by the two so appointed, and vacancies to be filled by persons appointed by the incumbents of such judgeships.

7. The failure of the judges to appoint trustees would not defeat the trust.

8. A provision giving the judges authority to formulate rules for the government of the trustees does not invalidate the trust, as conferring on the judges discretionary power in the administration of the trust.

9. The fact that no provision was made in the will for the conveyance to the trustees of certain land given the executors in trust will not defeat the trust, as such land would be charged with the trust in either the hands of the executors or heirs.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Proceeding by James John and others against Philip T. Smith, executor of the will of James John, deceased. From a decree affirming the decree of the probate court, petitioners appeal. Affirmed.

E. B. Watson, W. W. Thayer, and J. N. Dolph, for appellants. H. B. Nicholas and John Catlin, for respondent.

**WOLVERTON, J.** This proceeding was instituted in the county court of Multnomah county, by the next of kin of James John, deceased, for the purpose of having revoked an order or decree of said court, made and entered July 29, 1886, admitting to probate in common form what purports to be his last will and testament. The following is a copy of the will, omitting formal parts and attestation:

"First. I do hereby give, bequeath, and devise all money, property, and estate, real and personal, of every kind and nature, of which I may die seised or possessed, or be entitled to at the time of my death, and wheresoever situate or being, to my executors, hereinafter named, to and for the following uses and trusts, that is to say: (1) To sell and convert all my personal property into cash, at private or public sale, as to them shall seem best. (2) To lease all my real estate, except that certain block hereinafter mentioned, upon such terms and for such times and in such parcels as they may deem to be the best interest of my estate, but all leases shall terminate fifteen years after the date of my death. (3) After the payment of my funeral expenses and the expenses of administration upon my estate, to expend all other moneys which shall come to their hands upon my death, from the sales of personal property or from rents of real estate, in the erection of buildings for school purposes upon block No. 29, in the town of St. Johns, Multnomah county, state of Oregon, and employing teachers to teach the common-school branches. (4) To sell all real estate, fifteen years after the date of my death, and

not before, excepting said block 29 and such other lots and blocks as they may deem necessary for school buildings and grounds, at public or private sale, with or without an order of court, and upon such terms as they may deem advisable, and the proceeds arising from such sales to be delivered to trustees to be appointed as hereinafter provided. If such sales shall not be for cash, then the notes and securities shall be turned over to such trustees. (5) It is my intention that all taxes, claims, charges, and expenses shall be paid out of money coming into the hands of my executors from other sources than from sales of real estate, and that only the remainder shall be used by them in erecting school buildings and supporting schools. (6) The sales of real estate hereinbefore mentioned to be made by my executors shall be made within eighteen years after my death, and not until fifteen years after my death. (7) It is my desire that my estate shall be used in establishing and maintaining free schools or school in the town of St. Johns, and that such schools shall be public, and at all times open to children of the school district which shall embrace the town of St. Johns; and, if my executors shall consider it to be the best interests of the children of said town and district, they may act in concert with the directors of said school district in erecting school-houses and maintaining schools, but any and all buildings erected with money belonging to my estate shall belong to my estate, and not to the district, and all moneys expended in maintaining schools shall be expended under the supervision of my executors as long as they shall continue to act, and until the trustees hereinafter mentioned and provided for shall be appointed and qualify.

"Second. I do hereby nominate and appoint my friends Philip T. Smith, of St. Johns, C. W. Burrage and P. A. Marquam, of Portland, executors of this, my last will and testament; and, in case either of them shall fail to accept the trust, I do hereby suggest my friend John Catlin to act as executor in the place of the one failing to accept.

"Third. It is my will that, fifteen years after my death, three trustees be appointed, as follows: One by the judge of the circuit court of the state of Oregon in whose judicial district the town of St. Johns may be in, one by the person who shall be district judge of the United States in whose judicial district the town of St. Johns may be in, and the third shall be appointed by the two persons acting as such judges; and the three persons appointed as such trustees shall be and constitute a board of trustees, and such board shall have the possession, management, and control of all moneys and property by them received from my executors, for the purpose of promoting educational interests in the town of St. Johns, and to that end shall use such money and property so as to establish a permanent fund, the interest only to be used in educational purposes, or so

much thereof as shall be necessary. The principal to be loaned only upon real estate security. A portion of the principal, which shall be in excess of fifty thousand dollars, in the discretion of such trustees, may be used in erecting buildings for educational purposes, and in employing teachers.

"Fourth. The persons acting as judges aforesaid may from time to time make rules and regulations for the government of the board of trustees, which rules and regulations shall be binding upon such board, and they may fix the qualifications of such trustees, and determine whether or not they shall give security for the faithful performance of their trusts, and to whom such security shall be given.

"Fifth. It is not my intention to direct the particular branches of education which shall be taught, nor in any way limit the use of the money in promoting certain kinds of education, only I desire that it shall never be used to inculcate the doctrines of any religious sect or denomination, one more than the other.

"Sixth. It is my intention and desire to establish a permanent and perpetual educational fund, to be forever used in promoting education.

"Seventh. Whenever a vacancy shall occur in the board of trustees hereinbefore mentioned, such vacancy shall be filled by appointment, to be made by the persons occupying the positions of judges as aforesaid. Said board to be always kept full, and to consist of three persons, a majority of whom may transact business."

The petition for the revocation of the order of probate is based upon two grounds: First, the want of testamentary capacity of the testator; and, second, the insufficiency of the attempted devise to charitable purposes, as it respects the objects and beneficiaries of the charity and the trustees in whom the power of administering the charity is reposed. The first ground of contest was abandoned at the trial, and the case is here for determination upon the latter ground only.

It is contended by the executor that, the will having been properly executed, and provision made therein for the appointment of executors and the payment of debts, it was properly admitted to probate, and that this proceeding is without merit, even if it be conceded that certain gifts or devises are void and of no effect for any purpose. It is said to be no objection to the probate of a will that some of its provisions are not valid or susceptible of being carried into effect. 3 Redf. Wills, § 3, subd. 22, and Appeal of Baxter, 1 Brewst. 460. Again, it is considered to be well settled that a will, appointing an executor, and making no disposition of personalty, is entitled to probate, whether it contains any disposition of real estate or not. 3 Redf. Wills, § 4, subd. 15. By the older English books it was established that, if an instrument be testamentary,

and is to operate upon personal property, probate must be obtained, whatever its form, but that a will which clearly respects lands ought not to be probated; while, if the will was concerning both land and personal property, probate was proper, though such probate was without prejudice to the heirs of the land. Schouler, Ex'rs, § 59. The ancient law proceeded upon the theory that there could be no proper testament without the naming of an executor, but modern jurisprudence stands in support of the will whether an executor is nominated therein or not, and yet the nomination of an executor is sufficient to make the instrument a will. It is not uncommon for a testator to make his will for the sole purpose of nominating an executor to administer his estate. A fundamental rule, long established, is that the personal property of a deceased person goes to his personal representatives, while the real estate goes to his heirs at law. At one time it was thought that realty could not be diverted from the channel of inheritance by devise, but that doctrine no longer prevails; so that a person may now dispose of his real as well as personal property by will. Under the old law, it was the province of ecclesiastical courts to assume jurisdiction touching the administration of the goods and chattels of deceased persons, while the English chancery guarded with much jealousy its peculiar jurisdiction over the realty. But by statutory enactments in England, as well as in most of the United States, the discrimination between wills of real and personal property is abolished. Their probate has become a necessary process to the establishment of title to either style of property, and is effectuated by the same method and in the same court. Schouler, Ex'rs, § 59. Accordingly it has been held, under the statutes of this state, that the transfer of the title to the personal property of deceased persons is accomplished through the sole instrumentality of the court (Winkle v. Winkle, 8 Or. 193), and that a will must be admitted to probate before title to realty can be established under it (Lock Co. v. Gordon, 6 Or. 175; Jones v. Dove, Id. 188). The will here assumes to dispose of both personal and real property.

The ordinary functions of a court of probate, acting upon a proceeding for the probate of a will, seem to determine two things only, viz. the testamentary capacity of the testator, acting without restraint, and the sufficiency of the formalities observed in the execution of the instrument propounded as his last will and testament; in other words, whether the instrument propounded is the testator's spontaneous act expressing his last will in the form prescribed by law. Woerner, Adm'n, § 222; Appeal of Hegarty, 75 Pa. St. 516. Mr. Schouler says: "To construe a will duly probated, and define the rights of parties in interest remains for other tribunals. They must interpret the charter

by which the estate should be settled in case of controversy, while the probate court, by right purely of probate or ecclesiastical functions, establishes and confirms that character." *Schouler, Ex'rs*, § 86; *Hawes v. Humphrey*, 9 Pick. 350. No doubt exists but that a will may be probated in part, but the question usually involved in such cases is whether any certain clause forms a part and parcel of the instrument, or was interpolated by a fraud upon the testator, or without his knowledge, after the will had been formally signed and attested. *Allen v. McPherson*, 1 H. L. Cas. 191; *Appeal of Harrison*, 48 Conn. 202; *In re Welsh*, 1 Redf. Sur. 238; *Plume v. Beale*, 1 P. Wms. 388; *Morrell v. Morrell*, 7 Prob. Div. 68; *Schouler, Ex'rs*, supra. A distinction seems to have been taken between the testamentary incapacity arising from the person, and that which may arise from the nature of the subject-matter of the legacies or devises. The former is made to appear by evidence dehors the will, while the latter is apparent upon the face of the instrument itself; and where the record of the probate shows that the court has passed upon the question of fact touching the testator's personal capacity, its decree becomes conclusive of that question, but where the invalidity of the will, or some particular bequest or devise therein, is apparent from an inspection of the instrument, the matter is one of construction, and no action of a court of probate can change their effect. *Appeal of Hegarty*, supra, and *Appeal of Bent*, 35 Conn. 523. These cases are pertinent in so far as they announce a rule applicable to the effect of the ordinary decree admitting a will to probate under the issues usually involved,—those of testamentary capacity and the observation of due formality; but it does not follow that other matters may not be put in issue, touching which the decree may not be conclusive. To illustrate: In *Dickinson v. Hayes*, 31 Conn. 417, a minor between 17 and 21 years had made a will disposing of both real and personal property. Such a person could, by statute, dispose of personal property by will, but was incapacitated from so disposing of real estate. The decree of probate was, in effect, that an instrument purporting to be her will "was presented in court for probate, and, having been duly proved, was approved, accepted, and ordered to be recorded." The question arose in that case, which was an action of ejectment, whether the decree was conclusive as to the testamentary capacity of the testatrix to devise real estate. The court held that it was not, because her capacity in that regard was not necessarily involved in the issue, nor was it necessary to infer that she had attained the age of 21 years at the time the will was executed, but that it was sufficient, to uphold the order in general terms admitting the will to probate, that she was above 17 years of age, as the will was good in respect of the

personalty. The inference is strong, however, that, had there been an issue directly raised in the proceedings for the probate of the will as to testatrix's capacity to devise real property, it would have been decisive in the ejectment case. So we take it that issues within the jurisdiction of the court, other than those ordinarily involved in the probate of a will, may be tendered and heard at the same time, and, when heard and determined, will become conclusive, at least in so far as they affect the parties to the record or their privies.

But our probate courts are not entirely without authority or jurisdiction to construe wills, and more especially as it respects the disposition of personal property. By statute (*Hill's Ann. Laws Or.* § 895, subds. 1-5) the county court is invested with exclusive jurisdiction, in the first instance, pertaining to a court of probate, in the following particulars: "(1) To take proof of wills; (2) to grant and revoke letters testamentary of administration and of guardianship; (3) to direct and control the conduct and settle the accounts of executors, administrators, and guardians; (4) to direct the payment of debts and legacies, and the distribution of the estates of intestates; and (5) to order the sale and disposal of the real and personal property of deceased persons." There is here involved, in the power to direct and control the conduct and settle the accounts of executors, and to direct the payment of debts and legacies, an implied jurisdiction to construe bequests, and thereby determine who shall take, for the very obvious reason that it is a necessary and unavoidable step in the direction of the distribution among legatees under a will. By section 1191 it is provided, in effect, that after the payment and satisfaction of all charges and claims against the estate, the court or judge thereof shall direct the payment of legacies and a distribution of the remaining proceeds of personal property among the heirs and other persons entitled thereto. Here is a positive enactment requiring the court or judge thereof to direct the payment of legacies, but, before it can exercise that power, it must determine who the legatees are, and the nature and amount of their respective shares, and this it must do by an inspection of the will and a consideration of the bequests. In short, it must construe the will in order to intelligently comply with these requirements. Under a similar statute, in Michigan and other states, it has been held that the probate court has jurisdiction to construe wills, such power being necessarily involved in the power to assign the estate of the testator on the settlement of the executor's account. *Glover v. Reid*, 80 Mich. 228, 45 N. W. 91; *Byrne v. Hume*, 84 Mich. 185, 47 N. W. 679; *Id.*, 86 Mich. 546, 49 N. W. 576; *In re Verplanck*, 27 Hun. 600; *Siddall v. Harrison*, 73 Cal. 590, 15 Pac. 130; *In re Hinckley's Estate*, 58 Cal. 518; *Hill v. Bloom*, 41 N. J. Eq. 276, 7 Atl. 438. The jurisdiction of the county court to construe a will as it

pertains to real property is not so apparent. Such property descends to the heirs, subject to the debts of decedent, and yet it would seem that, if there be any surplus of the proceeds of the sale of real property sold for the payment of debts and legacies, the court must direct the distribution thereof (Hill's Ann. Laws Or. § 1192); and in this particular, and possibly in others, such as upon application for an order to sell and an order to confirm a sale under a power, its jurisdiction would extend to the construction of such a will, because it is a necessary, yet incidental, step in considering the application. So it may be considered that the county court, in the transaction of probate business, has jurisdiction for the construction of wills, as it respects bequests, and, possibly, in special cases, as to devises. There is a rule of equity which inhibits the assumption of equitable jurisdiction for the sole purpose of construing a will, and the jurisdiction will not be exercised unless there exists some special reason for seeking its interposition, other than a mere desire to obtain the opinion of the court touching the proper interpretation of such an instrument. *Edgar v. Edgar*, 26 Or. 65, 37 Pac. 73; *Siddall v. Harrison*, supra; *Orosby v. Mason*, 32 Conn. 482. "The reason," as stated by Lord, C. J., in *Edgar v. Edgar*, "is that the decision of such questions is purely legal, and equity will not assume jurisdiction to declare legal titles unless it has acquired jurisdiction of the case for some other purpose." See *Bowers v. Smith*, 10 Paige, Ch. 183. Probate jurisdiction being in its nature equitable, by analogy of this rule the probate court should not entertain a proceeding instituted for the mere purpose of obtaining the opinion of the court touching the construction of a will, even in those matters wherein it has jurisdiction to interpret. There should be some special purpose to be attained, and the interpretation should come as a means of granting the relief sought. Such questions ought to find solution only as they are involved in litigation touching actual dispute, as it is difficult, and often impossible, to construe any instrument generally, so as to meet all contingencies that may arise under it. The point of attack, or the peculiar applicability to the particular purpose in hand, ought to be present in the mind of the court, so that its opinion concerning the dispute will merit respect as a precedent and arise to the dignity of an adjudication.

We come, now, to the purpose of the present proceeding. It is primarily to obtain the revocation of the order of the county court admitting to probate the will of the late James John, or as to such bequests or devises thereunder as were incompetent for the testator to make in the manner adopted by him. It does not go to his personal incapacity, as this branch of the contest was abandoned on the trial, but challenges the sufficiency of the act done; in other words, the adequacy of the instrument to accomplish the alleged purpose in hand. The defect, if any exists, is

patent and inherent, and the test of its adequacy is purely a matter of construction. The proceeding casts upon the proponent the burden of re-probating the will by original proof in the same manner as if no probate had been had. *Hubbard v. Hubbard*, 7 Or. 42. The proof offered is ample, and the will is undoubtedly entitled to probate. It was made by a person possessing testamentary capacity, is sufficient in form, appoints executors, and directs the payment of funeral expenses and expenses of administration. But should its probate here comprehend the approval or disapproval of the attempted disposition of the estate to the purposes of charity? There is some doubt whether the occasion has arisen for the exercise of the court's jurisdiction to construe this will. Certainly not as it may affect the disposition of real property, as no conditions exist whereby a court of probate is called upon to act concerning it. But as it affects the personal property, may not the proceeding be considered in the light of a prayer for the direction of the executor in the administration thereof? We believe we are justified in so considering it, in view of the fact that the court has the authority "to direct and control the conduct and settle the accounts of executors," and that such proceeding was not instituted until more than five years after the original probate of the will in common form, during which time the executor has presumably been proceeding in a manner antagonistic to the alleged interests of the objectors. So that it is with some hesitancy we proceed to construe the will as it affects the personal property and the executor's duties respecting it, and, however it may incidentally affect the disposition of the real property, we disclaim any attempt to adjudicate touching its construction as it pertains to that particular class of property. The purpose of the testator was to establish and maintain a school or schools, within the town of St. Johns, which should be free and public, and at all times open to the children of the school district which shall embrace such town. That a bounty in support of such a school or schools would be a public charity needs no argument or authority to demonstrate or establish. It comes within the letter and spirit of all definitions of a legal charity. *Pennoyer v. Wadhams*, 20 Or. 274, 25 Pac. 720. The object is definite and the beneficiaries as certain as the rules governing charitable trusts require. Nor is it any the less a public charity because, as contended by counsel, the state has for all practical purposes provided for the maintenance of free public schools for all children of school age within the same territory. *Green v. Blackwell* (N. J. Ch.) 35 Atl. 375. The bounty of the state for the support and maintenance of common schools is a creature of governmental policy, and subject to the will of the people. They may change, modify, or even abrogate the policy, subject to the provisions of the fundamental law respecting it, and the con-

stitution itself may in time be superseded by another. The framers of the constitution have wisely provided for the accumulation of an irreducible common-school fund from the proceeds of lands granted to the state for educational purposes, from the proceeds of escheats and forfeitures, and gifts, devises, and bequests made to the state for common-school purposes, and other sources, the interest arising from the investment of which is exclusively applied to the maintenance of common schools. The revenues arising from this source are as yet insufficient for the support and maintenance of free schools throughout the state during the entire school year. For the purpose of supplementing this fund, the legislature has provided for the levy of a four-mill tax in each county. Hill's Ann. Laws Or. § 2785. Beyond this, individual school districts may supplement the fund, so as to make the schools absolutely free to the children of school age within such districts. So it may be said that ample provision is made by law for the support and maintenance of free schools in all the districts within the state. But, with all this, it is not compulsory with any district to levy a tax for the support of free schools within its territory, and it may, by neglect to have a school taught for one quarter in each year, forfeit all right for the time being to the school funds derived from whatsoever source. So that it may be readily seen that even the system provided by the state, while worthy of commendation, and free schools may be maintained under it in all the districts, does not guaranty that such schools shall be so maintained, and there is no absolute assurance under the law that a free school will be maintained within the district embracing the town of St. Johns. Hence there are, in fact, no conditions provided for by the state which will assuredly and inevitably meet the purposes of the testator. If the time should come when, by reason of the state's regulation of the public school system, the object of the bounty should substantially fail, then another question would arise, involving, perhaps, the cy pres doctrine; but suffice it to say that at this time the object of the testator's charity is not essentially supplied or superseded.

We come, now, to a construction of the will for the purpose of ascertaining the effect of its provisions touching the disposition of the personal property of the testator. As we have seen, the bequest was for a charitable purpose, but the question with which we have to deal is whether the method which was adopted by the testator is sufficient in law to effectuate the purpose. The bequest is direct to executors named, to and for certain uses and trusts, viz.: To convert into cash; to lease the real property for 15 years; to expend all moneys which shall come into their hands, together with the proceeds of sales of personal property and rents of real estate after payment of taxes and charges of administration, in the erection of buildings for school

purposes upon block 29, to sell all real estate, except block 29 and such other lots and blocks as they may deem necessary for school buildings and grounds, between 15 and 18 years after the testator's death; and to deliver the proceeds, whether in cash or notes with sureties, to other trustees, to be appointed 15 years after the testator's death in manner following: One by the judge of the circuit court of the state of Oregon in whose judicial district the town of St. Johns may be, one by the person who shall be district judge of the United States in whose judicial district the town of St. Johns may be, and a third by the two persons acting as such judges. Such persons so appointed shall constitute a board of trustees, who shall have the possession, management, and control of all moneys and property by them received from the executors. The persons acting as judges aforesaid may from time to time make rules and regulations for the government of the board which shall be binding upon them, and they may also fix the qualifications of the trustees, and determine whether and to whom they shall give security for the faithful performance of their trust. It is further provided that, whenever a vacancy shall occur in such board of trustees, it shall be filled by appointment, to be made by the persons occupying the positions of judges aforesaid; such board to be always kept full, and to consist of three persons, a majority of whom may transact business. It is a familiar doctrine, which holds good in moral ethics as well as in legal policy, that the will of the testator should, when ascertained, be upheld and given effect, whenever it is possible, having regard for fixed rules of law, long established, of which every person is bound to take cognizance. The discussion goes somewhat to the powers of a court of equity as the jurisdiction is exercised in this state, the real question being whether or not the executors—and, succeeding them, the board of trustees, the appointment and perpetuation of which as a board is provided for by the testament—are competent trustees to administer the charity. In other words, does the will appoint and provide for the naming of such trustees as are competent to take, hold, and administer the charity in the manner directed? And, if not, should a court of equity provide trustees, and intrust them with the administration of it? In *Trustees v. Adams*, 4 Or. 77, it is held that "equity jurisdiction, as administered by the courts of this state, derives its authority from the constitution and laws of Oregon, and includes only the ordinary jurisdiction of the court of chancery of England, modified and extended by the statutes of this state and the changes in the condition of affairs of the community." In a later case (*Pennoyer v. Wadhams*, supra), Mr. Justice Bean, after discussing the question whether or not the peculiar equitable jurisdiction over charities, as distinguished from the jurisdiction touching ordinary trusts, was derived solely from the statute of 43 Eliz. c. 4, says: "It

may then be stated, as a proposition supported by the great weight of authority in this country, that courts of equity in the various states, where they are not prohibited by statute, exercise an original inherent jurisdiction over charitable trusts, and apply to them the rules of equity, together with such other rules as may be applicable under the laws of the several states; and this they do by virtue of their inherent powers, without reference to whether the statute of Elizabeth has been adopted in this state." These authorities render it unnecessary to enter into a discussion of the once-disputed question touching the origin of equitable jurisdiction as it respects the peculiar doctrine governing charitable trusts.

It is contended by the objectors to the will that the property has not been given to a person sufficiently certain having capacity to execute the trust imposed. It is somewhat difficult to determine from the books what is required in this respect. The bequest is directly to the executors named, and thus far there is undoubtedly sufficient certainty as it regards the appointment of trustees. It is admitted that, if this were all the will contained, it would be sufficient in that respect. But it is urged that there is a scheme connected with the execution of the trust whereby the testator has attempted to create a trustee, an entity, and to devise the manner of its perpetuation, all of which is unknown to the law; that the entity is not a person, either real or artificial, and that the mode of its perpetuation is a thing which the law does not recognize; and that, taken as a whole, he has failed in his appointment of a trustee sufficiently certain and capable of recognition with capacity to execute the trust. It is said that the rule against perpetuities has no application to charitable trusts. It is, indeed, a striking characteristic of such trusts that they continue forever. They are not, however, exempt from the rule, barring one very important exception. The word "perpetuity" has a technical signification, denoting the period of time beyond which a future interest cannot vest. 18 Am. & Eng. Enc. Law, 362. "It may," says Mr. Sanders, "be defined to be a future limitation, restraining the owner of the estate from aliening the fee of the property, discharged of such future use or estate, before the event is determined or the period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity." Sand. & W. Uses & Trusts, 196, cited in *Perin v. Carey*, 24 How. 494. If a gift be to charity, then over to an individual, or to an individual, then over to charity, the rule is effective, and has perfect application. But a gift to charity, then over to charity, forms the exception, and this is sustained upon the reasoning that, as one charitable use may be made perpetual, speaking in a general and natural sense, the gift to two in succession can be of no longer duration or of greater evil. The property is tak-

en out of commerce, and goes instantly into perpetual servitude to charity. While the form of charity may vary, and a succeeding form become effective, contrary to the rule, the primary object, that of charity, continues and is allowable, through the law's regard for charitable uses, and in consideration of the beneficial results flowing therefrom. *Agricultural School v. Whitney*, 54 Conn. 342, 8 Atl. 141. The exception has even a broader significance. A gift may be made in trust for a charity not in esse, but to come into being at a time uncertain in the future, or which is to take effect upon some contingency that may possibly not happen within a life or lives in being and 21 years and 9 months afterwards, and it does not contravene the rule, provided there is no gift, in the meanwhile, to or for the benefit of any private corporation or person. The doctrine finds support upon the ground that the intention in favor of charity is absolute, the gift and the constitution of the trust is immediate,—takes effect in present,—and the only thing which is postponed or made dependent for its execution upon future and uncertain events is the particular form or mode which the donor would have applied to the execution of the charity.

In *Chamberlayne v. Brockett*, 8 Ch. App. 206, a testatrix bequeathed her estate, consisting entirely of personality, to trustees, upon trust to invest it in consols, and to make out of the dividends certain fixed annual payments for charitable purposes. Among other things, she directed that, when and as soon as land should at any time be given for the purpose as thereafter mentioned, almshouses should be built in three specified places, and that the surplus remaining after their completion should be appropriated in the way of allowances to the inmates. The bequest was held valid as an absolute, immediate gift to charity, the mode of execution only being made dependent upon future events. In *Henshaw v. Atkinson*, 3 Madd. 306, money was bequeathed to erect a blue-coat school and an asylum for the blind, with directions that lands should not be purchased, but with the expression of an expectation that lands would be given for the charities. It was argued that the bequest could not operate, because, as it was said, it was the testator's intention that the charities were not to take effect until lands were supplied by others, and the money might be locked up for an indefinite length of time; but the court was of opinion the point was not well taken, in view of the rulings in *Attorney General v. Lady Downing*, Amb. 550, and *Attorney General v. Bishop of Chester*, 1 Brown, Ch. 389. The state of facts in the *Downing Case* was that a testator devised lands to trustees, with directions to purchase with the rents and profits grounds at Cambridge, proper for a college, and to build such structures as should be deemed necessary for the purpose, and to obtain a royal charter for



founding such college, and incorporating it by the name of "Downing College," in the University of Cambridge; the trustees to hold the property devised "in trust for the said collegiate body and their successors forever." It was objected that the devise was void, for that there was no cestui que trust in being, and perhaps never might be, for it was at the will and pleasure of the crown to grant the charity or not; but the devise was held valid against the objection. *Attorney General v. Lady Downing*, Amb. 550. In the *Bishop of Chester Case*, it appears that Archbishop Secker gave £1,000 to trustees for the establishment of a bishop in the British possessions in America. Lord Chancellor Thurlow ruled that "the money must remain in court until it shall be seen whether any such appointment shall take place," against the objection of Mr. Mansfield that there was neither a bishop in America nor the least likelihood of there ever being one, for which reason it was claimed the legacy was void. *Attorney General v. Bishop of Chester*, 1 Brown, Ch. 389. In *Sinnett v. Herbert*, 7 Ch. App. 232, the testatrix bequeathed the residue of her personal estate to trustees, upon trust to be applied in the erection or endowing of an additional church at Aberystwith. A question was made as to a possible difficulty touching the time when her intentions could be carried into effect, and it was held that the possible remoteness did not render the gift void.

In *Inglis v. Trustees of Sailors' Snug Harbour*, 3 Pet. 99, the testator gave an estate, consisting of both real and personal property, to the chancellor of the state of New York, the recorder of the city of New York, and others (naming them in their official capacity), to have and to hold unto themselves and their respective successors in office, but for certain uses and purposes, viz. to erect an asylum or marine hospital to be called the "Sailors' Snug Harbour." He evidently intended that the institution thus created should be perpetual, and that the officers named and their successors should forever continue to be the governors thereof, but directed that, if such a thing could not be legally done according to his desires without an act of the legislature, then that they (the trustees) procure an incorporation to be had for the purposes specified. It was held that the officers named took, not in their official, but in their individual, capacity, and that the official distinction was a mere designatio personæ. But the case was treated as though no particular estate had been provided for, and the disposition under the will was held to be an executory devise. The gift was declared to be valid, and it was said that, upon the creation of the corporation, the title to the property became vested in it, or that the naked title was held by the heir at law in trust for the corporation. In a later case in the same court (*Ould v. Washington Hospital*, 95 U. S. 303), it appears that a devise of

certain lots was to two persons "and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor," but in trust to hold the same "as and for a site for the erection of a hospital for foundlings, to be built and erected by any association, society, or institution that may hereafter be incorporated by an act of congress as and for such hospital, and, upon such incorporation, upon further trust to grant and convey the said lots of ground and trust estate to the corporation or institution so incorporated, \* \* \* which conveyance shall be absolute and in fee." The corporation was to meet the approval of the trustees, but, if not so approved then, they were to hold upon the further trust until such a corporation as they would approve was created by act of congress. The possible remoteness of the incorporation of such a society by congress as would meet the approval of the trustees was held to be no objection to the establishment of the trust. An obvious analogy was observed between that and the *Sailors' Snug Harbour Case*. Mr. Justice Swayne says: "There, as here, a future corporation was necessary to give the devise effect. There, as here, there was a possibility that such a corporation might never be created. In both cases the corporation was created, and the intention of the testator carried into full effect. It is a cardinal rule in the law of wills that courts shall do this whenever it can be done. Here we find no impediment in the way. The gift was immediate and absolute, and it is clear, beyond doubt, that the testator meant that no part of the property so given should ever go to his heirs at law, or be applied to any other object than that to which he had devoted it by the devise here in question."

But, without going further into authorities, we cite, in support of the proposition, *McDonogh's Ex'rs v. Murdoch*, 15 How. 367; *Sanderson v. White*, 18 Pick. 328; *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327; *Trustees of McIntire Poor School v. Zanesville Canal & Manufacturing Co.*, 9 Ohio, 203; *Miller v. Chittenden*, 2 Iowa, 315; *Id.*, 4 Iowa, 252; *Odell v. Odell*, 10 Allen, 1; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336; 2 *Perry, Trusts*, § 736; *Christ's Hospital v. Grainger*, 16 Sim. 83; 1 *Jarm. Wills*, \*262, note; *Crerar v. Williams* (Ill. Sup.) 34 N. E. 467; *Webster v. Morris*, 66 Wis. 366, 28 N. W. 353. These cases involve, indiscriminately, bequests and devises, showing that the rule is not different whether real or personal property is the subject of the testator's bounty. See, in this connection, 2 *Washb. Real Prop.* \*375, subd. 6. In the *Chamberlayne Case*, as well as some others, the point was made that, if the gift had been to take effect upon a remote contingency, the rule against perpetuities would have been as applicable as to any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, or if it is so remote



and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift falls ab initio; but "when," says Lord Chancellor Selborne, "personal estate is once effectually given to charity, it is taken entirely out of the scope of the law of remoteness." The question here determined was not combated with great confidence by appellants at the argument, but we have gone into the consideration of it thus at length, and for this we may be pardoned, because it is deemed to have a special bearing upon the cardinal question.

We will now consider the nature and capacity of the trustee which the testator has attempted to create and clothe with perpetuity or longevity coequal in point of existence with the charity he has endeavored to establish. We can best reach a satisfactory result by a review of the authorities, and then apply the deductions to the facts of the case.

There is a class of cases of which *Inglish v. Sailors' Snug Harbour* is perhaps the leading one, the facts for an understanding of which have been heretofore sufficiently stated. It seems to have been intimated, by the justice who wrote the prevailing opinion, that if the devise had been to the officers named in the will in their official capacity and their successors, to execute the trust, without the contingent provision for the creation of the incorporation, the case would have fallen within the principle of *Baptist Ass'n v. Hart's Ex'rs*, 4 Wheat. 1. Whether this was a method of passing the point simply, and resting the case upon a more satisfactory basis, or whether the *Baptist Association Case* was taken as decisive of the question, it is difficult to tell from the opinion. At any rate, it was finally determined that the will could be sustained as an executory devise to a corporation to be created in the future, the devise to take effect upon the contingency of the creation of the corporation, and that the contingency was not too remote. Mr. Justice Story was of the opinion that the officers named took in their official capacity, and that the devolution of the property was to their successors, and so on in perpetual succession, and that it was perfectly competent for them to take and hold as trustees in such a capacity. In this connection it may be said that the *Baptist Association Case* involved a devise to a voluntary unincorporated association, to take in trust and manage as a perpetual fund, and it was held (Chief Justice Marshall announcing the opinion of the court) that the devise did not create a valid trust to charity, upon the ground that the association was incapable of taking. It was further decided that the devise was not to the individuals composing the association, as nothing was intended to pass to them but the trust, and they were not authorized to execute as individuals. It was thought, also, that a subsequent incorporation of the society would not cure the defect. *Ould v. Washington*

*Hospital* is so nearly like the *Sailors' Snug Harbour Case* that Mr. Justice Swayne remarked the analogy between the two. It being held that the officers in the *Snug Harbour Case* took as individuals, it would seem that the analogy was perfect, as it respects the preliminary provisions for the trust. In the *Washington Hospital Case* the devise was to individuals and their heirs, executors, assigns, etc. Although the *Snug Harbour Case* was treated as if the devise to the officers named was not contained in the testament, and the will was sustained as an executory devise to a corporation to come into being, without a particular estate to support it, it is not clear why it should not have been upheld as an executory devise, as well, under the rule that the deviser had parted with his whole estate to the officers named, they taking as individuals, but upon a contingency that qualified the disposition of it, and limited the estate upon that contingency (4 Kent, Comm. \*268), or, perhaps, speaking more accurately, why it might not have been treated as a conditional limitation of the estate vested in the trustees, as Mr. Justice Swayne characterized the *Washington Hospital Case*. In the latter case the gift was declared to have been immediate and absolute; and, if such was the case there, it is difficult to see why it was not so in *Inglish v. Sailors' Snug Harbour*, upon the theory that the officers took as individuals. If the doctrine in the *Washington Hospital Case* is right, and it is believed to be the better exposition, then the gift to charity in either case did not depend for its validity or establishment upon the contingency of the creation of the corporation provided for, and hence was immediate and absolute. In *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, lands and personalty were granted "for the purpose of founding an institution for the education of youth in St. Louis, Missouri," to one Horner and his successors in trust, "for the use and benefit of the Russell Institute of St. Louis, Missouri," with directions to the grantee to sell them, and to account for and pay over the proceeds "to Thomas Allen, president of the board of trustees of the said Russell Institute," and it was held that the gift was valid, as a charity, against the donor's heirs and next of kin, although the institute was neither established nor incorporated in the lifetime of the donor or of Allen, the reputed president of the board of trustees. In conformity with the trust, Horner paid and conveyed to Allen a large amount of money and lands, and the money and lands in the hands of Allen and his executors were considered to have been charged with the same charitable trust to which they were subject in the hands of Horner. See, also, *Trustees v. Beatty*, 28 N. J. Eq. 570; *Crerar v. Williams*, supra; *Coit v. Comstock*, 51 Conn. 352.

Another class of cases, of which *Vidal v. Girard's Ex'rs*, 2 How. 126, is the leading

authority, establishes the doctrine that, where a municipal corporation has capacity under its charter to take and hold such property as is made the subject of the trust, it may take and hold the same upon trust in the same manner and to the same extent as a private person may do. However, if the trust be repugnant to or inconsistent with the proper purposes for which the corporation was created, it would not be compelled to execute it; but this condition will furnish no ground to declare the trust itself void, if otherwise unexceptionable. In such case, the trust having fastened itself upon the property, a court of equity will appoint a new trustee to enforce it. See, also, *Perin v. Carey*, supra; *McDonogh's Ex'rs v. Murdoch*, supra; *Chambers v. City of St. Louis*, 29 Mo. 543; *Board v. Dinwiddie*, 139 Ind. 128, 37 N. E. 795; *Skinner v. Harrison Tp.* (Ind. Sup.) 18 N. E. 529; *Dailey v. City of New Haven* (Conn.) 22 Atl. 945.

There is another class of cases, of which *Baptist Ass'n v. Hart's Ex'rs* is a type, among which the views expressed are not uniform. This class involves bequests or devises to voluntary unincorporated societies. As we have seen, it was held in the *Baptist Association Case* that such a devise was void for want of capacity to take as a trustee. The holding has not escaped criticism in later adjudications, and it may be said to be distinguishable by the fact that the supposed trust arose under the laws of Virginia, which, as measured by the adjudications there, recognize no distinction between charitable and other trusts. *Russell v. Allen*, supra; *Kain v. Gibboney*, 101 U. S. 362, and *Jackson v. Phillips*, 14 Allen, 588. In *Magill v. Brown*, *Brightly*, N. P. 347, 348, a case in the circuit court of the United States for the Eastern district of Pennsylvania, Mr. Justice Baldwin, with whom Judge Hopkinson, the district judge, concurred, held that devises to the Monthly and Yearly Meetings of Friends in Philadelphia, voluntary unincorporated religious societies, as trustees to administer charity, were operative and valid. *Sharswood, J.*, in *Zeisweiss v. James*, 63 Pa. St. 465, says: "No doubt an unincorporated society may be a trustee, invested with such a discretion [to appoint the charity], and may perpetuate itself by the succession of its members,"—citing, in support thereof, *Magill v. Brown*, supra; *Appeal of Domestic & Foreign Missionary Soc.*, 30 Pa. St. 425; and *Appeal of Evangelical Ass'n*, 35 Pa. St. 316. It will be noted that these are cases arising in Pennsylvania, and that the peculiar religious associations known as the "Monthly and Yearly Meetings of Friends," are considered as bodies politic or corporate by prescription, possessing and enjoying the franchise of succession, with the same rights of property as natural persons do by inheritance. *Magill v. Brown*, supra, 378. In *Bartlett v. Nye*, 4 Metc. (Mass.) 378, a devise of real estate to an unincorporated society for charitable uses

was considered to be valid. But it was held that in such case the estate descended to the heirs of the testator, subject to the trust created by the testament, which they were bound to execute, and that a court of equity will enforce the observance and due execution upon their part. This is in accord with the idea that the trust has become fastened to the property, and that the court will compel its observance in whatsoever hands it may come. The same rule was applied to a bequest of personal estate in the hands of executors. *Burbank v. Whitney*, 24 Pick. 146. The rule is the same in Connecticut (*Society v. Wetmore*, 17 Conn. 181) and in Iowa (*Byers v. McCartney*, 62 Iowa, 339, 17 N. W. 571). See, also, *Bliss v. Society*, 2 Allen, 334.

We come now to a class of cases wherein the testator has appointed trustees and has attempted to devise the manner of their perpetuation as a board. In *Appeal of Treat*, 30 Conn. 113, the bequest was to sundry persons, named, and to their successors, forever, "who shall as a board of trustees add to and perpetuate their number, so long as in their opinion the objects of this bequest shall require the existence of the same." It was argued that the trustees were not a body corporate, and, having no legal successors, except so far as they might be appointed from time to time by themselves, the trust might fail for want of persons to uphold the title. The court held to the contrary upon the authority of *Society v. Wetmore*, supra, which was a devise to an unincorporated religious society, saying, "A trust never fails for the want of a trustee." It appears to have been assumed that, so long as the board was kept full by the appointment of their successors, no question could arise respecting their power and authority to administer the charity. Somewhat analogous to the case is *Heuser v. Harris*, 42 Ill. 425. A devise was made of lands to be sold, one-half the proceeds to go to a certain school district, and to be used for school purposes only, to be under the control of a trustee to be elected by the "people" for a term of four years. It was held that the school district had the capacity to take, and that in case the people should fail to elect a trustee, chancery would supply one, and the trust would not fail for the want of one. *Seda v. Huble*, 75 Iowa. 429, 39 N. W. 685, is a case where a bequest was made to two persons, naming them, with directions that they and their successors should invest the fund for the benefit of a church. The trustees named were presumably some officers of an unincorporated voluntary society. The bequest was sustained as being to the parties and not to the church, and the doctrine reiterated that a trust would not be permitted to fail through the failure of a trustee. In *Re Hinckley's Estate*, 58 Cal. 457, provision was made in the will for filling vacancies in the board of trustees by "an election, duly notified, in which election

each of the trustees of said religious society [First Unitarian Society of San Francisco] and each of the trustees of this fund shall be entitled to one vote," and no question was made touching the capacity of the board to administer the charity, which was to constitute a perpetual fund, to be called the "William and Alice Hinckley Fund." It so happens, at times, that individuals are appointed to administer a charity without any provision for perpetual succession, and yet the donation is not allowed to fail by reason of the fact that the charity will outlive the trustee. *Brown v. Brown*, 7 Or. 285, was a devise to individuals as trustees, to hold in perpetuity, which, it was held, constituted a donation to charity, and yet the devise was sustained without any provision for perpetual succession of trustees to administer the trust.

There are yet other cases which go further towards supporting, upholding, and maintaining the charity than any of these. In *Hunt v. Fowler*, 121 Ill. 269, 12 N. E. 331, and 17 N. E. 491, the testatrix's codicil contained this clause: "All the rest and residue of my estate, including that which may lapse for any cause, I direct to be invested or loaned, upon the best terms possible, so as to produce the largest income, and said income to be distributed annually among the worthy poor of the city of La Salle, in such manner as the court of chancery may direct." No trustee was appointed, but, as the distribution of the fund was expressly referred to a court of chancery, and it was held that the power of distribution carried with it the power to select the individuals to whom the distribution should be made, a trustee was appointed by the court, in effect, to be a trustee of the testatrix's appointment. In *Witman v. Lex*, 17 Serg. & R. 88, the court say: "It is immaterial whether the person to take be in esse or not, or whether the legatee were at the time of the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power, vested anywhere, over the application of the testator's boundary to those objects." This doctrine is reiterated with approval in *Vidal v. Girard's Ex'rs*, supra. And such bequests as "to the poor of Madison county," and to the "suffering poor of the town of Auburn," without any appointment of trustees to administer the trust, have been held to be a sufficient donation to charity, and that the court would appoint trustees to execute the trust. *Heuser v. Harris*, supra; *Howard v. Society*, 49 Me. 288. These cases, however, seem to have been decided upon authorities which would indicate that there had not been a due discrimination between the ministerial function of the English chancery, employed to administer the arbitrary power of the king as *parens patriæ*, and that which was exercised in a purely judicial capacity. However, a bequest "to the Sunday school of the Methodist Episco-

pal Church at Tuckerton" has been maintained, and the church to which the Sunday school was an adjunct, being a corporation, was appointed a trustee in equity, and that without reference to the English authorities. See *Mason's Ex'rs v. Trustees of M. E. Church*, 27 N. J. Eq. 47. These latter cases carry the doctrine to the very verge. The following principles are settled in Tennessee: "First, that trusts for charitable uses should be favored by courts of equity; second, that where the object of charity is definite, and it is to be administered by trustees, it will be sustained; third, that, although the objects may be too indefinite for a court of chancery to undertake to administer it, yet if a trustee capable of taking the trust be named, and clothed with the necessary powers and discretion for carrying out the charity, it will be upheld." *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668, 11 S. W. 825.

The citation of these authorities from those states, such as Oregon, which recognize the distinction between charitable and ordinary trusts, is sufficient to demonstrate beyond cavil that it is the policy of the law to uphold and give effect to donations to charity whenever it can be done under any reasonable construction of the instrument by which the charity is attempted to be established. Charity is still, as under the English chancery practice, a favorite of equity, and while, in this country, there has been much modification of the rules governing charitable donations, and perhaps a radical narrowing of the jurisdiction (see 2 Perry, *Trusts*, §§ 729, 731), the conscience of the court is always exercised to see that the charity is administered, if it can be done within the rules of the established law of the forum. The general rule everywhere is, whether speaking with reference to ordinary or charitable trusts, that a valid trust will never be permitted to fail for want of a trustee. This, of course, implies the existence in the first instance of a valid trust. But where there is an appointment of a trustee competent to take, and the other conditions of the trust are commensurate to give it validity, there can be no doubt that the property itself becomes impressed with the trust, and a subsequent failure of a trustee will not relieve it of this condition. So, if a donation to charity is immediate and absolute, and a trustee is appointed competent to take, the other conditions being sufficient, a trust arises at once, the property becomes impressed with it, and passes beyond the reach of the heirs or residuary legatees or devisees. The title is effectually diverted from its natural channel of devolution, in so far as it may be affected by reason of the necessity of a competent trustee as an ingredient to a valid trust.

Now, to the purposes of this case. The executors appointed are trustees charged with the duty of executing in part the scheme adopted by the testator for the administration

of the charity intended to be established. After the administration of the estate, they are to use the remainder of the money coming into their hands at the death of the testator, together with the rents of the real property which they are charged with leasing, in the erection of buildings for school purposes on block 29, loaning the funds, etc. A direct and explicit execution of the trust is given into their charge,—not to carry out the scheme in its utmost detail, but to carry it forward for the space of some 18 years, until it should go into the hands of other trustees, designed to be a permanent board for the perpetual administration of the trust. Now, can there be any question but what there was here an immediate and absolute donation to charity, with the appointment of trustees perfectly competent to take? Certainly not. The estate passed from the testator to the trustees direct. It never vested in the heirs, and the trust does not depend for its validity or establishment upon the performance of any condition or the happening of any event. The donation was in *præsent* and the estate vested at once in the trustees. The trust became fastened upon the property when the will took effect. But it is claimed that the scheme for administering the trust is impracticable, as the board of trustees which it was intended should succeed to the trust may never be established, inasmuch as the judges named are not compellable to appoint the members thereof, and, even if appointed, they would not constitute such a body known to law as having perpetual succession, and therefore could not administer the charity. We quite agree with the counsel that the judges may create the board or not as they see fit. It was designed that the judges in office for the time being should exercise the power of appointment, but in doing so they would not be acting in the exercise of their judicial functions, as it is no part of the duties enjoined upon them by law. They must, therefore, act, if at all, in an individual capacity. Should they appoint, the board would be an aggregation of individuals,—not a single entity, capable of acting as an official body; and we see no reason why the board may not be kept full and maintained perpetually by the judges named, and be perfectly competent as individuals to execute the duties required of them. It will be borne in mind that the judges are authorized and empowered to appoint the trustees,—not to use a discretion to name and appoint the objects of the charity or to create a definite charity. They are invested with no discretion or power whatever as it respects this feature of the trust. They take no property interest in any capacity, either as individuals, trustees, or otherwise, nor are they empowered to devise a scheme for the administration of the charity. The testator has not only appointed his own scheme of charity, to wit, the establishment of a free school or schools for the children of the district embracing the town of St. Johns, but he has prescribed with some particularity and

detail a scheme or plan of administering the charity thus appointed. There is manifestly a distinction between the scheme of charity and a scheme for administering it. See *Webster v. Morris*, 66 Wis. 396, 397, 28 N. W. 353. The power given the judges to formulate rules for the government of the board may enable them to direct in some measure the particular manner of carrying out the scheme for its administration, but it can in no way impinge upon, change, or modify the nature of the charity which the testator has sought to establish, nor can they in any way modify the manner of administration wherein the testator has particularized; and it is believed that this clause of the will can hardly be construed as giving the judges supervisory control over the board of trustees in the direction of the trust.

To reinforce the point, we cite, by way of illustration, *Fountain v. Ravenel*, 17 How. 369. There "the executors, or the survivor of them, after the decease of testator's wife, were to dispose of the property for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind." The executors died before the testator's wife. It was held that, the testator having delegated this power of appointing the particular charity to the executors, and the conditions upon which they were authorized to exercise their discretion having failed, the court was without jurisdiction to appoint others to exercise a discretion which was personal to those named by the testator. The question there involved a selection of the objects of charity, which the testator had failed to do. Here it involves the manner of its execution, with the object definitely designated and pointed out. The failure of the judges designated to exercise the power delegated to them would simply result in a failure of trustees, in which event a court of equity would certainly not allow the trust to fail. In *Heuser v. Harris*, *supra*, the donation was, as we have seen, to a school district, to be used for school purposes, and to be under the absolute control of a trustee to be elected by the people; and it was held that a court would appoint after the failure of the people to elect. The power to appoint by the people was a delegated power, and so it is here. The power of appointment of trustees by the judges under the will is delegated, and the failure to appoint in the present case could be no worse for the charity than the failure of the people to elect in the former. The citation of another case will suffice. In *Dailey v. City of New Haven*, *supra*, the devise or bequest was, one-fifth of the remainder "to the city of New Haven, to be held in trust by the proper authorities, and the income to be applied through such agencies as they may see fit, to supply fuel and other necessities to deserving indigent persons, not paupers, preferring such as are aged and infirm," and one-fifth "to the president and

fellows of Yale College, in trust, the income to be applied to the support of scholarships, or to such other purposes in the academical department as they may deem expedient." The city of New Haven refused to accept its trust, nor was it competent to take in such capacity; and from a survey of the will it was adjudged that the primary purpose of the testator was to appropriate the particular one-fifth of the residue of his estate to a particular charitable object, specifically pointed out, and that the form of its administration was secondary only, and new trustees were appointed to administer it. But as to the Yale College donation it was said: "Some of the trusts were in effect, and evidently so intended, gifts to the trustees. The question whether it would be of advantage to the trustee to accept or not was the only question, and a refusal might properly end the matter. Certainly the bequest to the president and fellows of Yale College, to the support of scholarships, or such other purposes in the academical department as they may deem expedient, is of that nature. The direct benefit is to the college. By its very terms the trust is incapable of being administered by another."

The primary object of the testator here, as gathered from the testament, is to establish and maintain a free school or schools in the town of St. Johns. His scheme of charity is fixed and definite. The manner of administering the trust is of secondary importance. He has indicated a method for its application, but it is not within the ken of human ingenuity to devise a plan that may be observed in every particular in its execution; so that, if his particular method of administration should fail in some particular, that would not give reason for voiding the trust. For instance, it is directed that the principal of the fund to arise shall be loaned only upon real-estate security. Now, if that particular form of security should fail or become unavailable, the trustees might be authorized to loan upon other sufficient securities without impairment of the trust. See *McIntire's Adm'r v. City of Zanesville*, 17 Ohio St. 352. So it is of other specifications and directions touching the mode or manner of executing or administering the charity. We think it clear, therefore, that the trust should not fail by reason of the fact that the judges may not appoint the board of trustees designed by the testator to succeed the executors in the control and management of the estate funds, and prescribe rules for their government, nor because the board may not be a body of perpetual succession. See *Gould v. Orphan Asylum*, 46 Wis. 106, 50 N. W. 422, and *Dodge v. Williams*, 46 Wis. 70, 101, 102, 1 N. W. 92, and 50 N. W. 1103.

It is objected to the validity of the trust that the circuit court of the state of Oregon for Multnomah county, in which jurisdiction St. Johns is situated, now has four judges, instead of one. Who shall appoint? Counsel say, "Manifestly neither of them, because neither

of them is the judge. Each one of them is a judge, or one of the judges, but not the judge." It is probable, however, that an appointment by either of these judges would suffice. Surely an appointment by either would fulfill the conditions of the particular manner of executing the trust. But, should the fact of a multitude of judges prevent the appointment entirely, we have seen that the trust should not fail. The condition that the judges should appoint was not a condition precedent to vesting the trust.

Another objection urged is that the district embracing the town of St. Johns has been changed, as it respects the boundaries thereof, and rechanged, and is liable to be changed again; but the testator seems to have contemplated just such a condition of things, and the children of the district, whatever territory it may comprise, are the objects of the charity. See *McIntire's Adm'r v. City of Zanesville*, supra, and *Heuser v. Harris*, supra.

Again it is urged that the trust must fail, as it affects block 29, because no provision appears to have been made for its conveyance by the executors to the board of trustees provided for. It is not clear but that there may have been an oversight in providing the manner by which this particular piece of property should pass to the board. It was the evident intention of the testator that this block should pass to the succeeding trustees; but, if it be admitted that the manner of its devolution has not been specially provided for, it would pass either to the heirs of the executors or result to the heirs of the testator. But in either event it would be charged with the trust, and equity would place it in the proper channel of administration. It is said, in the *Sailors' Snug Harbour Case*: "The will looks, therefore, to three alternatives: (1) That the officers named in the will as trustees should take the estate and exercise the trust. (2) If that could not legally be done, then he directs his trustees to procure an act of incorporation, and vests the estate in it for the purpose of executing the trust. (3) If both these should fail, his heirs, or whosoever should possess and enjoy the property, are charged with the trust. \* \* \* Whoever, therefore, takes the land, takes it charged with these uses and trusts, which are to be executed in the manner above mentioned."

What the testator has said, in his will, to the effect that the buildings should belong to his estate, was evidently for the purpose of making it clear that he did not intend a donation to the school district which shall embrace the town of St. Johns. And the direction that the school or schools should never be used to inculcate the doctrines of any religious sect or denomination, one more than another, is one that was perfectly competent for him to make. As to this last, see *Ould v. Washington Hospital*, supra.

Much has been said concerning the cy pres doctrine, but it is not apparent how it can

affect this case at the present time. We have seen that the appointment of the objects of charity is a matter not personal with the judges designated to nominate the board of trustees, and much less is it personal to the executors or trustees themselves. There has been no failure of the object for which the donation was made. There is no unexpected undisposed-of surplus, no increase of funds beyond that which is needed for the purposes designed, no change in the law rendering the object unlawful, nor have there been any intervening circumstances by reason of which it has become apparent that the trust cannot be executed strictly. There may come a time when this doctrine may be invoked, but with what effect it is not now within our province to decide. The decree of the court below will be affirmed.

(115 Cal. 430)

GRAY et al. v. LUCAS et al. (S. F. 458.)<sup>1</sup>

(Supreme Court of California. Dec. 28, 1896.)

STREET ASSESSMENT—VALIDITY—CERTIFICATE OF CITY ENGINEER.

The street improvement act, as amended by St. 1889, p. 167, does not require the certificate of the city engineer to be attached to a street improvement assessment; hence a judgment for defendant on the ground that the certificate was not so attached would not entitle plaintiff to a second assessment, under section 9 of the act, providing that the right to a second assessment exists only when the judgment shows that the prior assessment was defeated by some defect in the assessment.

Department 1. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by one Gray and others against one Lucas and others. From an order denying the application of plaintiffs to amend the judgment, they appeal. Affirmed.

Fisher Ames and Jas. W. Cochrane, for appellants. E. B. Mahon, for respondents.

HARRISON, J. The plaintiffs commenced an action in the superior court of the county of Marin against the defendants, to foreclose the lien of an assessment for the improvement of one of the streets in the town of San Rafael. At the trial of the action, upon the issues presented by the answer, a nonsuit was granted, and judgment rendered in favor of the defendants, and entered June 3, 1895. Thereafter, upon an affidavit filed on behalf of the plaintiffs, purporting to set forth the proceedings at the trial, and the nature of the evidence then presented, an application was made to correct and amend the judgment. The grounds for the motion were alleged to be to enable the plaintiffs to apply to the superintendent of streets for a new assessment, and it was stated in their notice of motion that unless it was granted they would be deprived of this right. The affidavit set forth that testimony was introduced at the trial identifying the street assessment sued on in the action, and that when

it was offered in evidence the defendants objected to its admission on certain grounds; "that said court thereupon sustained said objection; that thereupon, the testimony being closed, on motion of counsel for defendants said court granted a nonsuit and ordered judgment for defendants." Upon this affidavit the plaintiff made application to the court to correct and amend the judgment by inserting therein the said matter, or its substance, before the recital of the defendants' motion for a nonsuit, and also by inserting therein that the nonsuit was ordered "on the ground that the assessment offered in evidence on behalf of plaintiffs was defective and irregular, and did not comply with the statutory requisites in that behalf, in that the certificate of the town engineer of said town of San Rafael was not attached thereto, and said assessment was therefore inadmissible in evidence, and insufficient to support a judgment in favor of said plaintiffs." The court denied the application of the plaintiffs, and from its order the present appeal has been taken.

Section 9 of the street improvement act provides: "Whenever it shall appear by any final judgment of any court in this state that any suit brought to foreclose the lien of any sum of money assessed to cover the expense of any street work done under the provisions of this act has been defeated by reason of any defect, error, informality, omission, irregularity or illegality in any assessment hereafter to be made and issued, or in the recording thereof, or in the return thereof, made to or recorded by said superintendent of streets, any person interested therein may at any time within three months after the entry of said final judgment apply to said superintendent of streets for another assessment to be issued in conformity to law," and that thereupon said superintendent shall issue a second assessment. Under this provision of the statute the right to a second assessment does not exist unless it "appear" by the final judgment in a suit upon the prior assessment that the suit was defeated by reason of some infirmity in the "assessment," or in the recording thereof, or in some matter connected with the return of the warrant. If the suit is defeated by reason of a defect or infirmity in any other step taken in the proceedings, or by reason of a lack of evidence, or failure to prove any other fact essential to a recovery, the statute does not apply. The facts, therefore, upon which the judgment is based, must show the grounds upon which the suit was defeated, in order that it may be seen whether there is a right to a second assessment, and the grounds upon which the judgment rests should be embodied either in a finding of facts, or in a bill of exceptions. A mere recital in the judgment that the assessment was offered in evidence, and that, thereupon, judgment was rendered in favor of the defendant, would not satisfy the requirements of the statute, if it also appear that the suit was defeated by reason of some matter disconnected with the assessment. It

<sup>1</sup> For opinion on rehearing, see 47 Pac. 687.

has been frequently held that a finding of facts is inappropriate when a nonsuit is granted, and in the present case, as the evidence was excluded, there were no facts to be found, and the proper course for the plaintiffs to pursue would have been to have the evidence embodied in a bill of exceptions. The assessment upon which the action was brought is not set forth in the record so that it can be determined upon inspection whether it is in any respect defective, but the grounds of objection thereto set forth in the affidavit made on behalf of the plaintiffs as the basis of their motion, and upon which it was excluded by the court, were that it was "incompetent, irrelevant, and immaterial, in that it did not comply with the statutory requisites in that behalf, as the certificate of the town engineer of the town of San Rafael was not attached to, and did not accompany, said assessment." Unless, therefore, the statute under which it was made required such certificate to form a part of the assessment, the absence of the certificate did not constitute a defect in the assessment, and an insertion of the objection and ruling thereon in the judgment would make it "appear" that the suit was defeated by reason of an erroneous ruling of the court excluding the assessment from evidence, rather than from any infirmity in the assessment itself. Such error should be corrected by an appeal from the judgment.

It is provided in section 9 of the statute that, after the superintendent of streets has made an assessment for the amount due for the work performed, with a diagram annexed, and has attached the warrant thereto, "said warrant, assessment and diagram, together with the certificate of the city engineer, shall be recorded in the office of said superintendent of streets." The nature of this certificate is not defined in the statute, but it is presumably the certificate referred to in section 34, and which is the source from which the superintendent is to ascertain the amount for which the assessment is to be made. Prior to the amendment in 1889, it was only necessary for the city engineer to deliver his certificate to the superintendent, and it would be thereupon filed in the office of the last-named officer. In that year the legislature amended the section (St. 1889, p. 167) by requiring the certificate to be "recorded" in the office of the superintendent of streets. There is no requirement that it shall be attached to the assessment, although, for convenience sake, it may be desirable to do so in order that the several documents may be kept together. Section 12, however, provides that, in an action to foreclose the lien of the assessment, "the said warrant, assessment, certificate and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment, and of the

right of the plaintiff to recover in the action." The assessment, warrant, and diagram are by section 8 of the statute required to be attached together, and by section 10 the return, which consists of the affidavit of demand and nonpayment, is required to be "endorsed" upon the warrant, and these papers would naturally be offered as a single document; but, as there is no requirement that the certificate shall be attached to the other instruments, it is not necessary that it accompany them when they are offered in evidence, or that all be offered together. It was held in *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. 337, that the certificate should be recorded in connection with the record of the assessment, but nothing in that case authorizes the inference that when the original documents are offered in evidence they must all be offered together. It is essential that all be introduced in evidence, in order to entitle the plaintiff to judgment, but the order of their proof is immaterial, and we would be adding to the requirements of the statute if we should hold that they could not be offered separately. The answer of the defendants presented issues which required the plaintiffs to establish the regularity of the proceedings prior to the issuance of the assessment. By the above provision of the statute the necessity of introducing this evidence in detail is obviated, and the warrant, assessment, certificate, and diagram, with the return, are made prima facie evidence of such regularity; but, as in all cases in which substituted proof is made prima facie evidence of other matters, it is essential that all the proof which is required to constitute such prima facie evidence shall be presented to the court.

It was alleged in the complaint that the certificate was duly recorded by the superintendent of streets, in his office, at the time of issuing the assessment, and was delivered to the plaintiffs' assignor after it had been recorded, and, as this averment was not denied in the answer, it must be deemed as an admitted fact. There was therefore under the control of the plaintiffs all the evidence required by the statute to make a prima facie case of their right to recover. If at the trial they failed to produce this evidence, which was essential to entitle them to a recovery, it must be held that that was the reason why the suit was defeated. It is clear, therefore, that, if the entire proceedings before the court were properly in the record, it would not "appear" from the judgment that the suit was defeated by reason of any infirmity of the assessment. The court properly refused to grant the application of the plaintiffs, and its order is affirmed.

We concur: VAN FLEET, J.; McFARLAND, J.



(115 Cal. 538)

DE MARTIN v. PHELAN et al. (S. F. 352.)  
(Supreme Court of California. Jan. 6, 1897.)FRAUD—MORTGAGOR AND MORTGAGEE—PURCHASE  
OF EQUITY OF REDEMPTION.

1. There is no such fiduciary relationship between a mortgagee and mortgagor as will render it fraudulent for the mortgagee to purchase the mortgagor's equity of redemption as cheaply as he can.

2. A complaint, alleging that the defendant, who held a mortgage on property of the plaintiff, on which a judgment of foreclosure had been rendered, by threatening to sell the property under the judgment, and by reason of plaintiff being in indigent circumstances, and unable to sell the property or remortgage it, bought plaintiff's equity of redemption for much less than its actual value, and less than he intended to offer for it if necessary to procure it, does not state a cause of action for fraud.

Department 2. Appeal from superior court, city and county of San Francisco; James V. Coffey, Judge.

Action by Francesca L. De Martin against Alice Phelan and others, executors of the will of James Phelan, deceased. Judgment for defendants on demurrer to the complaint, and plaintiff appeals. Affirmed.

Geo. H. Maxwell and R. M. F. Soto, for appellant. Frank J. Sullivan, for respondents.

TEMPLE, J. This appeal is from a judgment upon demurrer to the complaint. The complaint contains averments to the effect that, on the 4th day of November, A. D. 1881, plaintiff owned a certain tract of land, which was then subject to mortgage liens then owned by James Phelan. The amount due on said mortgages was \$196,000. The real estate was worth \$390,375. The plaintiff and her 13 children were in indigent circumstances, destitute of available means of support, in great need, and unable to secure an additional loan upon said land, or to sell the same, owing to financial stringency then prevailing, and were wholly dependent upon the charity of others. Said Phelan knew of her distressed condition, and also that her equity of redemption was worth at least \$45,500. Still, designing to take advantage of her distress and necessities, he first offered her \$4,000, and then \$10,000, and finally \$19,000, for her equity of redemption. The offers were successively made on different days, and in the meantime said Phelan had her property advertised for sale, under execution, on a decree of foreclosure of said mortgages, and had the sale postponed repeatedly, for the purpose of securing her equity of redemption for a sum greatly disproportionate to its value, by taking an oppressive and unfair advantage of her necessities and distress. That on the 4th day of November, 1881, decedent made her the offer of \$19,000, and threatened to proceed with the sale unless she accepted it. Compelled by her distress and necessities, she finally did accept said offer, and conveyed her equity to him for said sum. That she did not know that decedent had taken such advantage,

or that he knew of her necessities and distress at that time, but that she discovered such fact on the 27th day of December, 1887. It is averred that, when defendant falsely represented that he would sell said property unless she accepted \$19,000 for her equity, decedent did not intend to sell said property, but had in fact determined not to sell the same, unless he was unable to procure plaintiff's interest for \$45,500; that he fully intended to offer her \$45,500 for her equity, if he could not procure it for less; that this intention was concealed from plaintiff, and decedent knowingly and designedly took advantage of her said necessities and distress.

A great many objections are made to this complaint, but I do not deem it essential to consider any of them, except the general objection that it states no cause of action. That the complaint does not state a cause of action is quite obvious. The facts constituting the supposed fraud are: (1) Plaintiff was without available means, and in great financial distress. (2) Decedent had obtained a judgment foreclosing mortgage liens upon her land amounting to \$196,000. Her land was worth much more than this, but, owing to a temporary stringency in the money market, she could not borrow more money upon the land, or sell it for more than the mortgage debt. (3) Decedent knew that her equity of redemption was worth \$45,500, and was willing to pay her that for it if he could not get it for less, but concealed from her his estimate of its value, and his willingness to pay that sum provided she would not take less. (4) He caused the property to be advertised for sale under the decree, and then caused the sale to be repeatedly postponed, in the meantime making her successive offers for her equity of \$4,000, \$6,000, \$10,000, and \$19,000, which last offer she accepted in ignorance that decedent would have given her more had she insisted upon it and induced by her necessities and fears of losing her property in case of a sale under the decree. It is impossible to believe counsel serious in their contention that it constituted fraud or oppression on the part of Phelan to conceal from her the fact that he intended to offer her as much as \$45,500 for her equity, if he could not succeed in getting it for less. It would constitute a new departure, both in business and legal ethics. If the obligation to make such disclosures rested upon Phelan, of course the like obligation rested upon the plaintiff to state to Phelan the very least sum her necessities could induce her to accept rather than permit a sale. Negotiations under such conditions would surely be novel. The real point in the case is, I presume, that the relations between mortgagor and mortgagee are in a sense fiduciary, and the mortgagee must obtain no advantage over the mortgagor by the use of the least unfairness or oppression; and it is maintained that it was oppression on the part of Phelan to get the property for



an inadequate price, taking advantage of her necessities.

1. In the first place, the relation between the parties was in no sense fiduciary. At common law the mortgagee, at least after condition broken, was the legal owner, and could oust the mortgagor. He was really a trustee. Under our system he occupies no such position, and ordinarily has no control over the mortgaged estate. In those cases in which he is, by the mortgage, given some power or control over the estate before foreclosure, the old rule may prevail. There is nothing to show the nature of the mortgages formerly held by Phelan, nor does it now matter. When the wrongs detailed in the complaint were enacted, the mortgages had been foreclosed, and Phelan had only his decree. It does not appear that a receiver had been appointed, or that proceedings to that end were threatened.

2. The sale, even after the decree was obtained, was not hastened. The negotiations between the parties were protracted and deliberate. Plaintiff was fully aware of the situation, and knew all the essential facts of the case. The sale was adjourned many times, and successive offers were made to her for her equity. She says she was threatened with a sale under the decree if she did not sell. Of course, she knew, without being told, that such sale was inevitable if she did not pay the debt or sell her equity. The financial stringency was not brought on by Phelan. It is not charged that he interfered to prevent her selling to another, or to prevent the obtaining of a loan. I can discover no element of fraud, oppression, or unfairness in the case. The judgment is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

(115 Cal. 529)

LEWIS v. COLGAN, Controller. (Sac. 164.) (Supreme Court of California. Jan. 5, 1897.)

BOARD OF EXAMINERS—AUTHORITY TO APPOINT EXPERT ASSISTANT—LEGISLATIVE APPROPRIATION—CONSTITUTIONALITY.

1. The state board of examiners, in examining claims against the state, books of public institutions, and of the auditor and treasurer of the state, has the implied power to employ an expert assistant when necessary for the efficient discharge of its duties. 44 Pac. 1081, reversed.

2. The appointment of an expert by the state board of examiners, and an agreement for his compensation, are made with "express authority," within the meaning of Const. art. 4, § 32, which provides that no appropriation shall be made by the legislature for the payment of a claim for extra compensation "under any agreement or contract made without express authority of law." 44 Pac. 1081, reversed.

3. The courts cannot hold unconstitutional an act appropriating money to pay for expenses legitimately incurred, or to be incurred, in the performance of official duty, unless it so appears from the face of the act, and without reference to facts aliunde. 44 Pac. 1081, reversed.

4. It cannot be urged against the constitu-

tionality of an appropriation bill that some of its items were included solely in anticipation of the passage of a pending bill, which was ultimately defeated.

In bank. For opinion in department, see 44 Pac. 1081. Reversed.

Devlin & Devlin, Burham & Miller, and A. E. Bolton, for appellant. R. B. Carpenter, for respondent.

BEATTY, C. J. Mandamus against the defendant, as controller of the state of California, commanding him to draw his warrant in favor of the plaintiff, upon the treasurer of said state, for the sum of \$166.66%, as salary due plaintiff from the said state for services as expert to and for the state board of examiners, during the month of July, 1895. An alternative writ of mandate issued to defendant, who demurred to the verified petition, and, upon his demurrer being overruled by the court, answered the petition. Plaintiff moved to strike out the fourth paragraph of defendant's answer, and demurred to the residue thereof. The motion to strike out was granted, and the demurrer sustained, and peremptory writ granted. Defendant appeals, and the cause comes up on the record, illustrated by a bill of exceptions. The substance of the verified petition upon which the writ issued is that "on the 28th day of June, 1895, plaintiff was employed by the state board of examiners as expert for said board of examiners, at an annual salary of two thousand dollars, payable monthly, and necessary travelling expenses in the business of said employment"; that he entered upon the discharge of the duties of such employment July 1, 1895, and continued to act as expert, etc., during the month of July, whereby there became due him from the state of California the sum of \$166.66%. The board of examiners duly audited, allowed, and approved his claim for said sum of money. The controller, upon demand, refused to draw his warrant on the state treasurer in favor of the plaintiff therefor. The more formal portions of the petition are here omitted.

The duty of the defendant to draw his warrant for the payment of this demand depends upon the question whether the board of examiners had express authority to employ petitioner as an expert at the salary claimed. There is no law which in express terms creates the office of expert to the board of examiners, but the act making appropriations for the support of the state government for the forty-seventh and forty-eighth fiscal years (the general appropriation act,—St. 1895, p. 280) contains the following items: "For salary of expert to board of examiners, four thousand dollars. For travelling expenses of board of examiners and expert, two thousand dollars." The validity of the act is not questioned by appellant except as to these items, and the

only ground of objection to them is that they are in conflict with certain clauses of the constitution limiting the power of the legislature to make appropriations of the public funds. Various sections of article 4 of the constitution are cited by appellant, and, among others, sections 29-32. Section 29 reads as follows: "The general appropriation bill shall contain no item or items of appropriation other than such as are required to pay the salaries of the state officers, the expenses of the government and the institutions under the exclusive control and management of the state." We concede the contention of appellant that an office cannot be created by the general appropriation bill. But it does not seem that there was here any attempt to create the office of expert, the whole scope of this portion of the act being to make an appropriation for the payment of his salary and expenses,—a perfectly proper appropriation if there existed any authority on the part of the board to appoint or employ him. With reference to sections 30 and 31 it need only be said that they have no application to this case, except in so far as they evince the general purpose of the framers of the constitution to limit the power of the legislature to make appropriations of the public funds. It is in section 32 that the language is contained upon which appellant especially relies to sustain his contention that the appropriation in question is unconstitutional. It reads as follows: "The legislature shall have no power to grant, or authorize any county or municipal authority to grant, any extra compensation or allowance to any public officer, agent, servant, or contractor, after service has been rendered, or a contract has been entered into and performed, in whole or in part, nor to pay or to authorize the payment of any claim hereafter created against the state, or any county or municipality of the state, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

It seems to be agreed that the question to be decided in this case is the same that would have been presented if the board of examiners had employed an expert without any previous appropriation for his salary, and the legislature had afterwards made an appropriation to pay the compensation stipulated or allowed by the board. In either case the validity of the appropriation would, as above stated, depend upon the question whether the appointment of such expert, and the agreement for his compensation, were expressly authorized within the meaning of section 32, as above quoted. This question is not a new one in this court. In the case of Rankin v. Colgan, 92 Cal. 605, 28 Pac. 673, the act appropriated \$250 to pay the petitioner for services in the state treasurer's office during the months of November and Decem-

ber, 1884, under appointment of Gov. Stone-man. The governor had not been authorized, in terms, to make the appointment; but as he was charged with the care of the property of the state, and therefore authorized to protect it, it was presumed in favor of the validity of the act that a proper occasion had arisen, and he had made the appointment in pursuance of his implied power to adopt necessary means for the discharge of his duty to care for the property of the state. The principle recognized in that case, and applied in the decision, is stated in Throop, Pub. Off. § 542, as follows: "The rule respecting such powers is that, in addition to the powers expressly given by statute to an officer or a board of officers, he or it has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the powers." This statement of the doctrine is abundantly sustained by the decided cases everywhere, and is so universal and undisputed that we deem it unnecessary to cite authorities. In a case recently decided by this court it was applied to sustain the authority of the harbor commissioners to employ an architect under an act empowering them to erect a certain building (*Bateman v. Colgan*, 111 Cal. 587, 44 Pac. 238); also, in a still more recent decision of a case involving the power of the board of supervisors of a county to employ an expert (*Harris v. Gibbins* [Cal.] 46 Pac. 292). The case last cited is very closely analogous to the case in hand, and the decision disposes of one of the principal arguments advanced by the appellant, viz. that, if the board of examiners has the implied power to appoint an expert, the board of supervisors must be conceded the same power,—a consequence which, he contends, is absurd. But in that case it was held that the board of supervisors has such power, because the employment of an expert is, or in many cases may be, necessary in order to enable them to perform the duties imposed upon them by law. If this is so, the argument holds good that the board of examiners must have the same power, because the proper discharge of their duties may involve the employment of an expert. They are a board of audit, and they must examine, not only the great mass of claims against the state, but also the books and accounts of many public institutions, as well as those of the auditor and treasurer of the state. As long ago as 1874 the former supreme court of this state, in the case of *Love v. Baehr*, 47 Cal. 364, held that the duties devolved upon the board of examining the books of state officers, counting the money in the treasury, etc., required for their discharge the skill of an expert accountant; and the legislature, in various acts in relation to orphan asylums and other benevolent institutions partly supported by the state, has

expressly authorized the employment of experts by the board of examiners to examine the books which those institutions are required to keep as a condition of receiving state aid. See St. 1880, p. 13; St. 1883, p. 55; St. 1889, p. 206; St. 1891, p. 428. In these statutes it is true the expenses of the examinations are required to be paid out of the appropriation for the support of the institutions on account of which the expenses are respectively incurred. They show, however, a recognition by the legislature of the necessity of expert assistance to the board of examiners in the examination of books and accounts, and there are many other public institutions aside from these asylums whose books must be examined periodically. It cannot be denied, therefore, that the duties imposed upon the board of examiners, and the corresponding authority conferred upon them by the express terms of the various sections of the Political Code and other statutes defining their duties, are such as may involve the employment of an expert for their due and efficient discharge; and it follows, on the principle of the cases above cited, that they have the implied power to employ one when necessary, independent of the clauses of the appropriation act above recited.

It does not follow from this view that their authority in the matter is unlimited and unrestricted, as appellant assumes it would be. On the contrary, whatever they do is subject to the approval of the legislature. They may employ an expert, but he cannot be paid without an appropriation, and he can be paid no more than the legislature may deem reasonable. He is not an officer with a fixed term of office and a salary ascertained by law, but a mere employé of the board, holding his position at their pleasure, and entitled to such compensation only for the time of his employment as the board may allow and the legislature approve, by the appropriation of money for the payment. And, when the legislature does make an appropriation for such payment, it must be presumed (as held in the Rankin Case) that the facts were found to be such as to render the employment necessary, for this is a question of fact, which must be decided by the legislature, and not a question of law for the courts. The constitution does not deprive the legislature of the power to appropriate money to pay expenses legitimately incurred in the performance of official duty, and the legislature is itself the judge of what expenses have been so incurred, so far, at least, that the courts cannot hold an act appropriating money to pay for such expenses unconstitutional, unless it so appears upon the face of the act, and without reference to facts allunde. And, if the legislature may make an appropriation to pay for a service after it has been rendered, we see no reason, and none is suggested, for holding that they cannot make an appropriation in advance of a sum sufficient

to cover an anticipated expense, as in this case; thus making a fund available for the payment of such sums within the amount of the appropriation as the board of examiners may in their discretion allow as a just and proper charge for necessary services.

But the appellant makes the further objection that these items of the general appropriation bill were included by mistake, or solely in anticipation of the passage of a pending bill empowering the board of examiners to appoint an expert, which was afterwards defeated. These facts were alleged by way of defense in that portion of his answer which was stricken out, erroneously, as he contends. We think the ruling of the superior court on this point was correct. Courts cannot inquire into the motives of legislators. In this case we know that the appropriation bill was duly enacted as a law. If the facts alleged in respect to the other bill are admitted, it is still a matter of mere conjecture what effect the pendency of that bill had; and it cannot be held as matter of law, or proved as matter of fact, that except for its anticipated passage the appropriation bill would have been altered.

Of the decisions of this court especially relied on by appellant to sustain his contention, the case of *Modoc Co. v. Spencer*, 103 Cal. 498, 37 Pac. 483, is clearly distinguished from this, as was pointed out in *Harris v. Gibbins*, supra, which, as above shown, directly supports the implied power of the board to employ an expert. *Linden v. Case*, 46 Cal. 174, merely states the undoubted proposition that unauthorized acts of the board of supervisors are void, but sheds no light on the question as to what acts are unauthorized. In *San Joaquin Co. v. Jones*, 18 Cal. 327, and *Foster v. Coleman*, 10 Cal. 279, the acts held illegal were clearly unauthorized; but they have no analogy to the action in question here, and could not by possibility have been necessary for the discharge of any duty devolved upon the board. In *Robinson v. Supervisors*, 16 Cal. 208, and *El Dorado Co. v. Meiss*, 100 Cal. 268, 34 Pac. 716, there was an attempt on the part of the respective boards to create offices, and in the latter case an infraction of the express inhibition of section 3 of article 11 of the constitution. In this case there is no creation of an office, but merely the employment of an assistant, whose duties, it is true, are of an important, delicate, and confidential nature, but whose employment, so far as its validity is concerned, cannot be distinguished from that of the governor's messengers, the porters, elevator attendants, and other employés in the service of the state, whose compensation is provided for in the general appropriation bill, although no officer of the state is expressly authorized to employ them. The judgment of the superior court is affirmed.

We concur: MCFARLAND, J.; VAN FLEET, J.; HARRISON, J.

(115 Cal. 308)

**MILES v. WOODWARD.** (S. F. 367.)  
(Supreme Court of California. Jan. 6, 1897.)  
Modified opinion. For former opinion, see 46 Pac. 1076.

**PER CURIAM.** The opinion heretofore rendered is modified by striking out the last paragraph of subdivision 2 thereof, commencing with "All that the law does in this regard," and ending with "Report upon ores and quartz."

(5 Cal. Unrep. 564)

**HEINTZ v. COOPER.** (S. F. 479.)  
(Supreme Court of California. Dec. 31, 1896.)  
**SUFFICIENCY OF FINDINGS—PHYSICIAN—COMPENSATION—EXPERT TESTIMONY.**

1. A finding, "that the matters and facts alleged in defendant's special defense and cross complaint on file herein, except the allegations of plaintiff's employment, and agreements under such employment, are untrue in substance and in fact," supports a judgment for plaintiff, where the answer and cross complaint both allege that defendant employed plaintiff as a physician and surgeon, for a reward, and that plaintiff undertook the service, whereby defendant was damaged by plaintiff's negligence and incompetency.

2. Where plaintiff sues for services as physician, and defendant, by a cross complaint, seeks damages for alleged negligent treatment, and plaintiff, in answer, alleges that defendant's suffering was aggravated by his own negligence and failure to follow plaintiff's directions, a finding that all the facts alleged in the cross complaint, except that of plaintiff's employment, "are untrue," renders the issue of defendant's negligence immaterial, and a finding as to it is not required.

3. In determining what is a reasonable compensation for surgical and medical services in a given case, the skill and learning of the operator and the character and circumstances of the subject to which he devotes his services must be considered, and the rule that compensation is determined by "the usual price at the time and place of performance" does not necessarily apply.

4. Possible error in the exclusion of evidence, on an issue which could not have affected the judgment, is harmless.

5. Before a witness can testify on the issue of a physician's neglect and unskillful practice, his competency must be shown.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; N. A. Dorn, Judge.

Action by J. P. E. Heintz against J. B. H. Cooper. From a judgment in favor of plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

S. F. Geil and John J. Wyatt, for appellant. W. A. Kearney, for respondent.

**HAYNES, C.** This action is prosecuted to recover for services rendered by the plaintiff as a physician and surgeon. The complaint contains two counts,—the first upon an account stated, amounting to \$1,200, and admitting a payment thereon of \$500; and the second count alleged said services to be reasonably worth \$2,500, the whole of which remained unpaid except the sum of \$500. The defend-

ant denied all the allegations of the complaint, and for a second defense alleged negligence, incompetency, and unskillfulness on the part of the plaintiff, whereby he was made sick, and kept from attending to his business, for more than six months, and compelled to pay \$1,000 for nursing and medical attendance, and "is permanently a cripple, to his damage in the sum of \$3,000." The same allegations are stated in a cross complaint, in which defendant seeks to recover damages in the sum of \$4,000, and to which cross complaint the plaintiff filed an answer. The cause was tried by the court without a jury. The findings were against the plaintiff upon the first cause of action. Upon the second cause of action the court found the reasonable value of plaintiff's services to have been \$750, of which sum \$500 had been paid. As to the special defense and counter claim pleaded by the defendant, the court found against him. A judgment in favor of the plaintiff for \$250 was entered, and defendant appeals therefrom, and from an order denying a new trial.

1. It is contended that the findings do not support the judgment. This contention is based upon the fourth finding, which is as follows: "That the matters and facts alleged in the defendant's special defense and cross complaint, on file herein, except the allegations of plaintiff's employment and agreements under such employment, are untrue in substance and in fact, and offered only as a bare pretense, without any justification or excuse whatever." The answer and cross complaint both allege that defendant employed the plaintiff as a physician and surgeon, for a reward, to set his leg, and dress and heal the same, and that plaintiff undertook to set and dress said leg for said defendant, and then proceeds to allege negligence, want of skill, etc., and damages resulting therefrom. Findings by reference to the pleadings, or parts thereof, have been frequently criticised by this court, and where such findings involve uncertainty as to what facts are found they are uniformly held insufficient; but where "they do show what facts are found, and there is no uncertainty about them," they are sustained. *Davis v. Drew*, 58 Cal. 157. The finding here in question is clear and certain, and, though the mode "is not to be commended," justice must not be sacrificed to form.

Appellant's contention, that a portion of plaintiff's answer to the cross complaint consisted of an allegation of new matter, and which is presumed to be controverted, raised a distinct issue upon which there is no finding, cannot be sustained as a ground for reversal. The finding that all the facts in the cross complaint alleged, except, etc., "are untrue," covered all the allegations in the cross complaint to which the alleged new matter applied; and such finding, which cut up by the roots the allegation that he suffered great pain in consequence of plaintiff's negligence and incompetency, rendered it wholly immaterial whether the defendant's "pain was caused or increased

by his own negligence and his failure to observe plaintiff's directions," as alleged in the answer to the cross complaint. A finding either way upon the question of defendant's negligence could not affect the result, and in such case the fact becomes immaterial, and no finding is required.

2. It is further contended that the evidence is insufficient to support the finding that the plaintiff's services were reasonably worth \$750, or any greater sum than \$500, which had been paid. The injury to the defendant, treated by the plaintiff, consisted of a compound fracture of the leg and a dislocation of the ankle joint. Both the bones were broken and protruded through the flesh, and six or seven pieces of the bone were removed. Plaintiff's services commenced July 12th, and continued until the 13th of the following October, during which time, the plaintiff testified, he made about 200 visits, and about 70 of these were for the purpose of dressing the wound. The testimony on the part of the plaintiff was that for visits when the wound was dressed \$5 to \$10 per visit was a reasonable charge, and for other visits \$2.50 each, and for reducing a compound fracture of the leg \$250 to \$500 is a reasonable compensation. This evidence would have justified the court in finding in favor of the plaintiff in a much larger sum. On the part of the defendant the medical testimony was that \$500 was a reasonable compensation for all services rendered by the plaintiff, though the testimony on behalf of the plaintiff as to a reasonable compensation for visits and for dressing the wound was not controverted. It appeared, however, that in no case in Monterey county within the knowledge of the medical witnesses had so large fees, in the aggregate, been paid in cases of compound fracture, though in none of the instances mentioned was the character of the fracture or the number of visits stated; and it is now contended, on behalf of appellant, that the prices so paid in those other cases in that county determine what is a reasonable compensation for plaintiff's services in this case, or, as counsel state it, "the usual price at the time and place of performance is the rule." The cases cited in support of this proposition relate to ordinary services, as to which there is a reasonably uniform established rate of compensation, and not to professional services, where the skill and learning of the person, as well as the almost infinite variety in the character and circumstances of the subject upon which he devotes his services, precludes the establishment of any fixed rate of compensation which could be applied to more than a very restricted class of cases and the more common class of services. Besides, defendant's witnesses testified that no medical society existed in Monterey county, and no fee bill or scale of charges had been fixed, but each charged according to his ideas of what was proper.

3. During the examination of the defendant, as a witness in his own behalf, he testified

that he had sustained damage by reason of the plaintiff's incompetent and unskillful treatment. His counsel then asked: "What did those damages consist of?" An objection to this question was sustained. Whether there was error in this ruling need not be considered; for, whatever may have been the suffering the plaintiff endured, or whatever his crippled condition, or whatever may have been the expense to which he was put, unless such suffering, condition, and expense were caused by or resulted from the incompetency, negligence, or unskillfulness of the plaintiff, no recovery could be had by the defendant therefor; and, as the court found, upon sufficient evidence, that all the allegations of the defendant's answer and cross complaint in that behalf were untrue, a rehearsal of those matters could not have changed the result, and the error, if it was error, did not prejudice the defendant, and therefore constitutes no ground for a reversal. If, on the other hand, the question was put for the purpose of proving the incompetency or negligence of the plaintiff, the witness was not shown to be competent to testify upon that subject, and upon that ground the ruling was right. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(115 Cal. 448)

VAN HORN v. RICKS WATER CO. (S. F. 339.)

(Supreme Court of California. Dec. 31, 1896.)

#### RIGHT TO REWARD.

A person who receives compensation from a water company for having reported a pollution of its source of supply, and the offender's identity, in compliance with the company's request for such information, cannot afterwards procure the offender's conviction, and for it claim a reward offered by the company "for the arrest and conviction" of such offenders, since the reward cannot be apportioned, and the acceptance of pay for the detection defeats a recovery for the conviction.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by Charles S. Van Horn against the Ricks Water Company to recover a reward. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. W. Turner, for appellant. L. F. Puter, for respondent.

HAYNES, C. Action to recover a reward. The cause was tried by the court without a jury, and at the conclusion of all the evidence the defendant moved for a nonsuit, and said motion was granted, and judgment of dismissal entered against the plaintiff. This appeal is from the judgment, upon the judgment roll and bills of exception, one of which

was to the refusal of the court to sustain plaintiff's motion to strike out defendant's second defense, and the other contains all the evidence given upon the trial, and specifies the granting of the nonsuit as an error of law. The defendant is a corporation engaged in supplying the city of Eureka and its inhabitants with water, the source of its supply being Elk river. The complaint alleges that in December, 1893, the defendant, for the purpose of protecting said waters from pollution, posted notices setting out a copy of section 374 of the Penal Code, which provides a penalty for polluting, in any of the ways therein enumerated, the waters of any stream from which water is drawn for the supply of any city, and appended thereto the following: "The undersigned will therefore pay the sum of five hundred dollars as a reward for the arrest and conviction of any persons violating the provisions of the above section by polluting the waters of Elk river in any manner specified therein." The complaint further alleged "that thereafter, to wit, on or about the 2d day of September, 1894, plaintiff detected and observed one Lawrence Padrick in the act of polluting the waters of Elk river by depositing therein, and upon the banks of said stream, fecal matter," and that he caused the arrest and conviction of Padrick therefor. The defendant, by its first defense, put in issue the allegations of the complaint, and for a second defense alleged, in substance, that prior to the alleged act of pollution the plaintiff was the duly appointed and acting agent of the defendant in detecting, observing, and reporting any and all alleged acts of polluting the waters of said river, for which he was to be paid according to the value of the work so done, or the time occupied therein; that, prior to the arrest of said Padrick, he, as such agent and servant, reported to defendant that he had detected said Padrick in the commission of said alleged act of pollution; and that, in pursuance of said agreement, defendant fully paid the plaintiff therefor what the same was reasonably worth. Plaintiff's motion to strike out said second defense was properly denied, for reasons that will appear in the discussion of the question presented by the exception to the nonsuit.

The grounds upon which the motion for nonsuit was based, briefly stated, are the following: (1) That Padrick did not violate section 374 of the Penal Code. (2) That plaintiff was employed by defendant for the purpose of preventing nuisances and reporting to it any that he discovered; that he was to be compensated for such services, and had been fully paid for his services rendered in connection with the alleged nuisance committed by Padrick. And (3) that there is a variance between the pleadings and proofs, the particulars of which need not be stated, as the nonsuit should be sustained upon the second ground. The plaintiff was engaged

in getting out railroad ties in the vicinity of Elk river and some of its tributaries, and, some time before the discovery of the alleged nuisance committed by Padrick, he discovered the carcass of a calf in one of said tributaries, and informed defendant of it by letter, and was paid for his services. The defendant then requested the plaintiff to keep a lookout for anything that would pollute the water, and inform the defendant of anything he discovered. There was some conflict in the evidence as to what was said, and as to the extent or scope of the alleged agreement, or whether there was in fact an agreement upon that subject. The plaintiff testified that he said to defendant's superintendent that, if he happened to see anything in the water, he would let him know, but that there was no bargain or agreement that in the future he would report and receive pay for it. He admitted that he was requested by the superintendent to report, and that "he might have said he was willing to pay for it, or something like that." It is not material whether the plaintiff agreed that he would keep a "lookout" for acts or sources of pollution, for a compensation to be paid him. There was at least a request that he would do so, accompanied by an offer of compensation; and the evidence shows that thereafter plaintiff saw a dead horse in one of the streams tributary to Elk river, and informed the defendant of it, and was paid therefor, and after that he informed the defendant, by letter, of the act of said Padrick which gave rise to the present controversy. Said letter was dated September 9th, and is as follows: "Ricks Water Co.—Sir: In compliance with your request, I write to inform you that there exists a nuisance in the water in Clapp Gulch. In fact, there is a person that does his business in the water quite often. If you will come out Monday afternoon, I will show you the place, also the man. \* \* \* If you can't come Monday, write, so I can meet you. At the request of the defendant, its attorney and Mr. Lord went out and met the plaintiff, and investigated the reported nuisance; and plaintiff was paid therefor \$2.50, by a check, which stated upon its face that it was "for reporting nuisance." The plaintiff had thus informed defendant of the alleged nuisance, and of the person by whom it was committed, and also that he "saw this man polluting the water." If the plaintiff had prosecuted Padrick without informing defendant of the commission or existence of the nuisance, and after the conviction had written the letter above quoted, informing them of its commission, he could not justly claim both the reward and the compensation for reporting the nuisance; and, if he could not do that, he could not entitle himself to the reward by an arrest and conviction after he had received compensation for detecting and reporting the act. It would not be claimed that if one of the officers of the defendant corporation had detected Padrick in

the alleged act of pollution, and had informed the plaintiff of the fact, and the plaintiff, upon such information, had procured Padrick's arrest and conviction, he would be entitled to the reward. The discovery of the act of pollution, and of the evidence showing by whom the act was perpetrated, is therefore necessarily included in the "arrest and conviction"; and as the reward cannot be apportioned, and plaintiff having been compensated for the discovery of the act and of the perpetrator, a recovery of the reward would necessarily include service for which he had been fully paid. In *Pool v. City of Boston*, 5 Cush. 219, 221, the plaintiff was a watchman, and while on duty he discovered Hollihan setting fire to a building, and it was his duty to give notice to the mayor, or some city officer, that they might prosecute him; but he preferred to prosecute him himself, with the hope of obtaining the reward offered. The court said: "But this will not help him. The principal object of the reward was to obtain the detection of the offender. The conviction was required to ascertain who was the offender. But, to entitle the plaintiff to the reward, he must show that he is so entitled, as well for the detection as for the conviction of the offender. The reward cannot be apportioned. But he is not entitled thereto for either service. He discovered the offender while he was on duty as a watchman, and was bound to give notice, or to cause him to be arrested, and he preferred the latter course; but he could not thereby subject the defendants to a liability to which they would not be subject if he had given notice to one of the city officers." See, also, *In re Russell*, 51 Conn. 577, and *Railway Co. v. Grafton*, 51 Ark. 504, 11 Pac. 702. The offer of the reward by the defendant was not intended, and should not be construed, to apply to cases where all the information and means essential to a conviction were in possession of the defendant before the prosecution was commenced by the plaintiff, the plaintiff having full knowledge thereof before he caused such arrest and conviction. As to the essential facts, there was no conflict in the evidence, and the nonsuit was properly granted. The judgment of dismissal should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of dismissal is affirmed.

(115 Cal. 460)

HARDIN v. SIN CLAIRE et al. (S. F. 478.)  
(Supreme Court of California. Dec. 31, 1896.)

NUISANCE—OBSTRUCTING PRIVATE WAY—SPECIAL ADMINISTRATORS—ACTION AGAINST ESTATE.

1. An obstruction of a private way is a nuisance, being an obstruction to the free use of

the property (Code Civ. Proc. § 731), and it is no defense to an action to enjoin it and for damages, brought under the statute, that a defendant has no interest in the land over which the way is claimed.

2. Special administrators may be sued for an obstruction of a private way which they created or maintain.

3. An action to abate a nuisance and for damages for obstructing a private way may be maintained against the personal representatives of a decedent without first filing a claim against the estate, only claims arising on contract being required to be so filed and rejected before suit brought. Code Civ. Proc. §§ 1493, 1498.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by Henry A. Hardin against H. G. Sin Claire and others to abate an obstruction in a private way, and for damages. Judgment for defendants, and plaintiff appeals. Reversed.

James W. Oates, for appellant. Pierson & Mitchell, Garrett McEnerney, and Burnett & Leppo, for respondents.

BELCHER, C. It is alleged in the complaint in this case that the plaintiff had been the owner and in possession of a certain described tract of land in Sonoma county, consisting of 200 acres, continuously for 13 years; that he had also, during the same time, been the owner and in possession of a certain described private way or road leading from his said land over other land to a public road, which private road, during all of said time, he had used and traveled over on foot and on horseback, and with wagons and other vehicles, claiming to own the same openly, notoriously, and adversely to all the world, and without let or hindrance from any one; that on or about December 25, 1894, the defendant H. G. Sin Claire and James G. Fair obstructed the said road so that plaintiff could not pass or repass over the same; that Fair died on December 27, 1894, and shortly thereafter the other defendants, Goodfellow, Angus, Breese, and Corothers, were appointed special administrators of his estate, with power to act for said estate, and to defend actions for and on behalf thereof, and ever since have been acting as such; that ever since their appointment they and said Sin Claire have maintained the said obstruction, and prevented plaintiff from using the said road, to his damage, etc. The prayer is for judgment that the obstruction be abated, and that defendants be enjoined from further interfering with plaintiff's free use of the road, and for damages in the sum of \$1,400. The defendants jointly answered the complaint by a general denial. When the cause came on for trial the plaintiff offered evidence to prove the allegations of his complaint, and the defendants objected to the admission of any evidence on his behalf, upon the ground that the complaint failed to state any cause of action against defendants, or any of them, because: (1) Four of the defendants are special admin-

istrators of the estate of a deceased person, duly appointed, qualified, and acting, and that a suit of the nature of the one at bar cannot be maintained against the special administrators of an estate. (2) That the defendant Sin Claire has no interest in the land over which the right of way is claimed by the plaintiff, either as owner, lessee, or tenant, and the court has no jurisdiction to hear or receive any evidence whatever against him. (3) The suit being in part to recover damages, it can only be maintained against the personal representatives of the deceased person after the claim has been properly presented to them and rejected, as provided by law. The court sustained the objections, and the defendants then moved to dismiss the action, which motion was granted, and judgment entered in their favor for costs. The plaintiff duly excepted to all the rulings of the court, and has appealed from the judgment upon a bill of exceptions.

The court clearly erred in its rulings. So far as defendant Sin Claire is concerned, it does not appear whether he was or was not an owner, lessee, or tenant of the land over which plaintiff claimed a right of way, and whether he was or not is entirely immaterial. If plaintiff owned a right of way, and it was obstructed as alleged, the obstruction was a nuisance, and any person creating or assisting to create and maintain the nuisance was liable to be sued for its abatement and for damages. Code Civ. Proc. § 731.

As to the other defendants: They certainly had no right to maintain and keep up an obstruction to a private way, to the detriment of the owner thereof, notwithstanding it was placed there by the decedent of whose estate they were special administrators. It cannot be that, under such circumstances, they can maintain a nuisance as long as they remain special administrators, and that the injured party can maintain no action to abate or enjoin it. In our opinion this action was properly brought against them, and plaintiff, upon proving the facts alleged in his complaint to be true, would have been entitled to a judgment against them enjoining or abating the nuisance, and for such damages as they by their wrongful acts had caused him to suffer.

The statute in regard to claims against estates provides that "all claims arising upon contracts" must be properly presented and rejected before suit can be brought to recover on them. Code Civ. Proc. §§ 1493, 1498. This is not such a case, but an action to recover damages for wrongful acts. No presentation was therefore necessary. Whether, if judgment for damages were rendered against these defendants, the estate could be made to pay the same, is a question which does not arise here, but is for the probate court to solve in the first instance.

The judgment should be reversed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

(115 Cal. 517)

**VERDELLI v. GRAY'S HARBOR COMMERCIAL CO. (S. F. 492).<sup>1</sup>**

(Supreme Court of California. Jan. 4, 1897.)

**MASTER AND SERVANT—PERSONAL INJURY—GENERAL VERDICT—SEVERAL ISSUES—EVIDENCE—INSTRUCTIONS.**

1. When one who is known to be an inexperienced person is put to work upon dangerous machinery, the employer is bound to give him such instructions as will cause him to fully understand the danger attending the employment, and the necessity for care.

2. In an action for personal injuries, where there was evidence from which the jury could have found defendant chargeable with negligence on one of the several grounds alleged, a general verdict for plaintiff will not be set aside.

3. In an action for personal injuries, defendant cannot ask plaintiff whether he did not make to his attorney, at the time he consulted him, and before the attorney had communicated with defendant, a statement as to the cause of the accident different from that which he made upon the stand; such communication being privileged within Code Civ. Proc. § 1881.

4. Where a question is excluded because not proper cross-examination, and the party proposes to repeat the question, "and ask it as a matter of expert testimony," he must first make the witness his own.

5. On the issue of whether an employé had been properly instructed in the use of a specific machine, it cannot be shown that other employés had been instructed in regard to the use of the machine.

6. In an action for personal injuries resulting to an inexperienced operator, it is proper to charge that, "if the superintendent or foreman of defendant was negligent in putting plaintiff to work without proper instruction, such negligence is, in law, that of defendant, and defendant is liable for it."

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Andrew Verdelli against the Gray's Harbor Commercial Company for personal injuries in the course of employment. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Van Ness & Redman, for appellant. Walter P. Stradley and Wm. M. Cannon, for respondent.

PER CURIAM. The plaintiff was employed by the defendant in its box factory, and on October 5, 1893, was operating a planing machine called a "pony planer." While so engaged, his hand was caught in the knives of the machine, and was so injured that it had to be, and was, amputated. He brought this action to recover damages for his injuries and obtained a verdict for \$7,500, on which judgment was entered. Upon motion for new trial, the judgment was reduced to \$5,000, and the motion denied. From the judgment as modified, and the order refusing a new trial, the defendant has appealed.

<sup>1</sup> For opinion on rehearing, see 47 Pac. 778.



The facts alleged in the complaint may be briefly stated as follows: The plaintiff was a minor, and was employed by the defendant in its box factory. He was inexperienced in, and ignorant of the dangers attending, the operation of planing machines; and the defendant, knowing this, failed to warn him of the danger attending the operation of the machine by which he was injured, or sufficiently, or at all, to instruct him how to operate it. The foreman of defendant, well knowing that plaintiff was a minor and inexperienced in the operation of planing machines, ordered him to operate one of its machines, the knives of which were not covered by the blower which was usually attached to said machine for the purpose of carrying off the shavings and protecting the operator. The said foreman ordered plaintiff to plane a lot of lumber with said machine, which lumber was, as said foreman well knew, too heavy to be, with safety to plaintiff, run through the machine; and the operation thereof, under these circumstances, was extremely hazardous to him. While operating said machine in pursuance of this order, plaintiff, being unaware of the danger, attempted to push a large plank through it, but the plank was too heavy for the machine, whereupon, without any fault on his part, he was, by reason of the jerking of said plank, thrown over upon the machine, so that his hand became entangled in its knives, and was so cut that it had to be amputated. The answer denies that the purpose of the so-called blower was to protect the operator from the knives of the machine; denies that the lumber the plaintiff was planing at the time of his injury was too large for the machine; denies that the plaintiff was inexperienced, etc.; and sets up that the plaintiff was perfectly familiar with the machine, had often operated it before he was hurt, and that his injury was wholly due to his own carelessness. Appellant contends that the verdict was not justified by the evidence, and that the court erred in several of its rulings upon the admission of evidence, and in giving and refusing certain instructions to the jury.

1. Plaintiff was 18 years and 5 days old when he was injured, and had been in the employ of defendant about 17 months. He testified, in substance, that he had never operated a planing machine until about 2 months before he was hurt, and during that time he had worked on it only off and on, not regularly. Sometimes he would go on maybe once a week, or two or three times a week, and assist on it for an hour or two a day. And during that time he had planed only light stuff,—“tea stock” and “orange stock,” as it is called,—but never heavy stuff such as he was planing at the time of the accident. He had never been instructed by the foreman of defendant or by any of its agents or employes, how to operate the planer, or warned of the danger to which he might be exposed in operating it. And as to how the accident happened he testified as follows: “Just before I went to work,

I was standing at the planer, and I looked up at the fan that gives suction to the blower, and while I was looking up the foreman came along, and told me to never mind the blower, to go ahead with my work; that it was not necessary to run the blower for that machine alone. The foreman was Mr. Pye. I was working under his orders those two days. I went to work, and was working on some stuff—some molding or other—which was eighteen inches wide, and was one and one-fourth inches thick. So I set my planer to one and one-sixteenth, to take off one-sixteenth. I got two pieces through, and I set my gauge down to one inch. I took one piece, which was alongside there, to run it through, and to plane it down to one inch; and, while I was in the attempt of getting it through, it did not go through, and I kept shoving, pushing on it, to force it through. I had it pretty near the end, and I got down on my right hand to force it through; and the board gave way all at once, like a jerk, and I lost my balance, and threw my hand up to save myself, up on the bonnet. I was hanging over the bonnet to keep myself from going over. I kept forcing my hand to raise myself, but my hand continued slipping off the bonnet, so I made an attempt to throw the belt over with my left hand, and I think that my foot gave way, and I slipped, also. My hand went into the knives, and that is the last I recollect. I pulled my hand from the knives, and found it cut off.” It was also proved by expert witnesses, who were well acquainted with the pony planer by which plaintiff was injured, that it was designed to do very light work,—to plane small stuff,—and that, if a board such as plaintiff was handling should be put in it, the belts should be tightened, and to plane it down one-sixteenth it should be run through twice, taking off one thirty-second of an inch at one time.

The law applicable to cases of this kind has been many times declared by this court. In *Ingerman v. Moore*, 90 Cal. 410, 27 Pac. 306, it is said: “It is well settled that one who enters the service of another takes upon himself the ordinary risks of the employment; and if he is an adult, and engages to do a particular work, the employer has a right to presume, unless otherwise informed, that the employé is competent to perform it, and understands and appreciates such risks. But, on the other hand, when one who is known to be an inexperienced person is put to work upon machinery which is dangerous to operate, unless with care, and by one familiar with its structure, the employer is bound to give him such instructions as will cause him to fully understand and appreciate the danger attending the employment, and the necessity for care.” And the court quoted with approval the following language of the supreme court of Wisconsin, as reported in *Jones v. Mining Co.*, 66 Wis. 277, 28 N. W. 210: “We think that it is now clearly settled that if a master employs a servant to do work in a dangerous

place, or where the mode of doing the work is dangerous, and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character, or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part." And in *Mullin v. Horseshoe Co.*, 105 Cal. 77, 38 Pac. 535, it is said: "The law is settled beyond controversy that it is the duty of an employer to furnish a suitable and safe place for his employé to work, and suitable and safe appliances and machinery for him to work with; and this duty cannot be delegated to another, so as to exonerate the employer from liability to an employé who is injured in consequence of the omission to properly perform the act or duty, whether that other is a superior officer, agent, or servant, or a subordinate or inferior agent or servant. In either case, in respect to such act or duty, the person who undertakes or omits to perform it is the representative of the employer, and not a mere fellow servant with the one who is injured. And when it is claimed that the injured employé was himself guilty of such negligence as to bar him from recovering damages for his injuries, it must appear that he not only knew, or had the means of knowledge, of the unsafeness of the place, appliances, or machinery, but also that he knew, or ought to have known, of the danger to which he was himself personally exposed." And see, also, *Ryan v. Storage Co.*, 112 Cal. 244, 44 Pac. 471, and *Foley v. Horseshoe Co.* (Cal.) 47 Pac. 42. The issues raised by the answer were questions of fact for the jury, and, while the evidence was quite voluminous, and in some respects conflicting, it appears from the verdict that the jury must have believed the statements of plaintiff to be true. The judgment cannot, therefore, be reversed for want of evidence to justify and support the verdict.

2. The point is made that the claim of negligence relied upon in support of the verdict is not the claim set up in the complaint. It is alleged and claimed that defendant was guilty of negligence in several respects, and, among others, those above set out. And, as we have seen, there was evidence to support the allegations referred to. The rule is that when the verdict is a general one, and there is sufficient evidence to justify the verdict on one of the issues, the verdict will not be set aside. *Crosett v. Whelan*, 44 Cal. 200. This point cannot, therefore, be sustained.

3. As to the alleged errors in law:

When plaintiff was on the stand as a witness, he was asked, on cross-examination,

"How soon after the accident happened was it before you consulted Mr. Stradley [his attorney] in relation to it?" This question was objected to as incompetent, irrelevant, and immaterial, and counsel for defendant then stated: "I propose to ask him if he did not make to Mr. Stradley at the time he consulted him, before we were communicated with by his attorney, a different statement as to the cause of the accident than that which he now makes upon the stand. The Court: You cannot do that. The objection is sustained." This ruling was excepted to, and is assigned as error. It is the policy of the law to encourage confidence between client and attorney, and to protect confidential communications between them from forced disclosure. It was a rule of the common law, and is declared by our statute, that "an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." Code Civ. Proc., § 1881. It is also a general and almost universally accepted rule that a client cannot be compelled to disclose communications which his attorney cannot be permitted to disclose. *Whart. Ev.* (3d Ed.) §§ 576-583; 7 Am. & Eng. Enc. Law, p. 104.

When plaintiff's witness Johnson was on the stand he was asked, on cross-examination, a hypothetical question as to the condition of the planer at the time plaintiff was injured. The question was objected to, and the objection sustained. Counsel for defendant then stated: "I will repeat the question, and ask it as a matter of expert testimony. On cross-examination I will examine you as an expert." The court ruled that it was no part of the cross-examination, but stated that counsel might make the witness his own witness, which he declined to do. In these rulings we see no material error.

Defendant sought to prove by one of its witnesses that it had a system of taking boys in, and gradually promoting them to higher places. An objection to this evidence was sustained, and the court said, "You may show what was done in respect to this boy's case." This ruling was proper. It does not follow, because other boys had passed through the shop and operated its machinery successfully, that plaintiff had received sufficient instruction to enable him to operate safely the machine in question.

The defendant's witness Pye was asked to state in what way the plaintiff learned to run the saw with which they were cutting up wood. He replied that plaintiff was assistant to the man who ran the cut-off saw; that he held the end of a board, and, any time the sawyer cut off a piece, he advanced it in his hand, adding, "which qualifies him to run a saw of that kind." This last clause of the answer was properly stricken out on motion of plaintiff. He was not injured by the cut-off saw, and there was no connection

between that and the pony planer. He might have been qualified to run the saw, and not the planer. Besides, it was only an expression of opinion.

Defendant's witness Griffin was 19 years old, and had been working in its box factory about 2 years. He was running the pony planer, and had been working on it about 6 months. He testified as to the kind of work he had done on the planer, and how he did it, and was then asked what work he was doing when he first went into defendant's mill. This question was objected to as incompetent, irrelevant, and immaterial, and defendant's attorney then stated that he wanted to show that the witness went through the same experience that the plaintiff went through; that he was put in charge of the pony planer, and learned to operate it just as the plaintiff did. Thereupon the attorney asked the witness, "When you took charge of the pony planer, or when you came to the pony planer, what machine had you been working at?" To this question plaintiff's attorney interposed the same objection, adding, "unless it is proposed to show that he is an expert." Defendant's attorney at once stated, "I propose to show it," but the court sustained the objection. We see no error in these rulings. It was immaterial what work the witness was doing when he first went into defendant's mill, or what machine he had been working at before he took charge of the pony planer. Besides, the testimony sought to be elicited by the questions objected to was fully brought out in the cross-examination of the witness. Several other questions were propounded to one of defendant's witnesses, and excluded on objection of plaintiff. We fail to see any material error in the rulings complained of, and therefore pass them by without further notice.

In accordance with the theory that the claim of negligence relied upon by the plaintiff was not the claim set up in the complaint, defendant requested the court to instruct the jury, in effect, that the plaintiff must prove the particular negligence alleged in his complaint, or he could not recover; that though the jury should be satisfied that the defendant was negligent in some respects, and that the injury to plaintiff was because of such negligence, still the verdict must be for defendant, if the negligence proved was not charged in the complaint; that the plaintiff can only recover upon the cause of action stated in the complaint, and not otherwise. The court refused to give the instruction as requested, but, in lieu thereof, gave the following: "The plaintiff must prove the allegations contained in his complaint, and, if he has failed to do this, the verdict must be for the defendant." The defendant could not have been prejudiced by this action of the court, for two reasons: (1) The instruction given, though brief, was in effect the same as that refused; and (2) there was evidence, as has been before stat-

ed, tending to show that defendant had been guilty of negligence as alleged in the complaint, and that by reason of such negligence plaintiff was injured. The court instructed the jury very fully and fairly, and at the close of the written instructions said: "Counsel in the case have so thoroughly covered the law, as I understand it, upon this subject, that I have only to state a word to you in conclusion. If the superintendent or foreman of the defendant was negligent in putting the plaintiff to work without proper instruction, such negligence is, in law, that of the defendant, and the defendant is liable for it." This instruction is criticised by counsel for defendant, but it states the law substantially as it is declared in the cases above cited, and must be upheld. The judgment and order appealed from must be affirmed, and it is so ordered.

(115 Cal. 481)

# **BURKE v. McCOWEN. (S. F. 302.)**

(Supreme Court of California. Dec. 31, 1896.)

**BOUNDARIES—PLAT IMPLIES A SURVEY—EVIDENCE.**

A map or plat of a town site or addition implies that it is based on a survey made on the ground; and one claiming under a deed describing lots by reference to such plat may show the existence of stakes indicating the lines as marked by the surveyor.

Commissioners' decision. Department 1. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Action in ejectment by A. A. Burke against George McCowen. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Seawell & Pemberton, for appellant. J. A. Cooper, for respondent.

**HAYNES, C.** This is an action in ejectment. The cause was tried by the court without a jury, and findings and judgment were in favor of the defendant. The plaintiff appeals from the judgment and an order denying a new trial. The plaintiff owns lots 2 and 8 in block F of Ukiah North addition, and the defendant owns lots 1 and 10 adjoining plaintiff's lots on the south. The only question of fact was as to the location of the line dividing the lots of the respective parties, the plaintiff claiming that the defendant was in possession of 10 feet belonging to his lots. Both parties claim under conveyances made by the North Pacific Land & Improvement Company, by whom the said addition was surveyed and platted. Lots 1 and 10 were conveyed by said company to the defendant November 21, 1890, by the following description: "Lots numbers one and ten in block F in Ukiah North addition, as the same are laid down and delineated on the map of Ukiah North addition, filed in the office of the county recorder of the county of Mendocino, state of California, on the 18th day of September,

1889." Lots 2 and 8 were conveyed by the same grantor to the plaintiff, September 14, 1893, by the following description: "Being lots numbers two (2) and eight (8) in block F, as the same are laid down and delineated upon the map of Ukiah North addition, filed in the office of the county recorder in the county of Mendocino, state of California, on the 8th day of May, 1893." Neither of these deeds contained any statement as to the size of the lots otherwise than by reference to these maps, nor were the sizes of the lots marked upon the lots on the maps, nor any reference marked upon the maps tending to indicate their size other than the following: On the first of these maps there was the following note, "Note. All full-size lots are 50x145 feet;" and upon the second map it was noted, "Scale, 200 feet, 1 inch." The first of these maps was made by "Geo. P. Aston, surveyor and C. E., Los Gullicus, Cal."; and the second map was made by S. H. Rice. Mr. Rice testified that his map, as to block F and other blocks in that vicinity, was a copy of the first map, and that no intentional changes were made in that part, nor did he make any survey of block F or other blocks in that vicinity. That his map was intended to show a boulevard that he had laid out, and some changes were made necessary thereby in other parts of the addition. Applying the scale to what appeared to be full-sized lots on the original map, plaintiff's lots appeared to be 63 feet in width.

Upon the trial the defendant offered evidence tending to show that the original survey was marked upon the ground by stakes on the south line of an alley extending from Pine street, on the east, to Bush street, on the west, which alley is the north line of plaintiff's lots, and that stakes corresponding to these, placed 50 feet south, were also found and existed, and that these stakes marked the line between his lots and those of the plaintiff, and that in block E, the next block west of F, an alley was made on the same line with that in block F, marked by stakes on its southerly line, and that the lots on the south side of the alley in block E were marked by stakes corresponding and on a line with said stakes in block F, 50 feet south of the alley; that these stakes were such as were used to mark lots and blocks; that they were seen a few months after the original survey was made, and appeared to have been in the ground for a time corresponding to that survey. To this evidence the plaintiff objected. His objection was overruled, and the evidence received, and, at the conclusion of the evidence in the case, plaintiff moved to strike out all the evidence in relation to the fact of a survey, and of the existence of the stakes marking it, and this motion was denied. The correctness of these rulings is the only question in the case.

The point of plaintiff's contention is that

on neither of the deeds or maps is any reference made to any survey or stakes. He concedes that if the deeds had called for certain lots, "as surveyed by a certain surveyor, or laid out in a certain survey, parol evidence to identify that survey and the lines thereof would be admissible; and, the map being made a part of the deed, the same result would follow if intelligible reference were made thereon to any certain survey." It may be conceded that in neither of the deeds or maps is any express reference made to any survey or stakes. The evidence of the surveyor who made the second map shows, however, that, as to that part which includes block F, the second map was not based upon any survey made by him, but was copied from the first map (which was referred to in defendant's deed) without any intentional change, and that he was never authorized to survey or plat block F or the blocks adjacent thereto. The first map, therefore, need only be considered.

The making and filing of the plat or map of the "Ukiah North Addition" implies that said addition had been surveyed, and that the map or plat thereof filed September 18, 1889, was based upon said survey, and that such survey was marked upon the ground, so that the streets, blocks, and lots could be identified; for, without such survey and marking being resorted to, neither block F, nor the lots 2 and 8, claimed by the plaintiff, could be identified, and his deed would be held void for that reason, and that would defeat his action. We are not without authority in saying that the map or plat of this addition implies a previous survey and marking upon the ground. In *McDaniel v. Mace*, 47 Iowa, 510, in speaking of town plats, the court gave the following concise definition: "A plat is a subdivision of land into lots, streets, and alleys, marked upon the earth, and represented on paper." So, in *Banker v. Caldwell*, 3 Minn. 103, (Gil. 461), it was said: "A map is but a transcript of the region which it portrays, narrowed in compass, so as to facilitate an understanding of the original. It may be said to be an abstract of the original." In *Jackson v. Freer*, 17 Johns. 29, 31, it was said: "The map was intended to represent the relative situations and localities of the lots, as regarded each other. The actual survey was the practical location; and, although the patents do not specially refer to the field book and the actual survey of the lots, they virtually referred to them by referring to the map. It was composed from the survey, and the lots acquired their individuality from the survey also. Without, therefore, any express reference to the field book or survey, the reference to the map was a reference to its accompaniments,—the field book and survey." To the same effect is *Jackson v. Cole*, 16 Johns. 261, where it was said: "This is not construing the patent by anything dehors the grant, but by facts and

provisions, although not expressed, necessarily implied." We find nothing in our own Reports, nor in cases cited by appellant, which, viewed in the light of the facts involved, conflict with the authorities above quoted. That where the survey, as made and marked upon the ground, conflicts with the plat, the former must prevail, is well settled. *Whiting v. Gardner*, 80 Cal. 78, 22 Pac. 71, and cases there cited.

No question is made as to the sufficiency of the evidence to justify the findings if the evidence relating to a survey marked by the stakes was properly received, and upon that point we entertain no doubt. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(120 Cal. 502)

KELLEY v. OWENS et al. (S. F. 437.)<sup>1</sup>

(Supreme Court of California. Jan. 7, 1897.)

RESCISSON—ACTION BY VENDOR—DUTY TO RESTORE CONSIDERATION—INSUFFICIENCY OF OFFER.

Under the general rule (which is not changed by Civ. Code, §§ 3406-3408, providing for actions to rescind contracts), that, before a vendor can sue to rescind an executed contract for the sale of land on the ground of fraud, he must restore, or offer to restore, the consideration received, where such consideration consisted of stock in a corporation transferred to plaintiff, an offer to restore, made for the first time in the complaint, with a deposit of the certificates with the clerk undorsed, and their subsequent indorsement after the hearing, under the order of the court, before the entry of judgment, and after the stock had been sold for nonpayment of assessments, will not support a judgment of rescission.

Department 2. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Action by Mrs. A. S. Kelley against William Owens, executor of H. K. Owens, deceased, and others, for rescission of a contract. Judgment for plaintiff, and defendants appeal. Reversed.

E. M. Gibson and Wells Whitmore, for appellants. D. M. Delmas (Frank C. Cleary, of counsel), for respondent.

McFARLAND, J. On the 14th day of June, 1894, the plaintiff made a conveyance by deed of the land described in the complaint to H. K. Owens. The consideration of said conveyance was 55,240 shares of the capital stock of a certain corporation called the Pacific Coast Steel & Iron Manufacturing Company. The certificates of said shares were in the name of the said Owens, and he delivered them to the plaintiff, who had new certificates issued to herself for said shares. Shortly after the conveyance of said land to said Owens, he conveyed the same by deed

to his wife, Helen M. Owens. This action was commenced against the said H. K. Owens and his wife, the said Helen, for a rescission of the said exchange of properties, and a reconveyance of said land to the plaintiff. During the pendency of the action the said H. K. Owens died, and his executor, William Owens, was substituted for him as a party defendant. The alleged ground for the rescission and reconveyance is a fraudulent misrepresentation by the said H. K. Owens to the plaintiff as to certain facts upon which the value of said shares of stock depended. The court below found that the said representations were false, and rendered judgment in favor of the plaintiff, rescinding and setting aside the contract between the parties as to said exchange of properties, and adjudging that the legal title be reconveyed to the plaintiff. From the judgment, and from the order denying a new trial, the defendants appealed.

It is contended by appellants that the finding of the court of fraudulent misrepresentation as to said stock is not supported by the evidence, and also that the court committed a great many errors in the admission and exclusion of evidence against their objections, and to which rulings due exceptions were taken; but it is not necessary for us to inquire into and determine these questions, because, in our opinion, the judgment must be reversed upon another ground. There is no averment in the complaint that, before the commencement of the action, the plaintiff restored or offered to restore to defendants the said stock; nor is there any averment that plaintiff was unable to restore said stock, or any excuse given why she did not restore the same, or offer to do so. Indeed, there is no averment that she gave any notice to defendants that she rescinded the said contract. Neither is there any clear averment that said stock was of no value; and the court found that it was of value, not exceeding \$2,000. All that appears upon the subject of restoration of said stock, or an offer to restore the same, is as follows: In the second amended complaint, upon which the case was tried, it is averred that in the original complaint an offer was made to deliver the certificates of stock to the said H. K. Owens, who was then living, and the court found that such offer was made in the original complaint, and that the certificates were deposited with the clerk of the court, "not already indorsed, but to be hereafter properly indorsed under order of court," and that since the death of said Owens plaintiff "has been ready and willing, and has offered, and is now ready, willing, and offers to return and deliver said certificates to defendant William Owens, executor of the last will and testament of H. K. Owens, deceased, indorsed in any manner that may be by the court directed, and that may be necessary to revest the title and property in said certificates in the estate of said deceased." And the court finds that "upon the

<sup>1</sup> Rehearing granted.

plaintiff tendering the certificates of stock for the 55,240 shares of said capital stock of the Pacific Coast Steel & Iron Manufacturing Company, received by her from said H. K. Owens, to the defendant William Owens, executor of the last will and testament of H. K. Owens, deceased, properly indorsed by plaintiff," then a decree should be entered for the reconveyance of said property, etc.; and the decree recites that, the plaintiff having left said certificates in the custody of the clerk for said defendant, "properly indorsed by plaintiff," therefore it is decreed, etc. And so it appears that the said certificates of stock never were indorsed by the plaintiff so as to transfer the right of property therein to the defendants, or give defendants an opportunity to receive the same, until after the findings and immediately before the entry of the decree. And it further appears that, long before this time, and while the certificates still stood in the name of the plaintiff unindorsed, the shares of stock represented by them were sold for assessments, and thus passed entirely out of the control of the plaintiff. Under these facts we do not see how the judgment in this case can be affirmed.

It is undoubtedly the general rule that there can be no rescission of an executed contract, upon the ground of fraudulent misrepresentation, without restoration, before suit, by the party seeking to rescind, of everything of value which he had received from the other party under the contract, or a bona fide offer to restore. This rule is expressly declared in the Civil Code, and has always been rigidly enforced in this state from a very early date in our judicial history. In *Gifford v. Carvill*, 29 Cal. 589, the suit was upon certain promissory notes given for the purchase money of certain shares of stock in a mining corporation, and the defense was that the defendant was induced to make the purchase by the false and fraudulent representations of the plaintiff as to the value of the mine owned by said corporation. Judgment was rendered in the lower court for the plaintiff, but it was reversed upon the ground that the defendant had not restored the shares of stock to plaintiff, or offered to do so at the proper time. The court said: "There is no averment in the answer, and no proof or finding of the court that defendant notified the plaintiff of his intention to rescind the contract on the ground of fraud, or that he offered to return the stock. On the contrary, it appears that this defect was made one of the grounds for a new trial, and the court required the defendant to deposit the stock with the clerk for the benefit of the defendant as a condition of denying the motion." This court, in its opinion, delivered by Sawyer, J., approved the language used in *Herrin v. Libbey*, 36 Me. 357, as follows: "The rights of a party who has been defrauded in making a contract are, on the discovery of the fraud, within a reasonable

time, to rescind the contract and restore the parties to their former condition, or to affirm the contract and claim compensation or damages for the injury he has sustained by reason of the fraud." It also approved the language of the court in *Burton v. Stewart*, 3 Wend. 239, as follows: "Had they intended to treat the contract as void on the grounds of fraud, it was their duty, when they discovered that the mare was not such as the party had represented her to be, to have returned her to plaintiff. When prosecuted on the note, and the cause brought to trial, it was too late to repudiate the contract." The court below (in *Gifford v. Carvill*), upon denying the new trial, had ordered the defendant to deposit the stock for the use of plaintiff, but this court said: "If it was of some value, and on that ground it was necessary for the defendant to return it, then it was too late, after verdict and judgment, to offer it for the first time, on the requirement of the court as a condition of denying a new trial." In *Collins v. Townsend*, 58 Cal. 608, the court repeats the language used in *Gifford v. Carvill*, supra. In that case the suit was also upon a promissory note given for the purchase of stock in a corporation, and the defense was fraudulent representation as to the value of the stock. The stock itself had been pledged to the plaintiff as security for the note, but a judgment for plaintiff was reversed because, before suit, the defendant had given no notice of any rescission of the contract. The court say: "But a return of the property is only one mode of putting the parties in statu quo. If the vendor has retained possession of the property sold, as security or otherwise, the purchaser may indicate his intention to rescind, and notify the seller that he abandons all right or claim to the property. If he fails to do this under such circumstances, he is equally at fault as if, having received the property, he should refuse or neglect to return or tender it. As we have seen, the person desiring to rescind the contract because of fraud must restore—so far as his action can do this—the parties to their former condition within a reasonable time." In *Herman v. Haffenegger*, 54 Cal. 161, the court referred approvingly to the above authorities, and say: "It nowhere appears that any offer to return was made previous to action brought. \* \* \* The plaintiff had received of defendant something of value, and we do not find in the testimony any return or offer to return to defendant that which plaintiff had received of him. The plaintiff, indeed, as the testimony shows, did not then own what he had so received. He could not maintain the action until he had so returned, or offered to do so. This was a condition precedent to his maintenance of the action. And, as he did not comply with this request, the nonsuit was properly granted. *Gifford v. Carvill*, 29 Cal. 579." In *Bohall v. Diller*, 41 Cal. 533, the court announced the same doctrine, and

said: "When a vendee has so failed to perform the contract that the vendor may elect to treat the contract as rescinded, it is incumbent on the vendor, in order to work that result, to restore to the vendee whatever he has paid on the contract. A rescission of a contract, in order to be effectual, must be a rescission in toto. The plaintiff has failed to allege a repayment or tender of the amount paid by the defendant at the execution of the contract. He therefore cannot proceed to recover the possession of the premises on the ground of a rescission of the contract." In *Hammond v. Wallace*, 85 Cal. 531, 24 Pac. 837, the foregoing cases are referred to approvingly, and the court says: "Moreover, there is neither averment nor proof that plaintiff ever made any attempt to rescind or make any tender of or offer to return anything of value received from defendant previous to the filing of the complaint, or any tender at all. The only averment upon the subject is that plaintiff is 'willing and able to return to the defendant all the moneys which she paid to him on the purchase of the property, and all the moneys which she has lawfully or legitimately paid out or expended on account of the purchase of said property, and now offers to do so.' This is not sufficient." In *Loalza v. Superior Court*, 85 Cal. 31, 32, 24 Pac. 707, the court announces the same doctrine, cites the authorities above mentioned, and declares what is necessary to constitute a rescission, or to authorize the court to adjudge a decision, in accordance with the above authorities, although in that case it was held that the offer to restore was sufficient. In *Vineyard Co. v. Tuohy*, 107 Cal. 243, 40 Pac. 386, the court reiterates the doctrine of the above cases, and says: "He who would rescind a contract must put the other party in as good a situation as he was before; otherwise, he cannot do it. Chlt. Cont. 276. And his complaint, framed with this object, must state facts showing that he has performed, or offered to perform, on his part, every act necessary to thus place the defendant." The foregoing are only a few of the cases in which this court has repeatedly declared the doctrine as above stated.

Counsel for respondent, in his very able briefs, endeavors to avoid the applicability of the rule above stated to the case at bar by contending that there is a distinction between an action upon a rescission and a bill in equity to rescind, and that the case at bar is of the latter class. No doubt such a distinction is to be found in some of the authorities, although no case decided by this court recognizing the distinction has been called to our attention. But in such a case the purpose of the action, no matter what it may be called, is always to effect the rescission of a contract and put the parties, as nearly as may be, in statu quo. Strictly speaking, a contract can be rescinded only by one or both of the parties to it; but when one of the parties, having the right to

do so, has rescinded in the way prescribed by the law, and the other denies the right or the fact, the former is usually forced to invoke in some way the aid of a court to secure the fruits and benefits of the rescission. It is evident, however, that he cannot, in a plain case, escape the consequences of a failure to himself take the proper steps to rescind by simply casting his complaint in the mold of a bill in equity to rescind. There are exceptional cases where restoration or an offer to restore before suit brought is not necessary, as, for instance, where the thing received by the plaintiff is of no value whatever to either of the parties, or where the plaintiff has merely received the individual promissory note of the defendant, or where the contract is absolutely void, or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore, or where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may, by a final decree, fully adjust the equities between the parties; and it will be found that such instances, or others similar to them in principle, are those to which the authorities cited by appellants generally relate. The substance of the distinction will be found to be based, not upon the form of the action, but upon the difference between the cases which are within the rule, and those which, owing to peculiar facts, are exceptions to the rule. And the real facts and rights arising thereon cannot be kept out of sight by the device of a particular form of action. Sections 3406-3408, Civ. Code, do not establish any new rule upon the subject.

But, under any view, the judgment here under consideration cannot stand. In the first place, the case at bar is as clearly within the rule requiring restoration before suit as any case that could be well imagined. To give notice of the rescission, and restore the stock within reasonable time after discovery of the alleged fraud, was a plain duty of easy performance. There is no excuse for not doing so averred in the complaint, and no valid excuse shown by the evidence. Moreover, there was no valid offer to restore the stock after suit brought. It was not placed in a position and condition to be taken by appellants. Placing the certificates issued to respondent in the hands of the clerk, without assignment, was of no avail. They were not assigned until immediately before the judgment, ten years after the contract, and nine years after the commencement of the action; and then there was no assignment of the shares of stock, for respondent did not then own any stock, and the certificates assigned were mere worthless paper. Therefore, the judgment cannot be maintained even upon respondent's theory of the nature of the action, for the conduct of respondent has made it impossible for the court to decree a rescission that would do equity between the parties. The decree does not even attempt to

give appellants a money compensation for the stock, although that would have been unwarrantable, because upon rescission a party is entitled to receive back the thing which he gave, and not the mere amount of money which some one else may consider its value, unless, without the fault of the rescinding party, the thing cannot be restored.

We see no merits in the point that leaving the unassigned certificates of stock with the clerk to await the requirements of the final decree, if it should happen to be favorable to respondent, threw upon appellants the burden of paying assessments upon or otherwise taking care of said stock, or in the point that, because Owens made a deed of the land to his wife under the circumstances stated in the complaint, respondent was relieved of the duty of restoring or offering to restore the stock, or of making any demand, or giving any notice whatever of intention to rescind, upon or to either the husband or the wife. Indeed, the argument of respondent and the decree of the court go upon the theory that such restoration was at some time necessary. The judgment and order appealed from are reversed.

We concur: HENSHAW, J.; TEMPLE, J.

(115 Cal. 544)

DWYER v. PARKER, County Auditor.  
(S. F. 345.)

(Supreme Court of California. Jan. 6, 1897.)

CONSTITUTIONAL LAW—STATUTES REGULATING COMPENSATION OF COUNTY AND TOWNSHIP OFFICERS—CLASSIFICATION OF COUNTIES.

1. Const. art. 11, § 5, providing that for the purpose of regulating the compensation of all county and township officers, in proportion to the duties they perform, the legislature "may classify the counties by population," when construed with article 1, § 22, declaring that "the provisions of this constitution are mandatory and prohibitory, unless, by express words, they are declared to be otherwise," requires an act regulating the fees of such officers to be based on such a classification.

2. The act of March 28, 1895 (St. 1895, p. 267), "to establish the fees of county and township and other officers," etc., in so far as it attempts to fix or limit the compensation of county or township officers, and to give to district attorneys supervisory powers over the bills of justices and constables, being applicable alike to all officers in the state, and not based on the classification of counties, is unconstitutional, and such compensation is governed by the county government act of 1893; but the provisions fixing the fees to be charged by officers for services are not thereby affected, and are valid.

In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Action for mandate by William Dwyer against W. F. Parker, county auditor, to require the issuance of a warrant in favor of plaintiff, for fees as a justice of the peace. Judgment for defendant, and plaintiff appeals. Reversed.

D. W. Burchard (Rodgers & Paterson and Reed & Nusbaumer, of counsel), for appellant. H. A. Herrington and H. L. Partridge, for respondent.

HENSHAW, J. The action is in mandate. Plaintiff seeks to compel defendant, auditor of Santa Clara county, to draw his warrant upon the county treasurer in favor of plaintiff in the sum of \$141 for fees as justice of the peace, to which it is alleged plaintiff is legally entitled. By stipulation, the parties agreed upon all matters of fact, and here present as their controversy the single legal question of the constitutionality or unconstitutionality of an act of the legislature, entitled "An act to establish the fees of county and township and other officers, and of jurors and witnesses, within this state." St. 1895, p. 267. This act of 1895 proceeded under the constitutional mandate to declare the fees which the various county and township officers throughout the state shall charge and collect for the performance of official duties; but, as to justices of the peace and constables, it attempted to do something more than this. It not only established the fees which justices of the peace might charge and collect, but it limited the amount of the fees collected which they were allowed to retain, by providing as follows: "Justices of the peace may for their own use collect the following fees, and no others: \* \* \* For all services in a criminal action or proceeding, whether on examination or trial, three dollars; provided, however, that no more than the sum of seventy-five dollars in any one month shall be allowed out of the county treasury in misdemeanor cases to any one justice." St. 1895, p. 272. The act likewise provided: "That the board of supervisors may reject all bills presented to the county by justices of the peace and constables for fees in criminal cases in all cases or proceedings in which the district attorney has not, in writing, approved the issuance of the warrant of arrest." There is also a proviso applying to constables: "That no mileage shall be charged for a warrant of arrest or criminal process served outside of his township, except such service be approved in writing by the district attorney."

It is claimed by counsel for appellant that each of these provisions is unconstitutional; that they are inseparable parts of the whole act, which must therefore itself be declared invalid. While certain of these provisions have plainly no reference to justices of the peace, or to their fees, yet, as the case of *Haley v. Parker* (S. F. 344) 47 Pac. 1097, which involves the question of the legality of this act, and of its provisions regarding constables, has been submitted with the case now under review, under stipulation that the determination of one shall govern the other, the terms and provisions of the act of 1895 may all be considered in this opinion. In 1893, the legislature passed the so-called "County Government Act," and by and in that act, as the constitution commands (article 11, § 5), classified counties by population, and under that classification regulated the compensation of all county and township officers in proportion to their duties. As to justices of the peace in counties of the fourth class, to which Santa Clara county belongs, it pro-



vided that justices of the peace should have "such fees as are now or may hereafter be allowed by law; provided that no justice of the peace shall be paid more than two thousand dollars in any one year for services in criminal cases; provided further, that he shall retain for his own use and benefit all fees collected by him in civil cases. All other fees collected by such justice of the peace, after deducting the civil fees and the amount hereby allowed for his own services, shall be paid over to the county treasurer of said county." And, as to constables, "that they should have such fees as are now or may hereafter be allowed by law." It is thus apparent that the county government act of 1893, and the act of 1895, to establish the fees of county and township officers, both undertake to fix the compensation of justices of the peace and of constables, and that there is a conflict between their provisions in this regard. The constitution has provided that the legislature shall regulate the compensation of all county and township officers in proportion to the duties which they perform, "and for this purpose may classify the counties by population." Const. art. 11, § 5. When this language is considered with that of article 1, § 22, of the same instrument, which declares that "the provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise," the conviction is irresistible that the constitution has prescribed a single mode which must be adopted and followed in fixing the compensation of officers, and that mode is to adjust the compensation in accordance with their respective duties under classification of counties by population made for this purpose. To hold that the provision concerning classification of counties is permissive merely would be to deny to section 22 of article 1 its plain effect in a case calling for its application, and would likewise be to give to the language itself no possible force or efficacy. It was not necessary to confer upon the legislature this power to classify, by way of permission. The legislature would have had that power in any event, unless it had been expressly withheld; and the conclusion, therefore, may not be escaped that the mode designated by the constitution is mandatory, and is the one and only method contemplated by the constitution for fixing the compensation of the officers therein mentioned. The framers of the constitution demanded the classification of counties by population for the purpose of regulating the compensation of the officers thereof. After the making of such classification, the compensation can be adjusted by a reference to one or more of such classes, as the varying exigencies of the occasion may require.

The legislature is forbidden to pass any local or special law affecting the fees or salary of any officer. Const. art. 4, § 29. By the act of 1895 the legislature, mindful of this constitutional provision, passed a general law applicable to all county and township officers, declaring the amount of fees which they were entitled to charge and col-

lect from the citizen for the performance of the specified duty; but, in the instances above enumerated, it attempted to go further than this, and to fix or to regulate the compensation of certain officers, without reference to the classes and to the classification made in the county government act of 1893. This it was beyond the power of the legislature to do, and the provisions of the act which undertake to accomplish this result are illegal and invalid. But it does not necessarily follow from this that the whole act is void. If the court can see and say that the act, in the form in which it is left with the obnoxious portions excised, is still such an act as it may be presumed that the legislature would have passed had it known that certain provisions were void, the remainder, under well-settled rules of statutory construction, may stand. With the act under consideration no difficulty is experienced in saying that after eliminating the objectionable provisions fixing compensation, as being in conflict with the constitution and the county government act of 1893, there still remains a full and complete fee bill, establishing the fees which all county and township officers are entitled to charge and collect. It would follow therefrom, in accordance with the harmonious plan indicated by the constitution, that the compensation of the officers in question is regulated by the act of 1893. So far as that compensation is governed by the fees which they may retain, that also is embraced within the act of 1893. So far as that compensation is dependent upon the fees which may be charged and collected, those fees are fully provided for and established by the act of 1895.

It is admitted by all parties to the controversy that the provisions relative to the supervisory powers of the district attorney over the fees and bills of the justices and constables are obnoxious to the constitution and void. Const. art. 1, § 11; *Dougherty v. Austin*, 94 Cal. 601, 28 Pac. 834, and 29 Pac. 1092; *County of Orange v. Harris*, 97 Cal. 602, 32 Pac. 594; *Smith v. Strother*, 68 Cal. 196, 8 Pac. 852. But without discussion upon that matter, it is also quite apparent that these provisions are for the regulation of the compensation of officers, and therefore are open to the same objection above considered. Moreover, as the law now stands, it is made the duty of the justice of the peace to issue a warrant upon any legal criminal complaint, and it is likewise made the duty of the constable promptly to serve such warrant. If it is the design of the legislature to give to the district attorney the control of criminal prosecutions and procedure which is indicated by the provisions of this act, a slight examination of the laws suggests the propriety, if not the necessity, of a general remodeling of them in these particulars, to make the changes harmonious. So drastic a departure should scarcely find its sole expression in a provisional clause of a fee bill.

The appellant's claim for \$141 rests upon the contention that his compensation is regulated by the county government act, and this contention, as has been seen, is sound. The judgment must therefore be reversed, and the cause remanded, with directions to the trial court to enter judgment for appellant as prayed for. Ordered accordingly.

We concur: HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.

(115 Cal. 561)

REID v. GROEZINGER, Justice of the Peace.  
(S. F. 401.)

(Supreme Court of California. Jan. 7, 1897.)  
COUNTY OFFICERS—COMPENSATION—CONSOLIDATED  
CITY AND COUNTY—CONSTITUTIONAL LAW.

1. Act March 28, 1895, "to establish the fees of county, township, and other officers," etc., applies to the city and county of San Francisco. *Miller v. Curry* (Cal.) 45 Pac. 877, followed.

2. Act March 28, 1895, "to establish the fees of county, township, and other officers," etc., is unconstitutional in so far as it fixes the fees which justices of the peace may charge and collect, and retain to their own use, as an attempt to regulate the compensation of county or township officers, without reference to the classification of counties made in the county government act of 1893, and required by Const. art. 11, § 5. *Dwyer v. Parker*, 47 Pac. 372, followed.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Proceedings in mandate by J. S. Reid against G. C. Groezinger, a justice of the peace, to compel the entry of a default judgment. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Charles Wesley Reed, for appellant. Harry T. Creswell, City Atty., for respondent.

HENSHAW, J. Petitioner tendered to respondent, a justice of the peace of the city and county of San Francisco, the sum of two dollars, and demanded that the justice accept the same as the legal fee for the entry of a judgment, and that he thereupon enter a default judgment in an action commenced in his court. Upon the refusal of the justice, proceedings in mandate were commenced. A general demurrer to the petition having been sustained, this appeal is taken.

Appellant contends that the legal fee for the service demanded is two dollars, under an act entitled "An act to establish the fees of county, township, and other officers, and of juries and witnesses in this state," approved March 28, 1895, and that this act is applicable to the city and county of San Francisco. This contention is sound. *Miller v. Curry* (Cal.) 45 Pac. 877. The tender in this case was made to the justice personally, under appellant's claim that the act of 1895 supersedes all other acts, fixes the

fees which justices of the peace may charge and collect, and further provides that they shall retain these fees to their own use. This claim is disposed of by the case of *Dwyer v. Parker* (S. F. 345; decided after the appeal herein was taken) 47 Pac. 372. It is not necessary to decide whether, in the mode of collecting fees, justices of the peace of San Francisco are governed by the provisions of "An act to regulate fees in the city and county of San Francisco" (St. 1865-66, p. 67), or by section 91 of the Code of Civil Procedure, or by the provisions of the act of 1893, providing a manner of paying fees in cities and counties of the class to which San Francisco belongs. St. 1893, p. 127. None of these acts contemplates or permits the reception by the justice personally of the fee in question, and he is not compelled, in the performance of his duties, to recognize a tender such as that here made. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

(5 Cal. Unrep. 568)

JOHNSTON v. COUNTY OF LOS  
ANGELES. (L. A. 217.)

(Supreme Court of California. Jan. 8, 1897.)

CONSTABLES—COMPENSATION.

The compensation of a constable is regulated by the provisions of the county government act (St. 1893, p. 390); and the provision limiting the amount of compensation he shall receive is valid.

Department 1. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by J. H. Johnston against the county of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Jones & Newby and Jos. F. Chambers, for appellant. J. A. Donnell, Dist. Atty., and F. R. Willis, for respondent.

PER CURIAM. In *Dwyer v. Parker* (S. F. 345; decided January 6, 1897) 47 Pac. 372, it was held that the provisions of the "Act to establish the fees of county and township, and other officers, and jurors and witnesses, within this state" (St. 1895, p. 267), so far as the same attempt to fix the compensation of the officers therein named, are unconstitutional. The compensation of the appellant, as constable of Los Angeles township, is fixed by subdivision 14 of section 164 of the county government act of 1893 (St. 1893, p. 390). By the provisions of that section he is not authorized to receive any greater amount than is admitted in his complaint herein has been received by him for the services for which his present claim is made. We have no doubt of the constitutional power of the legislature to limit the amount of compensation which any officer shall receive for the performance of the duties of his office. The judgment is affirmed.

(115 Cal. 466)

**CARLSON v. SUPREME COUNCIL, AMERICAN LEGION OF HONOR. (S. F. 476.)**

(Supreme Court of California. Dec. 31, 1896.)

**MUTUAL BENEFIT LIFE INSURANCE—CONSTRUCTION OF CONTRACT—DEATH OF MEMBER WHILE IN DEFAULT—REINSTATEMENT—WAIVER.**

1. Under a contract of mutual benefit life insurance, by which the association agreed to pay to the beneficiary named the amount of the certificate, on the death of the member while in good standing on the books of the association, and providing that, on a failure of the member to pay the monthly assessments by the last day of each month, he should stand suspended, but might become reinstated by a payment of all assessments due within 60 days thereafter, the association is not liable on the death of the member while delinquent on the books, and he cannot be reinstated after his death, though the 60 days have not expired.

2. Under such a contract, the levy of the usual assessments against the member during the 60 days following his default is required to enable him to exercise his right to become reinstated, and is not a waiver by the association of default.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; A. L. Frick, Judge.

Action by Mary Carlson against the Supreme Council, American Legion of Honor, to recover on a certificate of life insurance. Judgment for defendant, and plaintiff appeals. Affirmed.

Geo. W. Langan, for appellant. Walter D. Mansfield, for respondent.

SEARLS, C. Mary Carlson, the appellant, brings this action to recover from the defendant (the Supreme Council, American Legion of Honor, a corporation organized under the laws of the state of Massachusetts, and doing business in the state of California) the sum of \$2,000 upon a benefit certificate issued August 5, 1892, to Edward Carlson, the husband of plaintiff, reciting him to be a member of a subordinate council of defendant, known as "Livermore Council, No. 1,070." The cause was submitted to the court upon an agreed statement of facts, and judgment was entered in favor of defendant. From this judgment plaintiff appeals, and the case comes up on the judgment roll.

The certificate (No. 165,746) issued to Edward Carlson, recites that he is a companion of the American Legion of Honor, has applied for three-degree membership to Livermore Council, No. 1,070, American Legion of Honor, instituted and located at Livermore, in the state of California, and passed the requisite medical examination, and has been duly initiated in said council, etc. It then proceeds to recite that the certificate is issued as evidence of the facts in it contained, and as a statement of the contract existing between the companion and the Supreme Council, American Legion of Honor, which contract, so far as important here, is as follows: "In consideration of the full compliance with all the by-laws, of the Supreme Council American Legion of Honor, now existing or

hereafter adopted, and the conditions herein contained, the Supreme Council, American Legion of Honor, hereby agrees to pay Mary Carlson, wife, \$2,000 (two thousand dollars), upon satisfactory proof of the death, while in good standing upon the books of the supreme council, of the companion herein named, and a full receipt and surrender of this certificate, subject, however, to the conditions, restrictions and limitations following: \* \* \* Second. That said companion shall have paid all assessments called to the benefit fund within the time and in the manner required by the by-laws of the supreme council in force at the time of the issuance of this certificate, or as the same may be hereafter amended. \* \* \* Fifth. That this benefit certificate is issued by the supreme council, and accepted by the companion herein named, for himself and his beneficiary, upon the express condition and agreement that, in case of any false or fraudulent statement or misrepresentation, or violation of any covenants herein contained, the same shall be void." The certificate is under the seal of the supreme council, and is duly signed by the supreme commander and supreme secretary under date of August 5, 1892.

The objects of defendant, as provided in its certificate of incorporation, are, among other things, "to establish a benefit fund from which, on satisfactory evidence of the death of a member of the order who has complied with all its lawful requirements, a sum not exceeding \$5,000 shall be paid to the family, orphans, or dependents as the member may direct." The by-laws of defendant, or a portion of them, are set out in the agreed statement. We state the substance of such of them as are deemed necessary. Defendant has a benefit fund from which death and relief benefits are paid. This fund is recruited by assessments levied upon the members of subordinate councils. All assessments and dues to subordinate councils are collected by collectors, who are officers of the subordinate councils, but are appointed by the supreme commander of defendant, and are amenable to the supreme council. It is the duty of the collector to receive from members all assessments due the supreme council, and on or before the 10th of each month to remit to the supreme treasurer all assessments paid him during the previous month; also, to remit all payments made by members for reinstatement and to report to his subordinate council. He also has certain duties to perform in relation to collecting dues of the subordinate council, which do not go to defendant, but are for the maintenance of such subordinate body.

Assessments: Assessments are divided into two groups, viz.: (1) Those due for two years after admission, etc. (2) Those becoming due thereafter. As to the first class, applicants of the age of Edward Carlson when he became a member were and are required to pay at admission to the collector

one assessment of 80 cents, and, upon a benefit certificate of \$2,000, for 24 months thereafter one like assessment of 80 cents on the 1st day of each month, and an additional one of like amount on the 15th day of each alternate month during said period of 24 months, "and any member failing to pay the assessments so required of him on or before the day limited for the payment of the same shall stand suspended from the order, and all his rights and benefits therein and his or her certificate shall be void." As to the second group of assessments, defendant has an executive committee, whose duty it is, on the 1st of each month, to determine how many assessments will be needed to pay debts already accrued and which may be anticipated for the month. Notice thereof is to be given to each council and to each collector, "and, for each succeeding month after the expiration of said twenty-four months, such member shall, on or before the last day of each calendar month, pay to the collector of his council, and without notice, all assessments which may have been called by the executive committee and are payable by him during said month, and in default thereof he shall stand suspended from membership in the order, and all benefits therein and his benefit certificate shall be void." A suspended member may be reinstated within 60 days after suspension by paying to the collector the full amount of arrears for dues, fines, and all assessments called on or before the date of reinstatement. Failing to do so, he must make written application for reinstatement, and be re-examined and furnish a favorable certificate from the medical examiner, etc. Members can only be reinstated as above, and any reinstatement of a suspended member by any council in any other manner is void. The by-laws of defendant and the by-laws of the subordinate council do not require collectors to notify members as to the payment of assessments or quarterly dues, except that a by-law of the latter requires such collector to notify members thereof when their quarterly dues are three months in arrears. These last-named dues are one dollar per quarter, payable quarterly in advance, on the 1st day of January, April, July, and October. The collector of Livermore Council was in the habit of giving to all the members of said council written notice each month of the assessments levied by the defendant against them. These notices were given without the knowledge or direction of defendant.

We may summarize the agreed statement by saying that, from the date of Edward Carlson's admission to the order, viz. from July 20, 1892, to November 1, 1894, a large number of assessments were levied against him, some of which were paid when due, but on four occasions, at least, he failed to pay such assessments when due, and was suspended on the books of Livermore Council and on the books of defendant. In each

instance he paid such assessments within 60 days, as provided by the by-laws, and was reinstated. On the 1st of November, 1894, assessments Nos. 319, 320, and 321, of 80 cents each, were duly levied by defendant, and were due and payable by said Carlson on or before November 30, 1894. Carlson was notified in writing by the collector as follows, which notice he received by mail: "Livermore Council, No. 1,070, A. L. of H., Livermore, Cal., Nov. 1, 1894. To Ed. Carlson. Companion: You are hereby notified that assessments Nos. 319, 320, and 321, amounting to \$2.40, having been called under this date, must be paid to the collector on or before November 30, 1894. Due on account of dues to December 31, 1894, \$1. A. G. Beazell, Collector." These three assessments were never paid, and ever since the last day of November, 1894, said Edward Carlson stood, and now stands, on the books of Livermore Council, and on the books of defendant, suspended from membership, and has not since been in good standing on the books of defendant. On the 1st day of December, 1894, three additional assessments were levied, of which, on said date, Carlson was notified in writing as above, except as to dates. This last notice specified that the assessments must be paid "on or before December 30, 1894." These assessments were never paid. The quarterly dues of \$1, specified in both the notices of November and December, were paid by Carlson to one Lenhart, but were not paid by him to the collector until after the notices had been sent. Edward Carlson died January 4, 1895. On the 24th day of January, 1895, the plaintiff herein, the beneficiary named in the certificate issued to said Carlson, caused the sum of \$4.80, the full amount of assessments due from said Carlson, to be tendered to the collector of Livermore Council, together with proofs of death, and demanded payment of the sum of \$2,000 named in the certificate issued to said Carlson. The collector refused to accept the sum tendered, giving as a reason therefor "that said Edward Carlson was then dead, and that a dead man could not be reinstated." From the foregoing statement it will be observed that Edward Carlson was suspended December 1, 1894, and died, during such suspension, January 4, 1895, or within the period of 60 days during which, under the by-laws of defendant, he was entitled to reinstatement, whether in sickness or health, by simply paying all arrearages assessed against him up to the date of such payment.

Under the certificate which was issued by defendant to Edward Carlson, there were certain conditions made a predicate to the payment of the sum of \$2,000 to the beneficiary therein named. The first of these conditions is that said sum shall be paid "upon satisfactory proof of the death [of Carlson], while in good standing upon the books of the supreme council." The second predicate is that the companion

shall have paid all assessments called to the benefit fund within the time and in the manner required by the by-laws then in force or thereafter adopted. And it is further provided that, upon a violation of any of the covenants therein contained, the same shall be void. One of the by-laws, in force, and referred to in the certificate, required the member to pay to the collector, on or before the last day of the month, and without notice, all assessments called for by the executive committee and payable for him during said month, "and in default thereof he shall stand suspended from membership in the order, and all benefits therein, and his benefit certificate shall be void." Under this rule the nonpayment of assessments as specified *ipso facto* operated as a suspension, and no action was necessary on the part of the grand or subordinate council to emphasize or effectuate the suspension, or to render the certificate void.

The contention of appellant is that the contract does not provide for a forfeiture until the expiration of the 60 days' grace afforded him within which to become reinstated by payment of assessments; that an agreement that a contract shall be void in default of payment at a given time, attended by a further agreement that the rights of a party thereto may be saved by payment within 60 days thereafter, is repugnant to and inconsistent with the idea of forfeiture before the expiration of the 60 days; that forfeiture implies a determination of the contract, and, if complete, reinstatement would necessitate a new contract and a new consideration, and that, as there was no new contract or new consideration provided in the case at bar, the reinstatement is evidence of the existence of the original contract; that no forfeiture could have been declared within the 60 days, and hence, as he died within that period, his right passed to his representative. In mutual benefit societies provision is almost invariably made in the charter, by-laws, or certificates of membership for assessments upon members for the payment of death losses, and for forfeiture of all rights of membership in case assessments are not paid in accordance with the rules and regulations. Such societies have no practical means of meeting their frequently recurring obligations except by the prompt collection of such assessments, and it has been found necessary to adopt stringent means to enforce their prompt payment. Forfeitures are not favored in law, but they will be enforced for a breach of the condition agreed upon, when such condition is clearly set out, and the intention of the parties is made manifest. If, by the contract, previous notice is a necessary precedent to the forfeiture, such notice must be shown to have been given before the forfeiture can occur. If the forfeiture is to take place within a specified time after notice, both the notice and the lapse of the time specified thereafter, during the life of the insured, must be shown. If, in addition to the foregoing requisites, some action by the society is essential to crystallize the forfeiture, such

action becomes an added requisite, and, like the others, must have been taken during the life of the insured, to perfect the forfeiture. In other words, the forfeiture must have taken place during the life of the insured. The reason of this is that the contract of life insurance, in the absence of express stipulations to the contrary, becomes complete at the death of the insured. The liability or nonliability of the insurer becomes fixed by that event. The corollary right of the plaintiff, as beneficiary of Edward Carlson, to recover, depends equally, in the absence of some question of waiver or estoppel, upon the conditions existing at the moment of Carlson's death.

The case, then, stands thus: Under his contract, Edward Carlson was bound, without notice, to pay, on or before the last day of each calendar month, to the collector of the subordinate council of which he was a member, all assessments levied against him for the current month, under the penalty of a forfeiture of his beneficial certificate for failure so to do. The forfeiture took place *eo instanti*, by operation of law. No notice or action by the society was necessary to its consummation. He failed to pay his assessments for November, 1894, and on December 1st was suspended upon the books of the subordinate and supreme council. There was, however, a condition subsequent, contained in the by-laws of defendant, and made a part of the agreement, and in support of which his payment of assessments was a sufficient consideration, *viz.* that by the payment, within 60 days after forfeiture, of the previous assessments and such others as had accrued in the interim, he could defeat and annul the forfeiture. This was an option of which he might avail himself. He failed to do so, and died within the 60 days. Could his beneficiary avail herself of this privilege within that period? Bacon, in his work on Benefit Societies and Life Insurance, at section 385b, lays down the rule as follows: "If a member neglects to become reinstated during his lifetime, he cannot be reinstated after his death, though the period in which he might be reinstated if living has not expired." "Where a member had been suspended for nonpayment of assessments, and he had neglected during his lifetime to secure his reinstatement, in accordance with the terms of his certificate, by paying arrearages while in good health and within a certain time, his restoration to membership cannot be effected after his death by payment by another person within the time limited of the sum due from him at the time of his death." *Nibl. Mut. Ben. Soc.* § 202.

Counsel for appellant contends that the foregoing quotations are founded, not upon principle, but upon the syllabus in *Modern Woodmen v. Jameson*, 29 Pac. 473, and that such syllabus is misleading, in not stating certain factors present there and not involved here. A rehearing was granted in that case (30 Pac. 460, 31 Pac. 733), and the court finally held that the member had not in fact been suspended. We have quoted from Bacon and

Niblack, not because the quotations are based upon *Modern Woodmen v. Jameson*, but because we regard their statements as being founded in elementary principle. Judge Seymour D. Thompson, an accredited authority on the subject of Corporations, in *Borgraefe v. Supreme Lodge*, 22 Mo. App. 127, held the following language: "It was argued in behalf of the plaintiff at the bar that there was no forfeiture in this case, because the declaration of a forfeiture is a judicial act, and neither Ada Lodge, nor any other judicatory having the power to declare a forfeiture, had so adjudged. This contention has no foundation, in view of the fact that under the provision of section 3 of law 2, above quoted, it is not necessary that the lodge, or any other judicatory of the order, should adjudge a forfeiture against a delinquent member for nonpayment of an assessment for a death benefit, but that, on the contrary, the suspension attaches by operation of law. There is, in view of this provision, a plain distinction between this case and cases which have arisen under the constating instruments of mutual insurance companies and other benevolent orders of this character, where the governing statute recites that for the nonpayment of dues, or other named delinquency, the member may be suspended by the lodge or other judicatory. Here the member is not suspended until the lodge or other designated judicatory exercises the power of suspension. *Olmstead v. Insurance Co.*, 50 Mich. 200, 15 N. W. 82. The reason is that whatever right the lodge or the order may have against the member for an infraction of its rules must be sought in conformity with the laws and rules of the order. The remedy therein prescribed must be exhausted before resort can be had to the judicial courts. *Chamberlain v. Lincoln*, 129 Mass. 70. But where, as in this case, the suspension attaches by operation of law upon an event named, and the member dies before the suspension has been set aside in conformity with the rules of the order, there can be no recovery upon his benefit certificate." This view seems to be sustained by the authorities. *Society v. Baldwin*, 86 Ill. 479; *Rood v. Association*, 31 Fed. 62; *Madeira v. Society*, 16 Fed. 749; *McDonald v. Ross-Lewin*, 29 Hun, 87; *Blanchard v. Insurance Co.*, 33 N. H. 9; *Society v. Helburn*, 85 Ky. 1, 2 S. W. 495; *Brown v. Grand Council*, 81 Iowa, 400, 46 N. W. 1086; *Holland v. Supreme Council*, 54 N. J. Law, 490, 25 Atl. 367.

It is expressly stipulated by the parties herein that all the assessments specified were duly, regularly, and properly levied and called, and were payable to defendant by Carlson on or before November 30, 1894, as to the November assessments, and on or before December 31, 1894, as to the December assessments; "and no question is raised or arises herein as to the calling, legality, etc.," of said assessments, and the duty of Carlson to pay each and all of them; (2) "that since November 30, 1894, Carlson stood, and now

stands, upon the books of Livermore Council \* \* \* and the defendant, suspended from membership, \* \* \* and is not now, and has not been since said last day of November, 1894, in good standing upon the books of this defendant." "Good standing upon the books of the supreme council" at the date of death, and payment of all assessments called for the benefit fund within the time and in the manner required by the by-laws, were the conditions of Carlson's agreement. Not having complied with these conditions, his beneficiary cannot recover, unless defendant has waived the forfeiture, or has performed some act or omitted to perform some act whereby an estoppel can be invoked against it.

Appellant contends: (1) That the levy and notice of the December assessments was a waiver of any forfeiture to which defendant was entitled by nonpayment of the November assessment; (2) that in case of each of the assessments a larger sum was demanded than was due; (3) that notice of the December assessment was void, because it called for payment December 30th, instead of December 31st. It is a general rule that, if an insurance company, after knowledge of any default for which it might terminate the contract of insurance, enters into negotiations or transactions with the assured which recognizes the continual validity of the policy, and treats it as still in force, the right to claim a forfeiture for such previous default is waived. *Murray v. Association*, 90 Cal. 402, 27 Pac. 309, and cases there cited. That rule has no application, however, to a case like the present, where the insured has a right to reinstatement within 60 days after forfeiture upon paying the amount due and all accruing assessments subsequent to the default and prior to reinstatement. Manifestly, the company, in such a case, must continue to levy the assessments; and to give notice thereof is but to impart needed information to the insured, to the end that he may exercise his right of reinstatement. Niblack, after discussing the question of waiver, states the rule in cases like the present as follows: "When a delinquent member has a right to reinstatement to benefits under his contract of insurance, either with or without conditions, the making of subsequent assessments which he is required to pay before he can be reinstated, and the giving him notice thereof, do not in any manner waive his first default, but are entirely consistent with the duty of the society towards him until he has been in arrears for the time stipulated within which he may be reinstated,"—citing *Leffingwell v. Grand Lodge*, 86 Iowa, 279, 53 N. W. 243; *Schmidt v. Modern Woodmen*, 84 Wis. 101, 54 N. W. 264; *Stiepel v. Association*, 55 Mo. App. 224; *Nibl. Mut. Ben. Soc.* § 306, p. 585; *Insurance Co. v. Cochran*, 88 Pa. St. 230; *Lantz v. Insurance Co.*, 139 Pa. St. 546, 21 Atl. 80; *Lyon v. Supreme Assembly*, 153 Mass. 83, 26 N. E. 236; *Insurance Co. v. Laury*, 84 Pa. St. 43. There is a class of cases in

which notices were given by the insurers calculated to mislead the insured, of which such cases as *Moore v. Order of Railway Conductors (Iowa)* 57 N. W. 623, and *Murray v. Association*, 90 Cal. 402, 27 Pac. 309, are samples. But the case at bar is clearly distinguishable from those of that class.

The sum of one dollar, included in the November notice of dues to the local council, was proper. The quarterly dues were payable in advance on the first meeting in October, etc., and, although not delinquent until the end of the quarter, it was due and payable from the beginning of the quarter. True, Carlson had paid it to one Lenhart, but, as he failed to pay it over to the collector, and is not shown to have sustained any relations to the council, official or otherwise, this could not avail to the benefit of Carlson. Carlson was, however, suspended for the nonpayment of the November assessments by the grand body, which had nothing whatever to do with the dues of the local council; hence, we are not concerned with the latter. We need not consider the question of the December assessments, as Carlson's default was perfect on the November assessments. We recommend that the judgment be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(23 Colo. 217)

NEWMAN et al. v. BULLOCK.

(Supreme Court of Colorado. Oct. 31, 1896.)

JUDGMENT—RECITALS—JURISDICTION.

1. A misrecital in a decree, to the effect that an intervenor was a defendant, is not fatal to the decree, where the intervenor resisted plaintiff's claim.

2. Where an intervenor, in a suit in which the ownership of certificates of stock was in question, presented for determination, without objection being made, the subject-matter of the validity of the certificates, there was an issue before the court as to the validity of such certificates which could be properly adjudicated, though the pleadings presented no direct issue.

Error to district court, Arapahoe county.

Petition by R. S. Bullock, trustee, against Charles Newman, president, and William L. Stephens, secretary, of the Swansea Gold & Silver Mining Company, to punish for contempt. From an order of imprisonment, defendants bring error. Affirmed.

In January, 1894, in the district court of Arapahoe county, the defendant in error filed his petition, naming as respondents the plaintiffs in error, Charles Newman and William L. Stephens, as president and secretary, respectively, of the Swansea Gold & Silver Mining Company, in which he asked that they be declared guilty of contempt for failure to comply with a judgment theretofore (in 1889) rendered against the said company, directing the officers thereof to issue to the petitioner a

certificate for 6,000 shares of the capital stock of said company. To this petition the respondents at various times interposed a number of objections in the way of motions to quash and demurrers, and it was not until the following September that the respondent Newman filed his answer to said petition, which, in substance, is the same as the answer of his co-respondent, Stephens, which was filed in the latter part of the previous January. A demurrer by the petitioner to these answers, upon the ground that they did not constitute a sufficient excuse for a failure to comply with the said judgment, was sustained by the court, and the respondents, electing to stand by their answers, were thereupon by the court declared guilty of contempt, and ordered within a specified time to issue to the petitioner the certificate of stock in controversy; and upon a failure to do so it was ordered that they and each of them should be imprisoned in the county jail of Arapahoe county until they complied with the order. From the answers of the respondents and the other pleadings in this proceeding the following facts appear: In the year 1881 there was incorporated under the laws of this state the Marss Consolidated Mining Company. Of its capital stock a certificate for 6,000 shares was issued and delivered to one George W. Middleton. Thereafter, the defendant in error, R. S. Bullock, as trustee, became the owner of said certificate by assignment, but failed to secure a transfer of the stock upon the books of the company within 60 days after the assignment, as the statute of this state requires. Gen. St. 1883, § 269; Mills' Ann. St. § 508. About this time the name of the company was duly changed to that of the "Swansea Gold & Silver Mining Company." The officers of the company questioned the validity of this certificate. They refused on that ground to make the transfer and exchange desired by Bullock, and requested him to bring a suit against it to determine the legality of the same, which he did not do. Before any transfer was made, various suits were brought against Middleton and others, and in aid thereof attachments were issued and the writs levied upon this stock; the creditors asserting that it was the property of Middleton, standing, as it did, on the books of the company in his name for more than 60 days after the assignment by him. Judgments in some of these suits were duly rendered, and executions were sued out and delivered to the sheriff of Arapahoe county, who, in pursuance of the commands of the writ, threatened to sell this certificate and the stock represented thereby as the property of Middleton. Thereupon the defendant in error here, claiming to own said certificate of stock, as trustee, brought his action in the district court of Arapahoe county to establish his ownership of the stock, and to restrain the sheriff from making sale thereof as the property of Middleton. All of the attaching creditors were not made parties defendant to

the suit. During the pendency thereof, the State National Bank of Denver and others, attaching creditors, asked leave of the court to intervene. Permission was granted, and in its petition the bank claimed an interest in the subject-matter of the litigation adverse to both of the parties,—that is, it claimed that the stock in controversy belonged to Middleton, and not to the plaintiff, and that its lien, by virtue of the levy of its attachment writ, was superior to the lien of the attaching creditors who were made parties defendant in the original action. In this petition the bank asked that the mining company and Middleton be brought into court to answer its petition of intervention, to the end that the entire controversy touching "the date, number, and ownership" of the certificate be determined. Middleton was not made a party, or brought in to answer the petition of the bank; but process was served upon the mining company, and in response thereto it appeared and made answer to the bank's petition, in which, among other things, it alleged that it was unable to determine for itself whether the certificate in controversy was or was not valid. It denied any knowledge as to the ownership of such certificate, and disclaimed any ownership or interest therein; and it asked that all of the parties in any way interested in the ownership or validity of the certificate be brought in, and their rights determined. Bullock, the plaintiff in the action, also filed an answer to the bank's petition, denying Middleton's ownership of the stock in question, and denying also that the bank had any interest therein, either by virtue of its attachment or otherwise. None of the original parties to the action, either plaintiff or defendants, made any objection to the filing of the petition by the bank, or to the answer thereto interposed by the Swansea Mining Company. In this state of the pleadings, the action proceeded to a hearing before the court, and findings of fact were made to the effect that Bullock was the owner of the certificate of stock in controversy, that the same was a valid and legal certificate, and the shares thereby represented were legal and valid shares of the capital stock of said mining company; upon which findings a decree was entered adjudging and establishing Bullock's ownership of said stock, and enjoining the sheriff from making a sale thereof as the property of Middleton. The decree further provided and directed that the officers of the mining company, within a time fixed in the decree, upon the production and delivery to them of the original certificate by Bullock, issue to him, in lieu thereof, a certificate of the capital stock of the Swansea Gold & Silver Mining Company for 6,000 shares. In the decree are found these recitals: "This cause coming on this day to be heard upon the issues joined herein between the said plaintiff and the defendants \* \* \* the Swansea Gold and Silver Mining Company, \* \* \* and the court having read and considered the pleadings filed

herein, and having heard and considered the testimony and depositions of witnesses on behalf of the parties hereto, and the arguments of their respective counsel, and being fully advised in the premises, doth find," etc. An appeal by some of the defendants in the original action (but in which the mining company did not join) was perfected to this court, and the judgment was thereafter, in October, 1893, affirmed. *Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183.

Charles H. Toll and Wm. R. Barbour, for plaintiffs in error. Lafe Pence, J. S. McGinnis, and Sullivan & May, for defendant in error.

CAMPBELL, J. (after stating the facts). In the answers of the respondents it is averred that upon the trial of the original action there was no issue joined, either as between Bullock, the original plaintiff, and the Swansea Mining Company, or as between the original defendants in that action and said company, or as between the State National Bank, as intervener, and the said company, as to the validity or genuineness of the certificate of stock in controversy, or the shares represented thereby, otherwise than as appears from the pleadings filed in that case, an abstract of which has been set out. For this reason it is urged that, inasmuch as it is said that no issue was joined thereupon, the decree of the court, in so far as it purported to establish the validity of the stock and to order the officers of the company to issue a new certificate in lieu thereof, was absolutely void. Upon this theory it was that respondents, under advice of counsel, refused to comply with said judgment; and this is the point upon which they chiefly rely here. There are some other objections, more or less of a technical nature, interposed by them, upon which errors have been assigned and argued, but we consider none of them of sufficient merit to demand a consideration. We proceed, therefore, directly to a consideration of the main, and the only important, question involved in this controversy.

If this decree is void, respondents were not guilty of contempt of court in refusing to obey it. *Smith v. People*, 2 Colo. App. 99, 29 Pac. 924; *Rap. Contempt*, § 33. The decree shows upon its face that the matters adjudicated were such as come within the general jurisdiction of district courts in this state. If they were really in issue in the case, or so treated and litigated, or the parties were actually heard upon them, the decree is presumptively valid, as it recites that those affected were before the court as parties to the action. The various infirmities rendering the decree void, said to be apparent from an inspection of the record, set out in full in these proceedings, we now proceed to consider. It is safe to say that the tendency of the later authorities, especially in the federal courts, is to enlarge the definition of jurisdiction to make it include not only the power to hear and determine, but also the power to render the particular judgment in the particu-



lar case. In other words, "In order to the validity of a judgment, the court must have jurisdiction of the persons, of the subject-matter, and of the particular question which it assumes to decide." "Neither can it go beyond the issues and pass upon a matter which the parties neither submitted nor intended to submit for its determination." 1 Black, Judgm. §§ 215, 242; Johnson v. Johnson, 20 Colo. 143, 36 Pac. 898; 12 Am. & Eng. Enc. Law, 247, note 1 et seq.; Munday v. Vail, 34 N. J. Law, 418; Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773. This being so, it is said that the court exceeded its jurisdiction in rendering judgment against the Swansea Gold & Silver Mining Company in favor of the plaintiff Bullock—First, because it was not a party to the action; second, because the subject-matter in dispute between plaintiff and the defendants in the main action was the ownership of a certificate of stock, and no other or different issue, such as the validity of that certificate, could be thrust into the case, either by the intervener or the mining company in its answer to such petition of intervention; third, as a matter of fact, no issue touching the validity of the certificate was presented in the case, either as between the mining company and the plaintiff, Bullock, or as between the original plaintiff and the defendants, or the mining company and the intervener, or by any of the parties to the action. If either of these three contentions is borne out, it follows that the decree is void. But the claim of the plaintiffs in error rests purely upon assumption. Though averments to the above effect are in their answers, they are but conclusions of law of the pleaders, and are contradicted by the facts alleged in the same pleadings. The appearance of the mining company was in obedience to a writ to answer the petition of intervention of the bank. The recital in the decree that it was a defendant in the action is, therefore, not strictly correct in the sense that it was one of the original defendants. In the sense, however, that it made a claim antagonistic to the plaintiff, as to him it sustained the relation of a defendant. Be this as it may, the record does show that it was a party to the action, and a mere misrecital in the decree as to the true relation which it bore therein—so long as it was in fact a party, and in substance was a defendant resisting something claimed by the plaintiff in the case—is not fatal to the decree.

We may concede that the issue joined between the plaintiff Bullock and the defendants was over the ownership of a certificate of stock, and that a new or different issue cannot be introduced into a cause by a petition of intervention, and that said new issue, if it was present at all in the case, was brought in by the mining company in its answer to the petition of intervention filed by the bank, and that it was, in fact, an issue different from that in the main action. If a proper objection had been seasonably interposed, neither the intervener nor the one answering to its petition of intervention could have been permitted to change

the issues joined in the main action. Van Gorden v. Ormsby, 55 Iowa, 657, 8 N. W. 625; Mayer v. Stahr, 35 La. Ann. 57; 17 Am. & Eng. Enc. Law, 646 et seq. But if such new issue is of such a nature that in a proper case it comes within the jurisdiction of the court, if no objection in the lower court is made by any of the parties concerned to its introduction into the case, no such objection can thereafter be made or raised upon a direct review of the judgment, much less upon a collateral attack by the very party who tendered the issue. McKenty v. Gladwin, 10 Cal. 227; Smith v. Penny, 44 Cal. 161; People v. Reis, 76 Cal. 269, 18 Pac. 309; Sanxey v. Glass Co., 63 Iowa, 707, 17 N. W. 429; 17 Am. & Eng. Enc. Law, 648.

We come now to the crucial question in the case. Counsel ingeniously argue that the question of the validity of the certificate was not, as a matter of fact, mooted in the pleadings or litigated by the parties. As we understand them, their argument is that in its answer to the bank's petition the mining company did not expressly or positively allege that the certificate was or was not invalid, and there was no denial or response of any kind by any of the parties to its answer; therefore there was no issue raised touching the genuineness of this certificate. Ordinarily an issue of fact is raised by an allegation in one pleading and a denial in another; but an issue may be presented without a denial. For example, an allegation of partnership in a complaint brought to dissolve the co-partnership presents an issue which the court may determine, though no denial of that allegation is found in the answer. So here, when the Swansea Company presented for determination the subject-matter of the validity of this certificate, the mere fact that no denial was made by any other party does not eliminate that point from the case. Up to the time of the filing of the answer by it to the bank's petition the only issue before the court was that of ownership. But the mining company, when summoned in, voluntarily raised another and different issue, and expressly asked the court to determine it. It made no claim for itself, or in behalf of any of its stockholders, or in favor of any other party, of ownership of the stock in controversy. But for years it had refused to issue in lieu thereof another certificate in the new name of the company, upon the admitted ground that its officers could not, with safety to themselves or in justice to the stockholders, issue such certificate without having its validity adjudicated in a proper proceeding by a court of competent jurisdiction. To end all such controversy, it therefore, in this proceeding, perhaps somewhat irregularly,—and, had a proper objection been made by an interested party, possibly the attempt would have been unsuccessful,—asked the court to determine this question for those interested therein. No other pleadings by the other parties were necessary, and if no objection was made (as there was not) the court might properly adjudicate upon the matter submitted. That it did so is apparent from the record of that case. True it

is that there is no express recital in the decree that evidence was heard as to this particular question of validity; but the decree recites that the parties, including the Swansea Mining Company, appeared at the hearing, and evidence was offered by the parties to the action upon the issue joined, and findings were made both as to the ownership and validity of the stock in controversy. It appears, therefore, that the parties had an opportunity to be heard, and in fact were heard, upon the question of the validity of the stock, and treated the same as an issue in the case, and as though it was in the pleadings. In speaking of that section (section 1, art. 4) of the federal constitution which provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," Mr. Justice Brewer, in the case of *Reynolds v. Stockton*, supra, says: "The requirements of that section are fulfilled when a judgment rendered in a court of one state, which has jurisdiction of the subject-matter and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another state." That this issue as to the validity of the stock was not only raised by the pleadings, but that the mining company and the other parties were in fact heard on the matter determined, and that the judgment was fairly responsive to such issues, we have no doubt. The judgment is therefore affirmed. Affirmed.

(23 Colo. 167)

**LAST CHANCE MINING & MILLING CO.  
v. AMES.**

(Supreme Court of Colorado. Oct. 19, 1896.)  
EMPLOYEES—INJURIES—INSTRUCTIONS—FALSE TESTIMONY—APPLIANCES—MASTER'S DUTY  
—EVIDENCE.

1. In an action for death of an employé caused by a skip, in which he was being raised out of a mine, leaving the track, it appeared that the decedent was the eleventh to get on the skip; that a rule of the mine, of which the defendant had notice, prohibited more than six at a time riding on the skip. *Held*, that an instruction that decedent was not guilty of contributory negligence if he was ordered to get on by the skip tender should be qualified by stating that, if no emergency existed, it was the duty of decedent, notwithstanding the order, to refuse to get on if to an ordinarily careful man it was manifestly dangerous so to do.

2. A refusal to give an instruction based on and applicable to the facts in evidence which are not covered by other instructions, is error.

3. It is error to instruct that the entire evidence of a witness who had testified falsely as to a material fact may be disregarded, except where corroborated, without limiting it to false testimony corruptly given, where the evidence shows that the false testimony was given under an honest mistake.

4. An instruction that an employer must exercise such care to furnish safe appliances as an ordinarily prudent man would exercise, having regard for his own and the "safety of those nearest and dearest to him," is erroneous, as

imposing a degree of care on the employer higher than ordinary care.

5. In an action for death of an employé by a skip, upon which he was being raised out of a mine, leaving the track, it was error to admit evidence of defects in the track in other portions of the mine, in the absence of a claim that the track generally was improperly constructed.

Appeal from district court, Mineral county.

Action by Ella E. Ames against the Last Chance Mining & Milling Company. From a judgment for plaintiff, defendant appeals. Reversed.

Ella E. Ames, as the surviving wife of Fred Ames, instituted this action to recover damages on account of the death of her husband, alleged to have been caused by the negligence of the defendant company. In its answer the mining company denied the charge of negligence, and alleged that the death of plaintiff's husband was caused by his own lack of care. On the issues thus raised, there was a trial before a jury, which found for the plaintiff, in the sum of \$5,000, and upon this verdict the court entered judgment, to reverse which the defendant has appealed to this court. The plaintiff's husband was employed as a trammer to work in the fourth level of defendant's mine. The company was operating this mine by means of a shaft about 14 feet wide, which was divided into three compartments, substantially equal in dimensions, the north and south compartments of which were used as skip or car ways, and the middle one as a man way. In sinking this shaft, the foot wall of the vein was followed, and for the first 70 feet the pitch of the shaft ran at an incline from the horizontal of about 80 degrees; for the next 100 feet, about 63 degrees; and, for the residue of the distance, about 50 degrees. The course of the shaft, as it was first constructed, slightly inclined to the right or north from a perpendicular plane drawn through a direct east and west line, but was afterwards changed so that it was substantially straight. The shaft was cribbed, and in the center of the north skip compartment, in which the accident occurred, was laid a track upon which the skip was operated. The track was about 3 feet 2 inches wide. The skip or car which was used for hauling up ore, and lowering and raising the men as they went to their work and departed from the mine, ran upon this track, and is a box of iron, rectangular in form, with the exception that at its upper end, instead of being square, it is sloping. The bottom of the skip is 5½ feet in length, and the top 3½ feet in length, the height 2½ feet, and the width 2 feet 10 inches. The skip runs upon four wheels, one pair about 6 inches from the lower end, and the front pair about 3½ feet from the lower end. At or near its lower end is fastened a bail, which runs up at each side, passing over the front of the skip, and to the center of the bail is fastened a cable by means of which the skip is raised and lowered. On this bail, near the front of the

skip, shoes are fastened, one on each side, which run upon the guide rails, fastened to center pieces or uprights; and the object of this contrivance is for safety in checking the fall of the skip in case of a break or sudden slacking of the cable. The specific negligence charged against the defendant is that it carelessly and unskillfully constructed and maintained this shaft and track and the other appliances connected therewith, so that they were dangerous, unsafe, and unfit for use; that the track was unlevel and uneven, the south rail being lower than the north one; that there were depressions in the track; that the shaft was not straight, but winding, so that the track was curved; and that the guides upon which the ball of the car rested were of imperfect material, and unsafe in strength for the purpose required. And, by reason of such negligent acts, it is alleged that on November 5, 1893, while the plaintiff's husband was being raised from the fourth level of the mine in which he was working, the skip upon which he was being hoisted left the track, and one of the guides to the skip broke, and deceased was thereby forced between the skip and one of the posts projecting into the shaft from the partition of the compartment, and was killed. The specific act of negligence attributed to the deceased by the defendant is that he, with full knowledge of the danger, voluntarily got upon, and rode in, this skip, at a time when there were 12 men therein, and that the skip so overloaded was manifestly dangerous even to a casual observer, and, by reason of such overloading, the skip left the track, and the injury thereby resulted. There was evidence tending to establish plaintiff's cause of action, as well as to substantiate the affirmative defense of contributory negligence, interposed by the defendant.

Wolcott & Valle and W. W. Field, for appellant. Cavanagh & Thomas, M. S. Beal, and Rogers, Cuthbert & Ellis, for appellee.

CAMPBELL, J. (after stating the facts). If we should concede, as defendant claims, that this record leaves it somewhat uncertain as to what was the actual cause of this injury, nevertheless, as the evidence was conflicting, we would not be disposed to reverse the judgment on the ground of the insufficiency of the evidence. Some of the rulings of the trial court complained of, though technically erroneous, might be upheld as not being prejudicial; but there are others which cannot be sustained without overruling previous well-considered cases in this court and other courts of last resort.

Of its own motion, the court, in the nature of a general charge, instructed the jury as to the duty that rested upon the defendant, as well as the law pertaining to the contributory negligence of the deceased. This was followed by a series of instructions submitted by the plaintiff, and some asked by the

defendant, while other instructions requested by the defendant were refused.

There was evidence tending to show that one of the rules of the mine, notice of which had been given to all of the employees, including Ames, was that but six men at a time should ride on the skip, and that on this occasion twelve men were riding, deceased being the last but one to get on. The thirteenth instruction, given at the request of the plaintiff, informed the jury that if they believed that the skip tender of the mine, just previous to the accident, ordered the men who were on the skip at the time Ames was killed to ride thereon, and Ames complied with the order, then he was not guilty of contributory negligence, provided it was one of the skip tender's duties to prevent more than six men from riding in the skip at one time. This instruction conflicts with a previous paragraph of the general charge, given by the court of its own motion. Under the facts of this case, it should have been qualified by including the statement that Ames was bound to exercise ordinary care and caution, whether or not the rule existed, even though he was ordered by the skip tender to ride on the skip, provided, also, it was to an ordinarily careful man manifestly and obviously perilous for so many men to ride on the skip at the same time. There was no emergency calling for sudden action upon his part, which, in some circumstances, might excuse him for complying with the order of the master, even though such compliance was attended with danger.

The seventh instruction, asked by the defendant, and refused by the court, states the law applicable to a case where the injured party voluntarily remains in the service of his employer after knowledge of defects in the machinery or appliances which caused the injury. It should have been given, and its refusal was error. *Railroad Co. v. Lieke*, 17 Colo. 280, 29 Pac. 175; *Tramway Co. v. Nesbit*, 22 Colo. 408, 45 Pac. 405. The eighth instruction, asked by the defendant, and refused by the court, in substance is that if the injured party, by the exercise of ordinary care, under the circumstances, might have avoided the consequence of the defendant's negligence, but did not, then the case is one of mutual fault, which precludes a recovery. This ruling was error. We do not find that the substance of either of these instructions, which were refused by the court, was given in any of the instructions by the court of its own motion; but, on the contrary, in so far as there was an attempt to instruct upon these points, the law was not correctly given.

Plaintiff introduced evidence tending to impeach the defendant's witness Crawford, by showing that, previous to the trial, he made statements contradictory of his testimony as to the extent of the depression of the south rail below the level of the north rail of the track. The alleged inconsistency of the two statements the witness endeavor-

ed to explain by saying that his former statement was based on casual observation only, while his testimony was predicated upon an actual measurement subsequently made. As applicable to this situation, the court, at the instance of the plaintiff, gave an instruction, numbered 14. It informed the jury that, if they believed from the evidence that any witness has "testified falsely with reference to material fact, the jury may disregard the entire evidence of such witness, except as the same may be corroborated by other evidence worthy of belief." The jury is not at liberty to disregard the entire testimony of a witness merely because he has sworn falsely as to one material fact. If he has sworn falsely as the result of inadvertence, honest mistake, from imperfect memory, or through a misunderstanding, as, in this instance, it was claimed, no such consequences should attach to the rest of his testimony. It is only where the witness has willfully or corruptly sworn falsely to a material fact that the doctrine attempted to be laid down in this instruction is applicable, and this element should have been added. It was error to give it as it went to the jury. *Gottlieb v. Hartman*, 3 Colo. 53.

In defining the degree of care which the defendant company must exercise in furnishing safe machinery and appliances, the court instructed the jury that it must be such care as an ordinarily prudent man would exercise, having regard for his own safety "and the safety of those nearest and dearest to him." We think the clause quoted should not have been added, as its natural effect would be to impress upon the minds of the jury that the care must be higher and greater than ordinary care. It might well be that a man would exercise the highest possible degree of care to protect his wife and children from harm, and yet this degree of care is more than the law exacts of him in such a case as the one at bar. We find no authorities, and are cited to none, that impose a duty enjoined by this language. *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Railroad Co. v. Ogden*, 3 Colo. 499; *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771.

Over the defendant's objection, the court permitted the plaintiff to introduce evidence as to defects in the track and guide rails below the fourth level in the north compartment, and as to like defects in the south compartment. Had this evidence been confined to such defects, if any, as necessarily resulted from the pitch and course of the shaft, its admission might not be error, because, from the construction of the shaft, defects of this character, if any, would probably be found in all three of the compartments, and at different places therein. But, in the absence of any claim that the track and guide rails generally were improperly constructed and maintained, evidence as to defects therein below the fourth level in the north compartment, or in any portion of the south com-

partment, resulting from the ordinary wear and tear, and from improper maintenance, certainly would not be material, as shedding light upon the condition of the shaft or track or skip or guide rails at the place where the accident occurred. Such evidence relates to collateral matters, and inevitably tends to mislead and confuse the minds of the jury. *Marr v. Wetzel*, 3 Colo. 2.

There is no serious argument made in support of the rulings just discussed. Indeed, counsel for appellee seeks to escape the consequences thereof by insisting that no proper exceptions were saved, that the instructions were not embodied in the bill of exceptions, and that the errors are not particularly specified. But an examination of the record discloses that section 387 of the Code, covering this subject, as well as rule 11 of this court, has been substantially followed, and that the proper objections were seasonably interposed, and exceptions duly preserved.

Numerous other errors have been assigned and argued, which we consider unnecessary to determine. Our silence in reference thereto is not to be construed as indicating, one way or the other, our opinion concerning them; and, as they will probably not occur at another trial, we refrain from further mention of them.

It is to be regretted that this judgment must be reversed, but, for the errors pointed out, there is no other alternative. Were they not of such serious importance, and had they not so manifestly contributed to the verdict, as we have already said, they might be overlooked. In the haste and confusion of a hotly-contested trial, they were doubtless committed; but it is apprehended, in the event of another trial, that, with this and other similar decisions of this court called to their attention, the trial court and counsel will avoid the mistakes of the former trial. The judgment is reversed, and the cause remanded for a new trial. Reversed.

(23 Colo. 314)

### RITCHEY v. PEOPLE.

(Supreme Court of Colorado. Jan. 4, 1897.)

CRIMINAL LAW—INSTRUCTIONS—OBJECTIONS—BILL OF EXCEPTIONS—STRIKING FROM FILES.

1. The practice in criminal trials of giving instructions taken from the reports of states having statutes dissimilar to those of the state where the trial is had, condemned.

2. When conflicting propositions of law are given upon a material point, one correct and the other incorrect, the judgment will be reversed. *Clare v. People*, 10 Pac. 799, 9 Colo. 122, cited and approved.

3. A bill of exceptions should be filed during the term of court at which the trial is had, or, if thereafter, within such time as may be granted by the court by an order duly entered of record; but the right to strike from the files a bill signed after the term may be lost by laches, although the clerk's record fails to show an order extending the time.

4. In a criminal case a delay of four months in filing a motion to strike the bill from the files held fatal to the motion, the attorney general having in the meantime appeared, and re-

isted an application for a supersedeas based upon the bill of exceptions, and thereafter, upon an application to modify such order, counsel for plaintiff in error having in the meantime filed abstracts and briefs based upon such bill of exceptions, and the cause having been set down for oral argument upon the merits, at the request of the attorney general.

5. It is the better practice to require counsel to particularly point out their objections to instructions at the time the same are given; but, if this is not done, an exception at the close of a written charge, duly paragraphed and numbered, "to each and every instruction," held sufficient if allowed in this form by the trial court.

6. It is the duty of public officers intrusted with the prosecution of criminal cases to see that no conviction shall take place except in strict conformity to law.

(Syllabus by the Court.)

On petition for rehearing. Denied.

For former opinion, see 47 Pac. 272.

HAYT, C. J. The defendant was tried, and convicted of murder in the second degree, and sentenced to confinement in the penitentiary at hard labor for the term of 20 years. Upon review, the judgment of the district court was recently reversed in this court, for error in the instructions. A petition for rehearing has since been filed, together with what counsel designate as a "brief" in support of the same. Although the latter document covers 25 pages, it contains no argument tending to show that this court was in error in any one of the three specifications of error pointed out in the original opinion as occurring in instruction No. 18. Notwithstanding the fact that some brief allusion is made in the document to what is termed the "shadowy distinction" between the words "great" and "enormous," it is evident that the so-called "brief" was not filed for the purpose of pointing out any error in our former opinion, as the judgment of the district court was not reversed for the incorrect substitution in the instructions of the word "enormous" for the word "great." In order that similar errors may be avoided in the future, we will, in this connection, call particular attention to our statute (Mills' Ann. St. § 1188): "If a person kills another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing was absolutely necessary." Stating the proposition conversely, the law will justify the killing in self-defense by one otherwise without fault, where the danger is so urgent that, in order to save his own life, or prevent his receiving great bodily harm, the killing was absolutely necessary. The term "great bodily harm," as here used, is one to which courts and juries in this state have become familiar by frequent repetition and long-continued usage, and for this reason the language of the statute should not be departed from; and it is particularly dangerous to copy instructions from other states having dissimilar statutory provisions.

It may be instructive in this connection to

refer briefly to two decisions in other states upon statutes like ours. In the case of *Reins v. People*, 30 Ill. 256, the trial court substituted for the language of the statute the term "most serious bodily harm," and the supreme court said this required too great a degree of danger, and reversed the case for this and other errors. In *McDonald v. State*, 89 Tenn. 161, 14 S. W. 487, the court reversed a judgment of manslaughter, for the reason that the word "enormous" was substituted in the charge for the word "great," as in the case at bar; but in this case the judgment of the district court was reversed for other errors particularly pointed out in our former opinion, at least one of which (that in reference to "retreat to the wall") is more serious than the substitution of the word "enormous" for the word "great." *Babcock v. People*, 13 Colo. 515, 22 Pac. 817; *Boykin v. People*, 22 Colo. 496, 45 Pac. 419; *Beard v. U. S.*, 158 U. S. 550, 15 Sup. Ct. 962.

The errors in instruction No. 18 are so apparent upon its face that, as soon as the court's attention was called to the instruction, the writ of error was made to operate as a supersedeas. All the members of this court agree as to its erroneous character. In the opinion of Mr. Justice Campbell, instruction No. 34 cures the error occurring upon the doctrine of "retreat to the wall," in instruction No. 18, and for this reason he cast his vote for an affirmance of the judgment of the district court. A majority of the court are, however, of the opinion that it will not do to assume, in case two instructions are given, one correct and the other incorrect, that the jury followed the correct statement of the law. *Clare v. People*, 9 Colo. 122, 10 Pac. 799. Moreover, the latter instruction fails to cover two of the errors occurring in instruction No. 18, as a reading of instruction No. 34 will disclose: "(34) The court instructs the jury that, to justify homicide on the plea of self-defense, it is not necessary that the defendant should have had no other possible or probable means of escaping. A man who is rightfully going about his lawful business is not compelled to employ all the means in his power to avert the necessity of self-defense before he can exercise the right of self-defense. Should you find from the evidence that defendant had possession of the property, and yet had reason to believe that, if he sought to maintain possession of the tunnel, he would be attacked by another, and be compelled in self-defense to kill his assailant, yet he was not required by law to give up possession, or leave the premises to avoid the attack." It is true that an instruction similar to No. 18 was approved by the supreme court of Iowa in *State v. Kennedy*, 20 Iowa, 569; but that was a case of mutual combat, and in such cases the rule is not the same as in a case of deadly assault, where the deceased was the aggressor, as is claimed in this case by the defendant. *Boykin v. People*, *supra*.

In the document filed by the attorney general the following language appears: "We search the opinion of this court in vain for any discussion or even mention of the proposition of counsel for the people that there is no bill of exceptions in the record. The opinion is absolutely silent upon this matter, and, under these circumstances, we are bound to presume, inasmuch as the position of counsel for the people, if well taken, would be conclusive of the case, that the court overlooked this proposition. If the proposition has been overlooked by this court, we can but blame ourselves for not giving greater prominence to this proposition, and for not having urged it with greater force in our briefs, as well as in the oral arguments. We shall take care that the matter be clearly presented to the court in this brief." The attorney general should know why the former opinion of this court is silent upon the matter of the bill of exceptions. It was a matter finally passed upon by the court months before the final hearing, upon a motion to strike, and it has not since been an issue in the case, although the attorney general, in his final brief, devotes more space to its consideration than is given to all the other issues. One reason for not sustaining the motion to strike the bill of exceptions was that the attorney general, by his delay, had waived the right to have such motion favorably considered. This conclusively appears from the proceedings in this court, viz.: The transcript and the bill of exceptions were filed on the 26th day of December, 1895, and on the same day we granted a supersedeas upon the errors in instruction No. 18, which instruction appeared only in the bill of exceptions, which the attorney general argued and submitted to the court without any intimation that it was not properly a part of the record in the cause. Thereafter, and on the 27th day of January, a motion was made to modify the supersedeas order, and this motion was argued exhaustively, orally, and by printed briefs, upon the bill of exceptions and transcript on file. A written opinion was filed by the court upon the record as then presented. On the 17th day of March a motion was filed by the state to dismiss the writ of error, because no abstracts or briefs had been filed by plaintiff in error. When counsel again appeared, as they did three days later, explanations were made which resulted in the abandonment of this motion to strike, whereupon further time to file such abstracts and briefs was given by consent of the state. At this time counsel for the state asked that the cause be set for final hearing and oral argument, and two days thereafter the cause was accordingly set down for oral argument upon June 1st. On April 16th counsel for plaintiff in error filed his printed abstracts and briefs, prepared at much labor and expense; and it was not until May 1st that the motion to strike the bill of exceptions was filed. More than four months had then elapsed since the case was lodged in this court, dur-

ing which time many arguments had been submitted by the attorney general, based on the bill of exceptions, and considered by the court. In these circumstances we are surprised that any attorney would expect favorable action upon a motion to strike the bill from the files. *Murphy v. Cunningham*, 1 Colo. 467; *City of Central v. Wilcoxon*, 3 Colo. 566; *Gilpin v. Gilpin*, 12 Colo. 504, 21 Pac. 612; *Greig v. Clement*, 20 Colo. 167, 37 Pac. 960. It is true, the court suggested the advisability of applying to the district court for an amendment to the record proper; but it does not seem to have occurred to the attorney general that this may have been for the purpose of avoiding the necessity of passing upon the question raised by the delay in filing the motion, as we then thought the amendment would certainly be made, and a way thereby opened to settle the matter without embarrassing counsel. This belief was based upon the fact that the district judge had certified into this court, under his hand and seal, a statement of facts which not only justified, but required, such amendment. As the amendment was not, however, allowed, and as much stress is laid upon such refusal, we shall briefly review the facts with reference to the action of the lower court in this particular. The case was finally disposed of, and the defendant sentenced by the district court on the 10th day of December, 1895. Counsel for plaintiff in error states upon oath that he then asked in open court, and was allowed by the court, 10 days in which to prepare and file his bill of exceptions. The attorney general claims that no such order was made, and for this reason the bill of exceptions ought not to have been considered.

In support of the position taken by plaintiff in error, he relied upon the following additional facts, viz.: First. The bill of exceptions was prepared at the earliest possible moment, and a special trip made by counsel from the city of Denver to Ft. Collins to procure the signature of the district judge thereto, within the 10 days. Second. The bill of exceptions, which was, in fact, certified by the district judge under his hand and seal, on, to wit, December 20, 1895, states, *inter alia*: "And, forasmuch as the matters above set forth do not fully appear of record, the defendant has duly and regularly, within the time allowed, tendered this, his bill of exceptions," etc. Third. On May 29, 1896, the following order was made and entered of record: "State of Colorado, County of Boulder—ss.: In the District Court. The People of the State of Colorado vs. John J. Ritchey. Be it remembered, that upon this, the 28th day of May, 1896, came on for hearing before Jay H. Boughton, judge of the district court of the Eighth judicial district of the state of Colorado, the motion of the defendant, John J. Ritchey, for the entry of an order nunc pro tunc as of the 10th day of December, 1895, showing that on said date the court made an order allowing and grant-

ing to the said defendant ten (10) days within which to prepare and tender to the court his bill of exceptions. And thereupon, it appearing to the court, from the testimony presented, that upon the 10th day of December, 1895, the defendant, in open court, excepted to the rulings and judgment of the court that day made, overruling the defendant's motion for a new trial, and sentencing the defendant, and asked for ten (10) days' time within which to prepare and tender his bill of exceptions, and it further appearing that the court granted the defendant's request for time, and so ordered, but that, through inadvertence or mistake, no entry was made upon the clerk's minutes of the granting of the same, it is now therefore ordered, as of said December 10th, 1895, that the defendant is allowed ten (10) days in which to prepare and tender his bill of exceptions; and it is further ordered that said order be entered nunc pro tunc, thereby reserving to the defendant all of his rights, the same as if said order had been entered of record at the time it was made. [Signed] Jay H. Boughton, Judge. [Certificate of Clerk.] It is true that both these papers were procured upon ex parte applications; but when the case was again heard, before the same judge, a few days after making the latter certificate, he did not base his refusal to allow the amendment upon any finding that time was not, in fact, given by the court to present the bill of exceptions, as theretofore stated, but said: "Had I any doubt at all as to the justice of this conviction, and as to whether the defendant had received a fair and impartial trial, I might be disposed to look upon this question differently. I had no doubt at all as to these questions. There is no doubt at all in my mind that the defendant has received merited punishment, and the sentence should be carried out." At that time a majority of this court had determined that the defendant had not received a fair trial,—a right which liberty has guaranteed to her children,—and had issued a superseas. The question of the fairness of the trial was at that very instant before this court for determination, and could not properly have any bearing upon the question as to whether or not time for filing a bill of exceptions had been allowed by the district court of Boulder county. In these circumstances, we think that it would have been manifestly unjust and improper to have stricken the bill of exceptions from the files, and thereby have deprived the defendant of a review.

The instructions in the case (39 in number) are in separate paragraphs, and separately numbered. The exceptions to these instructions were taken as follows: "And to the giving of which instructions, and to each and every of them, the defendant, by his counsel, then and there duly and severally excepted." This is the usual and customary manner of taking exceptions where the

charge is written out and in numbered paragraphs. Perhaps in three-fourths of the cases brought to this court the exceptions are not otherwise taken. That is a better system of practice which requires counsel, at the time instructions are given, to come forward, and minutely specify their objections to the same; but we all know that in the haste of nisi prius trials this is seldom done. We believe that the time of the trial courts could not be spent to better advantage than by requiring counsel, at the time of giving instructions, to specify their objections thereto, giving them time to examine the same, in order that errors, if any, may be pointed out and corrected at the trial. Many reversals would, undoubtedly, be prevented by such a practice. This court, while condemning the practice which permits exceptions to be reserved as in this case, has never refused to consider such exceptions, if made to instructions duly paraphrased and numbered, although it has refused to review such exceptions where the charge is general and delivered orally. In the case of *Miller v. People*, 23 Colo. 95, 46 Pac. 111, the charge excepted to was given orally, as a general charge. In *Keith v. Wells*, 14 Colo. 321, 23 Pac. 891, and *Edwards v. Smith*, 16 Colo. 529, 27 Pac. 809, the instructions were given in the nature of a general charge; and the court held that a simple statement at the close, that counsel desired an exception to each and every instruction, was not sufficient. These cases proceed upon the basis that an oral charge is not as carefully prepared as a written charge; and that counsel, being listeners, are more apt to detect errors than the court. The case of *Railway Co. v. Ward*, 4 Colo. 30 (cited by defendant in error), does not sustain his contention. The court there held that, when the instructions are in the nature of a general charge, excepting to each and every of the instructions will not avail; but in that case, the instructions refused being numbered, a like exception was held sufficient. In reference to the instructions refused, the court says: "They are a series of separate and distinct propositions of law, each standing independent and alone, and against each of which the court was enabled to write on the margin the words 'Given' or 'Refused.' They each enunciated some rule of law which the appellant claimed at the trial should be given. As it was necessary for the court to either give or refuse them separately, each and every instruction was therefore called to the attention of the court, and the exception to the ruling of the court in refusing to give such instructions, and each and every of them, was held sufficient, although the instructions refused were in that case not numbered."

In the document filed by the attorney general this language occurs: "It is well understood by the bench, bar, and the public at large that, in the majority of criminal



cases, the jury have determined upon their verdict of conviction or acquittal long before the instructions of the court are read, and, except in rare cases, where the instructions are more than usually conclusive as to the duty of the jury either to convict or acquit, have little or no weight with the jury or effect upon their verdict. Certain it is that the instructions are not carefully weighed, nor a nice discrimination used by the jury in the jury room to determine the delicate shades of meaning of the words used by the courts in the charge. Courts are altogether too ready to reverse a case where the guilt is plain, and the injury arising from an erroneous instruction rests more in conjecture than in probability or solid substantial reason. It is this disposition of courts that produces disrespect and distrust of the courts in the eyes of the people, and induces resort to summary justice." The statement is on a par with many other reckless statements contained in the document, so-called a "brief." We are reluctant to believe that the attorney general would knowingly sanction such assertions, but as he has not disavowed the same, although ample time has elapsed for so doing, we are constrained to believe that he assumes responsibility therefor. It is not well understood, either by the bench, bar, or public, that juries in criminal cases determine upon their verdicts before the instructions are given, and, consequently, before the arguments of counsel. Neither do we believe it to be a fact that they do so pre-determine causes where there is a substantial conflict in the evidence, as in this case. The practice of this jurisdiction requires juries to receive the law from the court, and, under their oaths, they are bound to accept it as declared by the court, and we do not believe that they intentionally violate such oaths; and, if counsel generally believed that cases are determined before argument, they certainly would not indulge in oral arguments before juries, as is now the usual practice. As to the statement that courts are altogether too ready to reverse a case where the guilt is plain, we do not believe it to be true of courts in general, and it certainly is not true of this court, as counsel might have ascertained by an examination of the Colorado Reports. Aside from this, the argument is unworthy of consideration in a court of justice.

It is to be regretted that the law officers of the state have given much time of late to insistence upon matters that are purely technical, in the attempt to prevent defendants in criminal cases from having their causes reviewed upon the substantial merits; and we commend the following for consideration, as the opinion of one of the ablest authorities upon the administration of the criminal law: "It is scarcely necessary to add that a prosecuting attorney is a sworn officer of the government, required not merely to execute justice, but to preserve intact all the great

sanctions of public law and liberty. No matter how guilty a defendant may, in his opinion, be, he is bound to see that no conviction shall take place except in strict conformity to law. It is the duty, indeed, of all counsel, to repudiate chicanery and appeal to unworthy prejudice in the discharge of their high office; but eminently is this the case with public officers, elected as representing the people at large, and invested with the power which belongs to official rank, to comparative superiority in experience, and to the very presumption here spoken of, that they are independent officers of state." Whart. Cr. Law, § 3003.

Rehearing denied.

(23 Colo. 344)

### FORBES v. BOARD OF COM'RS OF GRAND COUNTY.

(Supreme Court of Colorado. Dec. 21, 1896.)

ACTION ON COUNTY ORDERS—WHEN WILL LIE—CHANGE OF VENUE—WAIVER.

1. Act March 24, 1877 (Gen. St. 1888, c. 23), relating to allowance of claims against a county, provides that orders shall be paid according to the order of time in which they are presented to the treasurer, and that it is a misdemeanor for the treasurer to refuse to pay any order presented to him, there being then money appropriated for its payment, or to pay any such order, there not then being money sufficient wherefrom all orders drawn on the same fund, and previously presented, may lawfully be paid. Act March 20, 1877, provides for a tax levy for ordinary county revenue. Act April 1, 1891 (Sess. Laws 1891, pp. 111, 112), permits a levy for ordinary county revenues for an amount "sufficient to defray the ordinary county expenses." *Held*, that no right of action on a county warrant accrues until either a fund is raised that is applicable to its payment in its order of presentation, or the same might have been raised by the levy and collection of the tax provided by the revenue law. *Schloss v. Board*, 28 Pac. 18, 1 Colo. App. 145, overruled.

2. Where a suit is brought in the wrong county, defendant waives the right to have it tried in the proper county by failing to apply for a change of venue. *Fletcher v. Stowell*, 28 Pac. 326, 17 Colo. 94, followed.

3. In an action in the county court of A. county against the county board of G. county on a county warrant, the right to a change of venue was not controlled by Gen. St. § 503, which permits changes of venue from county courts only to the county court of an adjacent county, for causes specified in Code, § 29, subds. 2, 3, 4, but by Code, § 29, subd. 1, which requires the change of place of trial to the county designated as the place of trial by statute, under which the case could have been transferred to the county court of G. county. *Fletcher v. Stowell*, 28 Pac. 326, 17 Colo. 94, followed.

Error to Arapahoe county court.

Action by Albert R. Forbes against the board of county commissioners of Grand county on a county warrant. There was a judgment for defendant on failure of plaintiff to plead further after a demurrer to his complaint was sustained, and he brings error. Affirmed.

Fillins & Davis, for plaintiff in error. Samuel Jones (L. B. France and Charles G. Clement, of counsel), for defendant in error.



GODDARD, J. On the 26th day of April, 1894, Albert R. Forbes, plaintiff in error, brought this action against the board of county commissioners of Grand county, defendant in error, in the county court of Arapahoe county, to recover on several of its county warrants, issued and registered at various times between August 22, 1882, and January 22, 1886. These warrants are not set out in *hæc verba*, but the complaint avers that they are in the following form:

STATE OF COLORADO.  
 \$ ——— County.  
 Board of County Commissioners.  
 Treasurer of said County, ——— Term  
 188—:  
 Pay ———, or order, ——— /100 dollars,  
 for ———, out of moneys in the treasury  
 not otherwise appropriated.  
 ———, County Clerk,  
 Per ———, Deputy.  
 No. ———,  
 Chairman Board County Commissioners.

—And that they were issued upon just and valid claims, audited and allowed by the board for services rendered and materials furnished to and for Grand county. It further avers that all of said warrants are unpaid, and that, after their registration, the plaintiff purchased them, and is now the holder and owner thereof; that at no time since the execution and delivery of said warrants has there been any money in the hands of Grand county, not otherwise appropriated, for their payment, nor has any treasurer of Grand county ever made a call for the payment of said warrants, nor any offer to pay the same. To this complaint the defendant demurred, for the following reasons: "(1) Because the said complaint does not state facts sufficient to constitute a cause of action. (2) Because the said defendant and its predecessors, as appears from said complaint, have not, within six years prior to the commencement of this action, promised to pay the said several sums of money in said complaint mentioned, or any of them. (3) Because the said action, as appears from said complaint, is barred by the statute of limitations in such case made and provided. (4) Because the said court has not jurisdiction to hear or determine this action. (5) Because, as appears from said complaint, this action can be tried only in the county of Grand, to which county this court has no authority in law to transfer the said cause." This demurrer was overruled as to the first, fourth, and fifth paragraphs, and sustained as to the second and third paragraphs. To the order of the court overruling the said paragraphs of the demurrer, the defendant excepted. To so much of the order as sustained the second and third paragraphs, the plaintiff excepted, and, he electing to stand by his complaint, judgment was entered in favor of defendant for costs. The plaintiff brings the case here, relying for a reversal of the judgment upon the ruling of the court below sustaining the demurrer, upon

the ground that the statute of limitations barred his right of action, but concurs with the defendant in asking that we consider the rulings upon the other grounds of the demurrer, since it is desired that the merits of each of the defenses may be considered upon this review.

These defenses present three propositions, viz.: (1) Was the action barred by the statute of limitations? (2) If not, does the complaint state facts sufficient to entitle plaintiff to maintain an action against the county on the warrants in question? (3) Did the county court of Arapahoe county have jurisdiction to hear and determine the case? The decision of the first proposition must necessarily depend upon the solution of the second, since it is evident that, unless it appears, from the allegations of the complaint, that a cause of action exists, and that such cause of action accrued more than six years prior to the commencement of the suit, the bar of the statute could not be successfully invoked by the demurrer, and also that, if the complaint fails to show that a cause of action has accrued upon the warrants at any time, the judgment of the court below must be upheld, notwithstanding its ruling upon the first proposition was erroneous. While it may be that, under some circumstances, an action may lie to recover a money judgment against a county upon orders or warrants of this character, yet the policy of the legislature, as evidenced by the various enactments prescribing the manner in which the finances of a county shall be administered, is manifestly against the maintenance of such a suit. By the act of March 24, 1877 (Gen. St. 1883, c. 23), full and express provision is made for the audit and payment of claims against the county. It is therein provided that claims against a county shall be presented to and audited by its board of county commissioners, and, if allowed, an order upon the treasurer for its payment out of the proper fund shall be issued therefor as provided by law. Id. §§ 538, 546. When any claim of any person shall be disallowed in whole or in part, such person may appeal to the district court. Id. § 547. Such orders are entitled to a preference as to payment, according to the order of time in which they may be presented to the county treasurer. Id. § 637. The treasurer is required to keep in his office a book, called the "Register of County Orders," wherein he is required to enter the date of the presentation, the date and number of such order, the amount for which the same is payable, the name of the person to whom such order is payable, and the name of the person presenting the same. Id. § 643. It is also provided that every fund in the hands of the county treasurer for disbursement shall be paid out in the order in which the orders drawn thereon shall be presented for payment. Id. § 644. And it is made a misdemeanor for the treasurer to fail, neglect, or refuse to keep such a regis-

ter, and to enter therein, at the time of presentation, every county order which may be presented to him for payment; or to refuse to pay any order presented to him for payment, there being then money in the treasury appropriated for the payment thereof; or to pay any such order, there not being then remaining in the treasury money sufficient wherefrom all orders drawn on the same fund, and previously presented, may lawfully be paid. Id. § 646. Section 2, p. 93, Laws 1879, amending section 4, c. 49, Gen. Laws, enacts: "County orders and warrants, and other like evidences, or certificates of indebtedness \* \* \* shall bear interest at the rate of ten per cent. per annum from the date of presentation thereof for payment at the treasury where the same may be payable, until there is money in the treasury for the payment thereof, except as in special cases otherwise provided by law; and every county treasurer to whom any such order or warrant is presented for payment shall indorse thereon the rate of interest said order or warrant will draw, and the date of such presentation, and subscribe such indorsement with his official signature." By an act approved March 20, 1877, entitled "An act to provide for the assessment and collection of revenue," etc. (section 6), it is provided that there shall be levied and assessed upon taxable real and personal property within this state, each year, the following taxes: "For ordinary county revenue, including the support of the poor, not more than ten mills on the dollar; for the support of schools, not less than two nor more than five mills on the dollar; for road purposes, not more than five mills on the dollar, and a poll tax not to exceed one dollar for such purposes, as shall be determined by the county commissioners of each county." Section 2816, Gen. St. 1883. This act remained in force until April 1, 1891, when it was amended so as to permit a levy for ordinary county revenues, including the support of the poor, for an amount "sufficient to defray the ordinary county expenses." Sess. Laws 1891, pp. 111, 112.

It is very evident, from these provisions, that it was the intention of the legislature to provide for the payment of county warrants, in the order of their presentation, out of a fund to be realized from the levy and collection of the 10 mills provided for general county purposes, and not until such a fund had been collected, and was applicable to the payment of the warrant in its order of presentation, could the holder require payment thereof, and not until such time would any right of action accrue upon such order or warrant against the county, unless, perhaps, the board had been derelict in its duty in levying the amount of taxes authorized. *King Iron Bridge & Manuf'g Co. v. Otoe Co.*, 124 U. S. 459, 8 Sup. Ct. 582; *Brewer v. Otoe Co.*, 1 Neb. 373. The fact that the tax provided proves inadequate to meet such obligations of the county does

not render the county liable for their payment in some other manner. Persons purchasing such obligations take them subject to the mode of payment that the legislature has imposed, and such method is exclusive, except when, for some exceptional reason, such as a failure to levy the tax provided, or a diversion of the fund, when collected, to a different purpose, a different procedure may be resorted to, to enforce payment. *U. S. v. County of Macon*, 99 U. S. 582; *Supervisors v. U. S.*, 18 Wall. 71; *Stryker v. Board*, 77 Fed. 567. When a fund is raised, through the means provided by the legislature, that is applicable to the payment of a warrant in its order of presentation, and the treasurer wrongfully refuses to so apply it, the holder has an adequate remedy, by mandamus against him, to compel its payment. *Hockaday v. Board*, 1 Colo. App. 362, 29 Pac. 287; *Beeney v. Irwin*, 6 Colo. App. 66, 39 Pac. 900. But no action can rightfully be brought upon such warrant until the fund is so raised, or the same might have been, by the levy and collection of the tax provided by the revenue law. *Brewer v. Otoe Co.*, supra. In other words, no right of action accrues on such warrant until it is made to appear that one of these conditions exists. Logically, therefore, the statute of limitations does not commence to run until the happening of such contingency. The complaint avers that at no time since the execution and delivery of the warrant sued on has there been any money in the hands of the county, not otherwise appropriated, for their payment, and it does not appear therefrom that the board has failed to levy the full amount of the tax prescribed. It therefore follows that no cause of action is stated in the complaint, and the court erred in overruling the first ground of the demurrer. Our conclusion is that, while it also erred in sustaining the plea of the statute of limitations, and the judgment in favor of the defendant in error cannot be sustained on that ground, yet it must be upheld upon the ground that no cause of action is shown to have accrued against the county upon the warrants in question.

The views we have expressed are at variance with those announced in *Schloss v. Board*, 1 Colo. App. 145, 28 Pac. 18. The court, in that case, assumed that a county order is payable upon demand, and that the indorsement by the treasurer of its presentation was an acceptance and a promise to pay the money from and after such presentation and acceptance; and upon such assumption rests its conclusion that then and thereby a right of action accrues to the holder upon such warrant. From an examination of the cases cited in support of its position, it will be seen that the courts therein had under consideration the right to sue upon a county warrant issued under statutory provisions very unlike ours, and wherein no particular or express method for their payment was provided, or limitation of the rate of taxation for

that purpose prescribed. We think they afford no authority for the right to maintain an action on a county warrant issued under the statutory provisions above cited, and that the court of appeals acted upon a mistaken assumption in this regard. In the cases of *Hockaday v. Board* and *Beeney v. Irwin*, supra, that court distinguishes those cases from one in which an action is brought upon a warrant payable exclusively out of a special fund, and holds that an action cannot be maintained on the latter to recover a general money judgment against the county. The reasoning in these later cases is against the doctrine of the *Schloss Case*.

The question raised by the third objection is settled adversely to defendant in error by the case of *Fletcher v. Stowell*, 17 Colo. 94, 28 Pac. 326. The county, by appearing, waived the defective service of the summons; and by failing to apply for a change of venue, the right to have the case tried in the proper county was also waived, under the rule laid down in that case. The right to change the place of trial of the case was not controlled by section 503 of the General Statutes, as assumed by counsel for defendant in error, which permits changes of venue from county courts only to county courts of an adjacent county, for causes specified in the second, third, and fourth subdivisions of section 29 of the Code; but by the first subdivision of the latter section, which necessarily requires the change of the place of trial to the county designated as the place of trial by statute, the case might have been transferred to the county court of Grand county for trial. Upon the entire record, we are of the opinion that, for the reasons above given, the judgment of the court below must be affirmed. Affirmed.

(23 Colo. 287)

# SAWYER v. ARMSTRONG.

(Supreme Court of Colorado. Dec. 7, 1896.)

## JUDGMENT AGAINST PARTNERSHIP—PARTIES.

1. In an action against four persons as partners, three only were served. Judgment was rendered against the three served, and provided that "execution issue against the joint property of all the defendants and the individual property of" the three served. *Held*, that the judgment substantially complied with Code Civ. Proc. c. 3, § 42, providing that, where the action is against two or more defendants jointly indebted, and part only are served, if plaintiff recover judgment, it may be enforced against all the defendants as to their joint property, and the separate property of the defendants served; and the judgment was not open to the objection that it was against three individuals, and not against the partnership.

2. Code Civ. Proc. § 235, provides that, when a judgment is recovered against one or more of several persons jointly indebted upon "an obligation by proceeding as provided in this act," those who were not originally served may be summoned to show cause why they should not be bound by the judgment as if originally served. Chapter 3, § 42, provides that, if plaintiff recover judgment, it may be enforced against all the defendants thus jointly indebted as to their joint property and as to the separate property

of the defendants served. *Held*, that the word "obligation," in section 235, includes a partnership indebtedness.

## Error to Arapahoe county court.

Action by John D. Armstrong against John S. Sanderson, Amos Sawyer, and others, as partners, doing business under the firm name of John S. Sanderson & Co., for goods sold and delivered, in which judgment was rendered against all the defendants except Sawyer, he not being served. Afterwards a summons was issued to and served on Sawyer, requiring him to show cause why he should not be bound by the judgment. There was a judgment against Sawyer by default, and he brings error. Affirmed.

In 1884 John D. Armstrong brought an action in the county court of Arapahoe county against John S. Sanderson, Amos Sawyer, Marcus Finch, and P. T. Smith, as partners, doing business under the firm name of J. S. Sanderson & Co., to recover for goods, wares, and merchandise sold and delivered. Summons was issued and served upon John S. Sanderson, Marcus Finch, and P. T. Smith on September 3, 1884. This original summons was not served upon Amos Sawyer. On January 15, 1885, trial was had, and the court found in favor of plaintiff, and against the defendant served, and rendered the following judgment: "Wherefore it is ordered, adjudged, and decreed by the court that the plaintiff have and recover of and from the said defendants John S. Sanderson, Marcus Finch, and P. T. Smith the sum of \$662.98, together with his costs in this behalf incurred, to be taxed, and that execution issue against the joint property of all the defendants and the individual property of John S. Sanderson, Marcus Finch, and P. T. Smith." In June, 1894, in pursuance of section 235 of the Code of Civil Procedure, a summons was issued to Amos Sawyer, requiring him to show cause why he should not be bound by the foregoing judgment. Sawyer entered his special appearance, and moved the court to quash the summons upon the ground that the original action was not upon an obligation of the kind and character contemplated in the foregoing section, and because there was no judgment in the case by which he could be bound, in that the original judgment was rendered against three individuals, and not against the partnership of which he was alleged to be a member. This motion was overruled, and Sawyer, electing to stand by it, and refusing to further plead or answer, judgment was rendered against him by default. To this judgment Sawyer prosecutes this writ of error.

Benedict & Phelps, for plaintiff in error.  
Enos Miles, for defendant in error.

GODDARD, J. (after stating the facts). The assignments of error are based upon the refusal of the court below to quash the summons to show cause, and present for our consideration two questions: First. Whether a

partnership indebtedness constitutes an obligation, within the meaning of section 235 of our Code of Civil Procedure, which provides: "When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in this act, those who were not originally served with the summons, and who did not appear to the action, may be summoned to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons." Second. Whether the original judgment is in conformity with, and was recovered by a proceeding provided in, the Code of Civil Procedure.

Counsel for plaintiff in error rely upon the doctrine of *Bank v. Ford*, 7 Colo. 314, 3 Pac. 449, in support of their claim that the word "obligation," as used in section 235, does not include a partnership indebtedness, but contemplates an indebtedness arising upon and evidenced by an agreement in writing. In that case the court had under consideration the meaning to be given to the word "obligation" in section 1834 of the General Statutes, and section 13 of the Code, as therein used to designate the contract itself, and in a very able and well-reasoned opinion held that the word, when so used, referred to a written instrument, and, in announcing its conclusion, laid down what we take to be the correct distinction, as follows: "As the result of our investigation, we feel justified in stating the conclusion that, whenever the word 'obligation' is used in a statute as the name of a contract, as it is in the sections now under consideration, an agreement in writing, sealed or unsealed, is referred to. Where, in a legislative provision, it is used with reference to legal duty or liability, such duty or liability may arise from an oral or written contract, or, in some instances, from actionable tortious conduct. \* \* \* The word is used in statutes, as well as in text-books and decisions, with these different meanings, and the significance to be given it in each statute must be gathered from the purpose and context of the enactment." Is the word used, in the Code provision under consideration, to describe the contract itself, or with reference to a legal liability arising from an oral or written agreement, or both? Tested by the foregoing rule, and remembering that "obligation" is a generic word, and, when used in its broadest sense, includes all kinds of contracts by which a person may become bound, and should be so construed, unless, from the connection in which it is used, it is to be gathered that the legislature intended to give it a more limited signification, and reading this provision in connection with section 42, c. 3, of the Code, to which it refers, as providing the proceeding by which the judgment

was recovered, it is evident that the word is used therein in its broadest sense, and refers to any joint indebtedness arising from contract, express or implied, oral or written. The latter section is as follows: "Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows: First, if the action be against defendants jointly indebted upon a contract, he may proceed against the defendants served, unless the court otherwise directs; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served," etc. It is manifest that the joint indebtedness herein referred to includes a partnership indebtedness, and that the word "contract," as here used, upon which such indebtedness arises, is designated as an "obligation" in section 235, and that the two words are used in the same sense, and as expressing the same legal duty or liability. We think, therefore, that the indebtedness upon which the original judgment was recovered, arose upon an "obligation," within the meaning of that section.

While the original judgment is not pro forma against the partnership of J. S. Sanderson & Co., yet we think it is in substantial conformity with the requirements of section 42 of the Code, and not obnoxious to the objections urged upon the second assignment of error. It was within the discretion of the trial court, under the provisions of that section, to permit plaintiff to proceed against the defendants served,—judgment, however, to be entered against all jointly indebted so far only as to be enforced against the joint property of all and the separate property of those served. In the original action all the parties were joined as defendants, including plaintiff in error; and, while it is true that the money judgment was not entered formally against all, it was in terms made enforceable against the joint property of all, and the individual property of those served. It is evident, from the fact that the judgment was made so enforceable against the joint property of all the defendants, that the evidence introduced showed that the plaintiff in error was jointly liable with the defendants served; and if it can be said that the judgment as rendered does not strictly conform to all the requirements of section 42, the alleged defect is at most an informality that in no way prejudiced the rights of plaintiff in error. It is certainly not invalid for any of the reasons given in the cases cited. Upon neither of the specifications do we think the objections to the rulings of the court below well founded. Its judgment is therefore affirmed. Affirmed.

(22 Colo. 213)

GROTH et al. v. KERSTING et al.

(Supreme Court of Colorado. Oct. 31, 1896.)

PARTNERSHIP — DISSOLUTION — DISTRIBUTION —  
AGREEMENT AS TO CONTRIBUTIONS —  
PLEADING — APPEAL.

1. The usual order of the distribution of the assets of a co-partnership may be altered by an agreement of the parties to the effect that the sums respectively contributed by them shall be considered as assets of the firm; and where the larger contribution of one has been equalized by a lease secured by others, and the consideration of their labor and services, it is not error, under the agreement, to direct an equal division of the assets on the dissolution of the firm, without regard to the ratio of the original contributions.

2. A party is not bound by an allegation of his pleading where it is denied, and evidence is taken on the issue thus joined.

3. A manifest error in a report of a referee, which was not called to the attention of the court in any of the briefs filed or oral arguments prior to the writing of the decision, may be corrected on a rehearing.

Error to court of appeals.

Actions by Fritz Kersting and another against Louis Groth and another, consolidated. From an affirmance of a judgment in favor of plaintiffs (36 Pac. 156, 4 Colo. App. 395), defendants bring error. On rehearing. Original opinion withdrawn. Modified.

Rogers Stair, H. M. Orahood, and F. A. Williams, for plaintiffs in error. O'Donnell & Decker, for defendants in error.

HAYT, C. J. The defendants in error, Fritz Kersting and August Wilmsmeier, commenced suit against plaintiffs in error, Louis Groth and Ferdinand B. Becker. This action was numbered 13,115 in the district court. The complaint in the suit, as originally instituted, contained two causes of action. The first, which was directed against the defendant Groth alone, is an action by two partners against the third member of the firm for an accounting. The second cause of action was against both of the defendants, upon an account stated. At the time of the institution of this suit, an attachment was issued in aid thereof, and sustained upon final hearing. To the original complaint a demurrer was interposed, and sustained. Thereafter the complaint was amended, and the first cause dropped therefrom. This first cause of action was subsequently made the basis of an independent suit, designated in the district court as No. 13,900. After the issues were joined in the two causes, they were consolidated, and referred to I. E. Barnum, as referee, to take testimony, and report findings. As a result of the proceedings had before the referee, the plaintiffs in both cases were successful. Exceptions to the report were in due time filed, and overruled by the court. In accordance with the findings of the referee, the district court rendered judgment for the plaintiffs for the sum of \$8,751.54, against both defendants, and an individual judgment against Groth alone for the sum of \$1,936.70. From this judgment a writ of error was sued out from the court of appeals, in which court the

judgment of the district court was in all things affirmed. See *Groth v. Kersting*, 4 Colo. App. 395, 36 Pac. 156. From this latter judgment the cause is brought here by error.

It is claimed that the referee's report, which formed the basis of the decree in the district court, as well as that of the court of appeals, is manifestly erroneous, in that it fails to provide for the repayment to each partner of his contribution to the business. Undoubtedly, the usual order of distribution of the assets of a co-partnership upon dissolution is as stated by counsel, to wit: (1) Payment of the debts or liabilities due third persons; (2) repaying to each partner his advances; (3) repaying to each partner his capital; (4) division of the balance as profits. While this is the usual order, it may be altered by agreement of the parties, and in this case we think, from the evidence and the conditions under which the co-partnership was formed and the firm business transacted, the referee correctly determined that the amount contributed by the several partners was to be considered as assets of the firm, and to be distributed accordingly. In accordance with the terms of the agreement, Kersting and Wilmsmeier were to devote their time and attention to the joint enterprise, and contribute only \$3,650.50, while Groth contributed \$8,000, although he had but a one-third interest in the business. This disproportionate amount was, we think, put in by Groth against the lease theretofore secured by Kersting & Co., and as an offset to their labor and services in the management of the business, with the further benefit to Groth resulting from an agreement to furnish brick for his building contracts at a lower price than they could be purchased for in the market. So, we conclude that it was not error for the referee to treat these several items as assets of the co-partnership, to be divided between the partners according to their interest in the co-partnership, without regard to the ratio of the original contributions.

Among the credits allowed Kersting & Co. is one for hauling brick. It is claimed that in this there is error, because the brick were hauled by teams belonging to the co-partnership. We do not so understand the evidence. On the contrary, the referee gave credit only for the money paid to others for hauling. Mr. Kersting says: "Brick hauling, \$1,242.40; that is, teams which hauled bricks, and we paid them for hauling." In the complaint it is alleged that the profits of the brick business were \$9,731.68, for which the firm of Kersting & Co. is accountable, while the net profits of the business, as found by the referee, were only \$7,828.60. It is urged that this is in violation of the rule binding parties by the allegations of their pleadings. This is not so, for the reason that this allegation of the complaint is denied by the answer, and evidence was taken upon the issue thus made. The referee found that the price charged for brick by Kersting & Co. was too high, and reduced the amount, thereby reducing the firm profits correspondingly. There was no error in this, but Kersting & Co. were improv-

erly allowed, as part of the expenses of the business paid by them, the sum of \$3,650.50, this being the value of the lease, horses, wagons, tools, brick, etc., contributed to the firm by Kersting and Wilmsmeier at the inception of the enterprise. The contribution to the firm, under the findings of the referee, became joint property or firm assets; and neither party should have been given credit for either of the amounts in the final settlement, except as the same may result from a division of the firm assets. The referee acted upon this rule so far as Groth is concerned, but adopted a different rule as to Kersting and Wilmsmeier. This was not called to the attention of the court in any of the briefs filed or oral arguments heard prior to writing the first opinion, but was first mentioned in the petition for rehearing; but the error is manifest, and the correction will now be made. With this change the account may be stated as follows:

Kersting & Wilmsmeier in Account with Kersting & Co.	
To collections for firm.....	\$68,805 64
By expenses paid for the firm.....	63,716 37
Balance due .....	\$ 5,089 27
Firm Assets.	
Due from Groth & Becker.....	\$ 8,751 54
Due from Kersting & Wilmsmeier, as above.....	5,089 27
Due from Louis Groth.....	8,000 00
Total .....	\$21,840 81
Of this amount Kersting & Wilmsmeier are entitled to two-thirds..	\$14,560 54
Less their indebtedness to the firm, as above .....	5,089 27
Balance due Kersting & Wilmsmeier .....	\$ 9,471 27

Kersting and Wilmsmeier are entitled to judgment for the amount due them, viz. \$9,471.27. It is now conceded that Groth & Becker and Louis Groth may properly be considered as one and the same party so far as the settlement of this business is concerned. We will therefore not interfere with the judgment rendered against Groth & Becker for \$8,751.54, but will correct the error by reducing the judgment against Groth from \$1,936.70 to \$719.73. The judgment of the court of appeals against Groth & Becker will therefore be affirmed, and the judgment against Groth reduced to \$719.73; the costs in this court to be equally divided between the parties. The cause will be remanded to the court of appeals for further proceedings in accordance with this opinion. Judgment modified.

(9 Colo. App. 64)

#### SMITH v. BLACK.<sup>1</sup>

(Court of Appeals of Colorado. March 9, 1896.)  
VENDOR AND PURCHASER — PAYMENT — TENDER — EVIDENCE.

1. A purchaser of lots with knowledge that his vendor held them subject to a trust deed held by the original vendor, which was to be re-

leased lot by lot as a stipulated sum was paid on each, is not entitled to a decree compelling the original vendor to release the trust deed on the lots purchased, in the absence of proof of payment or unconditional tender of the due proportion of the debt secured.

2. That plaintiff had paid money to a bank to the credit of defendant, on a note of one L. secured by L.'s trust deed, was not shown by evidence that plaintiff and L. went to the bank together; that plaintiff gave L. the money and took his receipt for it; that L. then deposited the money in the bank, and that he afterwards drew it out.

Appeal from district court, Arapahoe county.

Action by George M. Black against Charles H. Smith to release a trust deed. From a decree in favor of plaintiff, defendant appeals. Reversed.

Hugh Butler and Bartels & Blood, for appellant. T. J. O'Donnell, W. S. Decker, and Milton Smith, for appellee.

BISSELL, J. The involved and complicated history of the transactions between John W. Smith and Charles H. Smith, the appellant, and John E. Leet, compels a very extended statement of facts, although this appeal turns on a single point, and our views of the legal principles which must determine the rights of the parties on this basis. In February, 1883, John W. Smith was the owner of a large number of lots located in Garden Place, which was a subdivision of a part of the S. ½ of the N. E. ¼ of section 22, township 3, contiguous to the city of Denver. This part of the section had been platted and laid out in lots for the purposes of improvement and sale. At that time John W. Smith entered into an arrangement with John A. Leet, which took this form: Smith conveyed the described property to Leet. Leet did not pay the agreed consideration for the transfer, but entered into a contract respecting it which took this shape: He executed a writing which the parties have termed a note, though it lacks the essential features of commercial paper. "\$15,000.00. Denver, Colo., February 10, 1883. Five years after date I promise to pay to the order of myself fifteen thousand dollars, for value received, negotiable and payable at the Colorado National Bank, of Denver, Colorado, without defalcation or discount, with interest from maturity at the rate of 10 per cent. per annum. This note is secured by a deed of trust on real estate, bearing even date herewith, and it is expressly understood and agreed that in case of default in the payment thereof, that the holder thereof shall in no case sue the maker or indorser or indorsers thereof, in an action at law, for any amount that may be due thereon, but must look for payment solely to the property given in said deed of trust as security for said note. John E. Leet." This contract had an indorsement on it as follows: "The above note is hereby extended one year from maturity. October 6, 1887. C. H. Smith." On the 10th of February Leet gave a trust deed to Charles H. Smith on all the lots which

<sup>1</sup> Rehearing denied December 28, 1896.

had been theretofore conveyed to him to secure the performance of the contract. By it the Colorado National Bank was made the agent of the grantee, and Leet was given the right to pay over the stipulated consideration in a specified way. It is wholly unnecessary to recite all the terms of the deed. It is sufficient to state that thereby he had the right, as fast as he might negotiate a sale of any one or more of the designated lots, to pay \$60 in cash, or not less than \$30 and the balance of the stipulated price per lot by the promissory note of the maker, which cash and notes were to be deposited in the Colorado National Bank to the order and credit of the grantee in the trust deed. Whenever payments were thus made Smith was obligated to execute to the purchaser or purchasers releases, and take the cash and the notes, which were to be secured by trust deeds on the lots, in exchange for that proportion of Leet's liability under his contract. This general plan regarding the sale and transfer of the lots went on until near the expiration of the term fixed by the contract. On the 6th of October, 1887, a little more than four months before the absolute maturity of the original agreement, the extension above recited was indorsed on the paper. Prior to this extension Leet had sold a good many of the lots and paid the cash consideration and procured the execution and delivery of the notes according to the stipulation. The present appellee, Black, bought sundry lots embraced in the original conveyance in January, 1889, after the maturity of the original contract, though within the extension indorsed on it. The lots need not be described nor specifically mentioned. When Black bought, he bought, as he states, with full notice of the trust deed and its terms, and of the limitations on Leet's authority to convey. He was fully advised of the necessity to pay the purchase price either in cash or partly in cash and partly in notes, according to the agreement. Leet told him of the extension, and he relied on Leet's statement when he made the purchase. About this time a controversy had sprung up between Charles H. Smith, the present appellant, and Leet, as to the proper construction of indorsement which extended the time of performance. Charles H. had obtained the title to the property, and all the negotiations and discussions were had between him and Leet. The principal differences respected the amount due on the paper, and whether it did or did not bear interest after the lapse of the five years. The original agreement provided the contract should only bear interest from maturity, and it was insisted by Leet the extension made this part of the agreement operative and binding during the extension. Smith contended the extension did not affect his right to interest. In anticipation of difficulty respecting these releases, Black went to Smith to induce him to accept the price he had agreed to pay. Smith refused to negotiate with Black, said the title was with Leet,

and whatever settlements were made must be made with him. There is considerable talk about a tender made by Black during some of these negotiations. This may be dismissed from consideration. It can be disposed of by the single suggestion that Black never offered Smith any money, nor has he at any time, either in this suit or in the one which will be referred to later, offered to pay the purchase price directly to Smith, nor has he kept his tender good by bringing the money into court to abide the result of the action. It is well understood a tender can only be made effectual by proper proffer in the bill and the production of the money in court for the satisfaction of the decree if the one who makes the tender succeeds in maintaining his action. It was not a tender. The matter will not be further referred to. This narration brings us to the point when Black's rights accrued. We shall defer the statement of this transaction, though it may slightly disturb the regular and chronological order of events. We prefer to reserve it until later in the opinion, when the acts and their legal results will be conjointly stated.

We will now refer to some matters which have crept into the record which, as we view them, have very little significance in the settlement of the litigation. On the 7th of February, 1889, Leet brought a suit in the district court of Arapahoe county against John W. Smith, the original grantor, and Charles H. Smith and John W. Horner, who were the grantees and the trustees in the deed of trust. No attempt will be made to fully state the contents of the bill, the relief prayed, or the decree which was entered. Its general history will be given, and our conclusions about it stated, that it may be eliminated from the further consideration of the court in the ultimate progress of this litigation. By the allegations of his bill, Leet claimed to have deposited in the bank \$11,655 in money and notes, which was, as he contended, enough to pay the balance due under his original contract. He prayed its cancellation and a decree compelling Smith to execute releases for the lots which should be subject to the trust deed at the date of the judgment. Some sort of a deposit of money and notes was made in the bank. What form the deposit took, or how, if at all, it could ever have been made available to Leet, either as a payment of his obligation or as a discharge of the lien of the trust deed, nowhere appears. It may be remarked that in the present case the court certainly concluded the \$9,000 in cash and the note for \$2,655 were never deposited in the Colorado National Bank for the benefit of Mr. Smith. The court stated if it became essential to consider this question in the case he should find there was no proof of a deposit which was in any wise a compliance with the terms of the obligation. We must conclude, therefore, the deposit was not made according to the terms of the trust deed. There was an attempt to deposit \$3,-

120 in behalf of Mr. Black, as will be subsequently stated. Notwithstanding this, Black, the plaintiff in this suit, produced the decree which had been entered in the litigation between Leet and Smith. This decree recited the deposit of this sum. It granted a perpetual injunction against the sale of the property which is involved in the suit now under consideration, on Leet's giving a bond in the sum of \$4,000 pending an appeal to the supreme court. It ordered Smith to execute releases on the deposit for him of \$9,000 and notes for \$2,655, secured by trust deeds. The decree likewise states the note was paid before maturity, and adjudged it null and void. It is somewhat anomalous, and the scope of it is not made clear by anything found in the present record. The releases were to be executed on the deposit of the \$9,000 and the notes in the Colorado National Bank to the credit of Smith, and the cancellation of the agreement was manifestly conditional on this deposit. Notwithstanding this, the decree in terms declared the agreement canceled, null, and void. Smith appealed. Leet gave a bond for \$4,000, and took out of the bank the \$3,120 which had been deposited in Black's interest. It would appear that a total deposit of \$11,655 in money and notes had been made, but in May, which was the date of the decree, whatever had been deposited was withdrawn from the bank preparatory to the commencement of this suit. As we view the record, all this proof respecting that antecedent suit and what was done under it is not of the slightest consequence in the settlement of the present controversy. Black did not buy after the entry of that decree, nor in reliance on it. His purchase was made before it was rendered. He bought in February, 1891, and the decree was entered on the 15th of May following. We are unable to see how he can gain any benefit from it, or how he can strengthen his title or claim his rights are affected by its terms. In any event, the decree was conditioned upon the payment of the \$11,655, and unless he makes proof that the money and notes were deposited in the bank to the credit of Smith, according to the terms of the agreement, no advantage could come to him from the judgment, because it was conditioned upon the performance of those acts which the judge trying the present case found as a matter of fact were not performed. We are wholly unable to understand how he can predicate any claim on the formal annulment of the agreement, for it is evident this clause must be controlled by the antecedent condition. Since it is evident something was due under the agreement, and Leet was bound to pay the amount of money, or deposit some money and a certain amount of notes which would make the two the equivalent of the amount due, the agreement could not have been canceled except on the condition of performance by Leet. The decree cannot be otherwise construed. There was no attempt in this suit to show perform-

ance, and without it the decree would not be effectual. Even if Black had been a party, whereby he was both bound by the judgment and possessed of the right to insist on the benefits flowing from it, he was equally obligated to show performance if he would insist the decree was operative either in effectuating his claims or in overcoming the defense which Smith put in. Having failed to offer proof to this point, the decree may be dismissed from consideration. We likewise find many other agreements and contracts between Leet and Smith, which were introduced apparently to show a reduction in the amount due Smith, and a waiver of his rights under the trust deed. After the controversy had arisen, and after the first suit was begun, there was some agreement respecting the matters, though Leet and Smith differ as to the terms and conditions of it. Some memoranda in writing are produced which show a statement of the sums due, and apparently exhibit a decided reduction from the sum of the original contract. They contain nothing, however, which operates to release the trust deed, destroys its lien, or deprives Smith of the rights which he acquired thereunder. The most they amount to is an adjustment of the sum due from Leet to Smith. In case of foreclosure, it may be this settlement would determine the sum for which the property might be sold. We cannot understand what effect these things have on Black's rights. He was neither a party nor a privy. He neither bought on the strength of them nor does he hold title under them. His right to an unincumbered title had its inception, if at all, on the 4th of February, 1889.

If we were not entirely satisfied the plaintiff acquired no rights by his acts, and did not thereby become entitled to maintain his bill, we should still be compelled to reverse the case because of his failure to show a compliance with the conditions of the deed. The title stood in Leet by an agreement with the owner, subject to the payment of the consideration in the form and within the time specified in the security. When Black bought of Leet, he bought subject to the same conditions and became obligated to perform them. Black's purchase was subsequent to the maturity of the original agreement, though within the extension. Without attempting the utmost accuracy in the statement of amounts, it is enough to say Black bought lots which bound him to pay \$3,120 to have the trust deed released. This sum he was bound to pay either wholly in cash or partly in cash and partly in notes. We do not conceive Black was bound to comply with the terms of those subsequent arrangements in order to acquire title. When he bought, he had a right to acquire title through Leet, on performance of the original conditions. Had he done this, and had he paid the money into the Colorado National Bank directly and in accordance with the requirements of the contract, or had he procured Leet to do it for him, and



been exact in his observance of the stipulations, he would have acquired an equity which he might enforce against the original grantor, Smith. It is on this proposition that the plaintiff failed in his proof. Black did not show that he paid \$3,120 into the bank, either by himself or through Leet, as the purchase price of the lots which he bought. What he did can only be gathered from his own and Leet's testimony. Black did not produce the cashier of the bank, or any officer of it, to show what was done, nor did he offer proof of any deposit in the bank to the order and credit of Smith, whereby the money became Smith's and his title to the lots was relieved from the obligations to pay the purchase money. It is impossible to extract, conceive, and state this transaction and leave it an unvarnished tale. It has all the earmarks of an attempt to appear to observe an agreement and yet break it. The court did not find as a matter of fact that the deposit was made in the bank by Leet to the order of Smith, or to the credit of the holder of the note. What the court said is: "Thereupon the plaintiff handed over, in the bank, to Mr. Leet, a sufficient amount of money to pay what was required to secure the releases of the lots owned by him, and Mr. Leet deposited the same in the Colorado National Bank, as I suppose, to the credit of the holder of the note. Neither any of the officers of the bank nor any of the books of the bank were brought into court, so that the exact terms of the deposit do not appear. It does sufficiently appear that the deposit was actually made." Nothing further is contained in the opinion, either by way of findings or otherwise, respecting the deposit. We are therefore unhampered by the rule that the findings of the court on questions of fact are conclusive. The court did not find directly that Black's money was deposited in the bank to the credit of Smith, or to the credit of the holder of the note. He assumes it; but there cannot be found between the four corners of the record any evidence which would justify a finding that the money was thus deposited. We will now inquire what was done.

Black was entirely informed respecting the condition of the title and the terms under which Leet held it. He was advised there were some differences between Leet and Smith in reference to the property and the execution of releases. In response to a question what he knew about it, he said: "Don't know whether it was before or after I knew of the difference existing between Mr. Leet and Mr. Smith that I had the conversation with Mr. Smith. I knew I had the money to pay for the releases. I wanted the lots released as soon as I could. I knew it was the lots under trust deed. Didn't know at the time I made the offer to Mr. Smith that Mr. Leet and Mr. Smith were having certain differences, and that a lawsuit was threatened. Mr. Leet had informed me that if Mr. Smith didn't release he was going to commence suit. When I traded for these lots, Mr. Leet wanted to get the money to pay

this note." He was well advised concerning the probability of a lawsuit, but was anxious to get the lots to make a stock yard of them. He states: "I was anxious to get all the lots so I might make a stock yard of them, and wanted to get them clear, and we traded with the idea that he must release on the 10th of February, 1889. That is what Mr. Leet gave me to understand, and what the trust deed read. When the time came, I presented the money." He was likewise informed the money must be paid into the bank. His answer to a question concerning it is: "The trust deed read that we should pay the money into the bank, whoever owned the lots. The owner of the lots is the man to pay the trustee, I think." He likewise knew the note fell due in 1888, though he had been told by Leet it had been extended for a year. His only information respecting the extension was what he had learned from Leet. He never saw the note. Being thus advised of the terms of the instrument, Black attempted on the 4th of February, to do what was necessary to complete his right to a release of the trust deed as to his lots. What he did is best told in his own language: "Q. Isn't it a fact that the entire deposit that was made on account of this note was made in the name of John E. Leet, and was not made in your name at all? A. I could not say how that is. I took the money there. I never saw the receipt that Mr. Woodelton gave Mr. Leet. Mr. Woodelton said it was Mr. Leet's note, and the deposit would have to be made by him, and he would give Mr. Leet a receipt for the money, and Mr. Leet gave me such a receipt as I wanted. It was done in that way. I wanted the two Neven lots, and bought them through Mr. Leet as agent, and gave him the \$120 on the two lots a few days afterwards. I had a contract from Mr. Leet, signed by him as agent for Mr. Neven. I paid Mr. Leet \$120, and took his receipt. I didn't take the \$120 to the bank." When this money was put into the bank, he took a receipt from Leet which substantially recited Black's payment to him of \$3,120, to apply on the trust deed. This receipt was signed by Leet, made out on Leet's office paper, and under circumstances which will appear when Leet's testimony is commented on. Black subsequently learned the money had been taken out of the bank. He became uneasy about it and went to Leet, and August 7, 1889, obtained an agreement whereby Leet agreed to pay 10 per cent. per annum on the money, as compensation for the delay in procuring the release. Black states that, from February 4th on, he knew the lots which he had attempted to buy from Leet were subject to the payment of \$60 per lot, and that they could not be released until that sum had been paid. This is all to be found in Black's testimony respecting the payment to the bank, and his attempt to entitle himself to the release from Smith and the completion of his title. Clearly, there is nothing in this

evidence which even tends to show a payment in conformity with the conditions of the trust deed. Black bought under its shadow, with full knowledge of its existence and of what he was bound to do to secure an unincumbered title, and nothing in the litigation between Leet and Smith, and nothing which was done by way of the execution of new agreements, at all relieved him from the burden which he assumed when he bought. His deed was subject to the incumbrance, and he assumed and agreed to pay his proportionate part of it. If it be admitted Leet succeeded in procuring a reduction of the sum which he was bound to pay on the whole property conveyed by Smith, Black was not entitled to share in any part or portion of that advantage, but was bound to pay the \$60 per lot, either in cash or in cash and notes, according to the agreement. Whether he was further obligated to pay interest we are not required to determine. All we are deciding is whether what Black did amounted to a compliance with the terms of the deed, regardless of the question of interest.

We now come to a more definite history of this particular transaction, which can be best understood by a transcript of Leet's testimony. It furnishes its own definition, and can be best understood and appreciated without other comment or criticism than what is furnished by its own terms and substance. We will permit Leet to describe it. "Q. I want to know if you know that fact,—that he brought that money, \$3,120, at one time,—and do you know of his depositing that in the Colorado National Bank? A. Yes, sir; I think I was there with him when he did it. Q. You may state what was said,—the substance of what was said by you. A. The money was put there in escrow, I suppose you might call it. It was put there for Mr. Smith in compliance with the peculiar terms of the trust deed." Leet goes on to state that he does not remember the transaction as to its precise words, but he has a clear recollection of its substance, and he states: "A. The substance of it was that money was put up by him in order to comply with Smith's demand and the demand of the trust deed. Q. I am speaking about this \$3,120. A. Black assumed this amount, and Smith refused to receive it from him he said. Q. What did he do with that money,—that \$3,120? A. Went down there and put it up for Mr. Smith, and had him notified that it was there, but the notification that I had deposited that— Q. What date was it when you were there at the bank,—when this \$3,120 was deposited? A. I do not remember the date. It was previous to the time of bringing the suit. Q. And it was preparatory to bringing that suit that this money was so deposited, was it not? A. It is, because Mr. Smith had refused to accept it, according to the terms of the trust deed. \* \* \* I was getting ready to bring an injunction or mandamus to compel him to take the money and

release the lots." Leet undertakes to give a lengthy explanation of the reasons which led him to make this particular deposit; and, omitting what he says in regard to Smith's antecedent personal receipt of money, and as to the dispute with reference to the sum which he was bound to pay, as he says, to save expense, and at their request, and to comply with the terms of the deed, he continues: "I had them hand me the money, and I tendered it to Mr. Smith, through the bank, in this process required by the trust deed. Now then, Mr. Black, in handing me this money, wanted some evidence that he had furnished some money to pay Mr. Smith for this trust deed, which he refused to receive either from him or from me." Leet gives some explanations of the reasons for his proceeding which need not be recited, and then goes on to state, in his own fashion, that he had had some talk with Black and the other purchasers with reference to the obtainment of releases, and what he intended to do; and says: "Q. And then did you inform Mr. Black that you would commence a suit to compel Mr. Smith to make this release,—talk the matter over of commencing the suit? A. Yes, sir; with all of them,—about fifty others, besides Mr. Black. Q. And was it then that Mr. Black furnished this \$3,120? A. Yes, sir. He did not want to do it. I don't recollect whether the receipt to Black was given before going to the bank or afterwards. It was at the same time, either at my office or at the bank. It may have been written at the office and delivered at the bank. Q. And this deposit, when it was made in the bank, was made by you, so that it could be a tender given by you to Mr. Smith on account of this note. Is that the way of it? A. Yes, sir. It had been previously offered to Mr. Smith by Mr. Black himself, direct." This is the only evidence which the plaintiff offered of a payment into the bank. How the money was paid, under what circumstances, on what conditions, to whose order, nowhere transpires. We are unable to find out whether or not any payment was made in accordance with the terms of the trust deed. This the plaintiff was undoubtedly bound to show, if he would obtain the relief which was the object of his bill. The trial court supposes the money was paid in to the credit of Smith. We are unable to indulge in that supposition, and, on the other hand, we are well satisfied to conclude no such payment was made into the bank at all. The suit of Leet v. Smith, to which reference has been made, was tried in 1889, and in that suit Leet gave testimony, and some part of that testimony was read over to him, and he was interrogated about it on the present trial, and this is the result: "Q. Did you testify in that case that Mr. Black furnished this \$3,120? A. I have no doubt that I testified that in that case; and I did testify just as I have in this case, because that is the truth, so

far as truth is, that is what I testified to. Q. I ask you if in that case you did not testify that this \$3,120 was your own money. A. I say that I can only guess now, without going over that evidence, as to what I testified to; but I have every reason to believe, and I am entirely sanguine, that I testified to what was the truth, and that, if I testified that it was my own money, it was because the lawyers objected to my getting in the truth about it. Q. I will ask you if this is a correct transcript of the evidence given by you in this other case: 'Did you keep a memorandum of the deposit in the Colorado National Bank of the cash or notes upon which notice was given to Mr. Smith to execute these releases? A. Yes, sir. Q. Will you give the amount in cash and the lots for which the release was demanded in the first escrow? A. I put up four escrows, just as fast as I could rake and scrape the money before it became due. On the 4th of February I deposited for Mr. Smith \$3,120 and a release to be signed for lots 7 to 24, 27 to 39, in block 16; lots 25 to 45, in block 14. Now, I left releases for all of these lots, and left \$1,560 in cash and \$1,560 in one of the purchaser's notes, secured by trust deed, all executed and ready for delivery. After that was paid up, we left that until the 11th, which covered the 10th. Afterwards it was taken down, and the purchaser's notes withdrawn, and the whole amount of \$3,120 put up in cash by three purchasers.' A. I don't; but I have no doubt but it is correct. The essential thing that I remember is that all the money was paid when the injunction was obtained, and when the trial was off; and it is my recollection that it was up there all the time between the injunction and the trial. That evidence was given in what year? Q. 1889. A. That is five years ago. There is a great many things that I can't remember five minutes." There is something further in Leet's testimony which throws some light on this transaction: "Q. When you tendered it to the bank, and deposited it there in the bank, it was a deposit made by you, was it? A. Yes, sir. I don't remember how long this money remained in the bank. It remained there until after the trial. The money was there at the time the decree was signed, on May 15, 1889. It was there the day the injunction was brought, and up to the time of the trial, and after the decree was signed, and until Judge Stuart told me that I could give a bond and take it out, pending the appeal to the supreme court. Q. That is the \$5,000 or \$4,000 bond provided in the decree? A. Yes, sir. Q. Did you take out the money after you had given the \$4,000 bond to appeal to the supreme court? A. Yes, sir; took the whole \$11,165, of which this was a part. Q. You took it all out at that time? A. Yes, sir. Q. That would be about some time in May, 1889? A. Yes, sir. Q. The decree is signed May 15, 1889,—about that time, was it? A. Yes, sir.

I don't remember when I first told Mr. Black of my having withdrawn this deposit. I think I told him before the year 1890. Whether it was three weeks or ten months I could not say. Mr. Black came to me and wanted to know how long that money had to stay up. I told him it had to stay up until the supreme court decided the case."

This history of the case enables us to conclude there was never, at any time, any payment to the Colorado National Bank to the credit of Charles H. Smith. Courts must be presumed to have some knowledge of the methods by which banks transact business. We know as well as everybody else who has ever done business with a bank that money cannot be paid into a bank to the credit of A. and be drawn out by B. without A.'s signature. No solvent financial institution would turn over to B. A.'s money, or that which had become A.'s money, without his authority, or at all events without a guaranty from B. to guard against any claim which A. might make. We cannot assume there was any transaction of the latter description, because there is no evidence of it. There is a wide distinguishing difference between an unconditional and a conditional deposit of money, where it is made under a contract which requires the payment of money either to effectuate a transfer of title or divest a lien. If the money was paid into the bank by either Black or Leet for Smith's benefit, without conditions which would limit or modify its effect as a payment, it would undoubtedly be operative to satisfy the contract and establish Black's equitable right to a release of the trust. An actual credit of it on the books of the bank would be wholly unnecessary so long as it was paid in without conditions which would nullify its effect. If the bank failed in its duties as Smith's agent, Black could not be held responsible for this neglect or failure to protect the principal, unless it proceeded from restrictions laid on the deposit when it was made. We are then remitted to the single query whether, from what is contained in the record, we have a right to assume the \$3,120 was paid into the Colorado National Bank for Smith, in accordance with the terms of the trust deed. There is no evidence which convinces us this was done. The appellee's bill and his whole case rested on proof of this one fact. It was a fundamental matter, which he was bound to establish to the entire satisfaction of the court, to obtain any relief under the action as he had conceived it. Failing in this, he was not entitled to the judgment which he obtained, nor can he maintain it on this appeal. It is quite possible he may be able to settle this matter to the satisfaction of the court on the succeeding trial, and he may be able to prove that the money was actually paid in for Smith's benefit, as the deed provided, and that Smith declined to accept it because it did not include the interest, and that the bank subsequently permitted Leet to with-

draw it on the execution of what was to it an adequate security.

What we have suggested in the case, aside from this principal proposition on which we put it, will undoubtedly relieve the subsequent trial of considerable embarrassment, and take out of the record many of those things which we regard as wholly immaterial to the issue. We are entirely clear the only way by which Black can ever substantiate his right to a title freed from the lien is by clear and specific proof either of the payment of the consideration money or its deposit in the bank for the grantor's use. In other words, we conclude Black cannot take Smith's land without paying for it, nor can he compel Smith to look to Leet for the payment of that money. There is nothing in the record to determine the responsibility of these parties, nor do we think Smith is bound to imperil his rights by looking to the one or the other. The financial responsibility of either Black or Leet in no wise affects Smith's rights or Smith's claims. He cannot be divested of his lien, except by the payment of the money or by his own voluntary act. A deposit in the bank which could, under the conditions on which it was put in, be drawn out, and was drawn out, by the depositor, Leet, is in no legal sense a compliance with the terms of the contract. The deposit must have been irrevocable, or, if not irrevocable, must have been so made as to discharge both Black and Leet from any further responsibility, which must have been shifted by the transaction to the bank itself, or else it was of no value for any purpose. Smith has a right to insist on either the land or his money. His title can only be divested by an exact observance of the contract by which he agreed to surrender his interest in the land. We are unable to discover any such compliance in this record.

The judgment of the court below was not in harmony with our views of the case, and the judgment will be accordingly reversed, and the case remanded for a new trial in conformity with this opinion. Reversed.

(9 Colo. App. 36)

SUTTON et al. v. JONES.

(Court of Appeals of Colorado. Dec. 14, 1896.)

APPEAL—RIGHT—DISMISSAL.

1. Where appellants fail to submit abstracts or briefs, the appeal will be dismissed for want of prosecution.

2. A party in whose favor judgment is rendered cannot appeal therefrom.

3. Where defendant fails to perfect his appeal, and joins plaintiff in preparing a bill of exceptions, which is incorporated in the record on plaintiff's appeal, failure of plaintiff to prosecute his appeal will render necessary a dismissal of the appeal as to defendant, as well as plaintiff.

Appeal from district court, Arapahoe county.

Action by W. Henry Sutton and another against James A. Jones, administrator. From

a judgment for plaintiffs, they appeal. Dismissed.

Bennet & Bennet, for appellee.

BISSELL, J. This particular litigation, in one of its aspects, and in one of its phases, was before this court when we declined to assume jurisdiction to determine it; and thereupon the case, as might be done under the statute, was transferred to the supreme court. The appeal was there considered, and the case reversed, with directions to the plaintiffs to file a bill in the nature of a creditors' bill, wherein should be set up all the various claims and controversies between the several parties, that a judgment might be ultimately rendered stating and settling the entire account, and adjudicating their respective rights. *Jones v. Sutton*, 19 Colo. 285, 34 Pac. 989. The present action is presumably the result of that order, and the action which the parties took thereunder. At the conclusion of the hearing, a judgment was entered in favor of the plaintiffs for \$1,000. From it, both the plaintiffs and the defendant prayed an appeal, which was allowed to each party on the filing of a bond for a designated sum within a specified time. The plaintiffs, so far as might be, perfected their appeal, by filing a bond within the time limited. The defendant filed no bond, and consequently did not perfect his appeal. Afterwards, under a stipulation, both parties united in the preparation of a bill of exceptions, which was incorporated into the record, and brought to this court by the plaintiffs, as appellants, and docketed. Since that time the appellants have failed to prosecute their appeal, and have done nothing in the premises. Neither abstracts nor briefs have been filed by them, and for this reason the case must be dismissed for want of prosecution.

The appellee has attempted to submit the case ex parte, and for that purpose has prepared and submitted an abstract and a brief in support of his various contentions, and now calls on the court for a decision of the matters involved. We do not feel at liberty, on his application, to determine the matters presented. The appellee failed to perfect his appeal by giving a bond, and is not here as an appellant, with a right to call on this court to adjudicate the errors which he insists in here in the record. We know of no practice or procedure which permits an appellee who may have the right of appeal, but who has not perfected it, to require the court to determine the regularity or sufficiency of the judgment, nor do we know of any way by which he can call the judgment in question, save by prosecuting an appeal in his own right, or by suing out a writ of error, as he may do in a proper case, or assigning cross errors where an appeal has been perfected, and is prosecuted by the one who brings the case here.

It is clearly settled that the plaintiff was

without the right of appeal, because the judgment was in his favor. *Fischer v. Hanna*, 21 Colo. 9, 39 Pac. 420; *Bogert v. Adams*, 5 Colo. App. 510, 39 Pac. 351. It is barely possible that under some circumstances we should be compelled to take some other course in disposing of the case, providing the plaintiff had pursued the remedy which he chose, and we were without jurisdiction to afford him the relief which he prayed, and it appeared that he was entitled to some remedy had he seen fit to take it. The present case, however, presents no such question, because the appellants have entirely failed to prosecute their appeal, and are without right in this court, and we are bound under the practice to dismiss their case for want of prosecution. It is, perhaps, to be regretted that we are compelled to reach this conclusion; but since the defendant is not entirely remediless in the premises, and may, if he be so advised and the facts warrant, take steps to protect himself from the judgment, we cannot do otherwise than dismiss the case for want of prosecution. This appeal will accordingly be dismissed. Dismissed.

(9 Colo. App. 61)

#### GREEN v. HUGHES.

(Court of Appeals of Colorado. Dec. 14, 1896.)

APPEAL—FINAL JUDGMENT—ORDER OVERRULING MOTION TO SET ASIDE DISMISSAL.

Where an order of dismissal was entered at request of plaintiff, without objection or exception by defendant, an order subsequently made, overruling a motion by defendant to set aside the dismissal, is not a final judgment, from which an appeal lies, or which can be reviewed on error.

Appeal from district court, Pitkin county.

Action by Felix T. Hughes against Thomas A. Green. From an order overruling a motion to set aside a dismissal of the action, defendant appeals. Appeal dismissed.

E. B. Green, H. L. McNair, and T. A. Green, for appellant. Teller, Oranhood & Morgan, for appellee.

**PER CURIAM.** Green attempts to prosecute an appeal in this case; and, having filed his transcript of record, and taken the usual steps for its prosecution, except to comply with the rules with reference to the filing of abstracts and briefs, asserts a right to be heard on the appeal as to the errors which he alleges inhere in the record. The appellee moves to dismiss. In the argument of this particular motion, counsel for the appellant asked the court, under the provisions of section 388a, as found in *Mills' Ann. Code*, p. 685, in case the appeal should be dismissed, to file it on error, according to the provisions of that statute. It is this request alone which either necessitates or renders expedient a suggestion of the reasons which influence the court both to dismiss the appeal and to decline to file the case on error. A brief statement of the situation as it is dis-

closed by the record is essential to this determination. The particular cause of action, or the sufficiency or character of the alleged counterclaim, is wholly unimportant. The appellee, Hughes, brought suit in the district court of Pitkin county against Green to recover moneys alleged to be due him under some agreements with Green, and prayed for the relief which was appropriate to the cause of action as he stated it. Green answered by way of denial, and then set up what is designated in the pleading as a counterclaim, based substantially on the same facts which were set up by way of defense and denial, and prayed relief which he claimed was appropriate to the counterclaim as he stated it. We do not propose in this opinion to discuss the character of this counterclaim or its sufficiency. After the answer and counterclaim had been filed, the plaintiff, by leave of court, filed an amended complaint. Green demurred, and a subsequent amendment to the last complaint filed was put in in response to some of the suggestions of the demurrer which had been sustained by the court, with leave to the plaintiff to elect or to amend. While the case stood in this situation, and after the exercise of the right which the court gave the plaintiff to amend his pleading, and the cause was pending, the plaintiff applied to the court to dismiss the action, and the court entered this order: "It is ordered by the court that this cause be, and the same is hereby, dismissed, at the costs of the plaintiff, and without prejudice to the rights of said plaintiff." No other motion, no other action, no other order, and no other judgment, according to the record, was entered by the court at that or at any subsequent time, save one, which will be hereafter referred to. It will be observed that if this order is to be taken as a judgment, which it is not in form, the present appellant took no exception, nor did he interpose any objection in such form as to present any question to the court. Whether any other form of judgment entry permitting the defendant to go hence without day, as is usual in such cases, was entered, we are unadvised. None appears in the record. Afterwards, the appellant came into court with a motion to set aside this order and to reinstate the cause, because of the filing of his cross complaint, which naturally went with the dismissal of the action. This matter came up for argument, was taken under advisement, and subsequently overruled. According to the entry, as it appears in the record, "the court, being now sufficiently advised in the premises, doth overrule said motion, to which ruling of the court the defendants by their counsel then and there duly excepted, and prayed an appeal to the court of appeals, which was allowed," etc. This is the only exception noted in the record, and the only order or entry which is complained of, and from which an appeal was prayed. Manifestly, an appeal does not lie to this or any other court from an order overruling a motion, unless it take the form of, and can be said to be, a final judgment in an action. Such was not the character or nature of this

order. If there is anything in the nature of a judgment in the record, it is the one first made, wherein and whereby the plaintiff dismissed his action. To this the appellant did not object, nor reserve an exception. We are clearly of the opinion that the record, as filed in this court, discloses no entry of a final judgment, and certainly no entry of a final judgment which was objected to, and concerning which the present appellant is entitled to complain. Under these circumstances, and for the reasons expressed, the motion to dismiss the appeal must be granted, and the application to this court to file the cause on error must be denied.

(9 Colo. App. 19)

**BRANHAM v. NYE.**

(Court of Appeals of Colorado. Dec. 14, 1896.)

**MECHANIC'S LIEN—SUFFICIENCY OF STATEMENT—APPEAL—MATTERS NOT APPARENT OF RECORD.**

1. A mechanic's lien claim, which states in general terms that the conditions of the contract were the furnishing of materials and labor by plaintiff, and the payment of a specified sum by the owner on completion and acceptance of the building, is sufficient.

2. Since the statute requires no parties in a suit to enforce a mechanic's lien, except the owner and persons claiming liens the statements of which have been filed, a decree against the owner will not be reversed for failure to serve certain parties who were named as defendants in the complaint, where the record does not show what relation they sustained to the subject-matter of the suit.

Appeal from district court, Arapahoe county.

Action by Artemas F. Nye against Josie E. Branham to enforce a mechanic's lien. From a decree for plaintiff, defendant appeals. Affirmed.

W. W. Cover, for appellant. R. H. Gilmore, for appellee.

**THOMSON, J.** Appeal from a decree enforcing a mechanic's lien. The record is quite voluminous, but most of the questions which are discussed in the briefs of counsel are settled by the pleadings. Outside of them there was comparatively little for the trial court to investigate. The complaint alleges, and the answer does not deny, and therefore admits, that the plaintiff, Nye, performed labor and furnished materials in the construction of a building upon a parcel of land owned by the principal defendant, Josie E. Branham, at the instance and request of C. A. Branham, her husband, and duly-authorized agent; that, within 60 days after the alleged completion of his contract, the plaintiff filed with the recorder of the proper county a claim, containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner, and the name of the person by whom he was employed, and a description of the property to be charged with the lien; and that written notice of the intention to file the lien was given to the owner 24 hours before the lien

was filed. The complaint alleged that the value of the labor performed, and materials furnished, was \$105.08; this the answer denied. The complaint also alleged, and the answer denied, that the lien claim as filed contained a statement of the terms and conditions of the contract as the statute requires. Further, while not denying the contract as the complaint stated it, the answer set up a contract under which it alleged the plaintiff acted, and then averred that in certain specified particulars he failed in compliance with its terms. The only issues made by the pleadings were, therefore, upon the value of the labor and materials, the completion by the plaintiff of his contract before filing his lien claim, and the contents of the statement filed. The court found that the value of the labor and materials was as the complaint stated it, and there was substantial evidence in that direction. The defendant introduced a written contract between the plaintiff and C. A. Branham, the admitted agent of Josie Branham; but there was evidence showing that, after its execution, and during the progress of the work, such modifications and changes were, by agreement of the parties, made in the amount and kind of work to be done, that the written instrument was, at best, only a part of the entire contract. Upon the questions of the amount due, the terms and conditions of the contract, and its completion in accordance with its terms, the court found with the plaintiff, and the finding, being based on evidence introduced, is conclusive upon us.

The lien claim stated the terms and conditions of the contract to be the furnishing of the material and the performance of the labor by the plaintiff, and the payment of the amount agreed upon, aggregating \$105.08, by the owner, when the work should be completed, and the building accepted. This was a sufficient statement of the terms and conditions of the contract. The statute does not contemplate that all the minutiae and detail of the work to be done shall be incorporated into the lien statement. If there is anything in the argument for the appellant, all plans and specifications accompanying a building contract, and made a part of it, must be shown in the statement as conditions of the contract. We cannot adopt this view. We think the law is satisfied by a general statement, such as the one before us, of what each party to the contract obligates himself to do. See *Tredinnick v. Mining Co.*, 72 Cal. 78, 13 Pac. 152. The court found that this statement was in accordance with the facts. Upon the questions of the completion of the contract and the acceptance of the building, the court also found for the plaintiff. Upon all the questions of fact involving the plaintiff's right to a decree the findings were in favor of the plaintiff, and there was evidence to sustain them.

Joseph H. Smith, the public trustee of Arapahoe county, and Otellis Eyser, were named as defendants in the complaint. Summons was served on Smith, but not on Eyser. Smith did not appear, and the only answer was that of Josie E. Branham. It is objected that the case went to a decree without service of process on Eyser. Nowhere, in complaint, answer, evidence, or decree, does it appear what relation either Smith or Eyser sustained to the subject-matter of the suit. The statute requires no parties to a suit for the enforcement of a mechanic's lien except the owner and persons having claims for liens the statements of which have been filed as the statute provides. Any number of lien claimants may join as plaintiffs, and those who are not made parties plaintiff may be made parties defendant. Persons claiming interests of some other kind in the property involved need not be made defendants. So far as the record discloses, these two persons were not necessary parties; and it is immaterial whether process was served on them or not. Whatever interest the party not served may have in the premises is unaffected by the decree. For aught that is shown by the record, the court was authorized to adjudicate the controversy between the plaintiff and Josie E. Branham without the presence of any other parties. Upon the record the judgment was right, and must be affirmed. Affirmed.

(9 Colo. App. 31)

**HEINZ et al. v. AMERICAN NAT. BANK OF DENVER.**

(Court of Appeals of Colorado. Dec. 14, 1896.)

**AUTHORITY OF AGENT—EVIDENCE.**

A firm established a branch office at D., and placed a local agent in charge. He kept the bank account in his own name, collected for goods in checks or in money, and paid the expenses of the business. The firm then directed the bank to transfer the account to the firm's name, subject only to the firm's check. It also stated that the agent was authorized to indorse all paper payable to the firm, and to deposit it to the credit of the account. The business was continued as before, the agent collecting in checks or money; indorsing and collecting some checks over the counter of the bank without putting them to the firm's credit. The firm had full knowledge of the course of business at D., with seeming acquiescence, but it afterwards sued the bank for checks paid to the agent on his indorsement. *Held*, that there was evidence from which the jury could find that the bank was authorized to pay such checks to the agent.

Error to district court, Arapahoe county.

Action by H. J. Heinz and others against the American National Bank of Denver to recover for checks paid out on alleged forged indorsements. From a judgment in favor of defendant, plaintiffs bring error. Affirmed.

Thomas, Bryant & Lee and C. H. Pierce, for plaintiffs in error. T. J. O'Donnell, W. S. Decker, and Milton Smith, for defendant in error.

BISSELL, J. No legal question of any considerable difficulty is presented by this record. The facts are not at all complicated, and the conclusions of the trial court accorded with the defendant's contentions, and, from the judgment entered thereon, the H. J. Heinz Company prosecute error.

We find no difficulty in affirming the judgment if we accept the court's estimate of the evidence, because we are quite able to find in the record sufficient testimony to support it. It is an almost universal rule to affirm judgments which rest on matters of fact, where there is evidence supporting the judgment. The plaintiffs in error recognize this rule, and attempt to take the case out of its operation by an argument to the point that there is no testimony by which the judgment can be sustained. We cannot agree with their conclusions in respect to this matter. The H. J. Heinz Company were engaged in the business of growers, packers, and dealers in pickles, preserves, sauces, and other condiments, and had an office in Pittsburg, Pa. In the conduct of their general business they established agencies or branch offices in different sections of the country. One of them was established in Denver. When the Denver branch was started, Johnson was put in charge in February, 1889, and he continued to control the agency until the fall of 1890, when he was succeeded by Heiser, who was succeeded by Schmidt. When the agency was first established, the accounts of the firm were kept in the individual name of the manager, Johnson, who sold the goods, collected the money therefor, and deposited it in his own name, checking on the account as though it was an individual deposit. It continued in this way until the month of April, 1890, when the Heinz Company advised the American National Bank, where the account had been kept, that from that time forward the account should be transferred to and carried under the firm name, and subject only to the firm's check. Antecedent to that time, as a matter of course, Johnson had indorsed and collected all checks which he had received in the usual course of business, and he had been fully authorized by the firm to make these indorsements; and under the letter of April 24th, which directed the account transferred to the firm name, it was directly stated to the bank that Johnson was authorized to indorse all paper payable to the firm, and to deposit it to the credit of the account. There was no limitation in that special direction which limited Johnson's power to indorse the paper for the purposes of collection. There is an undated letter found in the deposition of Prager, who was a member of the firm, which simply contained a general authority to Johnson to indorse all checks payable to the agency for deposit only in the bank to the credit of the firm. Prager gave evidence tending to show that this letter was mailed with the other to the bank, but the cashier, who was produced

by the plaintiffs, testified that that particular letter was never received. We do not deem this of very much consequence, because we find in neither of the letters any limitation on the general authority which the manager had theretofore possessed to indorse all checks and drafts which the agency might receive in the transaction of the business. Nor do we find in either letter any limitation on the authority of the manager to indorse and collect whatever drafts or checks he might receive, devoting the proceeds to the purposes of the business and the agency, without depositing them to the credit of the firm, when the funds would only be available on the firm's check. We are not able to discover from those two letters any terms of limitation which will give any notice to the bank that the authority which the general manager had possessed was to be thereafter at all restricted in its exercise, except as it would be controlled by the circumstance that some of the funds might go into the firm account, and be deposited to the firm's credit in the bank. It is, of course, conceded that, when once the moneys had reached the firm account in the bank, they were no longer subject to Johnson's check, and were only available on paper to which was attached the firm's signature. This limitation of course continued from April to the time of the events which form the substance of the controversy. Johnson ultimately severed his connection with the firm, and was succeeded by Helser, who was followed by Schmidt. The business of the agency was conducted, after Johnson's relations were ended, as before. During all this time the Denver branch sold large quantities of goods, collected the pay therefor either by checks or in money, indorsed and collected checks without putting them to the firm's credit, and used the proceeds in the liquidation of the general current expenses of the agency. This was undoubtedly known to the Pittsburg house, because the testimony clearly shows that statements of the business of the Denver branch were forwarded to Pittsburg from time to time, and the money which was deposited to the firm's credit after April 24, 1890, was checked out by the firm itself; and the difference between the amount of money shown to have been received by the agency and the amount of the checks which the firm had cashed undoubtedly disclosed the use of considerable funds by the manager of the Denver agency in the general conduct of the business. The H. J. Heinz Company are therefore chargeable with full knowledge of the course of business at this end of the route, and were advised from month to month of the fact that their cashier and bookkeeper, or general manager, whatever he may be called, was using such of the funds as he collected from the sale of goods as were essential to the management and conduct of the business. Whatever legal results flow from this apparent delegation and use of authority attach to all the transactions of the agent, and the firm

at Pittsburg are undoubtedly liable to whoever dealt with the agents on the faith and strength of this apparent authority. It was shown by the testimony that the agency had been doing business with the bank for a long period of time, and had frequently cashed checks without depositing them to the credit of the firm; and this fact must have come to the knowledge of the home office many months prior to the particular transactions involved in this suit. This suit took on somewhat singular aspects. The bank had apparently cashed over its counter a good many checks for Schmidt, the agent, and had collected those checks in the usual course of business, either through the clearing house in Denver, or through the other usual banking channels. What gave rise to the dispute and the litigation is not made quite evident by the record. At all events, the Heinz Company gathered up some 22 or more checks which had been cashed by the bank over its counter on Schmidt's indorsement, and brought suit against the American National Bank to recover the amount of these checks on the ground that the indorsements were forged and unauthorized, and the bank therefore liable, as for money had and received to their use, for what they had collected. There is no dispute about the fact that the bank advanced the money, and ultimately collected the checks. What became of that money—whether it was actually used for the benefit of the Heinz Company—is not clearly disclosed. Presumptively, it was. While it is charged in the complaint that the company did not receive the benefit of the money, there was no evidence offered which clearly proved that the money had been diverted from the general uses of the company in the payment of the expenses of the Denver house. It is true, there are some statements in a couple of depositions found in the record to the effect that the company got no benefit from those checks; but this is only a legal conclusion, and there was no legal and competent evidence which even tended to prove that the money had been diverted from the legitimate purposes and business of the agency. If necessary, we should be inclined to hold the plaintiffs bound to show the illegal diversion of the money, in order to establish their cause of action. But this is wholly unnecessary, because there is enough in the history of the general course of business of the agency to charge them with knowledge of what their agents did; to clothe the agents with apparent authority to indorse the checks, cash them over the counter, and use the proceeds, and therefore to bind the Heinz Company by what the agents did in the matter. We do not feel called upon to enter into an extended or exhaustive discussion of the testimony, and to bring forth all the arguments which might be deduced to support the court's conclusion, but we deem it enough to indicate the general lines on which the judgment could be sustained; and since we find enough evidence in the record



to support it, and the court committed no error of law in the progress of the trial, we must, of necessity, affirm it. Affirmed.

(9 Colo. App. 58)

DEUTSCH v. BAXTER.<sup>1</sup>

(Court of Appeals of Colorado. Dec. 14, 1896.)

DUTY OF REAL-ESTATE AGENT—ACCEPTING INCONSISTENT EMPLOYMENTS.

An agent employed to sell real estate, who also accepts employment from one contracting to purchase the property to induce his principal to accept certain other property in part payment, thereby vitiates both agencies, and cannot collect commissions under his contract with the first employer.

Appeal from district court, Arapahoe county.

Action by Joseph N. Baxter against William Deutsch. Judgment for plaintiff, and defendant appeals. Reversed.

Appellant was the owner of some lots and buildings on Market street, in this city. On the 10th of December, 1888, he entered into a contract with Braun & Bochow, as agents, to sell the property. It is alleged that under such contract Braun & Bochow negotiated a sale of the property to Oscar Reuter for \$120,000; that during the month of December Reuter paid appellant \$1,000 on the purchase, to be forfeited in case Reuter did not complete the purchase. The purchase was not completed. It is shown that Reuter attempted to complete the purchase in accordance with the contract, tendered \$40,000, the amount due, and demanded compliance. The tender was refused. The cause is not clearly shown. Reuter brought a suit for specific performance, which was tried, resulting in failure, and the dismissal of the suit. Afterwards, by some arrangement between appellant and Reuter, appellant returned to Reuter the \$1,000 (the half of which is claimed as forfeit in this suit), and all negotiations for purchase were dropped, and the matter settled. The claim of Braun & Bochow was assigned to appellee, who brought suit for \$500, the one-half of the \$1,000 claimed by him to have been forfeited, there being an agreement in the contract that Braun & Bochow should receive one-half of all payments forfeited. The defendant, Deutsch, answered, denying, generally, every allegation of the complaint, and interposed a special defense. The case was tried to the court. Finding for the plaintiff, and judgment for \$500.

Talbot, Denison & Wadley, for appellant. Jos. N. Baxter, pro se.

REED, P. J. (after stating the facts). There are several errors assigned. The suit was brought by appellee in his personal and individual capacity. In the complaint it is alleged that the claim was assigned to him. Upon the trial, plaintiff (appellee) offered in

evidence an instrument in writing, being an assignment to him as trustee, which was objected to by the defendant, for the reason that it showed the assignment to have been made to appellee as trustee, and was not admissible in support of the complaint. The objection was overruled, and an exception taken to the ruling of the court, and error assigned. The only evidence in support of the allegation in the complaint was the written instrument. It was ably contended in argument that the written instrument was inadmissible, and many authorities are cited to support the proposition that, the assignment being to appellee as trustee, no action could be maintained by him in his individual capacity, and that the case alleged in the complaint was so variant from the one made by the instrument in writing that the admission of the latter was error. Upon principle, the contention would seem to be valid, but how far the Code controls we have not examined, and preferring to put the decision of the case on less technical ground, will only suggest that the complaint should be so reformed as to make the same case as that of the evidence. It is contended that the refunding of the money, under the circumstances, by appellant, and his refusal or inability to comply with his contract, prevented the \$1,000 in his hands being forfeited under the contract; and, having been properly returned to Reuter, no cause of action could be maintained for one-half by appellee. During the pendency of negotiations, an attempt was made by Reuter to have appellant accept other real estate in part payment of the purchase money. To effect it, Braun & Bochow made a contract with Reuter whereby they were to attempt to influence or induce appellant to take the property, and for such service, if successful, were to be paid \$500 by Reuter. Such contract was clearly established by the evidence. It is contended that such employment was incompatible with the employment by appellant, and precluded their recovery. It is clear that the contract of Braun & Bochow with Reuter for a commission of \$500 to effect the trade and exchange of property, and their efforts to secure the exchange with their principal, were incompatible with their duty to appellant. That "no man can serve two masters" is as true in fact as when enunciated over 1800 years ago, and is as well understood as a canon of law as a rule in ethics. According to the decision, such a second employment destroys the agency. The rule is well settled that the agent can collect from neither. It is put upon the ground of public policy. The principal is entitled to the fidelity and best services of the agent, which is impossible when the agent is employed by both parties in the same transaction, when their interests are antagonistic. See *Farnsworth v. Hemmer*, 1 Allen, 494; *Everhart v. Searle*, 71 Pa. St. 256; *Raisin v. Clark*, 41 Md. 158; *Finnerty v. Fritz*, 5 Colo. 174. In this case it is shown

<sup>1</sup> Rehearing denied January 11, 1897.

that neither employer knew of the employment by the other, but if both had known the agent could not recover from either. *Raisin v. Clark*, supra. Was the \$1,000 forfeit, so as to entitle an agent to the one-half? To have been forfeit, default or noncompliance must have been that of Reuter. No such fact is shown. On the contrary, he is shown insisting upon compliance, tendering the amount due, and bringing a suit for specific performance. The reason for the failure to complete the transaction is left obscure by the evidence, but it is inferable that appellant could not make satisfactory title; but, whatever it was, it was clearly a failure or refusal on the part of appellant. One clause of the contract reads: "Said Deutsch shall make title perfect if he can, but if it cannot be made perfect, and said Reuter shall not elect to take same within four months from January 1, 1889, said Deutsch may rescind this agreement, and declare it null and void and of no further effect, upon repayment to said Reuter of the \$1,000 forfeit hereinafter mentioned." Under that clause, or for some other reason, it is evident that appellant rescinded, and was either unable or refused to complete the contract. He, being in default and unable to comply, or rescinding under the agreement, could not keep the \$1,000, and was bound legally and equitably to repay it. It is a well-settled rule of law that, in order to rescind, the parties must be placed in statu quo as of the time the contract was made. We conclude that the money never became forfeit, and that appellee could not maintain an action for the one-half. For reasons stated, the judgment will be reversed, and cause remanded. Reversed.

(9 Colo. App. 50)

MILLER et al. v. HIDER.<sup>1</sup>

(Court of Appeals of Colorado. Dec. 14, 1896.)

EXECUTORS AND ADMINISTRATORS—APPOINTMENT AND REMOVAL—WASTE AND MISMANAGEMENT—DISCRETION OF COURT.

1. That an administrator, while acting as attorney for his predecessor, was paid an exorbitant fee for his services, is no ground for his removal.

2. A charge that an administrator had wasted the estate, in selling, at 80 cents on the dollar, time certificates of deposit in a bank which had suspended payment, but had since reopened, is not sustained where it appears that the sale was a public one, made by order of court, and conducted by a broker who sought to obtain the highest possible price; that the money was needed to pay claims against the estate; and that, if the bank was then paying the face value of the certificates, the administrator had no knowledge thereof.

3. The fact that a stranger is appointed administrator before the expiration of the time allowed by statute for application by the widow and next of kin is no ground for removing one who, after such time has elapsed, is appointed to succeed such administrator, and serves for over a year thereafter, without objection on the part of any one interested in the estate.

<sup>1</sup> Rehearing denied January 11, 1897.

4. Under Mills' Ann. St. § 4719, providing that letters of administration may be revoked where the administrator wastes or mismanages the estate, or conducts himself in such manner as to endanger his co-administrators or securities, a petition alleging that the administrator "has wasted and mismanaged the estate" admits proof of any waste or mismanagement.

5. The removal of an administrator can only be for statutory cause, and the court can exercise no discretionary power.

Appeal from district court, Arapahoe county.

Petition by Henrietta Hider for the removal of George W. Miller as administrator of Aaron Ray, deceased. An order of removal was affirmed by the district court, and respondent appeals. Reversed.

About the 1st of January, 1893, Aaron Ray, a resident of Louisville, Ky., temporarily residing in Boulder, in this state, died intestate at the home of his daughter Henrietta Hider (appellee), in the city of Denver; leaving a wife, Annie Ray, and seven children by a former wife. Shortly after his death, Robert J. Pitkin, Esq., was appointed to administer his effects in the state of Colorado. His inventory of the estate was as follows: Cash in First National Bank of Boulder, Colo., \$3,053.50; one gold watch and chain, \$100. It appears that during the administration of Pitkin some of the assets were disbursed, and that he changed money in the First National Bank of Boulder to the Union National Bank of Denver, and that on July 29, 1893, he had on deposit in the Union National Bank of Denver \$2,328.50, the money of the estate. About that date the Union National Bank failed, or suspended payment. Pitkin applied, in the county court, for leave to take from the bank time certificates of deposit, to enable the bank to pay, which petition was granted. Certificates of deposit were issued by the bank. Pitkin resigned as administrator, and on August 28, 1893, Miller (appellant) was appointed in his place. On the 18th day of October, 1894, appellee filed in the county court a petition asking for the removal of appellant as administrator of the estate, and that she be appointed in his stead. It was charged in the petition that, upon the resignation of Pitkin, Miller (appellant) improperly and surreptitiously procured his own appointment as administrator of the estate, notwithstanding the petitioner was a resident of this state, and a relative, and willing to serve as administratrix; that Miller was the attorney of Pitkin, administrator, and as such was paid by Pitkin \$250 for services, out of the assets of the estate; that such sum was grossly exorbitant, unreasonable, and excessive compensation for such services; that, by reason of having been the attorney of Pitkin, he was disqualified to act as administrator; that he was wholly irresponsible and insolvent; that he had wasted and mismanaged the estate; that Miller, as such administrator, received certain certificates of deposit of the

Union National Bank to the amount of \$2,-068; that they were worth their face, or par, and could have been readily sold for that amount; that Miller obtained an order from the county court to sell the certificates for 80 cents on the dollar; that such sale was unnecessary; that there was no urgent demand at the time of such sale for funds of said estate; that in selling the certificates he was grossly negligent in his duties as administrator; that appellant, as administrator, has neglected to defend the estate against unjust claims; that Mrs. Annie Ray, the widow, has filed certain pretended claims against said estate, which have not yet been heard or allowed; and that Miller, as administrator, had co-operated with, and been in collusion with, the widow. Appellant answered, denying that he improperly, or for any improper purpose, applied for appointment as administrator. Alleged that all the heirs of Aaron Ray were of full age at the time of his death, knew of the appointment of Robert Pitkin as administrator, and permitted him to act as such without objection, and received the benefits thereof; that they received large amounts of money from him, which were divided among them; that appellant was appointed administrator with the full knowledge and consent of the widow; that the time allowed by statute for application of the heir at law for appointment had then expired. Did not know whether appellee was the daughter of Ray or not. Did not know whether or not she resided in the state at the time, but that she made no application to be appointed administratrix until after the expiration of the time under the statute had elapsed. Denied that he is totally or at all unfit for the office of administrator of the estate. Denied the charge of unfitness and insolvency. Denied that he had wasted or mismanaged the estate, or that he was insolvent. Admitted that the principal assets were certificates of deposit of the Union National Bank. Alleged that the transaction with the Union National Bank was made by Pitkin, with which he had nothing to do, and for which he was not responsible. Alleged that the certificates were of uncertain value, and denied that the bank was ready and willing to redeem the certificates at par. Denied that he had failed to defend against unjust claims, or that he had co-operated with, or acted in collusion with, Annie Ray, the widow. An order was made in the county court for the removal of appellant as administrator. Case was certified to the district court. The order of the lower court was sustained, removing Miller as administrator, from which judgment an appeal was taken to this court.

Miller & Sayer, J. T. Deweese, and W. F. Freeman, for appellant. Thomas, Bryant & Lee and W. E. Richards, for appellee.

REED, P. J. (after stating the facts). Robert J. Pitkin was appointed administrator Feb-

ruary 14, 1893. Appellee, a resident of the state, was at that time temporarily absent; returned the ensuing month. No objection was made by appellee; no petition for his removal, nor application of appellee to be appointed in his stead, as next of kin. Mr. Pitkin transacted nearly all the business of the estate, administering without question or objection; collected and distributed all, or nearly all, the available assets of the estate. He resigned September 6, 1893. At the time of his resignation the assets remaining in his hands appear to have been three certificates of deposit of the Union National Bank, which had suspended payment. At the time the bank suspended, Pitkin, as administrator, had in it the money of the estate, amounting to \$2,328.50. He applied to the county court for leave to take time certificates of the suspended bank for the amount, which was allowed. Appellant was appointed administrator to succeed Mr. Pitkin. No objection to his appointment appears to have been made, nor to his administration, until October 18, 1894, although the appointment was made August 28, 1893. On September 14, 1893, appellant represented to the county court "that assets of said estate consist principally of certain bank certificates, of uncertain value. Prays permission to sell the same for the purpose of paying claims and costs of administration, provided same can be sold at eighty cents on the dollar." The order was made, allowing the sale, without objection; and the sale of the certificates for \$2,068.05 was made, realizing \$1,654.44, with which appellant charged himself. On August 29, 1893, he made a report in which he credits himself with \$108.50 paid to discharge sundry small bills allowed by the court apparently without contest, and shows a balance in his hands of \$1,545.94. On February 6, 1894, he filed another report, in which he credits himself with sums paid on bills to doctors and counsel, for the widow, amounting to \$231. The bills appear to have been allowed by the court without protest or objection. This left in his hands for distribution \$1,314.94, the distribution of which, and final settlement, appear to have been all left for appellant to do, when the application was made for his removal. It appears that there were eight heirs,—the widow and seven children by a former wife, all of full age,—and that appellee was the only one of the number who felt aggrieved. The other seven, by counsel, indorse and support appellant in this contest. The charges made were:

1. That appellant was attorney for Mr. Pitkin during his administration, and that he was paid for services by Mr. Pitkin \$250, from the assets of the estate, and that the sum was grossly exorbitant and excessive. Admitting the allegation to be true, it occurred previous to his administration; was paid by the former administrator to him. If improperly paid, the charge of maladministration would lie against the former administrator, who had made, without objection, a final settlement. That he had received too great a fee for legal services prior to his appointment had no connection with his

administration, did not disqualify him, and was no ground for impeachment or removal.

2. That appellant had wasted and mismanaged the estate, in selling the certificates at 80 cents on the dollar. Some evidence in support of this allegation, was attempted. W. H. Trusk, cashier of the Union National Bank, was called. His evidence, to say the least, was peculiar. He admitted that the bank was suspended, was not taking up its certificates on presentation, and in the ordinary course of business, said bank had not sufficient funds to meet demands, if given time it would pay them all. "Whenever they [the certificates] were offered to the bank at a discount, we promptly paid the face of them, not to allow them to go at a discount on the street." Did not recollect appellant's going to the bank and trying to get "a settlement, at some price, of these certificates. If you had made any such offer, would have paid them in full; our custom at the time." "Mr. Pitkin could have got it out, if he said he would have to have it; could have got it in full. He didn't represent it as necessary. I say, if you had come to our bank with that certificate, and represented that you were going to sell it at a discount, I would have paid it in full. That I did with other certificates, before and after." Again: "If Judge Miller had come to me, and said he was going to sell that at eighty cents on the dollar, I would not have permitted it, but would have paid it in full." This shows a curious management of bank affairs. The bank was not taking up its paper upon presentation, but, in order to get the money, "an urgent appeal for money must be made," or an offer made the bank to discount the paper. We are not informed what was necessary to constitute an "urgent appeal," nor why it was necessary to offer a discount to obtain the money in full; but the trouble is that it was not shown that appellant was informed of the fact that he could obtain the face by an "urgent appeal," or offering a discount. It is quite probable that, if he had been informed, he would have made the most urgent appeal of which he was capable, and offered the paper at a ruinous discount. Appellant's uncontradicted evidence was as follows: "I think I sold \$2,068.05 of these certificates. I so reported, and charged myself. \* \* \* It was a public sale; was talked of for some time. I went to the American National Bank. Went to Mr. Swallow. Employed a broker, and sent him around over the city for two weeks hunting the best figure I could get. Went everywhere I thought there was a chance. Asked the bank. They said they were good, but I could not get the money. There were claims urged for payment, and creditors were clamorous. I had to use my own money, and pay some of the creditors. I paid them rather than be annoyed to death." "My recollection would be, I sold all of them. The business was done through Horton, the broker that was employed. I sold all of them for some price. I sold some of my own. I sold as low as 75 cents." "I knew the bank had reopened; as I understand it, that certain

certificates had become due. If you mean in the general sense of the term,—to pay what they owed,—I don't consider that they reopened at all. Had issued time certificates. They were open, doing some kind of business. Impression left on me is, it didn't look like a bank doing business,—the recollection I have of it now. My idea was simply to do my duty, and try and save what of that estate I could for the parties interested; and it was done, if you please, at the request of the parties interested."

3. The remaining charge is "that Mrs. Annie Ray, the widow, has filed certain pretended claims against said estate, which have not yet been heard or allowed," and that appellant had co-operated with, and colluded with, the widow. The statement is too indefinite to require any attention. The filing of questionable claims by the widow cannot be imputed to the administrator. It is not stated that he had either advocated or resisted them, and the charge of co-operation and collusion is too general, and is not sustained by any evidence. The fact that the other six heirs had not learned that they were being wronged, and the assets of the estate dissipated, goes far to sustain the inference that the trouble arose between appellee and the widow. No evidence appears to show any fraudulent or illegal acts of the administrator, nor any statutory cause for removal. By statute (sections 4696, 4697, Mills' Ann. St.) it is provided that the estate shall be administered by the widow or next of kin, preference being given to the widow, if they will accept the same and are not disqualified. Mills' Ann. St. p. 2429, § 4696: "But if no widow or other relative of the intestate shall apply within twenty days from the death of such intestate, the county court may grant administration to any creditor or creditors who shall apply for the same; and in case no such application be made by any creditor or creditors within ten days next ensuing the lapse of said term of twenty days as aforesaid, administration may be granted to any person or persons whom the judge of probate may think will best manage the estate." By section 4697 it is provided that, within the time allowed the widow or next of kin to apply to administer, applicants shall produce satisfactory evidence that the persons having the preference have relinquished their prior right. "Provided, such application shall be made within the space of thirty days next ensuing the death of any such intestate as last aforesaid; but if such application be made after the expiration of thirty days it shall not be necessary to make such proof, and the county court may proceed to grant letters to such applicant or applicants, or any other person or persons, as he may think fit." At the time of the appointment of Mr. Pitkin (February 14th), appellee was absent, and the statutory time had not expired. In her evidence she says that she returned in March, but what date is not shown. It may be that Mr. Pitkin was improvidently appointed, and the

appointment erroneous. If such was the case, appellee could have made application, and had him removed and his acts declared void. *Schnell v. City of Chicago*, 38 Ill. 380. But the right was waived by silence and acquiescence. But, however that may have been, the statute had no application to his successor, appointed in September, after Mr. Pitkin's resignation. No protest or objection was made to appellant's appointment, nor an application made by appellee to be appointed. After the expiration of the year, and acquiescence in the appointment, there was no legal force in the claim of right as next of kin. By section 4719, *Mills' Ann. St.*, it is provided that letters of administration may be revoked where the administrator wastes or mismanages the estate, or conducts himself in such manner as to endanger his co-administrators or securities. The court can exercise no discretionary power. The removal can only be for statutory cause. *Munroe v. People*, 102 Ill. 406. The language of the statute is sufficiently broad to admit proof of any waste or mismanagement. The language of the petition is as broad and general as that of the statute: "He has wasted and mismanaged the estate." Proof of any waste or mismanagement was admissible, and appellee signally failed to establish either. It follows that the court erred in removing appellant, and that the judgment must be reversed and the cause remanded. Reversed.

(9 Colo. App. 23)

**SALOMON v. McRAE.**

(Court of Appeals of Colorado. Dec. 14, 1896.)  
**STATUTE OF FRAUDS—PLEADING—NECESSITY—EVIDENCE—CUSTOM AND USAGE.**

1. The statute of frauds, to be available as a defense, need not be pleaded, if the contract sued on is denied.

2. An indorsement by an agent, on bills of goods sold, of the words "O. K.," followed by his name, is not a sufficient memorandum, within the statute of frauds, of a contract of the agent to guaranty payment for all goods sold by him on credit.

3. Where an agreement to guaranty goods is defective, the terms of the agreement cannot be established by parol testimony.

4. Where a bill of goods is marked "O. K." by the agent effecting the sale, proof of custom is inadmissible to show that the letters used implied a guaranty of payment by the agent.

Error to district court, Arapahoe county.

Action by Duncan G. McRae against Hiram Z. Salomon. Judgment for plaintiff. Defendant brings error. Affirmed.

Wells, Taylor & Taylor, for plaintiff in error. James B. Belford and T. J. Galloway, for defendant in error.

**BISSELL, J.** McRae, the defendant in error, sued Salomon on a contract of employment, under which he was entitled to receive a stipulated wage, and averred performance. On the termination of the contract, Salomon refused to pay him some \$202.64, for which he brought this suit. The

contract and its terms were admitted. By way of defense and counterclaim, the defendant set up representations alleged to have been made by McRae respecting the extent of his acquaintance and the trade which he could control, and the making of an agreement between the parties whereby McRae agreed that, if he was permitted to sell goods to divers persons on credit, he was to guaranty the accounts, and become responsible for all bills which were contracted under that arrangement. The defendant alleged the sale of a very considerable quantity of goods on the faith and strength of this guaranty, and the execution of a memorandum in writing averred to be sufficient to take it out of the statute of frauds. The amount of money thus due Salomon for unpaid bills under this arrangement, according to his allegations, was some \$730, for which he demanded judgment. The replication denied the guaranty or agreement to pay the accounts as stated. On the trial the plaintiff offered testimony which sustained his cause of action. Thereupon the defendant, in support of his counterclaim, undertook to offer bills in evidence, against divers persons, on which were written the letters "O. K. McR.," and attempted to prove the custom which prevailed in the trade concerning the construction to be put on those letters, and therefrom deduce a contract which would sufficiently satisfy the statute. The evidence was objected to, and excluded, and the rulings of the court thereon are assigned as error.

The first proposition respects the absence of a plea of the statute in the plaintiff's replication. Counsel attempt to support their contention that the statute of frauds must be pleaded, in order to become available, by reference to a case decided by this court (*Hamill v. Hall*, 4 Colo. App. 290, 35 Pac. 927), wherein it is said, "The statute was not pleaded, which alone is sufficient answer." The opinion does not support the proposition. According to all the authorities in this state, the defense of the statute of frauds is a matter of evidence, rather than a matter of pleading. The brief sentence contained in the opinion of this court which has been referred to is in no sense opposed to this general doctrine. The opinion was not rested on that proposition, nor was the judgment based on it, though, as a legal proposition, the statement is entirely accurate, as applied to the particular facts of that case. According to the complaint in that suit, the contract was between the plaintiff and the defendant; and, as it was alleged the plaintiff was personally responsible for the goods sold and the work done, the defendant occupied no such relation to the matter in controversy as that of a guarantor, or a person who had promised to answer for the debt or default of another. In the answer which Hamill interposed, the agreement and the performance were substantially admitted, al-

though it was stated generally that the work was done and the supplies furnished to persons other than the defendant Hamill. Under these circumstances, if Hamill desired to avail himself of the statute it was incumbent on him, if he admitted the agreement, to plead its invalidity, and rely on the statutory defense. This has always been the practice in equity, where the plaintiff relied on an agreement within the statute which was admitted by the defendant. To avail himself of the statute, the defendant was bound to plead it. In analogy to this rule of equity pleading and practice, it is undoubtedly true, under the Code, that if the plaintiff sets up an agreement which is within the statute, though not so pleaded, and the defendant admits the contract, but relies on the statute, he must insist on this defense. This is conceded by most of the authorities, and no other practice is available. 1 Daniel, Ch. Pl. & Prac. (3d Am. Ed.) pp. 681, 682; Bliss, Code Pl. § 353; Tucker v. Edwards, 7 Colo. 209, 3 Pac. 233; Hunt v. Hayt, 10 Colo. 278, 15 Pac. 410. This analysis will serve two purposes: It disposes of one branch of the contention of plaintiff in error, and advises the profession of the limits within which the doctrine stated in Hamill v. Hall can be applied.

A collateral inquiry growing out of this question of pleading and practice is presented by the situation of the pleadings in the present suit. The plaintiff, by his replication, denied the agreement, and insisted that thereby the statutory defense was available, and he could insist on his objection to any proof which did not embrace an agreement properly executed and authenticated. It is very generally held by the authorities that wherever the agreement is denied the plaintiff is put to proof of a contract which is not void under the statute. Timely objection to the introduction of any other kind of evidence will exclude it, and the defendant thus have the benefit of the bar as fully and completely as though the statute had been specifically pleaded. Dunphy v. Ryan, 116 U. S. 491, 6 Sup. Ct. 486.

This proposition being disposed of, we are then brought to the inquiry whether the evidence which the defendant offered in support of his counterclaim was admissible. We conclude not. There was no attempt whatever to prove any agreement, unless one is properly deducible from the appearance of the letters "O. K. McR.," which appear on the face of the bills with which the defendant seeks to charge the salesman. The defendant conceded that the letters, by themselves, made no contract or agreement, but attempted to supply the necessary ingredients required by the authorities by proof of a use and custom which would give to those letters a distinct and specific signification. We do not find any of the authorities go to this limit. The essential terms of the agreement must be ascertained

by the writing itself, or by reference in it to something else. If the agreement is at all defective, it cannot be supplied by parol proof, and the terms of the agreement gathered, not from the writing itself, but from parol testimony concerning the convention of the parties. No well-considered case holds a contrary doctrine. Williams v. Morris, 95 U. S. 444; 1 Reed, St. Frauds, § 398; Hall v. Soule, 11 Mich. 494; Wright v. Weeks, 25 N. Y. 153. According to all the authorities, the contract which is offered, and which is supposed to take the agreement out of the operation of the statute, must be complete in its terms; and therefrom the court must gather the conditions, and be able to say that substantially the entire contract is expressed in the writing. It is likewise held that the omitted terms and conditions which are essential to a completed agreement may not be shown by parol, nor can they be supplied by proof of custom which is only admissible for the purposes of interpreting the meaning of language employed by the parties, or explaining it, where its meaning is otherwise obscure. Bank v. Ward, 100 U. S. 195; Hinton v. Locke, 5 Hill, 437. The evidence offered in this case was far below the level of what these authorities require. There was neither the expression of an agreement, nor was there a memorandum in writing purporting to contain it, nor any other thing found in the evidence offered, save the letters which have been referred to. These, of themselves, make no contract. Neither parties nor consideration are expressed. There is a total want of any statement of what the agreement of the parties was, or the circumstances under which one was to be bound, and a cause of action come to the other. We conclude that the court did not err in excluding this testimony, and that the judgment entered for the plaintiff on his proof was entirely correct, and it will accordingly be affirmed. Affirmed.

(9 Colo. App. 27)

MORRISON et al. v. BARTHOLOMEW.  
(Court of Appeals of Colorado. Dec. 14, 1896.)

SALE—EVIDENCE—DECLARATIONS.

1. An action to recover for goods sold may be maintained by the seller though he signed another person's name to the memorandum of sale delivered to the buyer.

2. Evidence of prior declarations of ownership made by the son is immaterial in an action by the father to recover for property which the son testifies belonged to the father.

3. In an action to recover the price of a saw-mill upon a contract embracing the sale of the mill and an agreement to saw 100,000 feet of lumber, at \$10.50 per M., evidence as to the value of the sawing, which has all been done and paid for, is immaterial.

4. In an action to recover the price of a mill sold for a certain price, without warranty, evidence of the value and condition of the mill is immaterial.

Appeal from district court, San Juan county.

Action by C. A. Bartholomew against E. W. Morrison and A. L. Jones to recover the price of a sawmill, and for the placing it in position. From a judgment for plaintiff, defendants appeal. Affirmed.

Barnes & Barnes, for appellants. Cornforth & Whitehead, for appellee.

REED, P. J. This suit was brought by appellee to recover \$900 and a balance due on freight on an alleged purchase and delivery of a sawmill. Appellee or his son, or both, owned the machinery pertaining to a sawmill, which was in the vicinity of Durango. Appellants were constructing buildings, owned timber, and needed lumber at Silverton. Appellant Jones and appellee had some conversation at Durango in regard to the mill. Afterwards the parties met in Denver, discussed the matter, and the following proposition was made by appellee, in writing, to which he signed the name of his son (no question is made in regard to the signing of the name of the son by the appellee): "Oct. 10, 1894. Sawmill complete to saw lumber, on cars, \$900.00; freight on cars, \$100.00; hauling and putting in position, \$125,—total, without covering, \$1,125.00; cutting 100 M. feet of lumber, \$1,050.00. Will haul all machinery for less than others will perform same work. Charles E. Bartholomew." It is claimed by the plaintiff that the offer was accepted as an entirety. At any rate, it is shown by the evidence that the mill was shipped; \$70 advanced by appellants to pay freight; that it was put upon the property of appellants; was operated by the son; the 100,000 feet of lumber cut by him, and paid for at the stipulated price of \$10.50 per 1,000; that, at the settlement for the cutting of the lumber, the \$70 advanced for freight was not considered. The suit was brought for the price of the mill, \$900, and freight, \$225, less \$70 paid,—\$1,055, and interest; was tried to the court, without a jury; finding and judgment for appellee for \$1,080 and costs.

Appellants contended that they did not buy the mill, and were not to pay the \$225 for the delivery; that the only contract was for the cutting of the 100,000 feet of lumber, at \$10.50 per 1,000, which had been paid, and for which they held a receipt. The evidence of the parties was conflicting, but there is one pertinent fact that should not be overlooked: The memorandum and offer was the only one made. It was delivered to appellants, and retained by them. There was no erasure, or evidence of any modification or partial acceptance. It is clear that there was an acceptance of, at least, a part of the offer, and that it was acted upon, and that it was regarded and retained by appellants as the basis of the contract.

It was contended that appellee, by reason of having signed the name of his son to the memorandum, could not recover as owner. By reference to the written memorandum, it

will be seen that it was for the sale and delivery of the mill, and the cutting and delivery of 100,000 feet of lumber. The evidence shows that, in so far as the cutting of the lumber was concerned, it was the contract of the son, who put up the mill, and cut the lumber. The title of the mill was not in question. It was on the property of appellants, and in their possession; and there being no question in regard to either title or possession, it seems a matter of no importance whether the father or son, or both, were the owners, because in either case the title would be complete; nor can we see how the signing by the father of the name of the son, by his authorization, could in any way affect the transaction. There was no necessity for the name of either. Appellants did not sign. On the part of the father, his offer was oral. As the son was absent, and was to be a party if the contract was made, the father claimed he was authorized to represent him; and he signed the name of the son, so that, in case of an acceptance, there would be no misunderstanding on the part of the son.

Upon the trial, appellants called witnesses to prove that the son had stated that he owned the mill. The court refused it, and this is assigned for error. The ruling was correct. All the evidence upon the question was that of the appellee and his son, who testified that it was the property of appellee; and proof that the son had said that he was the owner could in no way affect the appellants, nor prevent the recovery of appellee. The title was not in question, nor was there any attempt upon the part of appellants to show that the title was defective; and the testimony, if admitted, could not have established title in the son.

Appellants called a witness "to show that the mill was in poor condition, and that, when a party furnishes mill to cut lumber, it would not be worth more than \$7.50 per thousand." The refusal to admit the testimony is assigned for error. Whether in poor or good condition was of no importance. No warranty or representations in regard to the condition were attempted to be shown. The question of the value of cutting the lumber was not involved, nor was there any question in regard to it. The lumber had been cut, and paid for, and a full settlement had. The only important question in the case was one of fact,—whether or not appellants had contracted to buy the mill. Upon that question the evidence was conflicting. The court found the fact for the plaintiff (appellee), and there was sufficient evidence to warrant the finding.

Several other supposed errors are assigned upon the admission and refusal of evidence, but they appear to be more technical than substantial. A ruling either way would not prejudice appellants, nor in any way affect the merits of the controversy. The only defense was that appellants did not buy the mill, and, to establish such contention, the

widest legal limit was allowed; and, that having been found against them, the others were of no legal significance. The judgment of the district court will be affirmed. Affirmed.

(16 Wash. 281)

# HITCHCOCK v. NIXON et al.

(Supreme Court of Washington. Dec. 24, 1896.)

RES JUDICATA—MORTGAGES—PRIORITIES—SATISFACTION—MERGER—FORECLOSURE—DECREE—CONSTRUCTION.

1. In foreclosure by a second mortgagee against the mortgagor and N., the first mortgagee, to whom the mortgagor had conveyed the land, the decree recited that plaintiff's lien was "superior to any right, title, or interest which the defendant N. had in or to the said described real property, or any of it, except as to whatever right or title said N. may have under and by virtue of a mortgage" described. *Held*, that the decree did not establish the priority of N.'s mortgage.

2. Where a mortgagor conveys the land to the mortgagee when there is an outstanding junior mortgage, there is no merger, and the grantee has a right to be protected by his mortgage against the junior mortgage.

3. Land on which there were two mortgages was conveyed by the mortgagor to the first mortgagee, who also mortgaged it. Most, if not all, of the debt secured by the first mortgage was paid when the mortgage by the grantee was given, and afterwards the balance, if any, was paid. *Held*, that the second mortgage was superior to the mortgage given by the grantee in the deed.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by E. W. Hitchcock against Cora E. Nixon, as administratrix of the estate of Thomas L. Nixon, deceased, and others, to foreclose a mortgage. From a decree in favor of plaintiff, and declaring the lien of plaintiff's mortgage prior to any claim or lien of defendant Fred L. Geddis, who held a mortgage on the same land, Geddis appeals. Reversed.

Ralph Kauffman, for appellant. Eugene E. Wager and Will G. Graves, for respondent.

DUNBAR, J. One F. H. Wilkin borrowed \$5,000 of the Merchants' National Bank of Tacoma, and Thomas L. Nixon became his surety on the note given for the same. To indemnify Nixon, Wilkin executed to him a mortgage on the land involved in this case, for the sum of \$5,000, on the 21st day of January, 1887. On December 10, 1887, Wilkin executed a mortgage on the same land, together with some other land, to one S. R. Geddis, to secure a note for \$1,471. On December 17th of the same year, Wilkin deeded the land to Nixon. On December 28, 1888, Wilkin having defaulted, Geddis instituted a suit to foreclose his mortgage, making Nixon and Wilkin parties defendant. Wilkin defaulted, and Nixon answered, setting up the fact that he had a superior mortgage of \$5,000, and that no part of it had been paid. During the pendency of this

trial, Nixon and wife executed and delivered to respondent E. W. Hitchcock their promissory note for the sum of \$2,000, and, to secure the payment of said note, executed and delivered to said Hitchcock their mortgage on the land in controversy. Upon the trial of that suit, viz. the suit between Geddis as plaintiff and Wilkin and Nixon as defendants, judgment was taken against Wilkin for the sum of \$2,032.95, attorney's fees, and costs, and it was adjudged that Geddis' lien was superior to any right, title, or interest which Nixon had, except as to whatever right or title he had under and by virtue of the mortgage hereinbefore mentioned. Execution was issued, and a sale of the property was ordered. And right here we will notice the contention of the respondent that Geddis was bound by the decree in this case, which, it is alleged, established the priority of the Nixon mortgage over his. A perusal of the decree satisfies us that there was no priority established by the court in that case. The language of the decree was that "the Geddis lien was superior to any right, title, or interest which the defendant Nixon had in or to the said described real property, or any of it, except as to whatever right or title said defendant Nixon may have under and by virtue of a mortgage" (describing it). The interest which Nixon had, or claimed to have, was not in any way determined or passed upon by the court in that case. If he had any interest, it is fair to construe the decree as establishing it as a paramount interest. But there was no attempt to establish the fact that he had any interest, or, if he had, what that interest was. The property was sold upon the execution issued in this case, and all rights under the execution were assigned to Fred L. Geddis, the appellant here.

Nixon died while holding the legal title to the land, and in 1891 Wilkin brought an action against J. D. Caughran, administrator de bonis non of the estate of Thomas L. Nixon, deceased, Cora E. Nixon, Helen Nixon, Ansell Crosby, assignee of H. C. Crosby, and E. W. Hitchcock. In this suit there was an accounting. It was found by the court that the note for the \$5,000 to the Merchants' National Bank, which was indorsed by Thomas L. Nixon, and for which the mortgage above referred to was given, had been paid, and was ordered canceled and held for naught. It was also ordered and adjudged that the deed from Wilkin to Nixon "is declared to be and is held to be a deed of trust for the sole use and benefit of the plaintiff," Wilkin, and that "the creditors of Thomas L. Nixon never had or took any interest in the land therein conveyed, and the same is hereby canceled and adjudged null and void." It was adjudged that Wilkin was the sole and legal owner of the land described in the deed of trust, that the mortgage given by Wilkin to Nixon was fully paid and satisfied, and was null and void,



and that the same be canceled and held for naught; and a commissioner was appointed who was authorized and directed to cancel upon the records the mortgage executed by Wilkin to Nixon, and another commissioner appointed, empowered and directed to convey by deed to the plaintiff Wilkin the legal title to the lands theretofore conveyed by Wilkin to Nixon. Geddis was not made a party to this suit. The present action was brought by the respondent Hitchcock, Nixon's mortgagee, who prays judgment against the defendant Fred L. Geddis, the appellant here, that the lien of said Geddis, if any he has, be declared subsequent and inferior to the lien of plaintiff's mortgage, and that he recover his costs and disbursements herein from the said defendant Fred L. Geddis. A great many other persons were made defendants to this action, and a great many other findings of fact were made in the prior cases referred to; but, as we view the law of this case, it is not important to mention them. The court, as conclusions of law from the statement of facts agreed upon, and the findings of fact made by the court in this case, concludes, among other things, that plaintiff is entitled to a decree foreclosing a mortgage on the west half of section 30, township 17 north, range 20 east of the Willamette meridian, which is the land in dispute, and to a decree ordering the sale of said premises, and the application of the proceeds to the payment of the amount above set out, and a judgment against Cora E. Nixon for any deficiency that may arise after applying the proceeds of the sale of said premises to the satisfaction of said amounts; and, further, that the interests of the liens of the defendant Frank H. Wilkin, S. R. Geddis, and others are subsequent and inferior to the lien of plaintiff's mortgage, and are subject thereto. From this last conclusion, viz. that the liens are subsequent and inferior to the lien of the respondent, this appeal is taken.

We have examined the cases cited in the briefs of the parties to this action, and all the cases that we have been able to find bearing on this case, but from such research we have been unable to find a case that presents exactly the facts that are presented here. A great portion of the respondent's brief is taken up in discussing the subject of merger and nonmerger, and it is claimed that, when Wilkin deeded the land which he had theretofore mortgaged to Nixon, there was no merger, and that Nixon had a right to be protected against the outstanding mortgage of Geddis by his prior mortgage. We do not think that, under the almost universal authority, this proposition can be questioned. It was evidently to Nixon's interest that there should not be a merger; and, that being true, a court of equity would not compel the merger. That would have been true in this case, no doubt, on the face of the transaction, but the finding of the trial court in the case of Wilkin against Nixon and oth-

ers established the fact of the intention of the parties on this proposition. The court in this case, we presume, held that Hitchcock took Wilkin's interest in the mortgage pro tanto, and was subrogated to the extent of his mortgage to Wilkin's interest. The record, however, shows that the mortgage from Wilkin to Nixon has been paid and satisfied.

It is claimed, however, by the respondent, that, under the authorities,—and many authorities are cited to sustain the contention,—the payment of this mortgage was a personal right which could have been pleaded by the original parties to the mortgage, or in this case by Wilkin, but could not be pleaded or shown by Geddis. We think the authorities do not sustain this contention, and do not bear upon this kind of a case. Most of the cases cited were cases of duress or legal inability on the part of the contracting parties to contract, as coverture, duress, etc. But these propositions, it seems to us, are not controlling in this case; for, conceding that there was no merger so far as the interests of Nixon were concerned, it does not follow that the principle of nonmerger prevails to the extent of aiding or protecting the respondent's interests, if, as announced in section 794 of Pomeroy's Equity Jurisprudence, "whatever may be the circumstances, or between whatever parties, equity will never allow a merger to be prevented, and a mortgage or other security to be kept alive, when this result would aid in carrying a fraud or other unconscientious wrong into effect, under the color of legal forms. Equity only interposes to prevent a merger, in order thereby to work substantial justice." In this case it is difficult to see upon what principle respondent Hitchcock invokes the doctrine of nonmerger; for while it may have been sustained to protect Nixon's interest against the wrongful encroachment of Geddis' lien, so long as Nixon had any interest in the mortgage, it appears from the stipulated facts, judicially determined in a case to which Hitchcock was a party, and which has not been appealed from, that the note for which Nixon was responsible, and as indemnity for which he received the mortgage from Wilkin, was fully paid, and all but a trifling amount was paid even before Hitchcock's mortgage was executed. The mortgage then being paid, all questions of merger or nonmerger disappeared, and cannot be kept alive for the benefit of a subsequent incumbrancer. Moreover, as affecting the small portion which had not been paid at the time of the execution of the Hitchcock mortgage, we are unable to understand how it can be held that Hitchcock, by reason of his mortgage, became pro tanto a purchaser of Nixon's interest in the property, both legal and equitable, and succeeded to Nixon's right to have the mortgage stand out against the property; for, at the time Nixon executed this mortgage to Hitchcock, he must have executed it under the power and authority of the deed

which he had received of Wilkin, and Hitchcock must have relied upon his title through the deed, and not upon any interest Nixon had in the outstanding mortgage, for the legal title was in Nixon, and, if it had not been so, he could not have executed the mortgage to Hitchcock at all. The rehearsal in the mortgage itself, that Nixon was the owner of the land, is sufficient to show this. Hitchcock, then, relying upon the title which was in Nixon, with notice of the Geddis mortgage, which must be imputed to him by reason of its proper recording, must, in contemplation of law, have bought subject to the Geddis mortgage. The quotation from Jones on Mortgages, to the effect that "a mortgage of real estate is a purchase, within the meaning of the recording laws, and that a mortgagee is, to the extent of his claim, a purchaser of the land," can have no application to mortgagees in this state, where a mortgage conveys no title. The judgment will be reversed, and the lower court is instructed to establish the priorities in accordance with this opinion.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

(16 Wash. 74)

HERRICK v. NIESZ et ux.

(Supreme Court of Washington. Dec. 7, 1896.)

MOTION TO DISMISS—APPEAL—WAIVER OF OBJECTIONS—TAX SALE—APPLICATION FOR DEED—REGULARITY OF SALE—DEED AS EVIDENCE—CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.

1. A motion by plaintiff for nonsuit comes too late after the court, in a written opinion, has substantially announced its findings and conclusions.

2. Under Code, § 193, providing that objections, except to the jurisdiction, and that the complaint does not state a cause of action, are waived unless taken by demurrer or answer, the statute of limitations cannot be urged for the first time on appeal.

3. Act Feb. 3, 1886, amending Code 1881, § 2934, so as to require the holders of tax certificates to give notice of application for a deed at least 60 days before the expiration of the 3 years provided for redemption, applied to a sale occurring nearly 2 years prior to its enactment, since the purchaser had a reasonable time thereafter in which to comply with said act.

4. The application of the statute to such prior sale did not impair the obligation of contracts, in violation of Const. U. S. art. 1, § 10.

5. Code 1881, § 2937, declared a tax deed, duly acknowledged or proven, to be (except as against actual fraud) conclusive evidence of the regularity of all the proceedings up to the execution of such deed. Subsequently, Act Feb. 3, 1886, was passed, requiring the holder of a tax certificate to give notice of application for a deed at least 60 days prior to the expiration of the time for redemption. *Held*, that the mere production of the deed affords no evidence of compliance with the latter act.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by E. M. Herrick against U. R. Niesz and wife to cancel a tax deed and to

quiet title. From a judgment for defendants, plaintiff appeals. Reversed.

Mitchell Gilliam and Donworth & Howe, for appellant. J. T. Ronald, for respondents.

GORDON, J. This was an action, instituted by the appellant as the owner in fee of the premises described in the complaint, to cancel a tax deed executed and delivered to the respondent U. R. Niesz by the sheriff of King county, pursuant to a sale of the premises in question under a tax assessment for the year 1883, and to quiet plaintiff's title. From a judgment in favor of the defendants, plaintiff has appealed.

At the conclusion of the trial, the court below, having taken the cause under advisement, thereafter filed a written opinion upon the law and the facts, and therein directed the entry of a decree in accordance therewith. Thereupon the plaintiff moved the court for leave to dismiss his complaint at his own cost, and he predicates error upon the court's refusal to permit the action to be dismissed. In his written opinion the learned judge had substantially announced his findings and conclusions, and the application to dismiss came too late. *Somerville v. Johnson*, 3 Wash. St. 140, 28 Pac. 373, and *Walte v. Wingate*, 4 Wash. 324, 30 Pac. 81, are not applicable to the facts here shown.

An objection is made in the brief of counsel for the respondents that the statute of limitations has run against plaintiff's cause of action, but this defense was not interposed by either demurrer or answer in the court below, and we think it cannot be urged here. Section 193 of the Code provides that, "if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, which objection can be made at any stage of the proceedings, either in the superior or supreme court."

Various questions are discussed in the brief of counsel for the appellant which go to the regularity of the assessment and the proceedings taken to enforce it; but there is one main question, upon the decision of which the case must turn, and we will proceed to a consideration of it. The tax deed under which respondents claim was based upon a sale of the premises in question for the delinquent taxes assessed thereon for the year 1883. The sale occurred on the first Monday in May, 1884, pursuant to the statute then in force, and on that day the sheriff executed and delivered to the respondent U. R. Niesz a certificate of such sale, and on the 20th of May, 1887,—more than three years having elapsed from the date of the sale, and the lands not having been redeemed,—the respondent U. R. Niesz, having surrendered his certificate to the sheriff and paid the subse-

quent taxes against the land, received from the sheriff a deed of the property. At the time when the sale occurred, the statute did not require any notice of the application for a tax deed to be given, but subsequent thereto and prior to the execution of the deed by the sheriff to the respondent, viz. on February 3, 1886, section 2934 of the Code of 1881 (in force at the time of the assessment and sale) was amended, by adding the following thereto, viz.: "Provided, however, that no holder or owner of such certificate shall be entitled to a deed of the lands or lots so purchased until the following conditions have been complied with." Then follow provisions requiring that notice should be given persons in actual possession or occupancy of the land, and also the person in whose name the same was taxed or assessed, at least 60 days prior to the expiration of the three years (provided by law for redemption), and requiring the holder of the certificate to make proof of the giving of such notice, and cause the same to be recorded in the office of the auditor of the county in which the land is situated. The lower court found "that none of the acts or things required to be done by the purchaser at a tax sale, contained in the provisions of section 1 (being the provision just referred to), are shown to have been done by the records of the sheriff's office in King county, state of Washington, or by the records of the auditor's office of King county, state of Washington, or either of the said offices, or by any other evidence in said cause." Appellant contends that the trial court erred in admitting the tax deed in evidence, and thereafter in adjudging the same to be valid, and holding that respondents acquired title thereunder. Against this contention the respondents urge (1) that the act of February 3, 1886, supra, does not, and was not intended to, apply to sales theretofore occurring; (2) that, if the act should be considered as applying to respondents' deed, then it conflicts with the provisions of section 10, art. 1, of the federal constitution, and should be held for naught; (3) if it should be considered that the act applied to the tax sale in question, and be further found not to be in conflict with the federal constitution, nevertheless the tax deed is conclusive evidence that the notice required by the act of February 3, 1886, was given, and that any evidence to the contrary was inadmissible. Considering these objections in the order mentioned, we observe that at the time of the enactment of the amendment of 1886, supra, about 14 months remained before the expiration of the period for redemption from the tax sale in question, and this constituted a reasonable time to enable the purchaser to take the steps which that statute required. The language of the act is sufficiently broad and comprehensive to apply to the proceedings we are now considering; and, in holding its provisions applicable to the proceedings which terminated in a tax deed to the

respondent, we do not necessarily give them a retroactive effect. Nor do we think that when held to apply to respondents' deed the act impairs any constitutional right of the respondents. A like question was mooted, but not decided, by this court in *Ford v. Durlie*, 8 Wash. 90, 35 Pac. 595, 1082. While the authorities are conflicting upon this question, nevertheless it is one which involves the construction of a provision of the federal constitution, and it is sufficient to ascertain, if possible, what view is taken of it by the supreme court of the United States, and, when that is ascertained, to accept it as conclusive. *Curtis v. Whitney*, 13 Wall. 68, was a case in which this question was directly involved, and the court there say: "That a statute is not void because it is retrospective has been repeatedly held by this court, and the feature of the act of 1867 (Laws of Washington) which makes it applicable to certificates already issued for tax sales does not of itself conflict with the constitution of the United States. Nor does every statute which affects the value of a contract impair its obligation. \* \* \* In the case before us the right of the plaintiff to receive her deed is not taken away, nor the time when she would be entitled to it postponed. While she had a right to receive either her money or her deed at the end of three years, the owner of the land had a right to pay the money, and thus prevent a conveyance. These were the coincident rights of the parties growing out of the contract by which the land was sold for taxes. The legislature, by way of giving efficacy to the right of redemption, passed a law which was just, easy to be complied with, and necessary to secure in many cases the exercise of this right. Can this be said to impair the obligation of the plaintiff's contract, because it required her to give such notice as would enable the other party to exercise his rights under the contract? How does such a requirement lessen the binding efficacy of plaintiff's contract? The right to the money or the land remains, and can be enforced whenever the party gives the requisite legal notice. The authority of the legislature to frame rules by which the right of redemption may be rendered effectual cannot be questioned, and among the most appropriate and least burdensome of these is the notice required by statute."

The only point remaining to be considered is whether the tax deed in this case affords conclusive evidence of the giving of the notice required by the act of 1886. Respondents' claim in this connection is based on section 2937 of the Code of 1881, which is as follows: "Such tax deed, duly acknowledged or proven, is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed." Commenting upon this section in *Coulter v. Stafford*, 6 C. C. A. 18, 56 Fed. 564, the United States court of appeals for the Ninth circuit say: "Under the

law as it existed at and prior to the time when the deed was made, the sheriff was not authorized to execute the deed unless the affidavit as to the service had been made, presented, and filed as the law provides. Although the deed was prima facie evidence under the laws of Washington of 'the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed' (Code, § 2937), yet the authority to execute the deed is not shown. The statute must always be examined in order to ascertain the authority of the officer to execute the deed. After examining the provisions of the statute, it does not appear upon the face of the deed that the sheriff had any authority whatever to execute it, and, no authority for its execution being shown, it is absolutely null and void, and wholly insufficient to put the statute of limitations in motion, and the court erred in admitting it in evidence for any purpose." In *Miller v. Miller*, 31 Pac. 247, the supreme court of California, construing a similar statutory provision, say: "Section 3787 [Pol. Code] provides that 'such deed duly acknowledged or proved is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed.' These provisions of the statute are plain and explicit, and in the absence of other and additional legislation there would seem to be no question but that the production of a tax deed in evidence established a prima facie title; but, several years subsequent to the foregoing legislation, a statute was enacted providing that the purchaser of property sold for delinquent taxes, or his assignee, must, thirty days previous to the expiration of the time for redemption, or thirty days before he applies for a deed, serve a notice upon the owner. \* \* \* It is now insisted by respondents that the service of this notice is a condition precedent to the execution of the deed, and, appellants having failed to prove such service, the deed was issued without authority, and therefore passed no title.' \* \* \* As already suggested, this enactment of the legislature requiring this notice to be served, etc., is of much more recent date than section 3787 of the Political Code, and it is very apparent upon an inspection of these provisions that the legislature never intended that it should come within the purview of that section. \* \* \* The words 'conclusive evidence of the regularity of all other proceedings,' as used in this section, refer, and were intended by the framers of the provisions to refer, to the acts and proceedings required to be done and had at the hands of the public officials intrusted with the various steps leading up to the execution of a tax deed, and not, as in this case, to something required to be done by the applicant for the deed. This is the construction placed upon a very similar provision by the supreme court of Iowa, and is undoubtedly the true one." *Reed v. Thompson*, 56 Iowa, 455, 9 N. W. 331. In reason and upon authority we think that it was incumbent upon the respondents herein to show a compli-

ance with the provisions of the act of February 3, 1886, which was enacted subsequently to section 2937, supra, and the mere production of the tax deed afforded neither proof nor presumption of a compliance therewith, and of itself was not sufficient to prima facie entitle the respondents to recover.

In view, also, of the further fact that the court expressly found that no evidence existed of record, or had been given, that any of the steps which the act of 1886 required of the respondents had been taken, the appellant was entitled to a decree in his favor, and the cause will be remanded with directions to the lower court to enter a decree accordingly.

HOYT, C. J., and DUNBAR, ANDERS, and SCOTT, JJ., concur.

(16 Wash. 104)

#### MERRIAM v. RIDPATH et al.

(Supreme Court of Washington. Dec. 8, 1896.)

##### RIGHT OF LESSEE TO REMOVE BUILDINGS.

Where a lease provided that the lessee could remove buildings during the term, and negotiations were in progress some time before the expiration of the lease for purchase by the lessor, and the lessee was assured that no advantage would be taken of delay in removing the building pending the negotiations, the fact that at about the close of the term the negotiations failed will not prevent the lessee from continuing the removal of the buildings after the termination of the lease.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by H. C. Merriam against W. M. Ridpath and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Willis H. Merriam, for appellant. Blake & Post, for respondent.

DUNBAR, J. This action was brought by plaintiff and appellant against the respondents to restrain them from removing certain buildings from a portion of block 14, Railroad addition to Spokane Falls, on the grounds that the respondents forfeited all rights to remove said buildings in not removing them within the terms of their holding. The original lease was made to W. H. Taylor. Under its terms it expired on the 1st day of March, 1892. The respondents held under the assignment of Taylor's lease. There is a claim by the appellant that the respondents held as sublessees, rather than as assignees, under the Taylor lease. We think that, even if this question had not been precluded by the pleadings, the property was held by the respondents by assignment from the original lessee. Washb. Real Prop. (5th Ed.) 541. This question is unimportant under the pleadings in this case, and under the undisputed testimony in the case, for the testimony shows conclusively that the relation of landlord and tenant existed between the parties, and the correspondence and negotiations in evidence show that the respondents were

treated by the appellant as assignees of Taylor. The material portion of the answer of the defendants is to the effect that before the expiration of said lease, and when they were about to remove the buildings (the original lease having provided that the lessee should have the right to remove the buildings at any time prior to the expiration of the lease), the plaintiff negotiated with them for the purchase of the buildings, and agreed with them that, in event the negotiations should fail, defendants should not be prejudiced by the delay occasioned by such negotiations, but should have the time extended beyond the terms of the lease, within which to tear down and remove said buildings; that said negotiations commenced long prior to the expiration of the lease and continued up to within a few days before the filing of this suit, when said negotiations failed, and the defendants, unmolested, began to tear the buildings down, when they were stopped by these proceedings; that said buildings would have been torn down and removed within the time fixed by the lease but for the negotiations pending, and the request of the plaintiff and his agreement to extend the time, and upon the faith of which these defendants relied.

Upon these issues the case went to trial, and much correspondence was introduced upon this point, as to whether or not the failure of the defendants to remove the buildings during the term of the lease had been caused by the acts and promises of the plaintiff. The court found, in substance, that the failure of the defendants to remove the buildings during the life of the lease was caused by negotiations pending between the plaintiff and defendants, and found that some time in the month of February, 1892, said negotiations were still in progress, and the defendants were assured by the plaintiff, through his agent, that no advantage would be taken of them on account of delay in removing the buildings during the pendency of such negotiations. Finding 6 is as follows: "Sixth. In March, 1892, during which month, according to the then concession of the plaintiff to the defendants, the defendants might have removed the buildings, the plaintiff wrote to Ridpath, who was the then actor for the defendants, that defendants need not be alarmed; that no snap judgment would be taken. This was with reference to the time drawing to a close when defendants might remove the buildings, as both plaintiff and defendants then construed the lease under which defendants held. But, failing to agree upon a lease of the lands or a sale of the buildings, the defendants began the work of removing the buildings, and plaintiff immediately sued out this injunction." The court found that the relation of landlord and tenant existed between the plaintiff and the defendants prior to the expiration of the lease on March 1, 1892, and that their relations after that date were of

tenants holding over pending negotiations for renewal of the lease or sale of the buildings, such holding over being with the consent and approval of the plaintiff. Finding 9 is as follows: "Ninth. But for the pendency of said negotiations, and the bringing of this action, defendants would have removed the buildings in controversy within the limits as to the time of their right so to do; that the delay on the part of the defendants to begin the removal of said buildings, and their failure to do so up to the present time, were occasioned by the acts, representations, and conduct of the plaintiff, which acts, representations, and conduct were done and made with the purpose on the part of the plaintiff that defendants should act upon the same in the manner they did." The conclusion of law was "that plaintiff is not entitled to an injunction, nor any other relief in this case, and his complaint should be dismissed."

An investigation of the record in this case, and especially of the correspondence, satisfies us that the findings of the court are justified by the testimony introduced. Under the pleadings, there are no questions of law involved that affect the merits of this case. It becomes a plain question of fact as to whether the failure of the defendants to remove the buildings was the result of the negotiations entered into between the plaintiff and defendants, and of inducements held out by the plaintiff. Believing that the testimony warrants the conclusion reached by the court, the judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

(16 Wash. 143)

#### STATE v. BOGGS.

(Supreme Court of Washington. Dec. 10, 1896.)

#### PUBLIC OFFICERS—PROFIT OUT OF PUBLIC FUNDS —INDICTMENT—EVIDENCE.

1. A city treasurer, who knowingly receives and appropriates to his own use interest on funds of the city deposited in bank, may be indicted, under Pen. Code, § 57, making it a felony for a public officer, in any manner not authorized by law, to use money intrusted to his safekeeping, in order to make a profit therefrom, or to use the same for any purpose not authorized by law.

2. In a prosecution against a city treasurer, under Pen. Code, § 57, for making a profit out of public funds, evidence that interest on the city's deposits in a certain bank was credited on defendant's individual account; that he drew checks against the interest so credited, which were paid; and that these checks rapidly increased as the interest deposits grew larger,—is sufficient to warrant a finding that defendant knowingly accepted interest on the city's money.

3. The fact that defendant did not cause the interest to be credited to his own account, or know that it had been so credited, is immaterial, if he afterwards appropriated the money, knowing that it was interest on the city's funds.

Hoyt, C. J., dissenting.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

George W. Boggs was convicted of making a profit out of public funds, and appeals. Affirmed.

Fremont Campbell and Taylor, Dennis & Luse, for appellant. B. W. Colner and Lewis P. Shackelford, for the State.

DUNBAR, J. The appellant was indicted for the violation of section 57 of the Penal Code. The essential part of the indictment was as follows: "And of such moneys of said city, so in his possession and under his control, and intrusted to him for safe-keeping as aforesaid, he, the said George W. Boggs, did then and there unlawfully, feloniously, and in a manner unauthorized by law, use the amount of thirty thousand dollars thereof in order to make a profit out of the same, and for a purpose not then and there authorized by law, and did then and there make a profit out of the same, by then and there receiving and accepting interest thereon from the Tacoma Trust & Savings Bank," etc. Upon the closing of the state's testimony a motion was made to instruct the jury to bring in a verdict of not guilty, upon the ground that the testimony offered by the state was not sufficient to sustain a verdict, and for other reasons of similar import. The motion was overruled, testimony was introduced by the defense, and the jury was charged by the court, and returned a verdict of guilty. Upon this verdict the judgment of the court was entered, to the effect that the defendant should be imprisoned in the penitentiary at hard labor for six years.

A statement is made in the brief of appellant that the defendant was extradited from the state of Oregon upon a warrant issued upon a complaint which was not substantially the complaint upon which the defendant was tried, and motion was made by the defendant to quash the information, upon the ground that the offense therein charged was a different offense from that for which he was extradited from the state of Oregon, that he was not being tried for the offense for which he was extradited, and that he had not been held or arrested upon the charge or for the offense named or set out in the information, and was not extradited for said offense. This motion was overruled, and exceptions taken, and the allegation that the court erred in overruling this motion is argued quite extensively by the appellant in his brief. The record, however, fails to disclose that this question is properly before this court. It shows that the motion was made, as alleged by the appellant, and overruled by the court; but there is nothing in the record from which this court can determine that the defendant was not being tried for the offense on which he was extradited, and that the offense charged in the new complaint was in any way different from the offense charged in the complaint upon which he was extradited. So that this court does

not feel called upon to decide any questions that are not raised by the record.

It is alleged in appellant's brief that a demurrer was interposed to the information on the ground that it did not state facts sufficient to constitute a public offense, and that it did not comply with the requirements and constitution of the state of Washington or the constitution of the United States, and was not in accordance with the provisions of the statutes made and provided. We think the record is not correctly stated. The demurrer as shown by the record was as follows: "Comes now the defendant, George W. Boggs, and demurs to the information filed in the above-mentioned case on the following grounds, to wit: (1) That the said information does not state facts sufficient to constitute any crime under the laws of the state of Washington; (2) that said information does not state facts sufficient to constitute any crime." This demurrer was overruled, and we think very properly. The sufficiency of this indictment, and the legality of the statute under which it is drawn, were passed upon in the case of *State v. Krug*, 12 Wash. 288, 41 Pac. 126, and we think it is not necessary to enter into a discussion again of the propositions discussed in that case. It is contended, however, by the appellant, that this indictment is distinguished from the one in the *Krug Case* by the fact that this indictment goes further, and states the manner in which the profit was made, by saying that the defendant did then and there make a profit out of the same by then and there accepting and receiving interest thereon; that these last words are a limitation of the general words preceding; that, the first being the general statement that the crime has been committed, the latter states the precise act which constitutes the offense, and unless the particular facts constitute a crime, then no crime is charged by the information. We do not think there is anything in this contention. It might be that, by this specific charge, if the specific charge had not been proven, the case would have failed; but, if the crime was proven at all, it was proven by testimony tending to show the particular facts charged. In fact, that was the theory upon which the case was tried, and the instruction of the court to the jury was to that effect. On this point the latter part of instruction No. 4 was as follows: "And even though you might believe that he unlawfully used the city money in order to make a profit out of the same at any other time than that charged, you should find him not guilty, unless you are satisfied, from the evidence, of his guilt of the particular charge in this case."

It is contended by the appellant that the statute does not contemplate this kind of a case; that the receiving of interest by the treasurer was not in the mind of the legislature at the time of the enactment of the statute; that it is a matter of common

knowledge that treasurers have been commonly and usually depositing money in their hands in the banks, and receiving a bonus for the same; that, if the legislature had intended to stop this practice, they would have passed a law in express terms forbidding such practice. It is argued that, as the practice was so widespread and almost universal, the members of the legislature must have known of it, and it must be presumed that, if they had intended to make such practice unlawful, they would not have left the matter by passing a law in general terms, which might or might not cover the crime, but would have passed a statute in express terms forbidding such practice. The statute in question, it seems to us, will not bear any such loose interpretation, for while, in one sense, it is comprehensive, yet at the same time it is definite enough. It is as follows: "If any state, county, township, city, town, village or other officer elected or appointed under the constitution or laws of this state, court commissioner, or any officer of any court, or any clerk, agent, servant, or employé of any such officer shall, in any manner not authorized by law, use any portion of the money intrusted to him for safekeeping, in order to make a profit out of the same, or shall use the same for any purpose not authorized by law, he shall be deemed guilty of a felony," etc. It would be impracticable and impossible for the statute to specify all the particular uses of public moneys which would fall within the scope of the act, and all of the specific methods which are not authorized by law; but it is enough if the indictment shows that the officer, in any manner not authorized by law, uses the money to make a profit out of the same, or for any purpose not authorized by law. It evidently was the intention of the lawmakers that the officer should receive his compensation through the medium of the salary provided, and that he should not be allowed in any way to speculate with the money intrusted to his care, or use it in any way, directly or indirectly, for the purpose of making a profit out of it. An extract from the opinion in *State v. Krug*, supra, is cited and relied upon by the appellant; but an examination of that case, and of the circumstances under which the language was used, and of the question under discussion at the time, shows that it has no relevancy whatever to the question at issue.

The record in this case is exceedingly voluminous, but we have investigated it from beginning to end. Exceptions to the introduction of testimony were interposed at every step, and, if such exceptions had been sustained by the court, there would have been no trial at all. The objections to the admission of the testimony that are set forth in the appellant's brief as ground of error we have examined thoroughly, in connection with the whole record, and are of the opinion that no error was committed by the

court in the admission of any of the testimony.

The question, however, which we regard as the pivotal question in the case, and the one which has given the court more trouble than all the others, is whether, conceding the legality of the testimony offered, it was sufficient, as a question of law, to sustain the verdict. If this case should be reversed at all, it should be reversed on the ground that the court refused to instruct the jury to bring in a verdict of not guilty for the reason that the testimony offered was not sufficient to sustain the verdict. It was proven by the state that the defendant was the treasurer of the city of Tacoma; that the money of the city was in his control; that he deposited the same with the bank mentioned in the indictment; that, while it was so deposited, the defendant was given credit for interest on the city's money; that during said time the defendant had an individual account with the said bank; that the credit for interest was transferred to defendant's credit on his individual account; and that he checked against said account to the amount of his deposit and of the further interest credited. The principal contention of the appellant is that this was not legal proof against him; that it was not shown that this credit was given with the consent of the defendant, or that he ever knew that such credit was given him; that there is no evidence of the vital fact that the money was paid to him as interest on city deposits, or that he received it as such; that the debit slips and the credit slips were made upon the instructions of the bank's president; and that such action was in no way brought to the knowledge of the defendant. It is true that the entry upon the bank's books of a credit to the defendant for interest on city money would not bind the defendant, or prove him guilty of the crime, if it stopped there; but the evidence shows that this money actually came into the possession of the defendant, and that he appropriated it, and received the benefit of this credit by drawing checks against it, which were paid. It is claimed by the appellant that overdrafts were allowed him, and that he had no knowledge of his accounts with the bank, and that, therefore, he cannot be presumed to have known that these credits had been extended to him. It is not always necessary to prove a criminal intent by some direct or positive act. The intent may be proven by circumstances. For example, it was the old theory of the law that, if recently stolen property was found in the possession of a person, and no explanation thereof made, such possession would be conclusive evidence of guilt, although there was nothing connecting the person with the larceny excepting the possession; and, under the modern authorities, and under all authority, the possession of recently stolen property is a circumstance which the jury have a right to consider in



arriving at a conclusion as to the guilt or innocence of the defendant. And it seems to us that the appropriation by this defendant of the moneys which were credited to him by the bank is a circumstance which the jury had a right to consider in determining whether or not, as a matter of fact, he did know that this money was placed to his credit, and that it was placed to his credit as interest on the money of the city. We think that knowledge on the part of the defendant was at least a legitimate deduction from the circumstances proven. Whether it would be of sufficient weight to satisfy the mind of a juror is another proposition. But these circumstances, of the interest having been placed to his credit, and his having appropriated that interest by drawing checks against it, connected with other circumstances in the case, to wit, that about the time the interest was credited to the treasurer the deposits in that bank began to rapidly increase, that the overdraft grew higher in proportion as the interest deposits increased, and that it was the custom of the bank to allow interest on deposits of over \$100,000, and many other little circumstances which are developed by the record, convince us that there was sufficient prima facie proof of the appropriation of this money knowingly by the defendant to sustain the verdict. The testimony further shows that, so far as the overdraft is concerned, if there had been an overdraft to any extent, the defendant would have been notified by the bank. The jury was warranted in coming to the conclusion that it was unreasonable that a man of ordinary business capacity would have a long transaction with a bank without knowing something about his financial standing, or something about the state of his accounts.

It is true that the defendant, when he came to testify, stated that he never had any knowledge that this money had been deposited to his credit; but the jury, evidently, did not believe him. They did not think it was reasonable that he should do a large volume of business with the bank without having a pass book, or without having any statement of his account from the bank from the time that he opened his account until the closing of the bank. The following excerpt from the defendant's testimony, it seems to us, justifies the conclusion reached by the jury. After testifying that he had a general account, and that he deposited money there: "Question. What did you take as an evidence that you deposited money there? Answer. I didn't take anything. Q. You did not take any duplicate deposit slips? A. Well, sometimes I did, and sometimes I just went and laid the money down and walked out. Q. Said nothing? A. Said nothing. Q. Never had a bank book? A. No, sir. Q. You had, as to the city's deposit, hadn't you? A. Yes, sir. Q. But not as to your individual deposit? A. No, sir. Q. Were you ever notified as to the

condition of the balance of your personal account? A. No, sir." He further testified, in substance, that he paid no attention to his account; that he knew nothing about his standing with the bank, and did not know that he had been credited with this interest account until the commencement of this action, or the service of the indictment upon him, which was something over two years after the crediting of the interest account to his individual account; that during all that time he had no statement of his account, and knew nothing about whether he owed the bank or the bank owed him. The jury were justified in concluding, from all the circumstances, that the defendant did have knowledge of this credit, and that his claim of ignorance was an unreasonable one, and not justified by the circumstances. He testified, on page 408 of the record, that when the city had concluded that it would demand interest from the banks, he went to the president of this bank, and notified him of the same; that Mr. Allen, the president of the bank, said that he did not want to pay it, but he guessed he would have to; that, when he had such conversation with Allen, Allen never mentioned the fact that he was already paying interest on the city money to the defendant, but that he grumbled and protested against paying the city interest. It is not at all likely that, if Allen, the president of the bank, had been in the habit—as the record conclusively shows he had—of crediting the defendant on his individual account with the interest due the city, or interest on the city money, he would not have mentioned this fact to the defendant when he was notified that he would thereafter be called upon to pay the city interest on the money which was deposited in his bank, or that he would have contented himself with grumbling, and finally saying that he did not want to pay it, but guessed he would have to. This statement is not consistent with the actions of business men.

Some objections are made to instructions Nos. 3, 5, and 9. The objection to No. 3 is substantially an objection to the sufficiency of the indictment, because it is objected that the court did not instruct the jury sufficiently as to what particular use of the money was not authorized by law. What we have said in regard to the sufficiency of the indictment will apply to the objection in regard to this instruction. No reasons are given for the exception to instruction No. 5, and we are unable to see in what respect it is faulty. Instruction No. 9 was as follows: "Gentlemen, should you find, from the evidence, that the defendant did not cause to be made any credits of interest on his individual account, for the use of city money in the bank, subject to his check and control as city treasurer, upon the books of the bank, or agreed thereto, at or prior to the time such credits may have been made, if you find any such were made, that fact, of itself, would not excuse him, provided you are satisfied, beyond a reasonable



doubt, that he thereafter, and at the times charged, accepted the benefit of such credits, knowing they were made by the officers of the bank for the purpose of allowing him interest for his individual account, for the use of such city money on deposit in the bank, so subject to his check and control as such city treasurer." We think this instruction correctly states the law, and to hold this instruction bad would be to hold that, if a deposit were made in good faith, no conspiracy could afterwards be entered into between the bank and the depositor. The appropriation, under this statute, occurs at any time that the officer knowingly accepts the interest on the money. If the interest had been placed to his credit without his knowledge, as a matter of course he would not be guilty of any crime, if he had accepted and appropriated that money without knowing that it was money which was paid for the use of the city money. But, the instant that he does accept it, with the knowledge of what money it is, the crime is committed, no matter when the money was deposited or when the credit was made.

Considering the whole record, we are not able to say that any prejudicial error has been committed, and the judgment will therefore be affirmed.

SCOTT, ANDERS, and GORDON, JJ., concur. HOYT, C. J., dissents.

(16 Wash. 161)

STATE ex rel. COINER, Prosecuting Attorney, v. WICKERSHAM.

(Supreme Court of Washington. Dec. 11, 1896.)

APPEAL—DISMISSAL.

Where it appears that the right for which appellant contends has ceased to exist before the case comes on for argument in the supreme court, a motion to dismiss the appeal will be granted.

Appeal from superior court, Pierce county.

Quo warranto on the relation of B. W. Coiner, prosecuting attorney of Pierce county, against James Wickersham, to oust respondent from office. From a judgment in favor of defendant, plaintiff appeals. Dismissed.

B. W. Coiner and Stiles, Stevens & Tillinghast, for appellant. Ben Sheeks and Stacy W. Gibbs, for respondent.

ANDERS, J. This was a proceeding by information, instituted by the prosecuting attorney of Pierce county, under title 9, c. 10, of the Code of Procedure, to oust the respondent from the office of city attorney for the city of Tacoma. We will not consider the merits of the case, for the reason that it appeared, when it came on for argument in this court, that the respondent had previously been appointed city attorney by the mayor of the city, and the appointment had been confirmed by the city council, and that the respondent was there-

fore legally in office under the provisions of the city charter. If it be conceded that the judgment appealed from was wrong, and should be reversed, still, the judgment prescribed by section 688 of the Code of Procedure, which is that of ouster, cannot be given against the respondent, and a reversal of the judgment would therefore be futile. If the plaintiff was entitled to the relief demanded, or any relief, when the proceeding was commenced, such right has ceased to exist, and in such cases a motion to dismiss the appeal will be granted. *Cutcomp v. Utt*, 60 Iowa, 156, 14 N. W. 214; *State v. Porter*, 58 Iowa, 19, 11 N. W. 715; *Little v. Bowers*, 134 U. S. 547, 10 Sup. Ct. 620; *Washington Market Co. v. District of Columbia*, 137 U. S. 62, 11 Sup. Ct. 4. The appeal is dismissed on the respondent's motion.

HOYT, C. J., and SCOTT and GORDON, JJ., concur.

DUNBAR, J. I think the appellant should recover costs.

(16 Wash. 165)

OREGON MORTG. CO., Limited, v. CARSTENS.

(Supreme Court of Washington. Dec. 11, 1896.)

ALIEN CORPORATION—MORTGAGE—DIRECT DEED FROM MORTGAGOR—VALIDITY—SUBSEQUENT TRANSFER—BONA FIDES.

1. Where an alien corporation has made a loan, secured by a mortgage on land in the state, the taking of a direct deed from the mortgagor in satisfaction of the debt, without foreclosure, is not prohibited by Const. art. 2, § 33 (given effect by Gen. St. § 1524), which provides that "the ownership of lands by aliens \* \* \* is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; \* \* \* every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien, for the purposes of this prohibition." Dunbar, J., dissenting.

2. Where an alien acquires title to land in contravention of Const. art. 2, § 33, which prohibits the ownership of lands by aliens, unless within the exceptions named, such title can be attacked by the state only; and a deed of the land by the alien to a person entitled to hold it, if made before the state undertakes to have the original conveyance set aside, transfers a good title.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by the Oregon Mortgage Company, Limited, against Henry Carstens to enforce an agreement for the purchase of land. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Hastings & Stedman and Crowley & Grosscup, for appellant. Josiah Collins, for respondent.

SCOTT, J. This case presents the question of the power and right of an alien corporation to acquire and hold real estate within the state of Washington. The plaintiff loaned a sum of money to one McIntosh, and took a mortgage to secure the payment there-

of on certain lands, and, McIntosh being unable to pay the same, said parties entered into an agreement whereby he executed a deed of the lands to one Livingstone, as trustee for the plaintiff, and Livingstone subsequently deeded to the plaintiff. Thereafter the plaintiff and the defendant, Carstens, entered into an agreement whereby the plaintiff agreed to convey, by good and sufficient deed, to the defendant, the lands in question, and the defendant agreed to pay the plaintiff therefor a sum of money specified. It was further provided that, in case the defendant should fail to accept said deed and pay for the lands, the plaintiff should have the option to proceed to enforce the agreement and recover the purchase price of the land from the defendant. A tender of the deed in pursuance of said agreement was pleaded, and the refusal of the defendant to accept and pay for the same, and that the plaintiff exercised its option and elected to bring suit against the defendant for the purchase price. The answer admitted the making of the agreement and the promise to pay on the part of the defendant, and a tender of a deed sufficient in form as alleged; and for a further defense the defendant set up the fact that the plaintiff was a foreign corporation, the execution of the mortgage from McIntosh to the plaintiff, and the making of the deed by McIntosh to the plaintiff, as aforesaid, in satisfaction of the mortgage; but alleged that the plaintiff acquired no title by virtue of such deed, and for that reason that the defendant refused to accept it or pay the purchase price. Plaintiff filed a demurrer to the affirmative defense, which was overruled, and, declining to plead further, the court rendered a judgment upon the pleadings in favor of the defendant; whereupon this appeal was taken.

The constitutional prohibition against the acquisition of real estate by alien corporations is to be found in article 2, § 33, of the constitution, and is as follows: "The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void; provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal or fire-clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition." On March 28, 1890, the legislature enacted a law for the purpose of enforcing this provision, substantially following its language.

Gen. St. § 1524. The plaintiff contends that this land was acquired within the exception contained in the constitutional provision; that is, that the title was acquired under mortgage, or in good faith in the ordinary course of justice in the collection of a debt. It is conceded that McIntosh was the owner of the lands in fee simple, and that the deeds were all sufficient in form to convey the title. It is plain that the purpose of the prohibition is to prevent the acquisition of lands in large quantities by alien and nonresident owners. It is apparent by the exception referred to that it was not intended that the provision should be construed so as to prevent the loaning of money by aliens upon real-estate security within this state; but it was contemplated that such loans should be permitted and protected, of course with the limitation that such transactions must be bona fide. In this case there is no claim of any bad faith, but the question is whether, in the case of an actual loan made, an alien can take a direct deed from the mortgagor of the land in satisfaction of the mortgage debt, or whether he must proceed to acquire title by a foreclosure in the courts. It will readily be seen that an agreement such as was here entered into between McIntosh and the plaintiff would usually tend to the advantage of both parties. The costs of the foreclosure suit would be avoided, and as well the liability to a deficiency judgment upon the part of the mortgagor. It would seem that there could be but two objections urged against it as tending to defeat the purpose of the provision. One is that, in case of a foreclosure in the courts, the mortgagor would have a right to redeem the premises. But this is a personal right, which he might or might not exercise, at his option. We presume it will be conceded that he could waive the right to redeem after a judgment of foreclosure, and we see no reason why he should not be permitted to waive this right at any time, if he should deem it to his advantage, in order to avoid costs and a liability for a deficiency. The other objection is that, in case of a foreclosure and public sale thereunder, other parties would be entitled to bid for the lands, and the result might be, in consequence of this, that the alien plaintiff would not become the purchaser. The respondent contends that if a proceeding like this can be sustained, it would be an easy matter for an alien desiring to obtain a tract of land in this state to go through the form of making a loan thereon, and immediately thereafter take a deed in satisfaction of the mortgage, and thus avoid the prohibition. But we are unable to see why, in case of a fraudulent arrangement between the mortgagor and the mortgagee, such a proceeding could not as well be carried out through the form of a foreclosure. The loan could be made in so large an amount, and so great a price bid for the lands upon the foreclosure sale thereunder,

as to prevent other parties from becoming purchasers, and it would seem that the provision could be as readily violated in the one case as in the other. Alien corporations are not prevented from acquiring and holding lands in this state in all cases, and the objections urged against this transaction are substantially only to the form of acquiring title to lands upon which mortgage security has been taken. It is evident that the clause "and all conveyances of lands hereafter made to any alien directly or in trust for such alien shall be void" is limited by the other provisions contained in the section, and that it was not intended to prevent an alien from holding land under any circumstances. It simply goes to the means or purpose of the alien in acquiring title. In other words, in cases like this, the original purpose must not have been to acquire title to the lands under the transaction or guise of a mortgage loan, but must have been in good faith to make the loan as a loan, and the mortgage taken as an incident merely to secure its payment, and the land acquired in good faith thereunder. It is apparent that the form of the conveyance is of little or no consequence, unless it should tend to defeat the purpose of the provision. In *Devl. Deeds*, § 131, it is said: "It is not the object of the state to add to its revenue by the confiscation of property, but to protect itself from the danger of allowing persons who owe it no allegiance to own land within its boundaries, and perhaps use the profits derived from the land in acts of hostility to the state. For this reason is it that the land may be forfeited to the state."

It is further contended by the plaintiff that its title so taken would be only a defeasible one at least, and that it could only be attacked by a direct proceeding on the part of the state, and that a deed of the land by the plaintiff to a party entitled to hold it, before the state should undertake to have the conveyance to it set aside, would transfer a good title; and we are of the opinion that this position is well taken, for the objection would then be obviated; and, conceding this to be true, the deed tendered by the plaintiff to the defendant would have passed to the defendant an indefeasible title. There are a number of authorities, to which our attention has been called, upon provisions very similar to the one here in question, and the tendency of the decisions elsewhere, although under somewhat different provisions, but all for a like purpose, is to strongly sustain the plaintiff here. 6 *Thomp. Corp.* § 7918; *Phillips v. Moore*, 100 U. S. 208; *Cross v. De Valle*, 1 *Wall.* 5; *Carlow v. C. Aultman & Co.* (Neb.) 44 *N. W.* 873; *Mortgage Co. v. Tennille* (Ga.) 13 *S. E.* 158; *Williams v. Bennett* (Tex. Civ. App.) 20 *S. W.* 856. In *Murfree, Foreign Corp.* § 353, it is said that, if a foreign company has power to hold real estate at all, a deed to it in violation of the local law will pass a title good against all the world ex-

cept the state. As an alien may acquire and hold lands in this state in the instances specified, and, in case of mineral lands, etc., under the last part of the provision, may clearly obtain title thereto by direct purchase, the mere form of the conveyance can prove nothing; and the real question in each case must be whether the land was obtained in good faith or by fraud, in violation of the provisions, and this should only be determined by a proceeding upon the part of the state. Before such a determination, the presumption would be that the parties had kept within the law, rather than that they had violated it, and prima facie the deed would be good. The clause in the provision, "in the ordinary course of justice in the collection of debts," should not be held to require a proceeding in court in the case of a mortgage debt. The language used does not require it necessarily, and such a construction would go to the form rather than the substance of the transaction. It would afford little or no protection against an attempted fraudulent acquisition. While it is true that a foreclosure might result in a sale to a resident, it is a well known fact that the usual result is a sale to the mortgagee. There is no attempt or desire upon the part of the mortgagee to retain these lands. On the contrary, it is attempting to dispose of them, and it is evident that the whole transaction has been conceived and carried on in the utmost good faith to collect its debt; and, while a direct provision of the constitution as to the form of the conveyance even could not be disregarded, there is none in the way here, and it will be time enough to inquire into the validity of such transactions when fraud is charged and the desired protection invoked by a proceeding upon the part of the state. It is not an unusual proceeding for a mortgagor to convey lands directly to a mortgagee in satisfaction of a mortgage debt; and, where the parties agree upon such a course, it would seem as though it should be favored in a case like this, rather than discriminated against. The only just and effectual enforcement of the constitutional inhibition can be by a proceeding upon the part of the state to have the transaction adjudged fraudulent and invalid, and actual fraud of course could always be inquired into. It would be idle to assume that the state has not ample power to protect itself in such matters, and it might be just as necessary and desirable to resort to such a proceeding where title was acquired through the form of a mortgage foreclosure as in case of a direct deed by the mortgagor to the mortgagee.

We are of the opinion that the judgment of the court overruling the demurrer was wrong, and it is reversed, and the cause remanded for further proceedings in accordance with this opinion.

HOYT, C. J., and GORDON, J., concur.  
ANDERS, J., concurs in the result.

DUNBAR, J. (dissenting). The language of the constitution is plain and unequivocal, and in my judgment is not susceptible of construction, and the rights of aliens ought not to be enlarged by the courts. Under the constitution there is only one way for them to obtain title to land, so far as obtaining it under mortgage is concerned. This land was not acquired under mortgage. It was acquired by private contract of sale,—simply that and nothing more. Neither was it acquired in the ordinary course of justice in the collection of debts, or any course of justice at all. If sold under foreclosure, some citizen might have bought in the land. The majority opinion seeks to overcome this objection by asserting that it is a well-known fact that the usual result is a sale to the mortgagee. I do not think we ought to concern ourselves about who the purchaser usually is. If the mortgage were foreclosed, the citizen would at least be placed upon an equal footing with the alien in obtaining title to the land which the alien is resorting to to collect his debt "in the ordinary course of justice." The object of the constitution evidently was to prevent the acquisition of lands by aliens as a matter of public policy, and to prevent them from acquiring lands excepting when it was actually necessary for the collection of their debts. That necessity cannot be ascertained until the lands mortgaged are offered for sale in due course of law. In spite of all argument to the contrary, it is plain to my mind that the construction placed upon the constitution by the majority facilitates and encourages aliens in the evasion of the constitution, and destroys the safeguards placed around such transactions by the fundamental law of the state. The judgment should be affirmed.

(16 Wash. 163)

HICE v. ORR, Mayor.

(Supreme Court of Washington. Dec. 11, 1896.)

APPEAL AND ERROR — TERMINATION OF CONTROVERSY — DISMISSAL OF APPEAL.

1. An appeal in mandamus proceedings against a mayor, to compel him to appoint a city attorney, will be dismissed where, pending the appeal, the mayor appoints, and the appointment is confirmed by the city council, since there is no longer any controversy to be determined.

2. The fact that the controversy involved in an appeal has ceased may be shown at any time before decision, and by evidence outside the record.

Appeal from superior court, Pierce county; John C. Stalleup, Judge.

Application by Samuel Hice for a writ of mandamus against Edward S. Orr, as mayor of the city of Tacoma, to compel him to appoint some person to the office of city attorney. From a judgment dismissing the proceedings entered on an order sustaining a demurrer to the writ, relator appeals. Dismissed.

Stiles, Stevens & Tillinghast, for appellant Stacy W. Gibbs and Ben Sheeks, for respondent.

ANDERS, J. By a provision of the charter of the city of Tacoma, the city attorney is appointed by the mayor, and confirmed by the city council. On two separate occasions the mayor of said city appointed, by nomination, one James Wickersham for the office of city attorney, but each time the council refused to confirm such appointment. For more than a month after the last presentation of the appointment of Mr. Wickersham to the city council, the mayor failed to make another nomination to that office; and thereupon the appellant obtained an alternative writ of mandate from the superior court of Pierce county, commanding the respondent, as mayor of said city, from time to time, at the regular sessions of the city council, to appoint, by nomination, some qualified person to hold said office of city attorney until such appointment should be confirmed, or to show cause why he had not done so. On the return day a demurrer to the writ was sustained, and, the plaintiff electing to stand upon the sufficiency of the writ, a judgment was entered dismissing the proceedings, and the plaintiff appealed. When the cause came on for hearing in this court, it was made to appear, by the affidavit of the city clerk and a certified copy of the proceedings of the city council, that, after the appeal was perfected and briefs filed herein, the said James Wickersham had been appointed city attorney by the respondent, and that said appointment had been confirmed by the city council, and that said appointee was then holding the office. Upon this state of facts, respondent moved to dismiss this appeal, for the alleged reason that there was no longer any actual controversy involving any substantial rights between the parties to the record, and no subject-matter upon which the judgment of this court could operate.

As the object of the proceeding has been fully accomplished, there is no longer any controversy to be determined, and the motion must therefore be granted. The fact that there is no controversy between the parties to an action, or that a right involved in an action has ceased to exist, may be shown at any time before the case is decided. *Little v. Bowers*, 134 U. S. 547, 10 Sup. Ct. 620. And such fact may be shown either by the record, or by evidence outside of it. 2 *Enc. Pl. & Prac.* p. 344. See, also, *Washington Market Co. v. District of Columbia*, 137 U. S. 62, 11 Sup. Ct. 4. The appeal is dismissed.

HOYT, C. J., and SCOTT and GORDON, JJ., concur.

DUNBAR, J. This case simply involves a question of costs, which has been ignored by the majority opinion. If the appellant was entitled to costs if the litigation had been de-

terminated before the object of the proceeding had been accomplished, he is entitled to them now. I concur so far as the dismissal is concerned, but not in the judgment for costs which follows.

(16 Wash. 193)

**WALDRON v. HOME MUT. INS. CO.**  
(Supreme Court of Washington. Dec. 14, 1896.)

**INSURANCE—ORAL CONTRACT—EVIDENCE TO ESTABLISH—QUESTION FOR JURY.**

1. To establish an oral contract of insurance, binding on the company before the issuance of a policy, no higher degree of proof is required than on any other question of fact submitted to a jury.

2. Where it is admitted that a witness, if present, would testify as stated in an affidavit for continuance, and such affidavit is used in evidence, the jury are not bound to give it any greater weight than they would the testimony of the witness, if present; and they are at liberty to determine a conflict between the statements therein made and the testimony of another witness in favor of the latter.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by C. W. Waldron against the Home Mutual Insurance Company on a contract of insurance. Judgment for plaintiff, and defendant appeals. Affirmed.

Condon & Wright, for appellant. Maxwell & Romaine, for respondent.

DUNBAR, J. This is an action brought by C. W. Waldron against the Home Mutual Insurance Company upon an alleged contract for insurance in the appellant company upon a certain two-story frame building in Whatcom county. The contract is alleged to have been made between the respondent and the firm of McLennan & Reed, agents of the appellant company, at Fairhaven, Wash., on the 12th day of September, 1892. No policy was ever written or issued by appellant, or by any of its agents. On the 17th day of September, A. D. 1892, the said two-story frame building was destroyed by fire. The answer denies generally all the allegations of the complaint. On trial by jury, verdict was rendered against the defendant, and judgment was entered for the sum of \$552.72 and interest, and an appeal was taken.

This cause was before this court in October, 1894, the report of which is in 9 Wash. 534, 38 Pac. 136. In the trial upon which that appeal was based, the judgment was rendered for the respondent, as in this case, but the cause was reversed, and sent back for a new trial, for the reason that there was a variance between the contract declared upon and the contract proved, in that the contract declared upon was for the insurance of one building in the sum of \$500, while the evidence showed a contract to insure two buildings,—one for \$500, and one for \$100. The reversible error has been obviated in this case.

The appellant's assignments of error, based upon erroneous admission of testimony, are not, in our opinion, meritorious. The questions were admissible, and therefore the appellant was in no way prejudiced. There was an assignment in this connection, namely, that the court erred in permitting the respondent to testify as to what the agent told him concerning the company's claim that the policy had not been delivered, on the ground that the company could not be bound by the statement of the agent, which might have some weight if it were founded upon the record. The record shows, however, that this was not a statement of the agent which was intended to bind the company, but simply a statement of what the company itself gave as a reason for not adjusting the loss.

The answer in this case raised a direct issue as to the main fact stated in the complaint, viz. that the appellant had agreed to insure the building, and had taken the application for such insurance. It is undoubtedly well-established law that where there is an oral contract entered into for insurance, all the essentials having been agreed upon, and loss occurs before the policy is actually issued or delivered, the contract is binding upon an insurance company, in accordance with the terms of the agreement, just as though the policy had been issued. 1 May, Ins. §§ 20-23; 1 Wood, Ins. § 20. Indeed, this proposition is not disputed by the appellant, but his claim is that the law requires the plaintiff, upon such an oral contract, to prove by clear and conclusive proof that such contract was made. The burden of proving this contract is, of course, upon the plaintiff, as the burden is upon any litigant to prove an affirmative proposition; but we know of no reason why there should be a distinction, so far as the weight of testimony is concerned, between this and any other case where the question of proof is submitted to a jury.

In this case the agent of the company was not present, and an affidavit was offered by the appellant, setting up the fact that the agent, if present, would swear virtually in opposition to the statement made by the respondent concerning the contract. It was admitted by the respondent that the witness, if present, would swear as indicated by the affidavit. Now, it is contended by the appellant that, inasmuch as there is a direct conflict between the only persons having a knowledge of the facts who testified at the trial of this case, if the witness McLennan could have been produced upon the witness stand, so that the court or jury could have found anything in his appearance, manner of testifying, or the testimony given by him to warrant them in discrediting his statement in any manner, that the preponderance of the evidence necessary to sustain the respondent's case might be admitted, but that, inasmuch as he was not present, and

it was admitted that, if present, he would testify to the facts set forth in the affidavit, the jury has no right to discredit his testimony, and that, therefore, it cannot be said that the respondent has sustained his duty of proving his contract by preponderance of the evidence. We think it would certainly be the announcement of a novel doctrine that the weight of testimony can be increased by producing it in the form of a deposition, or by an admission, for the purpose of avoiding a continuance, that the witness, if present, would swear to a certain state of facts. This testimony, like any other in the case, goes to the jury; and they have a right to weigh it as they do any other testimony in the case, although it may be more difficult to weigh it correctly than it is to weigh the testimony of a witness who appears in proper person before them. But it is all a question of fact for the jury to pass upon, and, the testimony being conflicting, and the jury, under proper instructions, having rendered their verdict, presumably based upon the weight of testimony, and there being sufficient testimony on the part of the plaintiff to sustain the verdict, under the uniform rulings of this court, the judgment will not be disturbed. Finding no error in the record, the judgment will be affirmed.

SCOTT, ANDERS, and GORDON, JJ., concur.

(16 Wash. 198)

ANDERSON v. BIGELOW et ux.

(Supreme Court of Washington. Dec. 14, 1896.)

APPEAL—SUFFICIENCY OF BOND—DEDICATION—ACTION OF COVENANT—JUDGMENT AGAINST GRANTEE AS EVIDENCE.

1. Under Laws 1893, p. 122, §§ 6, 7, providing that an appeal in a civil action shall be ineffectual unless an appeal bond shall be filed, conditioned that the appellant will pay all costs and damages on the appeal, or on a dismissal, not exceeding \$200, and further providing that an appeal shall not operate as a stay "unless the original or a subsequent appeal bond be further conditioned that the appellant will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court," an appeal bond conditioned only as required for a stay is a full protection of the rights of the respondent, and gives the supreme court jurisdiction of the appeal. Anders and Gordon, JJ., dissenting.

2. A power of attorney given by a wife to her husband to sell and convey her real estate does not authorize him to dedicate any part of it for public purposes, nor render his declarations of dedication binding on the wife.

3. A judgment against the title of a plaintiff in an action for trespass is not evidence of the failure of his title as against his grantor, in an action on the covenant in his deed, unless the grantor was notified and requested to defend the title in the former action.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Action by L. H. Anderson against D. R. Bigelow and A. E. Bigelow on the covenants

in a deed. Judgment for plaintiff, and defendants appeal. Reversed.

Milo A. Root and Troy & Falknor, for appellants. Phil Skillman and J. R. Mitchell, for respondent.

HOYT, C. J. The respondent attacks the sufficiency of the appeal bond. The conditions therein do not exactly conform to the provisions of the statute, but there is not such a variance from the statutory requirements that it could not be enforced as a statutory bond. This being so, and the conditions being such as to protect every right of the respondent, the bond is not so defective as to require us to dismiss the appeal. See *McEachern v. Brackett*, 8 Wash. 652, 38 Pac. 690; *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140; *Horton v. Donohoe-Kelly Banking Co.* (decided Oct. 9, 1896) 46 Pac. 409.

The action was brought to recover damages for the alleged breach of a covenant of warranty contained in a deed made by appellants to respondent. The covenant which it was claimed had been broken was for quiet enjoyment, and the ground of the claim was that, at the time the deed was delivered, the property described therein had been dedicated to public use for the purposes of a street. Plaintiff sought to establish the fact that the land had been so dedicated by evidence tending to show acts on the part of the defendants which estopped them from denying that it had been so dedicated. He also claimed that the fact that the land had been so dedicated had been determined in a certain action in which he was plaintiff and one Banner was defendant, and that the defendants were so connected with that action that they were bound by the decision rendered therein.

Upon the first proposition, there was evidence introduced tending to show that the defendant D. R. Bigelow had made statements, to those about to purchase land in the vicinity, that the land in question had been set aside for street purposes, but there was no evidence tending to show that the defendant A. E. Bigelow, who was the wife of the other defendant, had done or said anything; but it was shown that, at the time D. R. Bigelow made the declarations relied upon, he held a power of attorney from his wife authorizing him to sell her real estate, receive payment therefor, and make conveyances thereof. The superior court instructed the jury that the wife was bound by the declarations of her husband by reason of having given him this power of attorney. There was nothing in such power of attorney which gave defendant D. R. Bigelow authority to do more than sell the land. There was nothing said therein about platting it, nor about dedicating any portion thereof to the use of the public; and while it is true that the setting aside of one portion for street purposes might have added value to other portions, so might the

conveyance of one portion to an individual for a certain purpose have added value to other portions for other purposes. But the fact that one tract had been sold for a certain purpose would not authorize the attorney to convey another portion without receiving value therefor. The general power to sell did not authorize the person acting thereunder to make a dedication for street purposes. See *Dupont v. Wertheman*, 10 Cal. 354; *Mott v. Smith*, 16 Cal. 534; *Randall v. Duff*, 79 Cal. 115, 19 Pac. 532, and 21 Pac. 610.

The court held that the allegations of the complaint as to the judgment in the other action and as to its effect had not been denied in the answer, and that, unless defendants had shown that it was collusive and fraudulent, they were bound thereby. It is not necessary for us to determine as to the sufficiency of the denial, for the reason that we are of the opinion that the allegations in the complaint, if admitted to be true, were not sufficient to show that the defendants were bound by the judgment. The only statement tending to connect the defendants, or either of them, with the action, was that during the pendency thereof they had full notice and knowledge of the several matters involved, and that the said defendant D. R. Bigelow attended upon the trial of said cause, and was a witness therein in behalf of the plaintiff; and this was not sufficient to show such a demand upon them to appear and prosecute the action as to make them responsible for the result. And whatever may be the force of a judgment against a defendant, to the effect that the plaintiff had a title paramount to that conveyed by the deed under which such defendant held, where the grantor therein has not been regularly called upon to defend, no case can be found where, under such circumstances, a judgment against a plaintiff in favor of a defendant has been held to in any manner affect the rights of the grantor in the deed under which the plaintiff claimed. In fact, it may well be questioned whether a grantee who sees fit to voluntarily go into court is in a situation to have any rights established in an action thus voluntarily brought, which shall have any effect in an action brought by him against his grantor; and it is certain that a judgment rendered in such an action, to which the grantor is not a party, and in which he has not been legally notified to protect the title conveyed by his deed, is not even *prima facie* evidence in an action brought by the grantee against the grantor. The judgment must be reversed, and the cause remanded for a new trial.

SCOTT, J., concurs.

ANDERS, J. (dissenting). Section 6 of the act relating to appeals to the supreme court (*Laws 1893*, p. 122), provides that "an appeal in a civil action or proceeding shall become ineffectual for any purpose unless at

or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party conditioned for the payment of costs and damages as prescribed in section seven of this act, be filed with the clerk of the superior court, or money in the sum of two hundred dollars be deposited with the clerk in lieu thereof. \* \* \* And section 7 provides that the appeal bond "shall be conditioned that the appellant will pay all costs and damages that may be awarded against him on the appeal, or on the dismissal thereof, not exceeding two hundred dollars. An appeal shall not stay proceedings on the judgment or order appealed from or on any part thereof, unless the original or a subsequent appeal bond be further conditioned that the appellant will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court, and (where such condition is applicable) shall pay all rents of or all damages to property accruing during the pendency of the appeal, out of the possession of which any respondent shall be kept by reason of the appeal." The only bond filed in this case is conditioned as follows: "Now, then, if said appellants shall satisfy and perform the judgment appealed from in case the same shall be affirmed, and any judgment or order which the supreme court may render or make or order to be rendered or made by the superior court, then this obligation to be null and void." This is, according to the statute, a stay bond pure and simple. There is no appeal bond in the record, and it is not claimed that the sum of \$200 has been deposited with the clerk of the superior court in lieu thereof. That an appeal bond is necessary to give this court jurisdiction of the appeal is clearly indicated in section 6 of the appeal act, referred to above. And it seems to me that there is a wide difference between this case and the cases cited in the foregoing opinion. In those cases the bonds required by the statute had been given; but the accompanying affidavits were defective in some particulars, and it was held that the appeals would not be dismissed for such defects, the objections to the affidavits not having been made in the court below. But here there is neither bond nor affidavit, and I think the appeal ought to be dismissed for want of jurisdiction.

I make no objection to the disposition made of the case upon the merits in the opinion of the Chief Justice. While it was not necessary for the plaintiff to give his grantor, Mr. Bigelow, notice of the action against Banner in order to maintain this action, yet, in the absence of such notice and a request to appear and prosecute the action, the judgment therein rendered was not binding upon the defendants herein. Notwithstanding that judgment, it was necessary for the plaintiff

to allege, and to prove de hors the record, a sufficient cause of action against the defendants, and this I think he has failed to do.

GORDON, J. I concur in what is said by Judge ANDERS.

(16 Wash. 155)

UTTERBACK et al. v. MEEKER et al.

(Supreme Court of Washington. Dec. 14, 1896.)

APPEAL—ACTION—JOINDER OF SEVERAL CAUSES.

1. In an action to remove a cloud caused by a mortgage on land purchased by plaintiffs from the mortgagor, the latter's acceptance of money tendered by the former pursuant to a decree for plaintiffs, without objection by the defendant mortgagee, did not estop such mortgagee from prosecuting an appeal.

2. Plaintiffs, some of whom claimed title to land under deeds, others under contracts of purchase from the same vendor,—the several deeds and contracts being made on different dates, and embracing distinct parcels,—brought suit to remove a cloud caused by a mortgage which covered all the land, it being alleged by those plaintiffs who had not received deeds that they had performed all the requirements of their contracts. *Held* an improper joinder of several causes of action in favor of parties whose interests were distinct and separate.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by A. C. Utterback and others against Ezra M. Meeker and others. From a decree for plaintiffs, defendants Ezra M. and Eliza J. Meeker appeal. Reversed.

A. R. Hellig and John P. Hartman, Jr., for appellants. A. R. Titlow, for respondents.

GORDON, J. Plaintiffs brought this action to remove a cloud upon the titles of plaintiffs to their respective pieces of land, caused by a mortgage upon the whole of said land held by the appellants, Ezra M. Meeker and Eliza J. Meeker, husband and wife; also to restrain certain of the defendants from fencing up certain alleged public streets and alleys in the town of Puyallup, and interfering with the ingress and egress to and from the several properties of the respondents. There are 13 plaintiffs in the case, each claiming to be lawfully in possession of distinct and different pieces and parcels of land, consisting of town lots in different additions to the town of Puyallup. The possession and right of possession of some of the plaintiffs is based upon contracts of purchase and for deeds made with the defendant the Tacoma & Puyallup Railroad Company, a corporation, and Otis Sprague, receiver therefor (not appealing), which contracts bear different dates, and embrace the premises claimed by the respective defendants. Other plaintiffs claim possession and right of possession by virtue of deeds of general warranty, with covenants against incumbrances, executed by said railroad company, conveying in severalty to such plaintiffs the several distinct pieces and parcels of land respectively claimed by them, said deeds bear-

ing different dates. The mortgage held by the Meekers, already referred to, embraces within its description all of the lands in question owned by the plaintiffs, respectively, and was a subsisting mortgage, and of record in the proper office, at and prior to the date of execution of any of the contracts or deeds hereinbefore referred to. The complaint, among other things, alleges in substance that, prior to entering into any of said contracts with the respective plaintiffs, the Tacoma & Puyallup Railroad Company—at that time the owner of the lands in question—entered into an agreement with the defendants Ezra M. and Eliza J. Meeker (appellants), whereby said railroad company, on behalf of itself and appellants, was to make sale of said town lots covered by the aforementioned mortgage to any and all purchasers it might procure, and make a full, complete, and clear title in fee simple to said lands and lots to such purchasers as might be procured. That thereafter, and in pursuance of said contract and agreement between said railroad company and the Meekers, the various plaintiffs purchased of said railroad company the lots respectively claimed by them, and made payments under their respective contracts. The complaint further alleges that appellants received from said railroad company, on account of said mortgage, the various sums paid by plaintiffs on account of their respective purchases; and also alleges that said mortgage and the indebtedness secured by it have been fully paid, and that the appellants knew that, by the terms of the contracts between the railroad company and the respective plaintiffs, the plaintiffs were to receive from said company full, complete, and perfect title in fee simple, free of all incumbrances, to the respective lots so purchased by them, and never, at any time, objected to the said railroad company making any of the aforementioned deeds and contracts, nor gave plaintiffs, or either of them, any notice that they would assert any right in and to said property by virtue of said mortgage, but, on the contrary, by their acts induced plaintiffs, and each of them, to make said purchases, in consequence of which the plaintiffs were led to believe that the Meekers would make all the necessary and proper releases and acquittances of said pieces and parcels of land, freeing and discharging any and all incumbrances against each parcel thereof; that some of the plaintiffs have erected dwellings upon their respective properties, and otherwise permanently improved the same. The complaint also alleges that the appellants unlawfully, against the rights of the plaintiffs, and each of them, and without authority, have closed up, by fencing and boarding, a number of streets and alleys in said addition to the town of Puyallup, "although the same had been dedicated to the public use forever, and although said plaintiffs had purchased said aforementioned and described



pieces and parcels of land in consideration that the same should be kept open and free for the use of these plaintiffs, and for the public in general," etc. The other allegations of the complaint require no notice. The appellants demurred to the complaint upon several grounds; among others, "(2) that several causes of action have been improperly united." The demurrer having been overruled and issues of fact joined, the cause was tried, and a judgment and decree entered by the lower court in favor of the plaintiffs, from which this appeal has been taken.

A preliminary question arises upon a motion to dismiss the appeal, which motion is based upon the theory that the appellants Meeker have, by their silence and failure to make objections to the action of their co-defendants (the McDonalds) receiving from plaintiffs money tendered by plaintiffs pursuant to the decree of the court, consented thereto, and consequently are estopped from further prosecution of the appeal. We think there is no merit in the motion. The appellants cannot be held bound by the conduct of the McDonalds in accepting the money which the decree provided should be paid to them, and the receipt and acceptance of said money by the McDonalds did not put an end to the controversy between the parties here. The demurrer to the complaint should have been sustained upon the ground above stated.

The respondents contend that they, each and all, are interested in the contract made between the railroad company and the Meekers; that they, each and all, are suffering from a cloud that the appellants Meeker are attempting to cast upon their title; that they, each and all, are suffering from the fencing up of the streets which they are entitled to have kept open; and that they, each and all, made their respective purchases relying upon the representations of the defendants Meeker. They insist that the action belongs to the class "where a number of persons have separate or individual claims or rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of these persons suing on behalf of the others, or even by one person suing for himself alone." 1 Pom. Eq. Jur. § 245. That the rule thus laid down by Mr. Pomeroy has much authority in its support cannot well be doubted, but we are convinced that it is not applicable to the present controversy. The rights of the plaintiffs in this action do not arise from a "common cause." Nor is the case of *Osborne v. Railway Co.*, 43 Fed. 824, in point here. In that case the plaintiffs claimed to be the owners of tracts of land acquired under the provisions of the homestead and pre-emption laws of the United

States, and the question was whether their lands were within the limits of the grant by congress to the railway company, or reserved to the United States, and therefore open to settlement. The court held that they had a community of interest in the subject-matter, and a common source of title, namely, "the action of the land department's opening these lands for entry under the homestead and pre-emption laws of the United States." But there is a clear distinction, it seems to us, between that case, in which it was said that "the company's claim is good or bad against all the plaintiffs as it may be good or bad against any one of them," and the present case, in which some of the plaintiffs claim under separate and distinct contracts to which all of their co-plaintiffs are strangers, and still others of them rely upon covenants contained in deeds to which all of their co-plaintiffs, are strangers. As already noticed, five of the plaintiffs have not yet secured deeds to the respective tracts claimed by them. They assert that they have performed the requirements of their respective contracts, and this of itself suggests an obstacle to the action. The question, for instance, of whether or not a particular plaintiff had performed the conditions devolving upon him under his contract of purchase, is a question in which none of his co-plaintiffs can possibly have any interest. In the determination of that question they have nothing in common, and yet its determination becomes important and necessary to a decision of the cause. We say "necessary," because those of the plaintiffs who are without title have found it necessary to allege in their complaint that they have performed the conditions of their respective contracts. Without this allegation they would not be entitled to any relief upon the other facts stated, and, if it was necessary or proper to the statement of a cause of action that the complaint should contain this allegation, it would be equally permissible for the defendants to tender issue thereon, and, in that event, could it be said that "the defendants' claim is good or bad against all the plaintiffs as it may be good or bad against any one of them"? Clearly not. The mere statement of the proposition engenders its negation. The contracts and deeds under which the respective plaintiffs claim title or right to title are distinct and independent contracts and deeds, made at different times, embracing separate and distinct parcels of land. For a breach of the covenants contained in the deed of one of the plaintiffs none of the other plaintiffs could have a right of action, and the evidence necessary to sustain the cause of one plaintiff might, and probably would, be wholly inadmissible in support of the claims of the other plaintiffs. So too, in regard to the relief which is sought against the acts of some of the defendants in fencing certain streets. The property claimed by some of the plain-

tiffs is in Maplewood addition to the city of Puyallup, that of some of the others is in the Second Maplewood addition, and that of the others is in still another, viz. the Third Maplewood addition. These additions were platted at different times. The plaintiff who bought lots in the First Maplewood addition clearly did not buy with reference to streets subsequently laid out in another and different addition. He has no interest in common with his co-plaintiff who bought in the last-named addition, and his right of action, if he has one at all, is founded upon a distinct and different claim. We deem it unnecessary to extend the discussion. Briefly stated, what is attempted here is to unite in one action several distinct and separate causes of action existing in favor of distinct parties, whose interests are several, and neither of whom has any interest in the cause of the others. "The only respect in which it can be said that they have the same interest is that their positions are similar. They each happen to have a right of action against the same person, for causes almost identical in their facts. This, however, is not sufficient to give them a joint right of action." *Hendrickson v. Wallace's Ex'r*, 31 N. J. Eq. 605. *Bort v. Yaw*, 46 Iowa, 323; *Samuels v. Blanchard*, 25 Wis. 329; *Bliss*, Code Pl. (3d Ed.) § 123. We have examined every case cited by counsel for the respondents upon this point, and are of the opinion that none of them conflict with the views herein expressed. Indeed, we think that *Tribbette v. Railroad Co.* (Miss.) 12 South. 32, and *Owen v. Frink*, 24 Cal. 171, cited by respondents, are decidedly adverse to the position taken by them in the present controversy. The demurrer should have been sustained. The decree will be reversed, and the cause remanded, with instructions to dismiss the action.

HOYT, C. J., and ANDERS, J., concur.

(16 Wash. 273)

**HEFFNER v. BOARD OF COM'RS OF SNOHOMISH COUNTY et al.**

(Supreme Court of Washington. Dec. 24, 1896.)

REMOVAL OF COUNTY SEAT—ELECTION—DECLARATION OF RESULT—LIMITATION—LEGALITY OF VOTES—DECISION OF CANVASSERS CONCLUSIVE—APPEAL—RECORD.

1. Affidavits introduced in evidence on the hearing in the court below must be brought into the record by a statement of facts. *Clay v. Irrigation Co.*, 45 Pac. 141, 14 Wash. 543, followed.

2. Where the board of county commissioners, acting as canvassers, have failed to discharge their duty in a given case within the time limited by statute, they may, in relation to it, do voluntarily whatever they might be compelled to do by mandamus.

3. The limitation in 1 Hills' Ann. St. §§ 2462, 2463, which, in relation to the removal of county seats, provide that, when the returns have been received and the result ascertained by the board, "if three-fifths of the legal votes cast by

those voting on the proposition are in favor of any particular place" notice of the result shall be given, and the place selected to be the county seat "must be so declared from a day specified in the notice not more than 90 days after the election," is not mandatory; and a canvass and declaration of the result may be made, and the notices given, after the 90 days.

4. Where the legislature has imposed upon a county board the duty of ascertaining, declaring, and publishing the result of an election to determine the removal of a county seat, and has provided no method for reviewing the board's action, the board can pass on the legality of the votes cast, and its decision in canvassing and determining the vote is conclusive upon the courts.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by J. W. Heffner against the board of county commissioners of Snohomish county and others to enjoin the county officers from removing their respective offices from the city of Snohomish to Everett. From an order granting a preliminary injunction, defendants appeal. Reversed.

Crowley, Sullivan & Grosscup and Francis H. Brownell, for appellants. S. H. Piles and Sapp & Lysons, for respondent.

ANDERS, J. The respondent moves the court to strike the statement of facts from the record herein, on the ground that the statement is not permissible, under the law, for the alleged reason that it is composed of affidavits which were introduced in evidence at the hearing in the court below, and filed with the clerk. The contention of the respondent is that the affidavits should have been included in the transcript certified by the clerk as part of the files, as provided in section 14 of the act of March 8, 1893, relating to appeals. Laws 1893, p. 126. As matter of fact, however, the affidavits are embraced in the transcript, as well as in the statement of facts, and, if the statement were stricken, they would still be a part of the record. But this court recently decided, in *Clay v. Irrigation Co.*, 14 Wash. 543, 45 Pac. 141, that affidavits should be brought into the record by a statement of facts. See, also, *Windt v. Banniza*, 2 Wash. St. 147, 26 Pac. 189. The motion will therefore be denied.

This is an appeal from an order of the superior court of Snohomish county granting a preliminary injunction restraining the defendants, who are county officers, from removing their respective offices from the city of Snohomish to the city of Everett. The facts necessary to an understanding of the case are as follows: At a general election held on November 6, 1894, there was submitted to the voters of Snohomish county the question of the removal of the county seat from the city of Snohomish to the city of Everett. The returns of the election were duly transmitted from the various precincts of the county to the county auditor, and, after a pretended canvass thereof, a majority of the board of commissioners, on December 18, 1894, entered an order declaring that more

than three-fifths of the legal votes cast on the proposition were in favor of removing to Everett, and posted the notices required by law, declaring the city of Everett to be the county seat from and after the date named therein. Prior to the time fixed for the removal, one John Krieschel, one of the county commissioners of said county, instituted an action against all the county officers to enjoin them from removing their respective offices, records, fixtures, and furniture from Snohomish. An order granting a temporary injunction was entered, and the defendants appealed; and it appearing to this court that the orders made by the county commissioners were void, because they had never received and compared the returns of the election and ascertained the result as prescribed by the statute, the order of the superior court was affirmed. See *Krieschel v. Board*, 12 Wash. 428, 41 Pac. 186. Subsequently to the decision, and on October 2, 1895, the commissioners assembled at their usual place of meeting, and, having received the returns of the election, proceeded to examine, compare, and canvass the same, and to ascertain the result, and on the following day made an order declaring that more than three-fifths of the legal votes cast at said election in said county were in favor of removing the county seat to the city of Everett, and prepared and entered of record the notice prescribed by statute, declaring the said city of Everett to be the county seat of Snohomish county from and after November 5, 1895. Thereupon the plaintiff, who was prosecuting attorney of the county, brought this action to restrain the several county officers from removing their respective offices and property pertaining thereto in accordance with said order. A temporary injunction was granted, and the defendants have brought the cause here for review.

Many points are made and discussed in the able and elaborate briefs of counsel for the respective parties, but we do not deem it necessary to determine or consider them all in order to properly dispose of the case. The statute providing for the removal of county seats provides that: "When the returns have been received and compared, and the results ascertained by the board, if three-fifths of the legal votes cast by those voting on the proposition are in favor of any particular place, the board must give notice of the result by posting notices thereof in all of the election precincts of the county. In the notice provided for in the next preceding section of this chapter, the place selected to be the county seat of the county must be so declared from a day specified in the notice not more than ninety days after the election. After the day named in the notice the place chosen is the seat of the county; and it shall be the duty of the several county officers, whose offices are required by law to be kept at the county seat, to remove their respective offices, files, records, office fixtures, furni-

ture and all public property pertaining to their respective offices to said county seat." 1 Hill's Ann. St., §§ 2462, 2463. And it is contended that the board of commissioners had no power, under the law, to canvass the votes, or declare the place appearing to be selected to be the county seat, at a date more than 90 days after the election. But it must be conceded that it was the duty of the commissioners to compare the returns and ascertain the result of the election. This they did not do at their first meeting, as this court found in the *Krieschel* Case. Not having performed that duty within the time specified in the statute, if they could not afterwards perform it the effect would be to disfranchise the voters of the county and to annul the election. We think that the commissioners might have been compelled by mandamus to meet and canvass the returns, notwithstanding their former pretended canvass, unless it be true, as claimed, that they had no power to do so after the time mentioned in the statute. Judge Cooley, in speaking of the duties of canvassing boards, says: "If canvassers refuse or neglect to perform their duty, they may be compelled by mandamus, though, as these boards are created for a single purpose only, and are dissolved by an adjournment without day, it has been held that, after such adjournment, mandamus would be inapplicable, inasmuch as there is no longer any board which can act. But we should think a better doctrine to be that, if the board adjourn before a legal and complete performance of their duty, mandamus would lie to compel them to meet and perform it. But, when the board themselves have once performed and fully completed their duty, they have no power afterwards to reconsider their determination and come to a different conclusion." Cooley, *Const. Lim.* (5th Ed.) p. 784. We think the language just quoted expresses the correct doctrine, and is fully applicable to the facts of this case. See, also, *Lewis v. Com'rs*, 16 Kan. 102; *Smith v. Lawrence* (S. D.) 49 N. W. 7. And see, also, *Ex parte Heath*, 3 Hill, 42; *People v. Schiellein*, 95 N. Y. 124. And we are of the opinion that what the board might have been compelled to do by mandamus they could do voluntarily, for the office of the writ is simply to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station, where there is no plain, speedy, and adequate remedy in the ordinary course of law. *Laws* 1895, p. 117. Nor do we think the board was precluded from canvassing the returns and declaring the result of the election by the mere lapse of time. In our judgment, the direction in the statute as to time is not mandatory. It is not of the essence of the thing to be done by the commissioners. There are no words showing that it was the intention of the legislature that the canvass should be made, the result declared, and the notices given within 90

days after the election, or not at all. No penalty is provided for nonperformance, and the canvass, when completed, accomplished the purpose contemplated by the statute, because it determined the result of the election. And we are therefore of the opinion that it was equally as efficacious as if it had been made within the time directed by the legislature.

It appears that the commissioners, in canvassing the returns, rejected certain votes cast at Port Gardner in favor of removal, and also 200 votes returned from South Snohomish against removal, and the rejection of these last-mentioned votes constitutes the real ground of complaint in this action. It appears from the poll books and tally lists that 242 votes were cast against the proposition to remove the county seat at the precinct of South Snohomish. The commissioners, however, counted only 42 of these votes, for the alleged reason, it seems, that the remainder appeared to be spurious, illegal, and fraudulent. It is claimed by appellants that the commissioners were justified in rejecting these votes, for the reason that it appears on the tally lists that the ink was changed in making the tally marks after 42 votes were registered; that erasures and changes were made in the figures showing the total number of votes cast, and also in the written statement of the total number of votes on the last page of the poll book; and that the highest number of votes cast at the election in the county for any county or state officer was 47 only. On the contrary, it is contended by the learned counsel for the respondent that the commissioners had no right or power to reject votes appearing on the returns for the reasons alleged, or for any other reason, but that they were bound to count all votes appearing on the face of the returns. It is almost uniformly held by the courts in this country that the duty of canvassing boards generally is ministerial simply, and consists in ascertaining the number of votes polled, and declaring the result as shown by the face of the returns; and such was declared to be the rule of law in this state in *State v. Trimbell*, 12 Wash. 440, 41 Pac. 183. And the reason for this rule is found in the fact that the statutes generally provide methods for contesting elections and trying the title to office before some judicial tribunal having power to examine witnesses, receive evidence, and determine the real facts, irrespective of what may appear on the face of the returns. But where the legislature have devolved upon a particular tribunal or board the duty of ascertaining, declaring, and publishing the result of an election to determine a special question, such as the removal of a county seat, it would seem to have been their intention that such tribunal, and no other, should finally determine such result, and they cannot discharge their duty without exercising their judgment as to the matters to be determined. All the courts of general jurisdiction

can do, in cases of this character, is to ascertain whether the tribunal or board has proceeded according to the directions of the statute defining their duties, and to declare their proceedings ineffectual and void if they have departed from such directions. In the *Krieschel Case* this court held that the county commissioners could not arbitrarily, and contrary to the constitution and the law, determine the result of the election, but must ascertain the result from an examination—or, using the statutory term, a comparison—of the returns, because such is the mandate of the law by which they were governed. But in this case it appears that the board, or at least a majority of its members, received and “compared” the returns, and ascertained the number of legal votes cast on the proposition, and declared the result; and, if they arrived at a wrong conclusion, we know of no legal method whereby their act in that regard can be reviewed by the courts. *Parmer v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757. In *Rickey v. Williams*, 8 Wash. 479, 36 Pac. 480, we enjoined the removal of the county seat because it appeared that the county commissioners acted upon an insufficient petition, and therefore without jurisdiction, in submitting the question to a popular vote; and in the *Krieschel Case* we did the same thing, for the reasons hereinbefore indicated. In *People v. Supervisors of Prosque Isle Co.*, 36 Mich. 377, the court held that a proceeding to remove a county seat, which failed to designate, as required by law, the place to which the proposed removal was to be made, was invalid. But the same court has repeatedly ruled, under a statute providing that the supervisors, for the purpose of ascertaining the vote of the county, shall examine the statements and certificates of the election officers, and canvass the vote thereon, and declare the result of the vote in the county (1 How. Ann. St., § 491), that the decision of the supervisors in canvassing and determining the vote is conclusive. And in a recent case that court held that it could not interfere with the action of the supervisors in rejecting the vote of a township on the grounds of fraud, for the reason that the legislature had not provided a method for reviewing such action; and we are in the same situation here, and must be guided by like considerations. *Pinkerton v. Stanniger* (Mich.) 59 N. W. 611.

It appearing that the commissioners have “received and compared” the returns, and have found, and properly certified to, the facts which the statute expressly submitted to them for determination, we feel constrained to accept their decision as conclusive upon the courts. The order appealed from must be reversed, and the cause remanded to the court below with directions to dismiss the action.

GORDON and DUNBAR, JJ., concur.

HOYT, C. J., dissents.

(16 Wash. 212)

**McEWAN v. CITY OF SPOKANE.**

(Supreme Court of Washington. Dec. 15, 1896.)

**MUNICIPAL CORPORATIONS — ASSESSMENTS FOR IMPROVEMENTS — DUTY OF COLLECTION — LIMITATIONS — LIABILITY.**

1. Where a city expressly covenants, in reference to providing a fund for the payment of certain street-grade warrants, that it "will prosecute the business of levying and collecting such special tax or assessment without any delay whatever in any part of the proceedings, and in the shortest time possible under its charter and ordinances relating thereto," the city, and not the contractors, must look after the assessment and enforce its collection.

2. Where a city allows limitations to run against assessments which it had covenanted to collect as a fund for the payment of certain warrants, it is liable.

Hoyt, C. J., dissenting.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by J. H. McEwan against the city of Spokane. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. H. Plummer, for appellant. Jones, Voorhees & Stephens, for respondent.

**DUNBAR, J.** This is an action brought by plaintiff (respondent) against the defendant (appellant), the city of Spokane, for not providing a fund for the payment of certain street-grade warrants mentioned in two separate causes of action. The complaint sets up the contract under which the warrants were issued and alleges demand of payment and assignment of the warrants, all of which is admitted by the defendant. Paragraph 5 of the complaint, which is the real allegation upon which the cause of action rests, is as follows: "(5) That defendant has wholly failed and neglected to make or levy any assessment or tax upon property benefited by the work and labor done upon said street, and has wholly failed and neglected to provide any street-grade fund, or any fund whatever, for the payment of said warrants, or either of them, and has not now, and never has had, any fund set aside or created for the payment of said warrants, or either of them, or any part of either of them, and has never at any time had, created, or levied any valid, or any, assessment or tax for the payment of said warrants, or either of them, or any part of either of them; and defendant has exhausted its power and authority to make or levy any special or local assessment or create said fund, and has no power or authority so to do."

It is contended by the appellant that it was necessary for the plaintiff to establish these allegations in order to rightfully obtain a judgment, and, further, that the allegations were not established by the proof, and that the mere fact that the fund has not been created gives the plaintiff no right to recover, as the city is not a guarantor of the creation of said fund, but is only held to ordinary diligence in doing everything possible under the existing circum-

stances to create the funds. For the purposes of this case, conceding this to be true, we think the record plainly shows that the city has not exercised ordinary diligence in making preparations for the payment of these warrants. This contract was entered into November 15, 1896, and the action was brought in April, 1896. The answer is not very definite as to the time when these warrants will be paid, but alleges that the city warrants will be paid by the city of Spokane as soon as and whenever the assessments are collected and paid into the fund upon which said warrants are issued and made payable, under and by virtue of the contract under which they were issued. The portion of the contract with reference to the collection of the funds is as follows: "Said city of Spokane Falls further agrees that it will proceed, as soon as its laws provide, to levy and collect a special tax or assessment upon the property within the assessment district created for said improvement for the payment of the sums herein agreed to be paid, and to collect the same, and to pay the same as herein provided; and said city expressly covenants that it will prosecute the business of levying and collecting such special tax or assessment without any delay whatever in any part of the proceedings, and in the shortest time possible under its charter and ordinances relating thereto." It can scarcely be said that, under the showing made by the city in this case, it has proceeded to collect these taxes without any delay whatever. The appellant urges, in defense of the city, that the delay was owing to a mistake on the part of the city as to the law, in which mistake, says the answer, said Massey and said Boston (the contractors) shared, that said moneys had not been heretofore collected, and assessments upon the property enforced, and that said Massey and said Boston, and their assignors, have never at any time done any act to enforce the collection of any assessments, but at all times remained absolutely silent upon the matter of collecting the reassessments, or assessments, until the commencement of this action. Under the special contract in this case, and under the law, it was not the duty of the contractors to look after the assessments. That was a duty which not only the law imposed upon the city, but which the special conditions of its contract imposed upon it, and, if the city was mistaken in regard to its construction of the law, the city must be responsible for such mistake, and not the contractors, who were not authorized to construe or enforce the law. *Eldemiller v. City of Tacoma* (Wash.) 44 Pac. 877.

The record shows that the statute of limitations, under the rule laid down by this court in *City of Spokane v. Stevens*, 42 Pac. 123, has run against a portion of these grade taxes, and the city, having failed to collect the said taxes until after the statute has run, would of course be powerless to collect them now. Hence it must necessarily follow that the city is liable to the plaintiff for its failure to collect them within a reasonable time, as a reasonable time must necessarily be a time prior to the time

when the statute of limitations runs. There is an attempt to plead an indebtedness by the city beyond its charter limit, but we think that no such indebtedness was pleaded, under the rule announced in *Baker v. City of Seattle*, 2 Wash. St. 576, 27 Pac. 462, and *Winston v. City of Spokane*, 12 Wash. 524, 41 Pac. 888. Affirmed.

ANDERS and GORDON, JJ., concur. HOYT, C. J., dissents.

(16 Wash. 174)

SMITHSON LAND CO. v. BRAUTIGAM  
et ux.

(Supreme Court of Washington. Dec. 14, 1896.)

MORTGAGES—ASSIGNMENT—WHAT CONSTITUTES—  
ESTOPPEL.

1. Where the mortgagee purchases the land at a void foreclosure sale, a deed by him which purports only to convey the legal title to the land has the effect of an assignment of the mortgage.

2. Where a mortgagee buys in the land at a void foreclosure sale, and afterwards makes a deed conveying only the legal title to the land, he is estopped from claiming, as against his grantee, that the mortgage did not pass by the deed, on suit being brought by the mortgagor to set aside the decree of foreclosure, and payment into court of the sum due on the mortgage.

On petition for rehearing. Granted.

For prior report, see 43 Pac. 1096.

HOYT, C. J. In the opinion rendered upon the former hearing of this case (14 Wash. 89, 43 Pac. 1096), it was assumed that the money paid into court by the plaintiff in the action brought to set aside the sheriff's deed to Brautigam, and Brautigam's deed to Nicholai, became, by virtue of the decree entered therein, the property of Brautigam, the mortgagee. Appellants contended that such was the effect of the decree in that action, and their contention was not controverted by respondent. The claim that this money became the property of Nicholai by virtue of this decree was first called to our attention in respondent's petition for rehearing; and, that this question might be argued, a rehearing was ordered. Upon the determination of this question the rights of the parties depend. If the money was the property of Nicholai, he, of course, waived no rights by receiving it. If it belonged to the Brautigrams, Nicholai obtained no right thereto by virtue of his connection with the action, and must be held to have taken it by virtue of the covenants in his deed from Brautigam; and, if he took the money by virtue of such covenants, it would be presumed that it was in full satisfaction, unless it appeared that there was an agreement that it should not be so taken. If the money was Nicholai's, it was by reason of the fact that the mortgage on account of which it was paid into court became his property, by force of the deed from Brautigam. If the rights of Brautigam as mortgagee passed by this deed, the value of the

mortgage must, in equity, be deducted from the damages for breach of the covenants in the deed, caused by the fact that the grantors had no title to the land. But this would not prevent the grantee from making use of such covenants to recover, as damages, the difference in value between the mortgage so conveyed and the land itself which the deed purported to convey. The value of the land, for the purposes of this action, was fixed by the deed at the sum of \$600, and the measure of damages would be the difference between this sum and the amount due upon the mortgage. It follows that the merits of the appeal must depend upon the question as to whether or not the effect of the deed from the Brautigrams to Nicholai was to assign to the grantee in the deed the mortgage upon the premises sought to be conveyed.

The effect of a deed which purports to convey the legal title to the property therein described upon a mortgage upon said property held by the grantor in such deed has been often before the courts, and the decisions upon the question cannot be harmonized. The greater number have held that such a deed will not convey the interest of the grantor in the mortgage, unless, at the time the deed was executed, he had taken possession of the mortgaged property for condition broken; that, if he had taken such possession, his interest in the mortgage would pass by the deed. In a few cases it has been held that the deed would amount to an assignment of the mortgage even before there had been any breach of its conditions; but the weight of authority is to the contrary, and appellants, in their answer to the petition for rehearing, concede that, if they had taken possession of the land after the foreclosure sale, their interest in the mortgage would have passed by their deed. Does a purchaser, in a proceeding to foreclose a mortgage, take such constructive possession of unoccupied lands that, as between him and his grantee, he must be held to have been in possession thereof? It has been expressly held that a purchaser at such a sale, which was void for want of proper notice, became the assignee of the mortgage sought to be foreclosed, and that his deed, which purported to convey only the legal title to the property, would vest in the grantee named therein the title to the mortgage, and the debt secured thereby. See *Robinson v. Ryan*, 25 N. Y. 320; *Smith v. Hiltchcock*, 130 Mass. 570; *Jackson v. Bowen*, 7 Cow. 13. The theory upon which these cases seem to have been decided was that the foreclosure proceedings, though void, were equivalent to an entry upon the mortgaged property for breach of the conditions of the mortgage. Except upon this theory, it is impossible to harmonize these cases with others in the same courts, of which no mention is made in the opinions. If a purchaser at a void sale who had no interest in the mortgage excepting that derived from such sale could by his deed convey it, much more could

a purchaser who, in addition to the interest derived from such sale, had an interest as mortgagee.

It must follow that, under the undisputed facts shown by the record, the deed from the Brautigams to Nicholai, though by its terms conveying only the legal title in the land, had the effect of an assignment of the mortgage held by the grantors when the deed was made. This being so, Nicholai was a necessary party to the action by McEachern to set aside the foreclosure proceedings, and the money, when deposited in court to redeem the land from the mortgage, was so deposited for the benefit of Nicholai, and, upon a decree setting aside the foreclosure proceedings, became his property.

There is another ground upon which it must be held that this money was the property of Nicholai, and that is that his grantors were not in a situation to claim that the mortgage did not pass by the deed. If the foreclosure proceedings had been regular, the deed would have passed the legal title to the property free from the lien of the mortgage held by Brautigam, and he will not be allowed to claim any rights by reason of the insufficiency of the foreclosure proceedings set on foot by him, and conducted in his interest. The trial court correctly determined the law of the case, and its judgment will be affirmed.

SCOTT, ANDERS, and GORDON, JJ., concur.

(15 Wash. 399)

HORTON et ux. v. DONOHUE-KELLY  
BANKING CO. et al.

(Supreme Court of Washington. Dec. 17,  
1896.)

REHEARING—PETITION.

A petition for rehearing which is discourteous and unprofessional will be stricken from the files.

On petition for a rehearing. Dismissed.  
For prior opinion, see 46 Pac. 409.

PER CURIAM. The respondents' petition for rehearing in this case is so discourteous and unprofessional that we deem it unfit for consideration. It will therefore be stricken from the files of the court.

(16 Wash. 219)

VAN LEHN et al. v. MORSE, Sheriff.

(Supreme Court of Washington. Dec. 17,  
1896.)

APPEAL—REVIEW—ERROR CURED—FRAUDULENT  
CONVEYANCES—CONSIDERATION—EVIDENCE.

1. A remark by the court, in ruling on an objection to evidence, that knowledge on the part of the attorney, who acted for the purchasers in the sale, of the intent of the seller to defraud creditors, was not binding on the purchaser, is not ground for reversal, where an instruction that such knowledge would be imputed to the purchaser was given.

2. Where a bill of sale reciting a consideration of "\$4,000 in gold" is attacked as in fraud of creditors, another consideration, as part cash and the conveyance of land, may be proved.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by B. F. Van Lehn and another against S. G. Morse, sheriff, and others. The action was dismissed as to all defendants except defendant Morse, and from a judgment for plaintiffs he appeals. Affirmed.

Allen & Powell, for appellant. Brady & Gay and Geo. C. Hatch, for respondents.

GORDON, J. This was an action in replevin for the recovery of a stock of general merchandise situated at Port Angeles, in Clallam county. It appears from the record that for several years prior to July, 1893, C. E. and J. Langdon Bell were co-partners, and, as such, conducted a general merchandise store at that place. They were largely in debt, and unable to pay their bills as they matured. On the 28th of July of that year, being pressed by certain of their creditors, they made a bill of sale of their entire stock to the respondents in this action (plaintiffs below). Immediately following the execution of the bill of sale, respondents caused it to be recorded in the office of the auditor of the county, and went into possession of the property in dispute. On the same day, suits were brought by certain creditors of Bell & Co., in which suits attachments were issued and levied upon the property herein involved; and thereupon respondents instituted this action against appellant, Morse, as sheriff, and the attaching creditors, to recover said property or its value. Respondents, in their answer, attack the sale, alleging that it was made by Bell & Co. to hinder, delay, and defraud their creditors, of which intent the plaintiffs had notice; further, that Bell & Co. were largely in debt and insolvent, and were being pressed by their creditors, of which the respondents also had knowledge. Other allegations of the answer need no mention. The court dismissed the action as to all of the defendants except Morse, sheriff, the appellant herein. Upon the trial it was admitted that the value of the stock of goods was \$4,000; that the respondents were in possession of the goods when attached; that Bell & Co. were, at the time of sale, indebted to various parties. It also appears that at the time of sale they were insolvent; that the real consideration for the transfer was 200 acres of land, the value of which was placed at from \$10 to \$20 per acre by witnesses for the respondents, and at from \$5 to \$10 per acre by witnesses for the defense; also, \$500 in cash, \$200 in county warrants, and a receipted bill for \$100, which Bell & Co. owed one of the respondents herein. The trial resulted in a verdict for plaintiffs, upon which judgment was thereafter entered. Defendants' motion for a new trial was denied, and the cause appealed.

There are a great number of distinct assignments of error set forth in the brief of appellant, all of which have been carefully considered, but many of which do not merit specific mention in this opinion. One of the principal points relied upon for reversal, and the one to which the oral argument of counsel was addressed, is based upon a remark alleged to have been made by the court in ruling upon an objection to the introduction of evidence. It appears from the evidence that one Bickford, an attorney at law, prepared the bill of sale from Bell & Co. to the respondents, and rendered other assistance in connection with the transfer, and upon the trial the appellant sought to show by witness Allen that Bickford had, prior to the consummation of the sale, obtained knowledge that Bell & Co. were being pressed by their creditors; and, an objection having been interposed by respondents' counsel, the court, in disposing of such objection, remarked: "It is in evidence that Mr. Bickford was there representing these parties, whether or not as their attorney I am unable to decide from the evidence. It will be admissible in certain phases of the case. Still, it would not bind them, even if they are presumed *prima facie* to know what their attorney knows, if, as a matter of fact, they never did know they would not be bound. That would be the fault of the attorney, and not the party." This purported remark was contained in the statement of facts proposed by appellant, and, the lower court having refused to incorporate it therein, a petition was filed in this court for the purpose of compelling the learned superior judge to include it within said statement of facts. An order was made directing a reference, and the evidence taken thereupon has been returned to this court. For the purposes of this opinion, we will dispose of the question upon the assumption that the remark actually occurred, and that it is, or should be, a part of the statement. Upon such assumption it is apparent that the court erred in stating, in effect, that respondents would not be bound by the knowledge obtained by their attorney of the intention of Bell & Co. to defraud their creditors by disposing of their property to the respondents; and such error would require a reversal of the judgment, did it not further appear that it was cured by the following explicit and direct instruction thereafter given to the jury: "If the jury believe from the evidence that H. K. Bickford was employed by plaintiffs to represent them and assist them as an attorney at law, and not merely as a skillful trader and assistant in drawing papers; and if you further believe from the evidence that said Bickford, while acting for said parties as such attorney at law, if you find he was acting in such capacity at the time and just prior to said transfer, knew of the intent of Bell & Co. to hinder, delay, or defraud their creditors, or any of them (if you find such intent existed); or if you believe said Bickford

was then acting as such attorney, and had knowledge of facts and circumstances which would have discovered such intent, if you find it existed, by the use of ordinary diligence, provided he had such knowledge before the completion of said transfer,—then, in such case, the law would impute the knowledge of the attorney to his clients, and the sale would be void as to creditors of Bell & Co." In view of this instruction, we think it clear that the jury could not have been misled by the remark made to counsel in the presence of the jury when passing upon the objection above noticed. The error thus committed was cured by the subsequent correct instruction expressly directed thereto, and, in contemplation of law, no prejudice resulted.

2. The bill of sale recites a consideration of "\$4,000 in gold coin"; and, on the trial, respondents, over appellant's objection, were permitted to prove the actual consideration already noticed, and this is assigned as error. While there seems to be some conflict of authority upon the question, we think that the true rule is as stated by Justice Sedgwick, speaking for the court in *Quarles v. Quarles*, 4 Mass. 680: "The principle is, I think, most clearly established, that, when one consideration is expressed in a deed, any other consideration consistent with it may be averred and proved." See, also, *Bump, Fraud. Conv. p. 596*, and cases cited; *Walt, Fraud. Conv. § 221*, and authorities there collated. A great many errors are predicated upon instructions given to the jury, and the refusal of the court to give other instructions requested by the appellant. We have carefully examined the charge, and are impressed with the conviction that, considered as a whole, it was comprehensive and fair. Many of the propositions involved required of the trial judge somewhat extended comment not susceptible of being stated in a single instruction; but, as already observed, we think the charge, as a whole, fully embraced and fairly declared the law of the case; and we are further satisfied that the judgment does substantial justice between the parties. Affirmed.

ANDERS and DUNBAR, JJ., concur.

(16 Wash. 232)

# DAVIS v. ATLAS ASSUR. CO.<sup>1</sup>

(Supreme Court of Washington. Dec. 18, 1896.)

INSURANCE—APPRAISEMENT—AWARD—PLEADING—WAIVER.

1. Under a fire policy providing that any loss shall be estimated according to cash value at the time; that said estimate shall be made by insured and the company, or, if they differ, then by appraisers; that loss shall not be payable till after notice of loss, including an award by appraisers "when appraisal has been required"; and that no action on the policy shall be sustainable till after compliance by insured with all the requirements,—an award of appraisers is not a condition precedent to right of action

<sup>1</sup> For opinion on rehearing, see 47 Pac. 885.



on the policy, and the complaint need not allege that there has been no demand for arbitration; but, when the company has demanded arbitration, pursuant to the policy, insured's refusal to arbitrate may be set up by the answer.

2. An award of arbitrators on loss by fire need not be set aside by independent action before action can be maintained on the policy without regard to it, but, being pleaded in the answer, it may be attacked by the reply.

3. Insured's appraiser signed an award in blank, agreeing that the company's appraiser should foot up the items and insert the amount in the blank. The company's appraiser there-after discovering that he had made a mistake, and that the items, instead of footing up \$1,900, exceeded \$2,300, sought out insured's appraiser, and proposed a correction of the award by signing a statement that the sum of \$1,900, inserted therein, was a mistake; but he refused to have anything more to do with the matter. The company, in correspondence with insured, offered to submit to a new appraisement if, for any reason, it should be found that the award of \$1,900 was invalid. *Held* that, as the company was chargeable with the knowledge of its appraiser, the facts sustained a finding that it was its fault that there was not a new appraisement.

4. An insurance company, by entering into an agreement for submission to arbitration of the amount of loss materially different in its terms from that provided in the policy, waives the right to demand a new appraisement pursuant to the terms of the policy.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Clarke T. Davis against the Atlas Assurance Company on a fire policy. Judgment for plaintiff. Defendant appeals. Affirmed.

The policy contained the following provisions: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers as hereinafter provided." "And the loss shall not become payable until sixty days after the notice of loss herein required has been received by this company, including an award by appraisers, when appraisal, ascertainment, estimate, and satisfactory proof of the loss has been required." "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the requirements."

Stratton, Lewis & Gilman, for appellant. Stanton Warburton and G. C. Britton, for respondent.

GORDON, J. This was an action upon a policy of insurance, issued by appellant, insuring respondent against loss or damage by fire upon certain laundry machinery and fixtures. The complaint alleges the issuance of the policy, the destruction by fire of the property in-

sured, the furnishing of proofs of loss, and non-payment on the part of the company. The answer admits the making of the policy and the fire, denies the amount of damage claimed, and sets up affirmatively that there was a submission to arbitration and an award made, under the terms of which the sum of \$1,900 was found to be the loss sustained by plaintiff, and that this amount the appellant stood ready at all times to pay. The reply admits the submission to appraisers substantially as alleged in the answer, but urges that the award was invalid, on account of the fraudulent conduct of the companies in selecting an appraiser, and fraudulent conduct of the appraiser selected by the companies in making the appraisement, and that the agreement of submission was not within the agreement and the terms of the policy. The trial which followed resulted in a verdict and judgment for the plaintiff, and the defendant has appealed.

1. The first contention is that the court erred in overruling a demurrer to the complaint. The ground upon which this objection proceeds is that the complaint does not anywhere show that the insured and the company had reached an adjustment regarding the amount of the loss, or that there had been an appraisement thereof, as provided by the terms of the policy; and it is argued, in support of the demurrer, that the contract of insurance arising upon a policy containing the terms and conditions included in the policy in question is not an agreement on the part of the insurance company to pay any fixed sum, but merely to pay such sum as may be found to be due the insured by an adjustment between the company and the insured, or determined by appraisement in the method pointed out by the policy,—in other words, that the contract of insurance requires the company "to pay only such sum as the insured and insurer may agree to be the loss, or, if they cannot agree, then that the loss be fixed by the appraisement." We think that the provisions of the policy in reference to arbitration and appraisement do not require an award of appraisers as a condition precedent to a right of action on the policy, but, when a demand has been made by the company for arbitration pursuant to those provisions, the insured's refusal to arbitrate may be pleaded as a bar to a recovery. It is not essential that the complaint should affirmatively show that no such demand had been made. While a diversity of opinion exists upon this question, we think that the weight of authority in Code states sustains this view. *Randall v. Insurance Co.* (Mont.) 25 Pac. 960; *Insurance Co. v. Hall* (Kan. App.) 41 Pac. 65; *Nurney v. Insurance Co.*, 63 Mich. 633, 30 N. W. 350; *Insurance Co. v. Badger*, 53 Wis. 283, 10 N. W. 504; *Wright v. Insurance Co.* (Pa. Sup.) 20 Atl. 716; *Wallace v. Insurance Co.*, 4 McCrary, 123, 41 Fed. 742; *Kahnweiler v. Insurance Co.*, 14 C. C. A. 485, 67 Fed. 483.

2. It is next contended that the court erred in overruling the objection of the defendant to the introduction of any evidence, and denying

defendant's motion for a judgment upon the pleadings. This contention is that, inasmuch as the pleadings disclose that an award had been made, such award was binding and conclusive on the parties until it was set aside by a competent court. We cannot agree with the claim of appellant that the pleadings show that an award was reached, notwithstanding it appears that arbitration was attempted and failed. However, we think that it was competent for the plaintiff, in his reply, to assail the award, and to show wherein it was of no effect or validity, and thus settle in one action all the differences existing between the parties growing out of the contract of insurance. In *Sanford v. Insurance Co.*, 11 Wash. 653, 40 Pac. 609, this court had occasion to fully examine that question, and, upon the authority of that case, we think that defendant's motion for judgment upon the pleadings was properly denied.

3. The sufficiency of the evidence to entitle the plaintiff to recover upon the issues submitted to the jury is also made a ground of contention. In substance, the record shows that the insurance companies having the insurance upon the property in question attempted, through their adjusters, to agree with respondent upon the amount of the loss sustained by him, and, being unable to agree, an appraisal was demanded by them. Respondent acquiesced in this demand, and appointed one Confare as his appraiser, and the companies selected one George Costen as their appraiser. Thereupon the plaintiff furnished these appraisers with a list of the property upon which he claimed to have sustained loss. Thereafter, being unable to agree upon some of the items, the appraisers agreed upon one Jager as umpire. The agreement for arbitration was contained in a printed blank furnished by the adjuster of the appellant. This blank contained provisions which were at variance and not in accordance with the terms of the policies. Each appraiser kept a separate list of the items and the amount of the loss. In the main they were able to agree upon the items without appealing to the umpire. The items of losses so kept by the appraisers were upon loose pieces of paper. They concluded their appraisal late in the evening, and thereupon the appraiser for the insured signed an award in blank, agreeing that the company's appraiser should foot up the items, and insert the amount thereof in the blank left for that purpose in "the award." There was some dispute as to whether, at the time Confare actually signed the so-called "award," the blank had been filled; but we deem it immaterial, in view of the other facts herein referred to. Afterwards the companies' appraiser, Costen, discovered that a mistake had been made in his footings, and that, instead of the items of loss aggregating \$1,900, they somewhat exceeded \$2,300. Thereupon he sought out Confare, and proposed to correct the award by sign-

ing a statement to the effect that the sum of \$1,900, inserted therein, was a mistake; but Confare refused to have anything more to do with the matter. The so-called "award" was given to the companies' adjuster, who thereafter delivered the same to the respondent, upon request, and upon respondent's promise to return it. It further appears that respondent disregarded his promise and retained the same. Appellant claims that it appears, from certain correspondence between counsel for the respective parties, that the appellant had offered to submit to a new appraisal if, for any reason, it should be found that the award of \$1,900 was invalid, and that the court erred in submitting to the jury the question of whose fault it was that a new appraisal was not had. But the correspondence referred to must be interpreted in the light of the fact that the company was bound to know what its appraiser knew, namely, that the sum of \$1,900, specified in the so-called award, was erroneous, and had not in fact been agreed upon as the amount of the loss, and that no award had in fact been made. It also should have known that the agreement for submission was not in accordance with the terms of the policies, inasmuch as the blank form for submission was furnished by its appraiser. Besides, it was conceded by counsel for the appellant, upon the trial below, that the terms of submission to appraisal were not in accordance with the terms of the policy, and that, "by mutual mistake of the appraisers, the amount of the award was not as it had been agreed upon between them." Under these circumstances we think the court did not err in giving the following instruction, which is complained of: "Touching this defense, you are instructed that the arbitration award for nineteen hundred dollars was ineffectual to bind the parties, because of the admitted fact that the wrong amount was stated therein; and the arbitrators failing thereafter to make any award, and the parties never having proceeded to a new arbitration, the question here for your determination is as to whose fault it was that no new arbitration was entered upon. If it was by fault of the plaintiff, then he is without right to maintain this action here; but, if it was by fault of the defendant company, then the plaintiff may rightfully maintain his action. When the plaintiff and defendant company ascertained and knew that the award made by the arbitrators selected was ineffectual, and that no agreement could be reached by them, it was the duty of the defendant, as well as the plaintiff, to disclaim right thereunder; and proffer readiness to proceed with a new arbitration. If you find, from the evidence, that the defendant company insisted on holding plaintiff to the terms of the award, after knowing the said fact of a wrong amount therein, and did not disclaim right to hold plaintiff there-to, then the plaintiff had a right to com-

mence and maintain this his action in the court here for the recovery of whatever damage he had sustained by loss or injury to the property described in the policy; but, if you find that the defendant company is clear of fault in this respect, then the plaintiff is without right to maintain this action, and your verdict will be for the defendant company." From the verdict arrived at we are bound to presume that the jury found that it was the fault of the company that no new arbitration was entered upon, and we are unable to say that such finding is not without sufficient evidence and support.

4. Instructions Nos. 4, 5, 6, 7, 8, and 11, requested by appellant, were properly refused, because the condition of the record did not justify their submission. Nor did the court err in refusing to give instructions Nos. 13 and 14, requested by the defendant. This leads to an affirmance of the judgment. But there is another reason why the judgment should be affirmed. The agreement for submission being in terms materially different from that provided by the policy constituted a waiver of the right to demand a new appraisal pursuant to the terms of the policy. "When defendant elected to take an appraisal which was not such as its policy gave it a right to demand and insist upon, it waived whatever right it might otherwise have had to insist upon the appraisal provided for in the policies." *Harrison v. Insurance Co.*, 67 Fed. 577; *Insurance Co. v. Alvord*, 61 Fed. 752; *Adams v. Insurance Co.*, 85 Iowa, 6, 51 N. W. 1149. In the case last cited the supreme court of Iowa say: "By entering into an agreement of submission not in accordance with the provisions of the policy, and standing on the validity of an award made under such submission, the defendant must be held to have waived the right, if it had any, to insist that an award must be made in accordance with the terms of the policy before suit could be commenced thereon." Affirmed.

DUNBAR and SCOTT, JJ., concur.

(16 Wash. 241)

#### DAVIS v. IMPERIAL INS. CO.

(Supreme Court of Washington. Dec. 18, 1896.)

**FIRE INSURANCE — CONDITIONS OF POLICY — DEMAND FOR APPRAISEMENT — WHEN TOO LATE.**

Plaintiff in an action on a fire policy dismissed it, and brought a new suit. On receiving notice of intention to dismiss, defendant served on plaintiff a demand for an appraisal under the terms of the policy. Held, that the demand came too late.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Clarke T. Davis against the Imperial Insurance Company on a fire insurance policy. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Sharpstein & Blattner, for appellant. Stanton Warburton and G. C. Britton, for respondent.

**PER CURIAM.** This case is similar in its facts to *Davis v. Assurance Co.* (just decided by this court) 47 Pac. 436, and the cases were tried together in the lower court. There is only one point of difference between the cases which requires notice. After the action had been commenced upon the policy issued by the appellant in this case, it was dismissed upon plaintiff's motion, and a new suit (the present one) instituted. Upon receiving notice of the intention of the plaintiff to dismiss the first suit, counsel for the appellant served upon respondent's attorneys a demand for an appraisal under the terms and conditions of the policy. This was nearly a year after the fire occurred, and, as already noticed, was subsequent to the commencement of suit upon the policy. We think that it came too late. Upon the authority of *Davis v. Assurance Co.*, supra, and for the reasons therein given, the judgment appealed from herein will be affirmed.

(16 Wash. 224)

#### COLLENSWORTH v. CITY OF NEW WHATCOM.

(Supreme Court of Washington. Dec. 18, 1896.)

**CITIES—LIABILITY FOR NEGLIGENCE—ULTRA VIRES.**

A city is liable for injury caused by negligence of one engaged in excavating for its waterworks, though the work was being done by direct employment of day labor, under supervision of the city engineer, when, under Hill's Code, § 649, it should have been by contract, the expenditure required exceeding \$500.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by Silas F. Collensworth against the city of New Whatcom. Judgment for plaintiff, and defendant appeals. Affirmed.

D. W. Freeman and H. A. Fairchild, for appellant. Newman & Howard, for respondent.

**GORDON, J.** The respondent sued to recover damages for personal injuries sustained, resulting from the alleged negligence of the servants and agents of the appellant city. The complaint alleges that the injury was caused by the servants and employes of the city carelessly and negligently firing and exploding a blast of giant powder, thereby causing a large rock to be thrown against the person of the plaintiff. That at the time of the injury the agents and employes of the city were engaged in excavating a trench or ditch for the construction and extension of its system of waterworks, and that the "blast" in question was fired and exploded in the prosecution and furtherance of the work of laying and extending such system.

The answer was a general denial. From a judgment in plaintiff's favor for the sum of \$7,250, the city has appealed.

It appears from the record that in the summer of 1894 the city authorities of New Whatcom, being desirous of extending its system of waterworks, called upon its engineer to furnish a report showing the cost and expense of a proposed extension. Pursuant thereto the city engineer made a report showing, among other things, that the cost and expense of digging the trench for the pipe, and filling and covering the same, would amount to about the sum of \$3,500. Thereupon the city council passed the following resolution: "On motion, the contract for constructing the tunnel for the water main at the lake was awarded to Quinn et al., and the city engineer was instructed to employ the necessary help, and to proceed at once to dig the ditch for the water main." Upon the authority of this resolution, the engineer laid out the work, staked it off, employed and discharged all of the labor, prepared monthly pay rolls and signed and filed them with the city clerk, and purchased explosives and other material used on the work; and it was while engaged in the prosecution of this work that the injury occurred which resulted in the present action. The appellant is a city of the third class, and section 130 of the general incorporating act, being section 649, 1 Hill's Code, provides: "In the erection, improvement, and repair of all public buildings and works, \* \* \* when the expenditure required for the same exceeds the sum of five hundred dollars, the same shall be done by contract, and shall be let to the lowest responsible bidder, after due notice, under such regulations as may be prescribed by ordinance." It is contended in this case that the work of digging and filling the trench was at a cost greatly exceeding \$500, and that the engineer's estimate of the cost, which estimate was furnished prior to the city's engaging in the work, showed that its cost would exceed \$500; and it is further contended that the resolution of the council above set out, and the undertaking of the city to perform the work of digging the ditch and covering the main by direct employment of day labor, under the supervision of its engineer, instead of letting the work to an independent contractor, was *ultra vires*. This contention proceeds upon the theory that if section 649, *supra*, had been followed, and the work let to an independent contractor, the city would not have been liable for any negligence arising in the prosecution of the work, and that the remedy for an injury of the character of which the plaintiff here complains would be confined to the person causing the injury and such independent contractor. This, in substance, is the position assumed by the city, and upon which it relies to defeat the action, and we think it unnecessary to notice in detail the various forms in which this main question is pre-

sented in the able and exhaustive brief of counsel for the appellant.

As a result of what has been stated, counsel argues that the parties who fired the blast which caused plaintiff's injuries were not the servants or agents of the city. We think it may be conceded that the resolution of the council above set out did not legally constitute the engineer the agent of the city. But it does not follow that the city can escape liability for the injuries occasioned to the plaintiff by the careless and negligent act of those actually within the control of the corporate authorities engaged in the prosecution of a work ostensibly within the scope of its corporate power. The reasons which would defeat an action brought by a corporation creditor upon a contract attempted to be created in disregard of statutory requirements, or an action brought by the laborers themselves to secure the value of their services, are not applicable to the present action. The creditor or laborer in such cases enters into the contract or renders the service with full knowledge, presumably, that the law forbids that the city should make such a contract, or forbids that the city should undertake the work in which the services were performed. But these reasons are entirely inapplicable when urged in defense of an action of the character brought by the plaintiff herein. His injuries have been sustained, not as a consequence of any act in which he has participated or had knowledge. The respondent cannot be charged with any knowledge of infirmity of the attempted contract of employment between the city and the persons firing the blast. It is enough, we think, that the city possessed the undoubted authority to construct or extend its waterworks system, and the mere fact that in attempting so to do it did not conform to the requirements of its charter furnishes no sufficient reason for exempting it from liability for the injury occurring to respondent. As is said by the supreme court of Wisconsin in *Houfe v. Town of Fulton*, 34 Wis. 608: "It always sounds badly when a party seeks to excuse or justify one wrong by saying that he perpetrated still another, which was the cause of that complained of. This is bad in morals, whether it be bad in law or not. But we think it is bad law, in a case like this." That was a case where the plaintiff sought to recover damages sustained by reason of a defective bridge, and the action was defended upon the ground that no legislative permission had been granted to build the bridge, and that it was an unlawful structure, and maintained in defiance of the law. The appellant city had authority to extend its system of waterworks, and it attempted to do so, but in an irregular manner. Such irregularity cannot avail it in the present action; nor can advantage be taken of it in a collateral proceeding. *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055; *Chapman v. Douglass Co.*, 107 U. S. 348, 2 Sup.

Ct. 62; *Poillon v. City of Brooklyn* (N. Y.) 4 N. E. 191; *Howell v. City of Buffalo*, 15 N. Y. 512; *Hunt v. City of Boonville*, 65 Mo. 620; *Dooley v. City of Kansas*, 82 Mo. 444; *Mayor v. Sheffield*, 4 Wall. 189. It was, we think, legitimately within the corporate power of the city of New Whatcom to cause the excavation of the necessary ditches and drains incident to an extension of its water system, and the mere fact that in attempting to exercise this power the corporate authorities departed from the method pointed out by the statute cannot relieve the corporation from the consequences of an injury resulting from an act committed within the scope of its corporate power, and the court did not err in denying appellant's motion for a nonsuit, and in refusing to instruct the jury to find a verdict for the defendant, and in refusing to grant judgment in favor of the defendant on the special findings of the jury, nor in refusing to award a new trial. Nor do we think that the charge of the court was prejudicial to the appellant, or that any error was committed in the charge of the court, and under the evidence the verdict cannot be said to have been excessive. Objections not specifically mentioned herein have been considered, and, upon the entire record, we think the case was fairly tried, and the appellant had the benefit of every right which the law afforded it. We perceive no reason for disturbing the judgment of the superior court, which is affirmed.

DUNBAR, SCOTT, and ANDERS, JJ., concur.

(15 Wash. 637)

**SNOHOMISH COUNTY v. RUFF et al.**  
(Supreme Court of Washington. Dec. 21, 1896.)

Dissenting opinion. For majority opinion, see 47 Pac. 35.

GORDON, J. I am unable to concur with the majority in the disposition made of the motion to dismiss the appeal. The service of an answer in a case constitutes an appearance therein, and entitles such answering defendant to notice of all subsequent applications. I do not think that the mere failure of a party to file his answer affords any reason for permitting the party upon whom it has been served to disregard it; but it would seem to logically follow from what is held by the majority that the service of an answer gives such answering defendant no standing in the action until the answer is actually filed. This, it seems to me, is contrary to the spirit of the practice act of March 15, 1893, and opposed to the express provisions of section 37 of that act (Laws 1893, p. 417). That section is as follows: "Sec. 37. All pleadings in any civil action shall be filed with the clerk of the court, on or before the day when the case is called for trial, or the day when any application is made to the court for an

order therein, and in case the moving party shall fail, or neglect to cause the pleadings to be filed with the clerk of the court as above required, the adverse party may apply to the court, without notice, for an order on such moving party to file such pleadings forthwith, and for a failure to comply with such order the court may order the cause dismissed unless good cause is shown for granting an extension of time within which to file such pleadings." This act permits the summons in a cause to be issued by plaintiffs' attorneys, and the pleadings therein to be withheld from the public record until the contest actually comes before the court, thus enabling many controversies to be settled and adjusted after action is brought without the publicity attending the filing of the pleadings. It is, I think, substantially the New York practice act, and similar acts prevail in Minnesota, North Dakota, South Dakota, and elsewhere. Section 416, *Walt's N. Y. Ann. Code*, is as follows: "The summons, and the several pleadings in an action, shall be filed with the clerk within ten days after the service thereof, respectively; or the adverse party, on proof of the omission, shall be entitled, without notice, to an order from a judge that the same be filed within a time to be specified in the order, or be deemed abandoned." Section 5335 of the *Compiled Laws of Dakota of 1887* is an exact reproduction of section 416, *Walt's Ann. Code*. The statute in Minnesota requires the pleadings to be filed "on or before the second day of the term for which the cause is noticed." *Gen. St. Minn. 1894, § 5220*. Section 37, p. 417, *Laws 1893*, provides the remedy for a party who has been served with a pleading which is not thereafter filed. That remedy is to apply to the court for an order requiring the pleading to be filed, and noncompliance with such an order works an abandonment of the pleading.

(16 Wash. 243)

**PENNSYLVANIA MORTG. INV. CO. v. SIMMS et al.**

(Supreme Court of Washington. Dec. 21, 1896.)

WRITTEN CONTRACTS—CONSTRUCTION—PAROL EVIDENCE.

Defendant executed to plaintiff a mortgage, on land covered by a lease, which gave to the lessee an option to purchase, and also an assignment of the lease, as security for a loan. The mortgagee indorsed on the lease that the payment of rent under the lease should be made to defendant, and used and applied as she might deem fit, and that the mortgagee had no interest in or claim on the purchase money which the lessee agreed to pay. *Held*, that parol evidence was admissible to show that the mortgagee did not waive the right to have the purchase money applied in payment of the mortgage; otherwise, the mortgage and lease would have been ineffectual as security.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by the Pennsylvania Mortgage In-

vestment Company against Lucy A. Simms and others. From a judgment for plaintiff, defendant Simms appeals. Affirmed.

Baldwin & Kelly, for appellant. Jones, Voorhees & Stephens, for respondent.

HOYT, C. J. On April 5, 1892, Lucy A. Simms, one of the defendants, was the owner of certain land, situated in the county of Spokane, state of Washington. On that day she made a lease of said land to Peter Morrison. This lease contained a clause which gave to said Morrison the right to purchase the property upon certain conditions therein named. Thereafter the defendant Lucy A. Simms borrowed from the plaintiff \$7,000, and gave her promissory notes for that amount, and to secure their payment executed a mortgage upon the property covered by the lease to Morrison, and made an assignment of her interest in the said lease. At the time that the mortgage and assignment of the lease were executed, the plaintiff executed a memorandum in writing in the following language: "It is hereby understood and agreed that the assignment of lease made by Mrs. Lucy A. Simms to the Pennsylvania Mortgage Investment Company is not to be recorded unless notice is first given to said Lucy A. Simms, or her heirs, administrators, or assigns. And it is further agreed, on the part of said mortgage company, that the payments of rent under said lease shall be made to said Lucy A. Simms, and used and applied as she may deem fit and proper. It is further understood and agreed that the Pennsylvania Mortgage Investment Company have no interest in, right to, or claim upon the purchase money, which Peter Morrison, as lessee, and as the second party to the contract of sale, agrees in said contract to pay to Mrs. Lucy A. Simms." And it is upon the construction of this memorandum that the rights of the parties depend. Morrison, the lessee, availed himself of the option contained in the lease, and elected to become a purchaser of the property upon the terms therein stated. The amount which he was to pay for the property was \$13,000,—\$4,000 on December 1, 1893, \$4,000 on April 1, 1895, and \$5,000 on the 1st day of April, 1896; and it was agreed that, out of the first \$4,000 so to be paid, a prior mortgage upon the premises should be paid. This \$4,000 was paid, and used to satisfy this mortgage in accordance with the agreement. Before the next payment of \$4,000 became due, both the plaintiff and the defendant Lucy A. Simms claimed the right to receive it, and on account of these adverse claims the money was not paid to either of them; and, default having been made in the payment of the installments of interest due upon the notes secured by the mortgage and assignment of lease, the plaintiff, availing itself of the conditions of the notes and mortgage, elected to declare the principal sum due, and thereupon

brought this action to foreclose. Trial was had, and a decree rendered substantially as prayed for by the plaintiff, from which defendant Lucy A. Simms has prosecuted this appeal.

Some question is made in the brief of appellant as to the sufficiency of the pleadings, and it is claimed that the superior court erred in admitting oral proof to change the terms of the written contract evidenced by the memorandum hereinbefore set out. In our opinion, the pleadings were sufficient, and the correctness of the ruling which admitted oral proof to show what was intended by such memorandum depends so entirely upon the construction of the language used that whatever is necessary can best be said in the consideration of the effect of such language. It is contended, on the part of the plaintiff, that the assignment of the lease gave it the right to receive the moneys to be paid by the lessee for the property covered by its mortgage, if he elected to become the purchaser thereof, until the \$7,000 borrowed of it by appellant, and interest thereon, was fully paid; that the only effect of the memorandum was to waive plaintiff's right to the rent to be paid for the use of the premises, and to allow the appellant to use the first payment of \$4,000 to take up the prior mortgage thereon. The appellant contends that the plaintiff, by the execution of the memorandum, waived not only the right to receive the money to become due as rent, but also all which was to become due for the property in the event the lessee elected to become a purchaser.

It appeared, from the undisputed proofs, that the loaning of the \$7,000 by the plaintiff, the making of the notes and mortgage, and the assignment of the lease by the appellant, and the making of the memorandum in question, were parts of a single transaction, the object of which was, on the part of the plaintiff, to loan its money, and receive security for its repayment, and, on the part of the appellant, to obtain the money and give such security. This being so, the assignment of the lease and the memorandum must be treated as parts of a single contract; and, if appellant's construction of the memorandum is to obtain, such contract was without any force whatever. If the plaintiff, as assignee of the lease, was entitled to receive neither the rent money which might become due upon such lease, nor the money which would be paid for the property if the lessee elected to become a purchaser, there was nothing beneficial which it could take. The assignment, without the memorandum, gave to the plaintiff the right to receive the rents and the purchase money for the property in accordance with the terms of the lease. But if the construction contended for by appellant is adopted, it must be held that these rights were waived by the execution of the memorandum. Hence, this construction will render the assignment of no effect, and the parties would be in the same situation as

though neither the assignment nor the memorandum had been executed. But elementary rules require that such a construction should be given to the contract as will give it force, rather than one which will make it of no effect. It follows that some other construction of the memorandum than that contended for by the appellant must be adopted, if its language, taken in connection with that of the assignment of which it was a part, is such as to make it possible.

In our opinion, the language used, when interpreted in the light of surrounding circumstances, is capable of other reasonable construction. The fact that the assignment of the lease was made to further secure the payment of the notes given by the appellant to the plaintiff did not appear upon the face of such assignment, and, if no memorandum had been made, there would have been nothing to show that the moneys collected by virtue of the assignment should be applied upon the amount due or to become due upon the notes of the appellant. Under these circumstances, it must be presumed that the waiver of the plaintiff was only intended to show that it had no absolute title to the money; that it must account for it in the adjustment of the loan, to further secure which the assignment had been made. Not only does the rule which requires the contract to be so construed as to give it effect require this construction, but the language of the memorandum, without the aid of such rule, tends strongly to show that it was not the intent that thereby the plaintiff should waive its right to receive the money to be paid for the land. It was made clearly to appear that the appellant was to have the money to become due for rent to use as she saw fit; but, as to the money to become due for the property if purchased by the lessee, there was no such express provision. In our opinion, the assignment and memorandum, without any proof as to the intention of the parties, warranted the plaintiff in asserting its right to receive the money to be paid for the property. But, if this was not the proper construction of the two instruments, construed together, their language was so ambiguous as to warrant the introduction of oral proof to show what was intended; and the evidence introduced for that purpose clearly showed that it was not the intention that the appellant should have the right to receive the money for the property after the assignment of the lease the same as before such assignment. Besides, the construction contended for by appellant would deprive the plaintiff of its security. If plaintiff had no right to the money to become due upon the lease or contract of purchase, the appellant had the right to receive it, and, when she had done so, Morrison could compel her to deed the property to him, and by her deed he would take title discharged of the lien of plaintiff's mortgage. It must be held that the plaintiff had a right to demand of Morrison the pay-

ment of the moneys to become due upon his election to purchase the property.

It follows that the plaintiff did only what it had the right to do, and, it having been made to appear that the interest upon the notes of appellant held by plaintiff had not been paid, its right was established to declare the whole sum due, and enforce payment thereof by foreclosure proceedings. The judgment will be affirmed.

DUNBAR, SCOTT, ANDERS, and GORDON, JJ., concur.

(16 Wash. 249)

STATE v. McCANN et al.

(Supreme Court of Washington. Dec. 22, 1896.)

CRIMINAL LAW—HARMLESS ERROR—WITNESS—CREDIBILITY—CONSPIRACY—SUFFICIENCY OF EVIDENCE—SELF-DEFENSE—TRIAL—REMARKS OF COUNSEL—NIGHT SESSIONS.

1. Error in overruling a challenge for cause is harmless where defendant subsequently peremptorily challenged the juror, and did not afterwards use all his peremptory challenges.

2. Error in refusing separate trials, demanded only by a defendant who was acquitted, is not ground for reversing a conviction of his co-defendants.

3. Defendant's counsel is only entitled to interrogate a witness for the state in regard to what feeling he had, friendly or unfriendly, towards defendant, and not as to what part witness took in altercations between defendant and deceased.

4. Refusal to strike out evidence cannot be reviewed unless an exception was reserved to the ruling.

5. It is a question for the jury whether a conspiracy existed between defendants to kill deceased, where the evidence shows that bad feeling had existed for some time between defendants (father and two sons) and deceased; that defendants lived together, and had opportunity to confer in regard thereto; that, on the day of the homicide, deceased and the father had a severe altercation, during which threats were made by the father; that soon thereafter the father communicated to the sons the facts regarding the altercation; that the sons armed themselves, and, immediately upon meeting deceased, one of them attacked him, exclaiming, "You are going to kill old man McCann [the father], are you?" during which encounter the homicide was committed.

6. An instruction, in a trial for murder, that the jury might consider the great interest defendants had in the result of the verdict, as affecting their credibility, is not erroneous.

7. An instruction on the theory of the right of self-defense after withdrawal from a quarrel commenced by accused is not required where the evidence shows that defendants, one of whom was armed with a pistol, commenced an unprovoked assault upon deceased, in which he was very severely injured; that, as deceased started for his house, defendants followed him nearly to his house, and secreted themselves behind a stump and a log; that, on deceased's appearing with a rifle, one of them called to him to go back; that deceased fired, wounding one of the defendants slightly, who thereupon grappled with him; and that the other defendant ran up, and while the others were on the ground, deceased on top, placed the pistol to deceased's head, and fired,—the entire time from the commencing of the first assault to the killing involving only a few minutes.

8. Where the evidence is sufficient to render

the existence of a conspiracy on the part of defendants, to murder deceased, a question for the jury, and evidence of threats by a defendant very shortly before the killing, who was not present at the time the homicide was committed, is admitted, the court instructing that it was only admissible in case a conspiracy was proven, the fact that such defendant was acquitted does not render the admission of such evidence ground for reversing a conviction against the other defendants.

9. A remark by the prosecuting attorney that defendants did not dare to have their good reputation put in issue, though improper, is not ground for reversal; there having been an attempt to prove the good character of one of the defendants.

10. During a prosecution, the court may, in its discretion, hold night sessions.

Appeal from superior court, King county; T. J. Humes, Judge.

John McCann and another were convicted of murder, and appeal. Affirmed.

James Hamilton Lewis, W. R. Gay, W. H. White, and Walter S. Fulton, for appellants. A. W. Hastie and W. H. Morris, for the State.

SCOTT, J. The defendants were informed against and prosecuted for the murder of one Joseph Cicero. The charging part of the information was as follows: "They, the said John McCann, James McCann, and Michael McCann, in the county of King, in the state of Washington, on the twenty-first day of August, A. D. 1895, purposely, and of their deliberate and premeditated malice, killed one Joseph Cicero, by then and there purposely, and of their deliberate and premeditated malice, shooting, and thereby mortally wounding, the said Joseph Cicero, with a revolver pistol had and held by them, the said John McCann, James McCann, and Michael McCann, from which said mortal wound the said Joseph Cicero then and there died." Michael McCann the father of the other two defendants, was acquitted by the jury; but John and James were found guilty of murder in the first degree, and are under sentence of death. Their appeal therefrom presents a great many questions, which will be taken up in detail, and the facts connected with the homicide will substantially appear in the discussion of certain of them.

The first errors alleged relate to the refusal of the court to sustain challenges for cause to two of the jurors who were called to try the case; but, as the record shows that the defendants afterwards peremptorily challenged both of them, and did not use all of their peremptory challenges, there was, at least, no harmful error. *State v. Moody*, 7 Wash. 395, 35 Pac. 132.

The defendants were all charged in one information, and elected by one of their attorneys to be tried together, and a continuance was granted them to prepare for trial with that understanding. The defendants were not present in court when this was done, and subsequently, when the cause was called for trial, one of the defendants, Michael Mc-

Cann, demanded a separate trial, which the court refused to grant, and this is alleged as error. But as Michael McCann was acquitted, and the two other defendants did not join in the request of Michael McCann that he be tried separately, and did not demand separate trials for themselves, there was no prejudicial error here.

It is contended that the court erred in sustaining objections to certain questions asked witness Parham upon his cross-examination by counsel for the defendants. The first one was: "You were connected with him [Cicero] when he ran a saloon in this city?" The objection to this was properly sustained, for it assumed as a fact that the deceased once conducted a saloon, of which there was no evidence, and it did not tend to show what the feeling was between the witness and the defendants, and was directed to business matters only, between the deceased and the witness, and, furthermore, the question was thereafter substantially answered in the further examination of the witness. The remaining questions were directed to occurrences between the deceased and the defendants, relating to altercations over road matters, and the part that the witness took therein. The objection was properly sustained to these questions. The witness had already testified that he was a friend of the deceased, and the court informed counsel for the defendants that he might interrogate the witness as to what feeling he had, friendly or unfriendly, towards the defendants, and this was all the defendants were entitled to show; but counsel did not see fit to examine the witness upon that subject.

The next error assigned is the refusal of the court to strike certain testimony given by one Weiss, relating to an occurrence between the deceased and John McCann some months previous to the homicide, and in answer to the question, "Where did this conversation take place?" the witness answered, "Right there; very near where he murdered him this year." It is contended that this answer was objectionable, as giving the conclusion of the witness with reference to the guilt of the defendants. But it was not specially objected to on that ground at the time. Counsel for the defendants said: "It impresses me, may it please the court, that this does not come within your honor's suggestion, and I move to strike it all out." The suggestion referred to was made in ruling upon an objection to a prior question as immaterial and irrelevant, wherein the court said: "If the witness recalls a conversation where any threats were made, I think it is proper for the witness to state it." Other questions were asked and answered after this ruling, and prior to the question and answer above given, and the motion was apparently directed to the whole of it. In response to the motion, the court said: "I do not think there is any necessity, particularly, to strike it out, if the jury do not un-



derstand any more about it than the court does." The particular testimony of the witness above given was objectionable to the extent of stating his conclusion that the deceased was murdered; and, if a motion to strike said answer upon that ground had been made, it might be considered that a refusal of it would have tended to impress the jury that the conclusion of the witness as to the crime charged was competent testimony, and might have resulted in harmful error; but it is apparent that the testimony was treated as of no consequence, and what did really occur was probably equivalent to striking it out. However, no exception was taken by the defendants to the court's refusal to strike the testimony, and this is a sufficient legal answer to the objection urged; and it is also evident from the whole course pursued that the defendants, as well as the court, treated the testimony of the witness as trivial, and entitled to little or no weight.

When the state rested, the defendants moved to discharge Michael McCann, on the ground that there was not sufficient evidence of guilt as to him to warrant submitting the matter to the jury. Michael McCann was acquitted, and, of course, he was not injured by the ruling; but it is contended that the other defendants were, on the ground that they would have been entitled to have certain of the testimony relating to the doings of Michael McCann stricken from the case after he was discharged. However this may be, we are of the opinion that there was sufficient evidence as to the guilt of Michael McCann, and of a conspiracy upon the part of all three of the defendants to warrant the court in submitting the whole case to the jury. It appears that the McCanns, father and sons, lived together upon a farm. Cicero, the deceased, lived upon another farm near by, his house being about an eighth of a mile from McCann's house; and they had all resided at said places, respectively, for some considerable time previous to the homicide. The deceased and the McCanns had been upon bad terms for some time. At the time of the homicide, Cicero was working upon the road with a Mr. Davis and a Mr. Provan, at a point about one-third of the way from his house to McCann's house. The tragedy occurred soon after the noon hour of said 21st day of August. At some time in the forenoon of said day, Michael McCann came up to where Cicero was at work, and had a wordy altercation with him, relating to a coming election for road supervisor, for which position one of the McCann boys was a candidate. Cicero was opposing him, and supporting another candidate. One Mr. Botsford was also present at this conversation. The testimony is somewhat conflicting as to just what was said between Cicero and Michael McCann at this time, but it is not necessary to set it forth in detail. There was testimony to show that during this time Michael McCann said to Cicero, in substance, that he (Cicero) was not a naturalized citizen, and had no right to vote, and that they (the McCanns) would "take damned

good care" that he did not vote, and also said to him that they would "do him up," and "do him up damned quick, and wouldn't go behind stumps and logs and trees to do it either"; that, after this altercation, Michael McCann passed on to a neighbor's house, about a quarter of a mile distant; and that, while there, he told these neighbors, Mr. and Mrs. Frank Sale, of the difficulty he had just been having with Cicero, and, among other things, said he had "a good mind to get Jimmy to knock out his (Cicero's) brains." There was other testimony to show previous threats made by Michael McCann against Cicero, to the effect that, if Cicero came to the polls, and tried to vote at the election for road supervisor, he would never go away again; also, that, on the day previous to the homicide, he had angry words with Cicero, and, among other things, said to him: "Well, you are nothing but a God damned gambler anyway, and we will fix you. We'll put you where that you won't bother us on election day." The testimony shows that Michael McCann left Sale's house about 12 o'clock, returned to his own house, and found his two sons, John and James, there, they having been working on his farm, where they all resided, during the forenoon of said day; and it appears by both Michael McCann's and James McCann's testimony that they talked about the difficulty Michael McCann had shortly before then had with Cicero, although they both testified that Michael McCann said it did not amount to anything, and made light of it. The testimony further shows that Michael McCann then immediately went up to or near Cicero's place, and talked with Provan; that Cicero was near by, having just come out of his house from dinner; but it does not appear that any conversation took place between Cicero and McCann at this time, and McCann returned home. There is testimony to show that, immediately upon his reaching his house the second time, his two sons, John and James, started for the place where Cicero had resumed work upon the road, as they say, to have a talk with him. But it appears that James McCann first armed himself with a revolver, which he borrowed from a neighbor, and carried in the pocket of a long coat he had just put on, while John McCann was in his shirt sleeves, the day being a warm one; that they approached Cicero rapidly; and that James McCann immediately attacked him, saying, "You are going to whip old man McCann, are you?" It is unnecessary to pursue the facts further with reference to this point. We think that the bad feeling which had existed between Cicero and the McCanns for some time; the fact that the McCanns were all living together, and in the same house, and had every opportunity to confer with each other in regard thereto; the trouble between Michael McCann and Cicero on the day of, and shortly before, the homicide; the threats made by Michael McCann then and previously; the communication had between

Michael McCann and his sons regarding his altercation with Cicero soon after its occurrence, on the day of the homicide; the fact that the boys armed themselves, and immediately attacked Cicero; and the testimony showing that James McCann said to Cicero, as he approached him, "You are going to whip old man McCann, are you?"—which tend to show a conference and mutual understanding of the defendants, justified the action of the court in the premises, and that there was no error in the particular claimed.

It is next contended that the court erred in instructing the jury that they had a right to take into consideration the appearance and conduct of the witnesses while on the witness stand, etc., and the right to consider the great interest the defendants had in the result of the verdict. A similar instruction was sustained by this court in *State v. Nordstrom*, 7 Wash. 506-513, 35 Pac. 382, and we think it was not error.

The next matters urged relate to the eighth assignment of error, which was that the court erred in failing to instruct the jury as to the law applicable to the state of facts the evidence of the appellants tended to prove. The argument hereon and this assignment are very general. The defendants state that they submitted some 50 requests to charge, most of which sought to embody and apply the law applicable to the theory of the defense, and that but one of them was given. The matters urged here are not specific enough to warrant a discussion of them, but they are all involved with and covered by points and arguments elsewhere presented in the brief, and especially under that part in their brief where it is urged, in substance, that the court, in charging the jury, treated the whole matter as one continuous affray, and erred in so doing, and in the instructions given, and erred in refusing to give the defendants' request No. 19, which was as follows: "(19) You are instructed that although you may believe from the evidence in this case that the defendants commenced the fight, and made the first attack upon the deceased, if you believe that they had withdrawn from such attack, then the right of the deceased to employ force against the defendants ceased; and, if the deceased did not desist from attempting to use violence towards the defendants, the defendants had a perfect right to defend themselves; and if they then found themselves in apparent danger of losing their lives, or of sustaining great bodily injury at the hands of the deceased, they had the same right to take the life of the deceased that they would have had if they had not originally commenced the fight. In other words, if the jury find from the evidence that the defendants first assaulted the deceased, and that, after such assault was at an end, the deceased left the defendants, went to his house, procured a weapon, and returned towards the defendants, with the apparent in-

tention of resuming the affray, by killing or inflicting great bodily harm upon the defendants, or either of them, and that the defendants, in good faith, believed that such was the intention of the deceased, even though, as a matter of fact, the deceased had no such intention, yet if his acts and movements were reasonably sufficient to induce in the minds of the defendants an honest belief that such was the deceased's intention, if you so find, you are justified in believing the deceased the aggressor, and that the defendants were justified in standing their ground and taking the life of their assailant." In considering this, a further reference to the facts is necessary. James and John McCann were 28 and 31 years of age, respectively. It is conceded that they attacked and killed Cicero, but it is contended that there were two separate affrays, and that, while they were the aggressors in the first one, Cicero was the aggressor in the second, and that they then only acted in self-defense. While the testimony was somewhat contradictory, more particularly as between that given by the witnesses for the state and the testimony of the defendants personally, it was ample to show a most unprovoked assault in the first instance. There was testimony to show that James McCann had a handkerchief wrapped around the hand with which he struck Cicero immediately upon coming up to him. The claim on the part of the state was that he had some hard, blunt instrument in his hand, concealed by the handkerchief, which he used in striking. He struck Cicero, knocking him down, and struck him several blows after he was down. One of the blows received by Cicero upon his left temple broke his skull, and physicians testified that it was sufficient in itself to result in death, and there was testimony to show that said injury was received at that time. In fact, we do not understand it to be claimed by the defendants that Cicero received any injury after that time aside from the gunshot wound. As to the part that John McCann took at this time, there was testimony to show that he prevented the others from interfering with James in his attack upon Cicero, and that he said to James: "Give him some of that you've got in your pocket, Jim. God damn him! Give him the gun." After James McCann stopped beating him, Cicero got up, went a few feet, and sat down on a log, badly injured, and in a dazed condition. He sat there but a moment or so, and then got up, and started towards his house. The appellants testify that he said for them to wait, that he would be back. The undisputed testimony shows, and appellants concede, that they followed him. The other persons there went in the same direction. From all that had occurred up to this time, it is clearly apparent that the above-requested instruction was not applicable to the facts of the case or any of the testimony. It was based entirely upon what took place

prior to the commencement of what the appellants contend was a second and separate affray, and their own and all the testimony shows that they made no attempt whatever to withdraw during that time. The conceded fact that instead of, at least, remaining where they were, or, better still, going towards their own home, they followed Cicero, can be interpreted in but one way, and that is a desire, or at least a willingness, to renew or continue the conflict. They were in no immediate danger, and neither of them had been harmed. Upon the undisputed facts there was no error in refusing to give said instruction; and whatever possible claim the appellants could make as to an attempt or desire upon their part to discontinue or withdraw from the affray must be based upon what subsequently occurred, and that will be considered with the instructions given by the court upon the subject of an attempt to withdraw. The testimony shows that Cicero went into his house, obtained a rifle, and started back; that his wife and others present in the house undertook to dissuade him; but that they were unable to prevent him from going out. It appears that at this time Cicero's face and head were badly bruised and swollen, one eye being swelled shut, and that his face was bloody. The appellants had followed him up to within a short distance of his house, and secreted themselves behind a stump and a log. There is a conflict in the testimony here also with reference to the time that they so secreted themselves,—as to whether it was before Cicero reappeared upon the scene, or whether it was when they saw him returning with the gun. It is unnecessary to set it forth in detail, nor is it necessary to set forth the remainder of the testimony as to what occurred, but the substance of it will be given and the claimed facts by the appellants stated to present the questions raised by them thereon. There is a conflict as to whether James McCann opened fire on Cicero with the revolver when he first reappeared, or whether he fired it in the air, as they testified, to induce him to go back. The testimony shows that they, or one of them, shouted to Cicero at that time, "Go back, Cicero! Go back!" Cicero fired, at least, one shot from the rifle, which took effect in James McCann's left arm, making a flesh wound. There is testimony to show that he fired more than once. The testimony shows that James McCann ran up, and grappled with him; appellants claim, to prevent him from doing them further injury. In the struggle which ensued, they fell to the ground, Cicero on top, and the rifle on the ground near them. It is uncertain whether or not James McCann had dropped the revolver. John McCann ran up to them, and either picked up the revolver from the ground, or took it from his brother's hand. He admits seizing hold of Cicero, and lifting him partly up, and throwing him aside. He claims that he did not know how the re-

volver was discharged; that he heard the report, but thought it was the rifle that was discharged. But the other testimony shows that he deliberately placed the muzzle of the revolver against Cicero's head, and fired it, and then shoved him aside. Cicero died immediately.

There had been no attempt on the part of the McCanns to get away, but, of course, there may have been a desire upon their part to discontinue or withdraw from further conflict when Cicero appeared with the gun. Upon this subject the court instructed the jury that "if you believe from the evidence that the defendants, acting conjointly, sought a difficulty with the deceased for the purpose of killing him, and without attempting to withdraw from said difficulty, but purposely, and of their deliberate and premeditated malice, with a deadly weapon, took the life of Joseph Cicero, it is murder in the first degree." "The defendants cannot avail themselves of necessary self-defense if the necessity of that defense was brought on by the deliberate and unlawful acts of said defendants, and they made no effort to withdraw from the combat." This covered the law of the case, and, in the absence of a request for a more specific one applicable to the facts, was sufficient, and there was no error in the premises. The time from the commencement of the attack to the killing of Cicero was short,—a matter of some minutes only; and the claim upon the part of the state was that it was all one continuous affray.

The next matter urged as error was the refusal of the court to give certain instructions requested on the subject of a conspiracy on the part of all three of the defendants. By these instructions the court was asked to charge the jury that there was no evidence of such a conspiracy, and no evidence of guilt as to Michael McCann. These matters have been practically disposed of in considering the motion for the discharge of said defendant, and, as we are of the opinion that there was evidence of a conspiracy and of his guilt, the instructions were properly refused. The court instructed the jury on that subject as follows: "If a conspiracy, having violence and murder as its object, is fully proved, then the acts and declarations of each in furtherance of the conspiracy are the acts and declarations of each of the conspirators." "If the jury believe from the evidence that the state has proved a conspiracy between all the defendants to take the life of the deceased, and that they did so take the life of the deceased, then you are charged that, in considering the guilt or innocence of the defendants, you may take into consideration every act and declaration of each member of the conspiracy in pursuance of the original concerted plan, and with reference to the common object which has been given in evidence before you. You are instructed, as a matter of law, that the evidence and proof of conspiracy will, in general, be circumstantial; and, although common design is the essence of the conspiracy, it is not

necessary to prove that the defendants came together, and actually agreed in terms to have that design, and precede it by common consent." It is conceded that these were correct as abstract propositions of law, but contended that they were erroneous as applied to the facts of this case, and especially when considered with certain requests submitted by the defendants, wherein they asked the court to instruct the jury that they could not take into consideration, as against John McCann or James McCann, any threats witness Frank Sale testified were made by Michael McCann, and, by separate instructions, asked the same as to the testimony of each of the other witnesses relating to such threats. It is argued that none of them were made during the pendency of the conspiracy, and in furtherance of the design, conceding that there was evidence of a conspiracy at all upon the part of all three of the defendants; that they were statements made in casual conversations, and not shown to have been communicated to the other defendants. But the proof of the conspiracy was, as is usually the case, circumstantial. It cannot be said just when it was entered into. It culminated in the attack upon Cicero. The most damaging statements were those made just before the attack, which were testified to by Frank and Sarah Sale and Botsford, on account of the nearness of the time. We think these were clearly competent, and while, of course, no witness testified directly that they had been communicated to the boys, because, as is likely, no one would have known of such communication but the defendants, the acts of the parties were in evidence before the jury, and strongly indicated a mutual design and understanding. The threats made at a previous time could add nothing to the force of these made at the time, for it was certainly of small consequence whether the threats or the same statements, in substance, were made by Michael McCann four times, instead of three. They were introduced in evidence for the purpose of convicting Michael McCann, who was not present when Cicero was killed; and it is further argued that, as the jury acquitted him, they must have found that there was no conspiracy, and that the court erred in not instructing that they were entitled to no weight as against the boys; but we do not think there was any error in submitting them to the jury, as against all three of the defendants. The court did instruct that they were evidence only in case a conspiracy was proved in the instructions above given. The fact that Michael McCann was acquitted would rather go to show that the jury attached little or no weight to them, if they were not sufficient to hold the party who made them, and to show that they were without injury as far as the appellants were concerned, especially when the attack upon Cicero by them is conceded. With reference to these statements, counsel has cited us to the case of *State v. McGee* (Iowa) 46 N. W. 764, but a reading of that case will show that it is not applicable to the facts of this case.

It is also contended that it was error for the

court to submit to the jury the evidence of a conspiracy without instructing the jury as to what a conspiracy was in legal contemplation. It was certainly partly defined in the instruction given,—that is, a common design, etc.; and we do not find that any more specific instruction was requested by the defendants. Therefore, there was no error in not more fully defining it.

It is further contended that the court erred in instructing the jury on the subject of self-defense, and refusing certain requests submitted by the defendants. The particular one questioned, that was given, was as follows: "To justify the taking of life in self-defense, it must appear from the evidence that the defendant or defendants not only really and in good faith endeavored to decline any further struggle, and to escape from their assailant before the fatal shot was fired, but it must also appear that the circumstances were such as to excite the fears of a reasonable person, viewed from defendant's standpoint, and that the deceased intended to take his or their life, or to inflict great bodily harm, and that the defendants really acted under the influence of these fears, and not in the spirit of revenge." It was given in connection with and just preceding the two instructions hereinbefore first set forth, where the matter of withdrawing is mentioned. It is contended that this instruction incorrectly states the law, for the reason that the jury must have understood from the language used that the appellants were called upon to retreat or flee from Cicero, before they could be justified in taking his life in self-defense; and it is claimed to have been specially injurious, because the defendants made no claim of attempting to retreat or flee. It is contended that the defendants had a right to stand their ground; that they were in the county road, a place where they had a right to be, when Cicero appeared with the gun. The evidence was contradictory as to this, there being some testimony to show that they were upon Cicero's premises; but, be this as it may, the appellants were, of course, entitled to the benefit of that in their favor, when considered with reference to the instructions to be given. In order to render this point available to them, it must be conceded that there was proof to show two separate affrays, and that Cicero was the aggressor in the second affray. This might be straining the testimony somewhat, as the time of the whole of it, from beginning to end, was very short, and the appellants could have had but one purpose after the first affray, in following Cicero. It is not contended by them that they had any particular purpose in going in that direction. They simply assert that they were in the county road, and that they had a legal right to be there. While this may be true ordinarily, yet, after the unprovoked and aggravated assault made by them upon Cicero, their following him towards his house thereafter was entirely unjustifiable. While it is contended that they were not called upon to flee when Cicero appeared with the gun, but had a right

to stand their ground, and resist his attack, it seems as though the necessity for taking his life ended when he was deprived of the gun. Of course, appellants claim especially, by the testimony of John McCann, who shot Cicero, that the shooting was unintentional and accidental. The defendants had the benefit of this testimony before the jury, but the jury evidently did not believe them.

A great many requests to instruct the jury were submitted by the defendants, and they are too numerous and long to be set forth herein. Likewise, the instructions given by the court to the jury were voluminous, and covered every phase of the question; and the discussion so far has been with reference to a few of them questioned by the appellants. While there might be some ground for the contention that the word "escape" might have been interpreted by the jury as requiring the defendants to flee when Cicero appeared with the gun, we think, in the connection in which it was used, it was harmless. Of course, as an abstract proposition of law, if the first affray had entirely ended, and the defendants were where they had a right to be, and were attacked by Cicero with a rifle, they would not be called upon to expose themselves to the risk of being shot down by attempting to run away. It is evident, from their own testimony, that they made no attempt to get away. The most they could claim was a desire to discontinue the affray when Cicero appeared with the gun, and that there was only an attempt on their part to defend themselves thereafter, and prevent him from harming them. The court, as before said, properly instructed the jury upon the subject of withdrawing, etc. The instructions given were not numbered, and the parts of them excepted to were set forth in the exceptions taken. Those parts relating to withdrawing were so excepted to, and also calling upon "the defendants to decline a struggle before they would have a right to assert their self-defense." But we find no such exception to the word "escape," or any part of said instruction last set forth in the exceptions noted; and it is evident that counsel understood them all as meaning substantially the same thing, and not that the defendants were called upon to run away when Cicero came out with the rifle. The instructions requested by the defendants upon the subject of self-defense were not applicable to the facts of this case, where they were themselves the original aggressors, and for that reason they were properly refused by the court, and the others substituted, which were given, were sufficient.

It is next contended that the court erred in refusing to instruct the jury as requested, in substance, that the bare presence of James McCann at the time of the shooting was not sufficient to convict him; that there must have been an intention on his part to kill, etc.—as such request was intended to present the attitude of James McCann, as he did

not fire the shot that killed Cicero. The substance of this instruction was given, although in different language. Ample definitions of what constituted murder in its different degrees were given by the court, and that, in order to convict a person of murder in the first degree, there must have been purpose, malice, and premeditation, etc., with the intention of taking life. The court also gave the usual instructions that the presumptions of law are in favor of the innocence of the defendants, and that the burden was upon the state to prove each and all of the allegations beyond all reasonable doubt; that every person accused of crime is clothed with the presumption of innocence, and if, after a consideration of all the evidence in the case, the jury had "a reasonable doubt as to the guilt of the defendants, or either of them," the verdict should be "not guilty as to such defendant as to whose guilt you have such reasonable doubt."

It is further contended that the court erred in instructing the jury that "it is sufficient if there was a design and determination to kill distinctly formed in the mind at any moment before or at the time the fatal shot is fired." Our attention is called to the case of *State v. Rutten*, 13 Wash. 203, 43 Pac. 30, which case this court has lately had occasion to examine upon this point. *State v. Straub* (decided Dec. 8, 1896) 47 Pac. 227. We will not consider it further in this case, for it is conceded that no exception was taken to it. Even though it stated the law too strongly under our statutes, there is every indication that it was harmless in this instance, considering the testimony and the whole instructions given.

Another error claimed is that the evidence is insufficient to justify a conviction of murder in the first degree. In discussing the previous questions, we have not undertaken to present it as strongly against the defendants as the testimony upon the part of the state might warrant; but enough has been shown, it seems to us, in what has been said, to render a discussion of this point unnecessary. We are of the opinion that the evidence was ample to sustain the conviction.

It is next contended that the motion for a new trial should have been granted, on account of the misconduct of the prosecuting attorney in his closing argument, in making certain statements to the jury. The record with reference to this is as follows: "During the closing argument by Prosecuting Attorney Hastie, to the jury, defendants excepted to the following remarks made by him: 'Defendants did not dare to have good reputation put at issue. They cannot prove good reputation unless put at issue.' 'Now, the mud in that rifle that Cicero had thrown to the ground— There is the mud.' Mr. Lewis: 'I do not like to interrupt you. The boys said they used it as a crutch coming down.' Mr. Hastie: 'It was brought here, and offered in evidence.' The Court: 'Proceed.'" It does

not appear that the court acted upon it in any way, or that he was asked to direct the jury to disregard it. While the remark with reference to reputation, etc., was improper, it was not sufficient to require a reversal. There had been an attempt to prove the good reputation of one of the appellants only.

Appellants further complain because the court held night sessions during the pendency of the trial; but this was a matter which was within the discretion of the court. Appellants were defended by several able lawyers, and there is nothing to indicate that they were unduly hastened, and did not have ample time to protect the appellants' interests during the trial.

After an examination of the long record sent up in this case, and of the voluminous brief filed by the appellants, we are of the opinion that there is not a single question of law urged that would entitle them to a reversal, and that there is nothing in the facts that would warrant an appellate court in interfering with the verdict. The judgment is affirmed.

HOYT, C. J., and DUNBAR and GORDON, JJ., concur.

(23 Nev. 356)

STATE ex rel. HARDIN v. SADLER,  
Governor. (No. 1,488.)

(Supreme Court of Nevada. Jan. 16, 1897.)  
DEATH OF GOVERNOR—VACANCY IN OFFICE OF  
LIEUTENANT GOVERNOR.

Under Const. art. 5, § 18, providing that, in case of vacancy in the office of governor, the powers and duties shall devolve on the lieutenant governor; and section 17, providing that if, during a vacancy in the office of governor, the lieutenant governor die or become incapable of performing the duties of the office, the president pro tempore of the senate shall act as governor until the vacancy is filled,—vacancy in the office of governor creates no vacancy in the office of lieutenant governor.

Application by C. H. E. Hardin for mandamus to Reinhold Sadler, governor of the state of Nevada. Writ dismissed.

James F. Dennis, for relator. J. R. Judge, Atty. Gen., for respondent.

BELKNAP, C. J. This is an application for a writ of mandamus requiring respondent to commission relator as lieutenant governor of the state. The petition, among other things, alleges that the Honorable John E. Jones, the duly-elected governor of the state, died upon the 10th day of April, 1896; that thereupon the powers and duties of the office of governor devolved upon respondent, the lieutenant governor, who is now the acting governor of the state; that at the last general election relator was the candidate of the Silver party and of the Democratic party for the office of lieutenant governor, and received the highest number of votes cast for any candidate for that office, and was elected. A demand upon and refusal by respondent

to issue a certificate of election are alleged, and this court is asked to issue a writ of mandamus requiring him to do so. The attorney general has demurred to the petition, upon the ground that it does not state facts sufficient to entitle relator to the relief prayed for.

The provisions of the constitution bearing upon the subject are as follows (article 5):

"Sec. 17. A lieutenant governor shall be elected at the same time and places, and in the same manner, as the governor, and his term of office and eligibility shall also be the same. He shall be president of the senate, but shall have only a casting vote therein. If during a vacancy in the office of governor, the lieutenant governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of the office, or be absent from the state, the president pro tempore of the senate shall act as governor until the vacancy be filled or the disability cease.

"Sec. 18. In case of the impeachment of the governor, or his removal from office, death, inability to discharge the duties of the said office, resignation, or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term, or until the disability shall cease."

The gubernatorial succession is covered by the foregoing provisions. If a vacancy occurs in the office of governor, the powers and duties of the office devolve upon the lieutenant governor, but there is no vacancy created thereby in the office of lieutenant governor. The officer remains lieutenant governor, but invested with the powers and duties of governor. Again, if, during a vacancy in the office of governor, the lieutenant governor becomes incapable of discharging the duties of the office of governor from any of the causes enumerated in the constitution,—in other words, if a vacancy exists in both the office of governor and lieutenant governor,—the president pro tempore of the senate acts as governor until the vacancy be filled or the disability cease. *People v. Budd* (Cal.) 45 Pac. 1060. There being no vacancy in the office of lieutenant governor, the demurrer must be sustained, and the writ dismissed. It is so ordered.

BONNIFIELD and MASSEY, JJ., concur.

(115. Cal. 53)

FAIRBANKS et al. v. SAN FRANCISCO &  
N. P. RY. CO. (S. F. 427.)

(Supreme Court of California. Jan. 15, 1897.)  
BUILDING—NEGLIGENT DESTRUCTION—JOINDER OF  
CAUSES OF ACTION—EXTENT OF RECOVERY  
—ADVERSE POSSESSION—TITLE.

1. A joint action may be sustained by the owner of a building and an insurance company who has paid a loss thereon against defendant for having negligently set fire to the building, though the joint plaintiffs sue to recover, not

only the value of the building in excess of the policy, but damages to the owner's business, proximately caused by defendant's negligence.

2. For the purposes of adverse possession there may be a cleavage of corporeal real estate horizontally; and where a building was a part of the land, and, with claim of title, its occupant and his predecessor have held undisturbed possession thereof and paid taxes thereon for the statutory period required to bar an action for the recovery of real property, the occupant's title in the building is established, though another may yet have title in the supporting land.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Fred E. Fairbanks and another against the San Francisco & North Pacific Railway Company. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

Sidney V. Smith, for appellant. Vogelsang & Brown, for respondents.

BRITT, C. Fairbanks and the National Fire Insurance Company joined in this action to recover damages for the destruction of a certain building by fire resulting from defendant's negligence. It was alleged in the complaint that the building was the property of Fairbanks, of the value of \$1,835, and insured by the insurance company for \$900, which latter sum said company paid to Fairbanks before the commencement of the action; also, that Fairbanks' business carried on in the building was interrupted by its destruction, to his loss of profit stated at \$300. Plaintiffs prayed damages in the sum of \$2,135. A demurrer to the complaint for misjoinder of plaintiffs and of causes of action was overruled, and defendant answered, denying, among other things, that Fairbanks owned the building. It appeared in evidence that one Fulton formerly owned a tract of land which included said structure. December 10, 1872, he conveyed the land to defendant by deed containing a reservation of the "right to maintain" the building, with the privilege of ingress and egress to and from the same over the lands conveyed. In the year 1884, whatever transferable interest was thus saved to Fulton became vested by proper deeds of conveyance in one Estinghausen, and on June 5, 1890, the latter executed a deed of the land containing the building to Fairbanks. Estinghausen, and after him Fairbanks, until the time of the fire, had possession of the building adversely to defendant, and paid all taxes thereon. They successively claimed to own both the building and the land on which it stood, but, after 1883, neither of them paid taxes on the land itself. It was not assessed to them, nor shown to have been assessed at all. Plaintiffs had a verdict and judgment for \$2,000.

Defendant claims that the joinder of plaintiffs was rendered improper by the allega-

tions of injury to Fairbanks' business, a source of damage in which the insurance company had no interest. But the same objection would apply to the value of the building above the amount of the insurance policy; and that this may be recovered in a joint action such as the present is conceded by defendant, and is established by authority upon sound considerations of justice and expediency. *Swarthout v. Railway Co.*, 49 Wis. 625, 6 N. W. 314; *Crandall v. Transportation Co.*, 16 Fed. 75; *Home Mut. Ins. Co. v. Oregon Ry. & Nav. Co.*, 20 Or. 569, 26 Pac. 857. The negligence which gave rise to the action was the single cause of the whole injury, and, unless all the damage of either plaintiff is recoverable in the joint action, defendant must be twice vexed for the same delict; and it seems to us that to allow as damages to the joint plaintiffs the value of the building in excess of the policy, and deny the recovery in the same action of other damages to the insured proximately caused by defendant's negligence, would be to create a useless distinction and balk at an imaginary difficulty. See *Code Civ. Proc.* § 378; *Bliss*, *Code Pl.* § 73; *People v. Morrill*, 26 Cal. 360.

Counsel have discussed with much learning and ingenuity the effect of the saving clause in the deed of Fulton to defendant,—whether it operated to reserve a mere unassignable easement in gross, as argued with considerable force by defendant, or an exception of a profit a prendre at least in favor of the grantor, as plaintiffs contend. We think the proper construction of the deed unnecessary to be now determined. For the purposes of adverse possession and the invocation of the statute of limitations, there may be cleavage of corporeal real estate horizontally as well as vertically. This appears from the cases relating to mineral strata and tunnels. *Caldwell v. Copeland*, 37 Pa. St. 427; *Lillibridge v. Coal Co.*, 143 Pa. St. 293, 299, 22 Atl. 1035; *Powell v. Lantz*, 173 Pa. St. 543, 34 Atl. 450; *Bevan v. Cement Co.*, 3 Reports, 47. Here the building was part of the land. With claim of title Fairbanks and his predecessor held undisturbed possession thereof and paid taxes thereon for the statutory period required to bar an action for the recovery of real property. Under the view, obtaining in this state, that the statute, when it has run, has the effect to extinguish the right as well as bar the remedy of the former owner of land, nothing further was necessary to the establishment of Fairbanks' title in the structure, although defendant may yet have title in the supporting land. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.



(115 Cal. 561)

**CUNNINGHAM v. LOS ANGELES RY. CO.**  
(L. A. 181.)

(Supreme Court of California. Jan. 14, 1897.)

**STREET-RAILROAD COMPANY—INJURY TO CHILD ON TRACK—ORDINARY CARE—INSTRUCTIONS—COMPLAINT—GENERAL TERMS SUFFICIENT.**

1. On a trial for personal injuries, where the issue was whether defendant street-railroad company was exercising ordinary care, which was all it owed to plaintiff, the issue was to be determined from a consideration of what actually occurred at the time of the accident, and it was error to instruct the jury that they might take into consideration the fact that the motorman "had only been at work about twelve days, according to his own testimony, and was a new hand on the road."

2. The instruction would have been correct had defendant been bound to exercise the highest care.

3. On a trial for personal injuries, it was error to charge that defendant street-railroad company was bound to provide "proper cars and appliances, and to provide safe, skillful, watchful, and competent agents or servants to manage the same," without the qualification that so far as its obligation to plaintiff was concerned, who was injured while on the track, it was bound to exercise only ordinary care in the selection of such servants.

4. What precautions, under given circumstances, constitute the ordinary care of parents for their young children, is a question of fact for the jury, and should not be determined by the court as a question of law.

5. On a trial for personal injuries to a young child, where contributory negligence of its parents appears, the question whether defendant, notwithstanding such negligence, could have avoided the injury, is for the jury, when fairly involved in the evidence.

6. In an action for personal injuries, the complaint is good against a demurrer, though defendant's negligence be alleged in general terms only.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by David Cunningham, a minor, etc., against the Los Angeles Railroad Company, for personal injuries. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Bicknell & Trask and John D. Pope, for appellant. Murphy & Gottschalk, for respondent.

**VAN FLEET, J.** Plaintiff, an infant of 18 months, escaped from the premises of its parents into the public street, and went upon the track of defendant's electric railway, running thereon, and was knocked down and injured by one of its cars. He brought this action to recover damages for the injury, alleging negligence by defendant in running over him. From a judgment in his favor, and an order denying defendant's motion for a new trial, the latter appeals.

The jury were instructed that, in determining whether the defendant was negligent in not stopping its car so as to avoid the injury, they had the right to take into consideration the fact that the motorman "had only been at work about twelve days, ac-

cording to his own testimony, and was a new hand on the road." There was no direct issue upon the question whether the defendant had been guilty of employing incompetent servants, the question being whether the plaintiff was injured through the actual negligence of defendant's servants on the occasion in question; but the fact adverted to in the instruction had incidentally appeared in the cross-examination of the motorman, when examined as a witness for defendant. It is objected that the instruction was erroneous, as submitting to the jury an element which could have no competent bearing upon the question whether defendant was guilty of the degree of negligence with which it was chargeable, under the circumstances of the case; and this objection must, we think, be sustained. Defendant was responsible to plaintiff for a want of ordinary care only, and whether it was in the exercise of such care was to be determined from a consideration of what actually occurred at the time of the alleged negligent act, regardless of any fact affecting the general character of the servant for skill or proficiency in the discharge of his duty. The question was, did the servant exercise ordinary care to avoid the injury? If he did, the plaintiff could not recover, no matter how wanting the servant may have been in general competency; while, if he did not exercise such care, plaintiff was entitled to recover, even if the servant possessed the utmost degree of efficiency and skill in the performance of his duty. The sole question therefore was, what was the conduct of the servant at the time? and this was to be unembarrassed by any consideration of his general qualifications. The latter consideration is proper where the defendant is required to exercise the highest or utmost degree of care, and is held responsible for slight negligence. *Boyce v. Stage Co.*, 25 Cal. 468; *Flicker v. Jones*, 28 Cal. 618. In such a case the inquiry becomes pertinent, but not here. *Deer. Neg.* § 407; 2 *Thomp. Neg.* 408; *Jacobs v. Duke*, 1 E. D. Smith, 271; *Chase v. Railroad Co.*, 77 Me. 62. These principles have been expressly approved and followed by this court. *Towle v. Improvement Co.*, 98 Cal. 342, 33 Pac. 207, and see the large number of citations there made.

The court also charged the jury that it was the duty of a person or company operating such a road upon the streets of a city to provide "proper cars and appliances, and to provide safe, skillful, watchful, and competent agents or servants to manage the same." This is complained of, as requiring more than ordinary care at the hands of defendant; that to require it to provide safe servants is, in effect, to make it an insurer of their character for fitness; while, as to plaintiff, it is not such. It is undoubtedly the duty of one engaged in the business of defendant to provide the character of servants defined in the instruction, and none



other; but, in performing that duty, the defendant, so far as its obligation to the plaintiff is concerned, was only called upon to exercise ordinary care; and the jury should have been so informed. The instruction was deficient in this qualification. Nor do we think the instruction given on behalf of defendant, as to the degree of care required of its servants, the equivalent of such qualification. We think the court should have refrained from charging that the law does not require parents to keep an attendant with their young children; and that they are not required to shut them up. While, abstractly speaking, these things are perfectly true, the question of whether such precautions are necessary, under any given circumstances, to constitute ordinary care for the safety of their children, with which parents are charged, is one of fact for the jury, and not for the court to determine as matter of law. It is not unlikely that this instruction may have had a material bearing, to the prejudice of defendant, upon the determination by the jury of the question of contributory negligence of the parents which the answer raised. We find no further material departure from a proper submission of the case in the instructions.

The criticism that, by the instruction that it was the duty of the motorman to use "proper caution" in the conduct of his motor, the jury were authorized to hold him to a higher degree of care than required, is not tenable. The language was qualified and limited by the further charge that the degree of care or caution required to be exercised was only ordinary care.

A careful review of the evidence satisfies us that the contention that there was not sufficient evidence to convict the defendant of any negligence cannot be sustained. We regard the evidence on the question as to whether the car could, by the exercise of ordinary care, have been stopped in time to avoid contact with the plaintiff, as substantially conflicting.

Upon the question of contributory negligence by plaintiff's parents, assuming that such negligence clearly appears, nevertheless the question whether, notwithstanding such negligence, the defendant could have avoided the injury, was fairly involved in the evidence, and the case in that regard was a proper one for the jury.

The demurrer to the complaint was properly overruled. While the negligence was averred in general terms, such mode of presenting the facts is sufficient in this character of action, where, as a general thing, the more specific facts are more largely within the knowledge of the defendant than that of the plaintiff; and the complaint cannot, therefore, be held open to the objection of uncertainty. *House v. Meyer*, 100 Cal. 592, 35 Pac. 308; *Davies v. Steamship Co.*, 89 Cal. 280, 26 Pac. 827; *Bliss*, Code Pl. § 211; *Doe v. Sanger*, 78 Cal. 150, 20 Pac. 366.

For the errors above pointed out, the judgment and order must be reversed, and a new trial granted. It is so ordered.

We concur: HARRISON, J.; TEMPLE, J.

(115 Cal. 555)

SYMONS et al. v. CITY AND COUNTY OF SAN FRANCISCO. (No. 15,968.)

(Supreme Court of California. Jan. 8, 1897.)

MUNICIPAL CORPORATION — VACATION OF STREETS — PARTIES IN INTEREST.

The only persons who can complain of the vacation of a street in whole or in part are the owners and occupants of lands adjoining, or through which runs, that part of the street which it is proposed to vacate.

In bank. Appeal from superior court, city and county of San Francisco; James M. Troutt, Judge.

For opinion in department, see 42 Pac. 913. Affirmed.

HENSHAW, J. Upon consideration in bank the opinion heretofore rendered in department is adhered to and adopted. A taxpayer is permitted to maintain an action to restrain the improper diversion or use of the public funds, or to compel an official to do some act whose omission would increase his burden as a taxpayer. In both cases the ultimate object is the same,—to escape the imposition of an increased taxation, which, except for his right of action, would be by direction or indirection illegally thrust upon him. No such consideration is here presented. It is not made to appear that any additional burden or expense is to be imposed upon plaintiffs as taxpayers, or that any expense at all attends the proposed vacation. While plaintiffs show that they are property owners, they show, also, that they are not owners of property abutting upon the streets proposed to be closed. Owners of abutting property have a special easement, which is property, upon the fronting street. *Eachus v. Railway Co.*, 103 Cal. 614, 37 Pac. 750; *Bigelow v. Ballerino*, 111 Cal. 559, 44 Pac. 307. But it is well settled that owners of other realty have no such property in a street as entitles them to damages for its vacation. Whatever detriment or inconvenience they may suffer by the closing of the street they bear in common with the community at large, for the public convenience and welfare, as decreed by the proper legislative authorities in ordering the vacation. *Coster v. Mayor*, etc., 43 N. Y. 414; *Insurance Co. v. Stevens*, 101 N. Y. 411, 5 N. E. 353; *Smith v. City of Boston*, 7 Cush. 254; *Castle v. County of Berkshire*, 11 Gray, 26; *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. 395; *Heller v. Railroad Co.*, 28 Kan. 625; *Kimball v. Homan*, 74 Mich. 690, 42 N. W. 167. In *Heller v. Railroad Co.*, supra, the court refused, at the instance of an owner of nonabutting property to enjoin proceedings looking to the vacation of a street, holding that there was no such special interest

or property in plaintiff as would entitle her to maintain the proceeding. In *Kimball v. Homan*, supra, the precise question here presented was considered and determined. The proceeding was in certiorari, and it was declared that the only persons who can seek a review of proceedings to discontinue a highway in whole or in part are the owners and occupants of land through or adjoining which it is proposed to discontinue the road, which adjacency is confined to the part discontinued. If, as plaintiffs contend, the proceedings of the supervisors looking to the vacation of the streets are void, there is no occasion for the interposition of equity (*Oakland v. Carpentier*, 21 Cal. 642, 666); for plaintiffs would have adequate remedies at law for any illegal and improper obstructions of the streets. The judgment is affirmed.

We concur: McFARLAND, J.; VAN FLEET, J.; TEMPLE, J.; HARRISON, J.

(115 Cal. 496)

SENIOR et al. v. ANDERSON et al. (L. A. 119.)

(Supreme Court of California. Dec. 31, 1896.)

WATERS—APPROPRIATION—BENEFICIAL USE—EVIDENCE—REASONABLE TIME FOR APPLICATION—ADVERSE POSSESSION—RUNNING OF LIMITATIONS—SPECIFIC PERFORMANCE—PARTIES.

1. The quantity of water appropriated, as well as the validity of the appropriation itself, must be determined by the purpose of the diversion and the use of the water diverted, and not by the mere fact of diversion.

2. On the issue of the acreage which had been irrigated from a ditch, and the quantity of water that could have been beneficially used for that purpose, there was evidence that, at no time since the appropriation of the water, had there been more land in cultivation than there was at the time of the trial; that there were 39 acres in trees; that the total quantity in cultivation was between 40 and 50 acres; that the proprietor had "intended to hold the water and keep it, and irrigated the hills for that purpose"; and that it would take 40 inches of water, used all the time, to irrigate the place properly. There was no evidence that any other portions of the proprietor's land were capable of irrigation, or that more than 40 inches would ever be required for the proper cultivation of all the irrigable land. The proprietor had diverted 78.77 inches, and it was conceded that the water was then being used to irrigate about 200 acres of land besides the proprietor's. *Held*, that a finding that the proprietor had appropriated all of the 78.77 inches by using it for a beneficial purpose was not justified by the evidence. McFarland, J., dissenting.

3. A proprietor of a water right is entitled to so much water as he can put to a useful purpose on his lands within a reasonable time by the use of reasonable diligence; and, after 10 years from the date of the diversion, it will be presumed that he has brought under cultivation all the land intended by him for cultivation by the use of water.

4. Where there are two appropriations of water, and the first proprietor seeks to enlarge his appropriation by adverse possession as against the second proprietor, the mere construction of ditches, or the laying of pipes by him for the purpose of using the water on other lands outside his own, do not constitute notice, since he has the right to conduct there at least his origi-

nal appropriation, but the adverse possession begins only with the actual use of the water.

5. A finding that plaintiffs are not entitled to the specific performance of an oral contract on the ground of part performance will not be disturbed, where the evidence is conflicting and it does not clearly appear that the acts relied on as part performance are attributable to the contract sought to be enforced.

6. In an action to quiet plaintiffs' title to certain waters of a stream, where defendants claim from the same source, and the water used by them is diverted by the same ditch, and their claims of right affect plaintiffs' right, they are properly joined as parties defendant, even if their claims are asserted as individuals.

Commissioners' decision. In bank. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by Edwin Senior and others against J. C. Anderson and others to quiet title to a water right. From a judgment in favor of defendants, and an order denying a new trial, plaintiffs appeal. Reversed.

H. L. Poplin, for appellants. J. B. Chapman, for respondents.

HAYNES, C. Action to quiet title to a water right. The defendants had judgment, and the plaintiffs appeal therefrom, and also from an order denying a new trial.

In 1883 J. D. Hines settled upon 160 acres of public land through which a small mountain stream known as "San Antonio Creek" flowed, and constructed a dam and ditch by which he diverted from said stream about 79 inches of water, and discharged the same upon said land. No notice of said appropriation is shown to have been made, and its purpose and the quantity of water appropriated can only be determined from its subsequent use. That a valid appropriation may be so made, see *Wells v. Mantes*, 99 Cal. 583, 34 Pac. 324. The defendants claim under said appropriation. Edwin Senior, one of the plaintiffs, in 1886 settled upon 160 acres of public land below the Hines place, through which said stream also ran, and on October 29, 1887, posted a notice claiming to appropriate 50 inches of the water of said stream, measured under a 4-inch pressure, and constructed a ditch to convey the same for use upon his said land. J. D. Hines died in December, 1886, and Alice Hines obtained a patent for the land occupied by J. D. Hines in his lifetime October 25, 1889, and Senior obtained a patent to his land October 30, 1890. The other plaintiffs are vendees of portions of Senior's land and water right. The Hines ranch, above mentioned, was conveyed by Alice Hines to E. S. and W. L. Hall, August 21, 1888, together with the water right appurtenant thereto, and on June 15, 1889, the Halls conveyed said water right—but not the land—to the Ojai Valley Water Company, a corporation. The persons named as defendants are the members of an unincorporated association, or partnership, composed of the stockholders of said corporation, to which association said corporation conveyed its water

right May 5, 1894. The agreement by which the association was formed divides the interest acquired into 1,000 shares, being the same number of shares issued by the corporation, and the said agreement fixed the number of shares to which each member of the association was entitled. The corporation was thereupon dissolved.

The principal question is as to the sufficiency of the evidence to justify the sixteenth finding, which is as follows: "That J. D. Hines settled upon certain lands riparian to the said San Antonio creek, and above the lands of the plaintiffs in this action, in 1883, and all the water flowing in the said San Antonio creek to and upon the lands of the said J. D. Hines, in the said year 1883 and ever since, in the ordinary stages of the water, was necessary for uses upon the said land so occupied by the said J. D. Hines for agricultural and domestic uses, and all of said water flowing in the said stream in ordinary stages, and to the amount of 78.77 inches, was diverted from the said stream by the said J. D. Hines and used upon the said lands until the death of the said J. D. Hines, and ever since." Whatever water rights were acquired by Hines were acquired by appropriation. Senior's appropriation having been made prior to the acquisition of title by Alice Hines, no riparian rights attached to Hines' lands which could affect Senior's appropriation. Her patent was expressly made "subject to all accrued water rights"; and as the two appropriations above mentioned, whatever may be their respective quantities, equal or exceed the entire flow of the stream during the irrigating season, the question of riparian rights does not arise in this controversy.

The evidence is quite clear that the capacity of the Hines ditch was practically the same in 1883 that it is now, and that during all the time since 1883 the water ran through it to its full capacity when there was sufficient water in the stream to fill it, and, when there was less, that it was all diverted, except so much—a small quantity—as seeped through the dam by which the water was turned into the ditch. But that is by no means conclusive of the quantity of water appropriated, nor is it, without showing a useful purpose to which the water, or some of it, was applied, evidence of any appropriation. The purpose of the diversion and the use of the water diverted are the general tests of a valid appropriation, as well as of the quantity appropriated. None of the water diverted by the Hines ditch was used upon any other than the Hines land until after the conveyance of the water right by the Halls to the corporation, which was nearly two years after the appropriation by Senior. The extent of the Hines appropriation is therefore not enlarged by the subsequent use of the water by the corporation upon other lands, but must be determined by the use upon the lands for which the water was ap-

propriated. The quantity of land cultivated and irrigated by Hines and his successors until the time of the trial is uncertain, but that no greater quantity of land was cultivated upon the Hines ranch at any time than was under cultivation at the time of the trial is clear, while the preponderance of the testimony is that it was formerly much less.

As to the quantity of land being irrigated upon the Hines ranch at the time of the trial, one of the defendants, W. L. Hall, who is in charge of that property, testified that, at that time, there were "39 acres in trees, no alfalfa," and that "there are about 200 acres being irrigated from the same stream now outside of the old Hines ranch." No witness put the quantity of land that is or has been irrigated upon the Hines ranch at more than 40 to 50 acres. E. S. Hall, also a defendant, testified as follows: "I am son-in-law of Judge Hines, and took charge of the place after his death until August, 1888. When I took charge of it in 1887 the flumes and ditches were practically what they are now. The ditch extended down past the house, and the water, after running off the Hines land, went down a little stream or ravine, but did not reach Senior's land again, but would reach the creek again about three miles below, if it did not sink into the sand or earth. The ditch and flume was kept in use continuously as it was possible. Judge Hines intended to hold the water and keep it, and he irrigated the hills for that purpose. He got domestic water from another stream. I do not know how much was irrigated in 1887. In the summer months all the water was turned into our flume, and only seepage would go down to Mr. Senior's flume." A little later this witness repeated the foregoing statement in almost the same words, including the statement that Hines "irrigated the hillsides for the purpose of holding the water." Miguel Errero testified that he commenced to work for Judge Hines in 1883, and helped to construct the ditch and flume; that the land was cultivated "for alfalfa, for orange and lemon trees, and for barley." "It [the water] was taken north of the house, but afterwards ran down the creek right by the house. \* \* \* When I said, in 1883, when the water ran through this ditch and flume, it passed again into the stream, I mean the little creek where the house is. The water may return to San Antonio creek, but it would be way down." George Stewart testified that it was hard to estimate how much Judge Hines had under cultivation. It was in patches; that he used to irrigate a great deal of it for pasturage; that he judged there were about 50 acres irrigated by Judge Hines, altogether, in 1885-86. E. S. Hall, the present occupant of the Hines ranch, testified that it would take 40 inches used all the time to irrigate the place properly; that "this year" he had 25 inches, and would have been glad to have had more.

There was no evidence tending to show that any portion of the Hines ranch other than that now irrigated is capable of irrigation, or that any larger quantity of water than that mentioned by E. S. Hall is or ever would be required for the cultivation of all the irrigable land on that ranch. This fact, together with the further conceded fact that the water diverted by the Hines ditch is now used to irrigate from 180 to 200 acres of land outside of the Hines ranch, gives great force to the testimony of E. S. Hall, whose relation to Judge Hines gave him ample opportunity to know the facts, that he irrigated the hillsides for the purpose of holding the water, and that water was permitted to flow off in the little stream or ravine which connected with San Antonio creek some three miles below. This evidence clearly shows that the quantity of water claimed by defendants under the Hines appropriation largely exceeds the quantity put to any useful purpose on the Hines ranch, and therefore exceeds the quantity actually appropriated. While the quantity of water appropriated for use upon the Hines land is the measure of the quantity appropriated by Hines, we do not hold that the water so appropriated may not be used upon other lands; but the fact that other lands may be, or are, irrigated from the Hines ditch, does not affect the quantity of water appropriated. In *Atchison v. Peterson*, 20 Wall. 514, Justice Field, delivering the opinion, said: "The right to water by prior appropriation is limited in every case in quantity and quality by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right. That is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste, and prevent others from using it for mining or other legitimate purposes." See, also, the California cases there cited, and *Simmons v. Winters*, 21 Or., 35, 27 Pac. 7; *Barnes v. Sabron*, 10 Nev. 243; *Hindman v. Rizor*, 21 Or. 112, 27 Pac. 13.

We do not hold that the Hines appropriation is limited by the quantity of water he could put to a useful purpose upon his land the first or second year, but to such quantity as he could put to a useful purpose upon his land within a reasonable time by the use of reasonable diligence. "To entitle the defendant, however, to the benefit of such an appropriation, he should within a reasonable time apply the water to such beneficial use. As fast as he could reasonably put his homestead into cultivation, he is entitled to divert and use the water for that purpose. The rule established in *Simmons v. Winters*, supra, is just and reasonable; but it is not intended that, because a prior appropriator is entitled to a given quantity of water necessary to irrigate the lands he intends to

cultivate, he can suspend his improvements an unreasonable time, and then, by adding to the area of his cultivated land, be restored to his original intentional diversion, when subsequent appropriators have acquired rights upon the stream. The fact that he for an unreasonable time delays additional cultivation should be construed into an abandonment of his original claim to divert a sufficient quantity to irrigate his whole tract, and his appropriation, after such unreasonable delay, should be confined to such necessary use as applied to the lands he had cultivated within a reasonable time." *Cole v. Logan*, 24 Or. 304, 33 Pac. 568. See, also, *Simmons v. Winters*, supra, and *Barnes v. Sabron*, supra. We think that the time elapsing after 1883 was ample to bring under cultivation all the land upon the Hines place intended for cultivation by the use of water, and the voluntary disposition by the present owner of the Hines land of so much of the water as is not now used thereon, for use upon the land of others, justifies the conclusion, upon the evidence before us, that the appropriation made by Hines should be restricted, as against the plaintiffs, to the quantity of water now reasonably necessary for the irrigation of the Hines land under cultivation when this action was commenced. We therefore conclude that said finding is not justified by the evidence, though it is immaterial to the plaintiffs where said quantity of water is used, and that the use of the water upon other lands is therefore a false quantity in the problem as to the quantity appropriated by Hines, and whether that quantity has been increased must depend upon the question whether the right to a larger quantity has been acquired by an adverse use for the period of five years, the defense of the statute of limitations having been pleaded by the defendants.

The diversion through the Hines ditch of water not necessary for a useful purpose for any length of time would not give a right as against the plaintiffs, and therefore the application of the water to a beneficial purpose upon other lands by the defendants, or their predecessor in interest, the Ojai Valley Water Company, must mark the beginning of the adverse use. These other lands never belonged to Hines, or to any owner of the Hines land, and the evidence is without conflict that no water was used except upon the Hines ranch until after the conveyance of the water right by the Halls to said corporation. That conveyance was made June 15, 1889, and the complaint in this action was filed August 4, 1894. At what date the use of the water by the corporation upon the outside lands was commenced nowhere appears. Unless an adverse use commenced on or before August 4, 1889, no right was acquired by adverse user. It may be proper to add, in view of another trial, that the mere construction of ditches or the laying of pipes for the purpose of using the water

upon other lands outside of the Hines ranch did not constitute such adverse user as would set the statute in motion, since no right could be acquired adversely to Senior otherwise than by the actual use of the water. Besides, whatever right to the water Hines or his successors in interest in the Hines ranch acquired—and as we have seen some right was acquired—was conveyed by the Halls to the corporation. There was, therefore, some water which the corporation had the right to conduct to said outside lands, and the construction of ditches, therefore, could not be notice to Senior of any adverse claim to the water; for, in the absence of the statutory notice, an appropriation of water can only be made by its actual diversion and use. The Halls, in their conveyance to the corporation, reserved all riparian rights attaching to their lands, but did not reserve any right to the water acquired under the Hines appropriation; and all the right they have since had to water upon the Hines ranch was acquired by them as stockholders in the corporation, or as shareholders in the association known as the San Antonio Water Company. Indeed, at the time of their conveyance of the water right to the corporation, no riparian rights existed, the title to said lands being still in the United States; and no subsequent riparian rights could exist affecting either the Hines or the Senior appropriation, such prior accrued rights being expressly reserved in the patents.

Plaintiffs further alleged in their complaint that a certain compromise agreement was made between them and the said corporation, by which Senior was to convey to the corporation whatever rights he had as an appropriator and riparian proprietor, and turn into the flume of the corporation all the water coming into his ditch; the corporation, on its part, to turn out to Senior and his grantees one-tenth of all the water in their flume, or which might thereafter, by development or otherwise, be caused to flow therein, and would also secure to plaintiffs the right of way for pipes or ditches to convey said water to plaintiffs' land across the intervening private lands. And plaintiffs, while asserting their rights as riparian proprietors, and also under Senior's appropriation, prayed for a specific performance of said compromise agreement. A proposition covering the ground above stated was made in a letter written by Mr. Hall, then president of the corporation, to Mr. Senior, but it was qualified so as to express what he was personally willing to do, and would advise the corporation to accept. A connection of the Senior ditch was in fact made in accordance with said proposition, and Hall turned out from the flume of the corporation approximately that proportion of the water for Senior's use. This was about April, 1892, and the water so turned out continued to flow to Senior from that time until the time of the trial.

Senior and his co-plaintiffs prepared and executed a deed for the purpose of consummating this compromise, and deeds were prepared at the instance of Hall for the conveyance of said right of way to the plaintiffs, but no deeds were ever delivered, though plaintiffs notified Hall that their deed was executed and ready for delivery. A large part of the evidence in the case was directed to this question, and from which it appeared that the change made, and plaintiffs' use of the water from defendants' flume for two years, was with the knowledge of most, if not all, of the directors and stockholders of the corporation and its successor, the San Antonio Water Company. Mr. Hall testified that the connection was made with the company's flume for experimental purposes, and the matter was not consummated because the corporation would not agree to the compromise, and the court so found. Touching this finding, which is also attacked by appellants, it need only be said that, while much of the evidence seems wholly inconsistent with defendant's claim that it was not agreed to, the conflict in the evidence would not justify us in disturbing the finding, especially in view of the well-settled doctrine that, to justify the specific performance of a contract, the fact of the existence of the contract must clearly appear, and that, where part performance of an oral contract is relied upon, such part performance must be clearly attributable to the contract sought to be enforced. Upon plaintiffs being notified to disconnect their flume from that of the defendants, this action was commenced.

The complaint alleged that the individuals named as defendants are co-partners under the name of the San Antonio Water Company, and the court found that the defendants are the owners of the water rights formerly pertaining to the Ojai Valley Water Company, but not as co-partners; and this finding is also attacked. The question whether the defendants are co-partners, or are a voluntary association, or whether they hold whatever rights they may have as individuals, is immaterial. They claim from the same source, and the water used by them is diverted by the same ditch, and their claims of right, whether several or united in the use of the water, affect the right of the plaintiffs; and they are therefore, even if their rights or claims are asserted as individuals, properly joined as parties defendant in the action to quiet the title of the plaintiffs. Whether the action might have been prosecuted against the association without naming the persons composing it, under section 388, Code Civ. Proc., need not be considered.

The judgment and order appealed from should be reversed, and a new trial granted.

We concur: BELOCHER, C.; BRITT, C.

TEMPLE, HENSHAW, HARRISON, and VAN FLEET, JJ. For the reasons given in

the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

McFARLAND, J. I dissent. The action was tried without a jury, and the court made very full findings. Judgment went for defendants, from which, and also from an order denying their motion for a new trial, plaintiffs appeal. The action may be called, generally, I suppose, an action to quiet plaintiffs' title to certain waters of a stream called "San Antonio Creek"; but it is exceedingly difficult to tell from the complaint what the particular right is which plaintiffs seek to have declared, or what the particular wrong is of which they complain. It would have been much better if the court had sustained the demurrer to the complaint, at least upon the grounds of ambiguity, uncertainty, and improper joining of causes of action. The complaint could then have been amended so as to have shown clearly what the plaintiffs' asserted right was.

The only exceptions presented by the record are to the insufficiency of the evidence to sustain the various findings, and, of course, these exceptions are subject to the rule that a finding must be sustained when there is substantially conflicting evidence respecting it. The complaint and the prayer show that the main foundation of plaintiffs' asserted rights is a certain contract, alleged to have been made between the plaintiffs and the defendants, touching the right of the plaintiffs to tap and make connections with a certain ditch of defendants, and to take water from it at the point of connection. But the court found that there never was such a contract, and it is sufficient to say that the evidence fully warrants that finding.

It is clear beyond all question that in 1883 one J. D. Hines settled upon certain United States public lands lying on and near said San Antonio creek, and in that year constructed a ditch at a certain point on said creek, and through said ditch diverted the water of said creek to the extent of 78.77 inches, and carried the same to the lands upon which he had settled; that the defendants are the successors in interest of said Hines to said ditch and water right; and that from said 1883 to August 4, 1894, when this suit was commenced, said Hines and his successors in interest, including these defendants, have continuously, notoriously, and adversely to all the world, continued, without interruption, to divert through said ditch onto said lands all the water of said creek when said water was not greater in amount than 78.77 inches. Several years after said 1883, to wit, 1886, one of the plaintiffs, Edwin Senior, also settled upon a tract of public land on and near said creek, and on the 3d of November, 1887, he posted a notice on said creek about one mile below the head of the ditch of defendants above described,

stating that he claimed the water there flowing to the extent of 50 inches, and intended to divert the same by a ditch, flume, etc., and in due time constructed a ditch, and in said ditch did divert from the stream at divers times such water as was flowing therein at the point of said diversion for use upon his said land.

The court found that "when the water of the said stream flowing to defendants' dam and ditch, as hereinafter mentioned, was less than 78.77 inches of water, the said plaintiffs did not divert any water from the said stream, except such small quantity as might seep under the defendants' dam, or through the banks of the stream below the dam of defendants." The court also found "that J. D. Hines settled upon certain lands riparian to the said San Antonio creek and above the lands of the plaintiffs in this action in 1883, and all the water flowing in said San Antonio creek, to and upon the lands of said J. D. Hines, in the said year 1883, and ever since, in the ordinary stages of the water, was necessary for uses upon the said lands so occupied by the said J. D. Hines for agricultural and domestic purposes, and all the said water flowing in said stream in ordinary stages, and to the amount of 78.77 inches, was diverted from the said stream by the said J. D. Hines, and used upon the said lands until the death of said J. D. Hines, and ever since." Also, "the court further finds that the said J. D. Hines and his successors in interest have diverted the waters of said Antonio creek to the extent of 78.77 inches, measured under a 4-inch pressure, and have used the same for agricultural and domestic purposes ever since the year 1883, so long and during every portion of each year when that amount of water was flowing therein; and when less than said 78.77 inches, measured under a 4-inch pressure, was flowing in said stream at or above the dam where the same was constructed by the said J. D. Hines in 1883, then the said J. D. Hines and his successors in interest diverted and used the whole of the said water, and such use has been open, notorious, and adverse, and under a claim of right, peaceable, continuous, and uninterrupted, until the commencement of this action."

It is contended by appellants that the foregoing findings are not supported by the evidence. This contention, however, in my opinion, cannot be maintained. As to the actual, continued, notorious diversion of the amount of water above named from 1883 to the commencement of the action in 1894, there is no question or doubt whatever. The whole point of appellants' contention in this matter is that, during the earlier years of Hines' possession of this ditch and water he did not apply the whole of it to a beneficial purpose; that is, that he did not actually use the whole of it in irrigating his land. The point made is that an appra-

priation of water must be for a beneficial purpose, and that the whole of the water carried by the ditch was not used. No doubt the rule is that there cannot be a valid appropriation of water where the intent is merely to allow it to run to waste. Mr. Pomeroy correctly states the rule as follows: "In order to make a valid appropriation of water upon the public domain, and to obtain an exclusive right to the water thereby, the appropriation must be made with a bona fide present intention of applying the water to some immediate useful or beneficial purpose, or in present bona fide contemplation of a future application of it to such a purpose, by the parties thus appropriating it." In looking through the evidence, it seems to me, that the court was fully justified in finding that the appropriation by Hines was within the principle above announced. The present defendants became owners of the Hines ditch and water right more than five years before the commencement of this suit, and there is no doubt that they, for some years before the commencement of the suit, actually used the whole of this water for a beneficial purpose; and, while there is some conflict in the evidence as to how much water Hines used during the first years of his occupancy of the land, there is sufficient upon that point to justify the finding of the court. Where, as in this case, there has been beyond a doubt a continuous, actual diversion of water through a ditch, and that water has been used generally for a beneficial purpose for a period more than twice as long as the period of limitation, it would be a dangerous thing, in my opinion, to upset a right thus so long exercised upon slight evidence that the whole of the water was not continuously used. Title to valuable property should not thus be hazarded. And where, in such a case, a trial court or jury has found that the appropriation was for a beneficial purpose, we would not be warranted in overturning such finding unless the evidence supporting it was "slight" in an extreme sense. In the present case I see no reason for disturbing the finding.

There are no other features of the case necessary to be specially noticed, and in my judgment the conclusions of the court below should not be disturbed.

(115 Cal. 567)

PEOPLE v. KLOSS. (Cr. 128.)

(Supreme Court of California. Jan. 14, 1897.)

**HOMICIDE—INSANITY AND INTOXICATION AS DEFENSES—INSTRUCTIONS—NEW TRIAL—CUMULATIVE EVIDENCE—DILIGENCE—IMPEACHING VERDICT.**

1. A requested instruction that, if the jury believed defendant, by reason of epilepsy, or long-continued use of intoxicating liquors, was in such a condition of mind, etc., they should acquit, is objectionable as an instruction in rela-

tion to insanity, because of the confusion of intoxication and insanity.

2. Evidence that defendant was frequently under the influence of liquor, and, when so affected, was abusive and quarrelsome, and that he "had been drinking" on the day previous to the morning on which, shortly after midnight, he killed deceased, does not call for an instruction on intoxication at the time of the killing.

3. Testimony of a physician who attended defendant at the time of an injury, that, in his opinion, it was the kind of an injury which would produce epilepsy, is but cumulative evidence, not calling for a new trial; the physicians who testified as experts having had all the data that he had, and more, and defendant's expert having testified to the same thing.

4. An affidavit for new trial in a homicide case on newly-discovered evidence is objectionable in not stating why witness could not have been discovered in the six months between the homicide and trial, or the manner in which he was discovered.

5. To caution the jury to examine with care the defense of insanity, lest a counterfeit of the infirmity furnish immunity from punishment, is not error.

6. Where the intent in question is the premeditated and deliberate intent to take life, an instruction as to consideration of intoxication, "in determining the felonious motive or intent with which he committed the act," is not erroneous because of the use of the word "felonious."

7. A juror cannot impeach a verdict by swearing that he did not understand it, or that he was too timid and confused to express his dissent at the time when he ought to have dissented; it having been read by the foreman and by the clerk on the return of the jury into court, and there having been no dissent when the jury were asked if it was their verdict.

In bank. Appeal from superior court, city and county of San Francisco; George H. Bahrs, Judge.

Frank Cooney Kloss, alias Frank Kloss, was convicted of murder, and appeals. Affirmed.

Thornton Woodbury and Henry L. Wilson, for appellant. W. F. Fitzgerald, Atty. Gen., and Charles H. Jackson, Deputy, for the People.

BEATTY, C. J. The defendant appeals from a judgment inflicting the death penalty for murder, and from an order denying his motion for a new trial.

Numerous errors are assigned upon the rulings of the trial judge, and it is also contended that the evidence is insufficient to sustain the verdict. The evidence for the prosecution was, in substance: "That on the morning of April 18, 1895, shortly after midnight, the defendant entered a barroom at the corner of Hayes and Laguna streets, in San Francisco, where were present the barkeeper, the deceased, and a party named David Middleton. The deceased and Middleton were asleep. Defendant aroused Middleton, and told him to wake up the deceased, which he refused to do. Defendant then said, 'I will wake him up,' and struck deceased two blows with a knife in the neck. When asked what he had done, defendant said: 'I have woke him up. I have fixed him. I have killed the son of a bitch.' A police whistle being blown, he again walk-

ed to the deceased, and struck an additional blow, remarking: 'Dave, I have killed him. I have fixed the son of a bitch,'—showing a knife, and throwing it on the floor. Subsequently, on being arrested, he admitted the stabbing, and, when asked why he had done it, replied that he would explain it at the proper time. It was also shown that about 9 o'clock on the evening of the 17th defendant entered the same saloon, and inquired for the deceased, calling him a son of a bitch, and saying, in substance, he was not prepared for him at 6 o'clock, but he was then. From the effect of the wound the deceased died almost immediately." The evidence was amply sufficient to justify the inference that the killing was unlawful, premeditated, and deliberate,—or, in other words, that it was done with express malice; and the conflicting evidence offered by the defendant tending to prove habits of drunkenness and insanity does not detract from the legal sufficiency of the evidence for the people.

The following instructions were requested by defendant, and refused by the court: "(2) That if you believe this defendant, from a severe blow, or from any other cause, was an epileptic for some five years prior to April 18, 1895, and was also addicted to overindulgence in intoxicating drink during the same period, and for these reasons was in such a mental condition as to prevent him from distinguishing between right and wrong at the commission of the act, then it is your duty to acquit him. (3) That if you believe that the defendant was intoxicated at the time he committed this act, but before he became intoxicated he had not premeditated the killing, then it is your duty to take into consideration the extent of his intoxication in determining whether or not it was of such a degree that he could not at the time premeditate the act. (4) If you believe the defendant, by reason of epilepsy, or long-continued use of intoxicating liquors, was in such a condition of mind at the time he committed the act, even though that condition was temporary, that he could not distinguish right from wrong, you must acquit him." The court did not err in refusing these instructions. Those numbered 2 and 4 are objectionable as instructions in relation to the plea of insanity, on account of the manner in which they confuse intoxication and insanity; and, even if they had been less objectionable in this respect, their refusal would have been harmless, for the reason that the whole law of insanity, as applicable to the case, was fully and clearly given in the charge of the court. The instruction numbered 3 is a sufficiently clear and correct statement of the legal proposition applicable to a case in which it appears that the defendant was intoxicated at the very time of the killing. But in this case that material fact was not shown. It appeared from the evidence that

the defendant was addicted to the use of intoxicating liquor, was frequently under its influence, and when so affected was abusive and quarrelsome. "It also appeared that he had been drinking on April 17th." This is absolutely all that is shown by the bill of exceptions in relation to intoxication at the time of the killing, and, in our opinion, is wholly insufficient to establish the fact. It does not show how much or how often he had been drinking on the 17th, or at what hour, or that he had at any time reached the stage of intoxication; and no doubt an habitual drinker might have partaken more than once on the 17th, and been perfectly sober on the 18th. In the absence of any substantial evidence of intoxication at the time of the killing, the superior court was justified in refusing this instruction.

One of the grounds of the motion for a new trial was newly-discovered evidence touching the alleged insanity of the defendant. Aside from the opinions of the experts (which were in direct conflict), the substance of all the evidence adduced at the trial in relation to defendant's insanity is stated as follows in the bill of exceptions: "The defense then introduced evidence showing that defendant was addicted to the use of intoxicating liquor, and was frequently under its influence, and when so affected was ugly and abusive. It also appeared that on April 17th he had been drinking. This evidence was introduced at the morning session of November 13th. There was no testimony of delirium, resulting from liquor, by those testifying in the morning. In the afternoon of November 13th a brother of the defendant took the stand, and testified to the drinking of defendant, to his injury about the head, and to his having had frequent fits; none that he knew of away from home; these fits having some of the symptoms of epilepsy. No one but the brother testified to these fits. There was other testimony of his drinking, and of his being ugly and abusive when under its influence, and on one occasion that he threatened suicide in the presence of another brother." The newly-discovered evidence relied upon in support of the motion is all embodied in the following affidavit: "Now comes E. Robbins, M. D., the affiant herein, and, being duly sworn, on oath deposes and says as follows, to wit: One evening, about eight o'clock, in the latter part of November, 1889, I was called to the Orpheum to see this defendant, who was on the stage, who, they said, they thought was dying. On personal examination I found that he was suffering from concussion of the brain and laceration of the cuticle of the forehead. I found a gash about six inches in length, reaching from the table of the skull. He had a very profuse hemorrhage from the same. I then commenced to wash away the blood, stop the hemorrhage; and, on making a still further examination, I found that the table of the skull



was slightly fractured, but not sufficient to trepan the same. I used antiseptics, cleansing the part thoroughly, put in a drainage tube, and then put in six stitches, saturated the part with Iodoform, put on an adhesive bandage, and bandaged the same up in the regular bandages, and still the patient was unconscious. By this time the theater had closed. I then asked Mr. Walters if he had a room in the building where the man could lay, and he said he had one. I then requested the employes to take the young man to the room. I then wished to know how the accident happened. They said he was winding up the scenery with the windlass, and that the iron handle slipped out of his hand, and ran back, and struck him on the head. I then said, 'Here is a case that we shall see, when he comes to consciousness, whether he is sane or insane,' for I quite expected to find him permanently insane when he returned to consciousness. Two hours had elapsed when he came to himself and commenced muttering incoherently, talking about things entirely foreign to his business. He wanted to tear off the bandages, and it was with difficulty that we kept his hands from his head. He then said he suffered horribly, and didn't know what had happened. He finally came to consciousness, and, with his friends around the bed, I told him then that if he should ever drink to excess it would affect his brain, and he would, in all probability, kill some person while suffering from emotional insanity produced by liquor. In five days I took out the stitches, and in two weeks the wound was perfectly healed, at which time his conversation was, to a certain extent, rambling, and his sentences disconnected. From my knowledge of the character of the blow, and my examination of the wound where the skull was slightly fractured, it is my opinion that this is the kind of a blow and the sort of a fracture which would produce epilepsy. [Signed] Edwin Robbins." It is conceded by counsel that this evidence was not new, and that it was cumulative as to the occurrence of the blows and injuries to the defendant's head, but as to the pathological results—the resulting and permanent injury—he contends that it was not cumulative. But we think it was, all the facts in regard to the accident being known to other witnesses who testified at the trial, and who presumably stated them to the jury. The physicians who testified as experts had all the data for an opinion that Dr. Robbins had, besides others (the epileptic fits, habits of intoxication, etc.) that he did not have; and defendant's expert testified to the same opinion. The evidence of Dr. Robbins would, therefore, have been merely cumulative, and for this reason alone the superior court was justified in denying the motion, upon the ground under consideration. And, besides, the affidavits are so vague and general on the subject of diligence that we could not have pronounced

it an abuse of discretion to have denied the motion on that ground. For aught that appears, Dr. Robbins was in San Francisco from the time of the accident to the date of the trial. The manner in which he was finally discovered is not disclosed, and no explanation given of the reason he could not be discovered during the six months which elapsed between the homicide and the trial. Considering the just disfavor and suspicion with which this ground of the motion is regarded, we think the affidavits as to diligence should have been more explicit than they were.

In the course of his charge to the jury the trial judge used the following language: "It is my duty to say to you, gentlemen, that against the defense of insanity the law entertains no prejudice. On the contrary, if it be established by a preponderance of evidence, the law accords to the accused the full benefit of it, and your duty will be to acquit him of all criminal responsibility by reason of his insanity. It may be true that this defense is sometimes resorted to in cases in which the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. It may have been abused and used in cases of unquestionable guilt, and may have been an excuse for jurors acquitting when their own and the public sympathy has been with the accused party, and justified and excused, according to public sentiment, but not according to law. While, therefore, all this may be true, it is a defense to be weighed fairly, fully, and justly, and, when proven in the manner I shall state and explain to you, must recommend itself to the sense of humanity and the justice of the jury. You are to examine it with care and caution, however, lest an ingenious counterfeited of this mental infirmity should furnish immunity from and perhaps defeat proper and just punishment." Appellant contends that in this part of its charge the court invaded the province of the jury by instructing as to matters of fact. This criticism is, we think, entirely unfounded, and we may add that a similar instruction was approved by this court in *People v. Pico*, 62 Cal. 54, and in *People v. Larrabee* (Cal.) 46 Pac. 922.

The trial judge also gave the following as a part of his charge: "Any act committed by a person while in a state of voluntary intoxication is not less criminal by reason of his having been in such a condition; but whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular offense or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the felonious motive or intent with which he committed the act." This is a literal transcript of section 22 of the Penal Code, with the exception of the word "felonious," which is interpolated near the end. The defend-

ant contends that the addition of this word constitutes grave error. But we cannot understand in what respect. The only intent in question in this case was the premeditated and deliberate intent to take life; and certainly that was a felonious intent, if it existed. If the objection means that the court instructed the jury that there was in fact any such intent on the part of the defendant, we can only say that the charge will not bear that construction.

Another ground of the motion for a new trial was misconduct on the part of the jury. In support of this allegation the defendant offered to file the following affidavit: "Now comes Isaac Leipsic, juror in the above-entitled cause, which was tried November —, 1893, and, being duly sworn, on oath deposes and says: That the verdict reached and rendered by the jury in the above case, to wit, 'Guilty of murder in the first degree,' was not the verdict which the said Leipsic agreed to. That the said Leipsic was not only misled by the statements of G. T. Ruddick, the foreman of said jury, to the effect that the above verdict would not entail the death penalty of necessity, but also was improperly coerced, confused, and bewildered by the importunity of said Ruddick, and, in effect, caused to bring in a verdict which he did not understand, and did not mean to bring in, and never agreed to. That much hubbub and confusion took place in the jury room at the time of voting; and that, when the jury had finally agreed on a verdict of guilty, this deponent expressly stipulated that the penalty of life imprisonment be added to said verdict. That said foreman, G. T. Ruddick, against the wishes of said deponent, read out a verdict of guilty of murder in the first degree, without adding on the penalty of life imprisonment. And that, when said verdict was read by said foreman, Ruddick, this deponent was so confused he did not at that time realize the situation he was placed in, and through a sense of embarrassment and timidity he at that time refrained from speaking out against said verdict in open court. That when said verdict was read and said jury was polled this deponent did not hear the question asked him if said verdict was his verdict, and he remained silent. That at all times after the jury had retired to the jury room this deponent asserted his refusal to bring in a verdict which would hang this defendant. And that the foreman of said jury, well knowing this, so manipulated the ignorance and confusion of this deponent, and so hastily brought the jury into the box, that this deponent was brought to seemingly agree to a verdict he did not, as a matter of fact, agree to at all. [Signed] Isaac Leipsic." The court refused to allow this affidavit to be filed, upon the ground that a juror could not thus impeach his own verdict. This action by the court was entirely proper. The jury, before retiring to consider their verdict, had been fully and clearly instructed

as to the various forms of verdict they might render, and as to the meaning and legal effect of such verdicts respectively. When they came into court, the verdict was read by the foreman, and recorded by the clerk, and then again read to the jury, who were asked if that was their verdict. No juror dissented, and the polling of the jury was waived. A juror cannot be allowed to impeach a verdict, to which he has thus assented, by swearing that he did not understand it, or that he was too timid and confused to express his dissent at the time when he ought to have dissented. *Polhemus v. Helman*, 50 Cal. 441; *People v. Azoff*, 105 Cal. 632, 39 Pac. 59, and cases cited.

No error appearing in the record, the judgment and order appealed from are affirmed, and the superior court is directed to fix a day for carrying its judgment into effect.

We concur: VAN FLEET, J.; HARRISON, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

(23 Colo. 238)

HORNER et al. v. BRAMWELL.

(Supreme Court of Colorado. Nov. 16, 1896.)

TRUST DEED—REFORMATION—PARTIES—RESALE.

1. A trust deed, containing full covenants of warranty, executed by H. to secure notes, by mistake included a certain 80 acres and omitted another 80 acres. Thereafter H. executed to R. a warranty deed of all the land intended to be described in the trust deed, which was expressly made subject to the trust deed, and was, in fact, but a mortgage to secure indebtedness to N. Subsequently sale was had under the trust deed to M., who conveyed to plaintiff, the holder of the notes secured by the trust deed; all parties believing, till thereafter, that the 80 acres omitted were included in the trust deed. After that R. deeded to M. the 80 acres omitted, and he deeded them to plaintiff. Held that, in an action thereafter brought to reform the trust deed to include the 80 acres, and to have them sold under it, that N. and M. were necessary parties, and R. a proper party; N. being necessary because its interest in said 80 acres could not be cut out without its having a hearing, and M. being necessary that H. might have the 80 acres included by mistake released, and be relieved from her covenants in the trust deed in respect thereto.

2. Where it appears that all the land intended to have been included in a trust deed could have been sold to a better advantage in its entirety, a sale under the trust deed of the land actually included, which embraced some not intended to be included, should, on suit being brought to reform the deed so as to embrace land omitted by mistake, be set aside, and a resale had.

Appeal from district court, Jefferson county.

Action by William C. Bramwell against John W. Horner and others. From a judgment for plaintiff, defendants Horner and wife appeal. Reversed.

Alvin Marsh, for appellants. Teller, Ormood & Morgan and Henderson & Campbell, for appellee.

HAYT, C. J. This action was instituted by William C. Bramwell, plaintiff, against John W. Horner, Tillie B. Horner, and others. It is based upon certain promissory notes for various amounts, aggregating \$2,750, and interest, and a deed of trust upon 400 acres of land in Jefferson county, Colo., given to secure the payment of the notes. The principal controversy in the case grows out of a mistake in the description of one 80-acre tract in the deed of trust.

The following facts, *inter alia*, were alleged in the complaint: That the defendants, John W. Horner and Tillie B. Horner, were the owners in fee of 400 acres of land, on the 27th day of June, 1889, situate in Jefferson county, Colo., and particularly described. On that day the defendants executed four promissory notes, aggregating \$2,750, payable five years after the date thereof, and drawing interest at 7 per cent. per annum, payable semiannually, the interest being represented by interest coupon notes, and both principal and interest being payable to the Security Investment Company, of Yankton, Dak. The execution of a deed of trust to William M. Ingersoll, as trustee, upon 400 acres of land, for the purpose of securing the payment of the notes, is next alleged; and it is averred that 80 acres of land, not belonging to the defendants, were included in this instrument in lieu of 80 acres omitted by mutual mistake. It is averred that, by the terms of the deed of trust, if any installment of interest should not be paid when due, or if the defendants should fail to pay all taxes legally assessed upon the property, the holders of the notes might declare the whole sum, principal and interest, due, and require the trustee to proceed and sell the property. It is alleged that the interest which fell due on the 1st day of October, 1892, and upon subsequent dates, had not been paid; that the taxes for the year 1892 were due and unpaid; and that the plaintiff, who had, in the meantime, become the owner of the notes and accounts, elected to declare the entire amount, principal and interest, due, and upon his request the premises described in the trust deed were afterwards sold by the trustee in manner and form as provided in the deed of trust, due and proper notice having first been given. It is averred that, after executing the deed of trust, the defendants John W. Horner and his wife, Tillie B. Horner, by their deed of general warranty, duly granted and conveyed to one George E. Ross-Lewin the 400 acres of land intended to be described in the deed of trust, but that such latter conveyance was made subject thereto; that afterwards Ross-Lewin conveyed the 80 acres in dispute to one Meston,—Meston, in turn, conveying it to plaintiff. This conveyance by John W. and Tillie B. Horner, while in form purporting to convey the whole right, title, interest, and estate of

said grantors in the property, the fact is alleged to be that it was intended by the parties as a mortgage only. It is further alleged that, at the sale made by the trustee, the sum of \$1,000 was the best bid received, and that it was sold for that sum to Meston, who was acting at the time as the agent of the plaintiff; that of this amount \$209.55 was paid out by the trustee as costs and expenses of executing the trust; that the balance of \$790.45 was applied upon the principal and interest of the indebtedness to secure which the trust deed was executed, leaving a balance due at that time of \$2,107.13 upon the notes, which is still due and unpaid. It is further averred that, at the time of the execution of the trust deed, and also at the time of the sale by the trustee, all parties believed that the deed of trust contained a correct description of the premises intended to be conveyed therein by the said John W. Horner and Tillie B. Horner, and that they did not know or discover the existence of the mistake in the description until after the sale by the trustee, viz. about January 15, 1893, and that the transfer from Ross-Lewin, through Meston, to plaintiff, was for the purpose of correcting such mistake. The plaintiff demands judgment for the sum of \$2,107.13, with interest thereon from January 7, 1893, and costs of suit; also, that said sums be declared a lien upon the 80 acres omitted by mistake from the deed of trust; and that the said premises be sold by the sheriff, under the same terms as provided in the deed of trust,—that is, upon 30 days' notice, and without redemption.

To this complaint a demurrer was filed by the Horners upon the following grounds: (1) Defect of parties defendant; (2) ambiguity and uncertainty; (3) failure of facts to constitute a cause of action. This demurrer having been overruled, separate answers were thereafter filed by the Security Investment Company and William M. Ingersoll, admitting all the allegations of the complaint. The defendants John W. Horner and Tillie B. Horner joined in an answer. This answer admits the facts averred in the complaint with reference to the execution of the deed of trust, mistake in description, default in the payment, sale of the property, and conveyance by the trustee, the execution of the warranty deed to Ross-Lewin in the character and for the purposes mentioned, and that title had passed by various mesne conveyances to the plaintiff. It is alleged that the conveyance by the Horners to Ross-Lewin was to secure an indebtedness to the First National Bank of Denver amounting to a sum in excess of \$8,000; that it was, in fact, but a mortgage, and so understood by all the parties; that it was expressly made subject to the prior deed of trust to William M. Ingersoll, for the use and benefit of the owner of the notes; and that all parties supposed at the

time that it included the omitted parcel of land. As a second and further defense, the Horners, admitting the making of the notes and coupons, default in payment, and mistake in description in the deed of trust, allege that Francis I. Meston purchased the land at the trustee's sale, including the 80 acres included in the deed of trust by mistake; that said trust deed contained full covenants of warranty, of good and perfect title, and lawful authority to convey, which covenants are in full force and unreleased. It is averred that, until this parcel of land shall be reconveyed to these defendants, or the covenants contained in the deed of trust shall be released, the plaintiff is not entitled to any relief, and that the rights of the parties to the 80-acre tract can only be fully determined in an action to which Francis I. Meston shall be a party. By way of a further defense and counterclaim, the Horners, admitting the allegations of the complaint as heretofore, allege that all the buildings belonging to the 400-acre tract of land intended to be included in the deed of trust are in fact located upon the 80 acres omitted therefrom by mistake; that these buildings consist of a frame dwelling house (containing nine rooms, and a stone cellar), one log dwelling house (containing four rooms), a large barn (with threshing floor in the center and suitable stabling on each side and mows for hay, with wagon house and shed for a large number of cattle), chicken house, and other suitable outbuildings for the whole ranch of 400 acres, but of practically no value to the 80-acre tract omitted, except as the same is used in connection with the remaining 320 acres. They allege that they were greatly prejudiced by the sale under the trust deed, omitting the 80 acres as aforesaid, and that by reason thereof the price bid at the trustee's sale was but a small fraction of what the premises would otherwise have brought. This pleading is very voluminous, containing, as it does, many matters of evidence which should not be included therein, and other matters entirely foreign to the issues between the parties. It concludes with a prayer that the First National Bank of Denver, George E. Ross-Lewin, and Francis I. Meston may be made parties to the suit; that the sale under the deed of trust be set aside, and held for naught; that the mistake in the description in the deed of trust be corrected; and that a resale of the property be made.

The new matters set up in the answer were denied by the replication. Upon these issues the cause was tried to the court. The trial resulted in a judgment for plaintiffs in the sum found due upon the promissory notes, and a decree making the same a lien upon the 80 acres omitted by mistake from the deed of trust, and ordering a sale of this tract of land by the sheriff, upon 30 days' notice, without the right of redemp-

tion. To reverse this judgment, the case is brought here by appeal.

The defendants, by answering, waived all the grounds relied upon by demurrer, except the one attacking the complaint for failure to state facts sufficient to constitute a cause of action. There was no error in overruling the latter ground of demurrer, for the reason that the complaint alleges the execution and assignment of the notes, default in the payment of the interest, etc., when due, with a prayer for judgment for the sum due. Upon the coming in of the answer, the court should have made Francis I. Meston, George E. Ross-Lewin, and the First National Bank of Denver parties defendant, according to the prayer of the answer and cross complaint. Meston was a necessary party to the action, for the reason that the defendants the Horners had executed the deed of trust covering the 80 acres included by mistake, with full covenants of warranty. Meston, being the purchaser at the trustee's sale, could sue upon these covenants. He should, therefore, have been brought in upon the request of the Horners, to the end that the rights of all parties might be fully adjudicated, and finally determined in this action. So, also, Ross-Lewin and the First National Bank should both have been made parties,—the bank for the reason that the property was deeded to Ross-Lewin as security for a loan made by the bank. The interests of the bank could not be cut off without affording it an opportunity to present its claim for a lien upon the property. Ross-Lewin was a proper party, for, although he had title in fee to the premises, it is admitted by the parties that he held only the legal title to the property in trust, and, from aught that appears, had no right to convey the same, and thereby cut off the rights of the bank.

In decreeing the amount of the judgment a lien upon the 80 acres omitted from the deed of trust, without in any manner releasing the defendants from the obligations imposed upon them as to the 80 acres included therein by mistake, the district court committed serious error. It appears, from the evidence, that the property could have been sold to better advantage in its entirety; that is, the whole 400 acres together. The proper course, under the circumstances, would have been for the district court to have entered a decree setting aside the sale made by Ingersoll under the trust deed, reforming the instrument, and directing the trustee to proceed to sell under the same as reformed. The title is admittedly in the parties, so that this may yet be done. By following this course, the equities of all can be fully adjusted, and the matters and things in controversy finally adjudicated. The pleadings are unnecessarily lengthy, and this prolixity has served to obscure the controversy, rather than elucidate the issues.

The parties should be allowed to amend the pleadings as they may be advised. The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with this opinion. Reversed.

(9 Colo. App. 38)

ROSS v. CAMPBELL.

(Court of Appeals of Colorado. Dec. 14, 1896.)

LANDLORD AND TENANT—IMPROVEMENTS MADE BY TENANT—REMOVAL—FIXTURES.

1. Where a tenant during the term, and at his own expense, lays a tile floor in the demised building, he may, before the expiration of the lease, remove the tile floor, and restore the building to its original condition.

2. Where a tenant, in possession, during the term, enters into a new lease for a term of years from its date, as the most convenient method of extending the then existing term, there is not such a termination of the lease as will bar the tenant's right to afterwards remove fixtures already annexed by him.

Appeal from district court, Garfield county.

Action by James W. Ross against M. Campbell to enjoin the removal of alleged fixtures. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

C. W. Darrow, for appellant. John T. Shumate and A. M. Stevenson, for appellee.

THOMSON, J. On December 8, 1888, the appellant executed a lease to Mrs. Campbell, the appellee, of a lot in Glenwood Springs, together with the building situated thereon, for the term of one year from that date, with the privilege of an extension of the lease, if appellee should so elect, for a further period of four years. The appellee immediately went into possession of the demised premises. Prior to the expiration of the year, appellee elected to take the extension, and the lease was accordingly extended for four additional years by an indorsement made by the appellant on the back of the agreement. The appellee used the building for the purposes of a saloon and billiard room. In October, 1891, the building took fire, and was so seriously damaged that a suspension of the appellee's business was necessary until the building could be repaired, the appellee, however, remaining in possession. The repairs were made by the appellant, who also enlarged the building by an addition. On the 1st day of February, 1892, when the repairs and addition were completed, and a considerable time before the expiration of the extension, a new lease of the premises was executed by the appellant to the appellee for a period of three years from that date. At the time of the original lease, the floor of the building was of wood. Before the occurrence of the fire, appellee replaced the wooden floor by a floor of tiling, and also introduced electric light apparatus, and some other things of a like nature, into the building. Before the

expiration of the last term of lease, the appellee being about to remove the tile floor, and the other articles in the nature of fixtures which she had attached to the building, the appellant brought this suit for a perpetual injunction against such removal. The judgment of the trial court was against him, and he has brought the case here by appeal.

There was some little conflict between the testimony for the plaintiff and that given in behalf of the defendant, but, as the court found the facts to be with the defendant, they must be so accepted by us. The tile floor was laid, and the other improvements introduced, by the defendant, for the purposes of her business. They made the room attractive, and tended to draw custom, and benefit her trade. She intended to leave the same kind of floor in the building that it had when she received it, and otherwise leave the premises in as good condition as they were in originally. The law of fixtures applicable to a case of this kind is tolerably well settled. Mr. Washburn says: "The rule of law as to removing fixtures is most liberal when applied between tenant and landlord. And, as a general proposition, whatever a tenant affixes to leased premises may be removed by him during the term, provided the same can be done without a material injury to the freehold." 1 Washb. Real Prop. (4th Ed.) 27. See, also, *Penton v. Robart*, 2 East, 88; *Van Ness v. Pacard*, 2 Pet. 141; *Second Nat. Bank v. O. E. Merrill Co.*, 69 Wis. 501, 34 N. W. 514. It is, however, contended that the acceptance by the defendant of the new lease operated as an extinguishment of the first tenancy; that the taking of the lease involved a surrender by her of the premises to her landlord at the time of its execution; that, having failed to remove the fixtures before she relinquished her possession under the first lease, she lost her right to do so; and that they immediately upon the surrender became part of the freehold, and were included in the second lease as the property of her landlord. It is undoubtedly true that a tenant must avail himself of his right to remove fixtures which he has annexed to the premises before his tenancy is terminated; and that, if he suffers his term to expire, and relinquishes his possession without removing them, the right is extinct. But we think the evidence hardly justifies the hypothesis upon which counsel predicates his argument. Between the commencement of the original term and the expiration of the time for which the last lease was given the possession of the defendant was continuous. The first term was extended by agreement for four years, and while the term created by the extension was still in existence the new agreement was made. There was evidence that it was made at the solicitation of the plaintiff, and, as to terms, was made to suit the changed condition of the premises, oc-

casioned by the repairs, and the enlargement of the building after the fire. There was ample justification in the evidence for concluding that the execution of the second lease was chosen as the most convenient method of extending the then existing term, and embodying in an agreement the change in the conditions of tenancy which the enlargement of the building rendered proper. The court evidently found that the defendant's occupancy of the premises after the execution of the second lease was, in effect, merely a continuation of the old tenancy; and, as the finding was derived from evidence given, we are not at liberty to disturb it. This being the case, the plaintiff sought to remove her fixtures during a term which began with her first occupancy of the premises, and was, therefore, merely exercising a right incident to her tenancy. Let the judgment be affirmed. Affirmed.

(9 Colo. App. 235)

**ST. CLAIR v. CASH GOLD MINING & MILLING CO. et al.<sup>1</sup>**

(Court of Appeals of Colorado. Dec. 14, 1896.)

**MINES—TAKING OF ORE BY TRESPASSER—RECOVERY—COST OF EXTRACTION—SET-OFF—BONA FIDES—COMMINGLING OF ORES—EVIDENCE—INSTRUCTIONS.**

1. Under the rule that, when a trespasser by mistake enters on a vein to which he has no title, and takes ore from it, he may limit the owner's recovery, in an action for the ore taken, by showing the value of the ore taken and the actual cost of digging that particular ore from that particular vein, tramping it to the shaft, and hoisting it to the surface, the bona fides of the trespasser, the value of the ore, and the actual cost of its extraction are questions for the jury, though defendant's evidence is uncontradicted.

2. In an action to recover for ore taken under a mistake as to ownership, where it appears that such ore was mingled with ore to which defendant was legitimately entitled, so that plaintiff was entirely unable to separate it, defendant must show how much came from plaintiff's vein and how much from his own, or plaintiff may recover the value of all the ore shown by his own evidence to have been taken out.

3. In an action to recover for ore taken in good faith, and mingled with ore to which defendant was legitimately entitled, where defendant has introduced evidence of work done and ore taken from his own vein, in order to reduce, to the extent of its value, plaintiff's recovery, the jury should be instructed to consider such evidence only so far as it might aid them in determining, if possible, what proportion of the ore came from defendant's vein.

Error to district court, Boulder county.

Action by John T. St. Clair against the Cash Gold Mining & Milling Company and others to recover for ore taken by trespass. From a judgment in favor of defendants, plaintiff brings error. Reversed.

L. C. Rockwell, for plaintiff in error. Riddell, Starkweather & Dixon, for defendants in error.

BISSELL, J. The matters of fact exhibited by this record are free from complications, the questions of law thereby suggested are not of great difficulty, and the modern authorities of recognized force are in harmony about them. The errors apparent in the record proceed from an instruction which took from the jury the right to pass on questions of fact raised by the evidence, and the refusal of the court to advise them as to the law by which their deliberations were to be guided, and the admission of evidence which is neither relevant nor competent. The assignments do not suggest the errors which spring from the admission of the testimony, but the retrial which must follow the reversal renders the discussion of these matters both legitimate and essential. These suggestions outline the course which the opinion will pursue.

The parties were the owners of mining claims situate in Boulder county. The locations were on a mountain, which ran to the north and to the east, and were laid along its general course. The Bella, which was owned by the plaintiff in error, ran north, 22 degrees 12 minutes east. This claim was of the usual size, being 1,500 feet long by 150 feet wide. About 200 feet from its southern end line, it crossed the Cash vein, and ran in such a manner that one of the Bella side lines projected from the southerly side line of the Cash about 200 feet from the end, so that the easterly side line of the Bella crossed the Cash about 200 feet from the Bella southerly end line, and its westerly side line crossed the Cash about 15 feet from the same end. The Cash vein, which was one of the oldest locations on the hill, ran northerly, 59 degrees and 22 minutes east, was 50 feet wide, and crossed the Bella at the points already indicated. Both these claims were patented. No question arises in the case with reference to the rights of the owners of the Bella and the Cash to what is known as the "Cash Vein," or to the right of the Cash owners to follow their vein within the limits of the Bella location. The Berkin location was unpatented, and laid across both the Cash and the Bella, running north, 41 degrees east, so that it crossed both the easterly side line and the southerly end line of the Bella very close to the southeast corner of corner No. 1 of the Bella lode. The Berkin discovery adit, as appears from the testimony, was immediately at the southerly end line of the Bella, and from its commencement reached the Bella end line in about 12 feet. Whatever may be said about these respective locations and the work that was done is stated for the purpose of illustrating the present controversy, and exhibiting the basis on which the case was tried and the contentions of the respective parties. All matters of difference, as between the Bella, the Berkin, and the Cash, with respect to the rights of the Bella owners in the workings, which will be hereafter

<sup>1</sup> Rehearing denied January 11, 1897.

referred to, are entirely eliminated, and are of no consequence in the settlement of the dispute. This comes from the fact that the Bella owners brought an action in ejectment against the alleged trespassers, and got a verdict which settled their title and established their right to the vein in which the work was done and their right to the ore which was taken out by the alleged trespassers, and leaves only the naked question as to what the Bella people were entitled to recover, the true measure of their damages, and the rules by which the jury must be governed in the ascertainment of the facts. The general nature, course, and direction of the work must be stated, in order to show on what basis the court below proceeded, and to determine the true rule, as we believe it exists, by which the recovery must be measured. After the commencement of this discovery adit, and on the assertion of what was claimed to be a right to pursue a cross lode, they then ran a level from the discovery adit, from the end line of the Bella, northerly across the Cash and beyond the northerly side line of the Cash lode. Some time in the prosecution of this work, the Cash owners became convinced that there might be some value in the Berkin location, and that it could be secured more advantageously and economically through their workings, which were between 200 and 300 feet deep, than from any surface workings of the Berkin owners. The owners of the Berkin, at that time or shortly afterwards, sold the claim to the Cash owners, and consolidated with it, so that the property was thereafter called the "Cash-Berkin." When the Cash-Berkin consolidation pursued their explorations underground, they connected the workings of the Cash vein proper, which had been prosecuted to a considerable depth in the Cash lode, by running levels from their main working shaft and cross cuts from those levels to what was asserted to be the Berkin vein, and, when they got into it, took from that vein a very considerable quantity of ore. It is this trespass which is the basis of the present action.

The plaintiff brought suit, and to maintain his case compelled the Cash-Berkin consolidation to produce the books, which showed the extraction of ore, during the time and within the periods complained of, in amount to a little upwards of \$14,000. Evidence was offered which showed that, during all the time the Cash-Berkin consolidation was prosecuting its work, both within the limits of their own rights on the Cash vein, as well as the development of the particular vein which was claimed as the Berkin, the ores were mixed and sold as belonging to one common property, and it was impossible, from any records which were kept, to sift out and determine what ore was taken from the Bella vein and what from the Cash. The plaintiff, St. Clair, attempted to

charge the company, under the doctrine in *Little Pittsburg Con. Min. Co. v. Little Chief Con. Min. Co.*, 11 Colo. 223, 17 Pac. 760, with all the ore extracted, and its total value as shown by the books, except as the defendants might be able to reduce it by separating, and establishing to the satisfaction of the jury, what came from the one vein and what from the other. The defendants recognized the force of the rule, assumed the burden of proof, and attempted to meet its responsibility. In order to do it they introduced evidence tending to show the cost, extent, and value of the work done on the Cash property and on the Cash vein, and the extent and value of the work done on the Bella vein, and that the ore coming from both sources was about equal, and that the expenses absorbed all the outcome. In a certain sense and in a certain way, possibly, this was legitimate. It will be discussed further on in the opinion. The evidence offered showed the value and extent of the cross cuts to strike the Berkin vein, and the necessity to prosecute this work of development from the Cash, in order to get at the Berkin to work it. The evidence tended to show the pay rolls and supply account during all this time, and the general expenses incident to this method of development. The evidence was objected to, but it was permitted to be offered. The plaintiff introduced no evidence contradicting this testimony, for, probably, there was none accessible to him, and he was compelled to accept the statements which the defendants made.

On the conclusion of the evidence the plaintiff asked a good many instructions, which were all refused, some of which will be subsequently stated, and the court, then, on the defendants' request, instructed the jury "that, from the uncontradicted evidence in this case, and the law as applicable to such evidence and to the case made by the pleadings, the defendants are entitled to abate the damages for the value of the ore taken out of the Bella vein to the extent that they have incurred expenses in mining, extracting, and milling said ore, and that the uncontradicted evidence shows that the cost of mining, milling, and extracting said ore exceeded the value of the ores extracted. You are therefore instructed that the plaintiff can recover only nominal damages for the trespass alleged in the complaint. You will therefore return a verdict for the plaintiff and against the defendants, and will fix the amount of damages at one dollar." This instruction was excepted to, and to give it was undoubtedly error. By it the court took from the jury the entire question as to the cost and expenses of extraction and the value and character of the ore taken, and refused to submit to the jury the real basis of the controversy, and on which the plaintiff was entitled to a finding. Whatever the jury

may have concluded, and whether any other verdict than one for nominal damages would or would not have been sustained by the court, the defendants were entitled to have the jury find the amount of the ore taken, its value, and the cost of its extraction. Although the evidence of the defendants may have been entirely uncontradicted, it by no means follows that the jury would have allowed the totality of the expenses as exhibited by the proof offered. The instruction was equally faulty in another particular, because it did not advise the jury that the only expenses with which the defendants should be credited were the actual expense of taking the ore out of the Bella lode, providing they were entitled to limit the recovery by the extent of this cost. All the items of expense, with reference to the running of drifts, levels, etc., to reach the Bella vein, should not have been before the jury, unless it was for the sole purpose of showing that the cost of extraction equalled the extent of the value of the ore taken from the Cash lode. Whether this would be at all proper would depend very much upon circumstances, and it was not admissible for the purpose of limiting the plaintiff's recovery by this cost, except in so far as it was an actual part of the legitimate expenses of taking the ore out of the Bella vein. In other words, the plaintiff was entitled to recover the value of all the ore taken from the Bella less only the actual cost of digging that particular ore out of that particular vein, tramping it to the bottom of the shaft, and hoisting it to the surface. Whatever expense the Cash owners may have been to in running their levels, drifts, and cross cuts to reach the Bella vein, were no part of the cost which could be rightfully or legitimately added to the expense of extracting the Bella ore. When a trespasser enters on a vein to which he has no title, and takes ore therefrom, he cannot charge the person whose property he has thus invaded with the expenses of the exploration incidental and necessary to finding it or reaching the vein which he spoils by his trespass. It was, therefore, true this instruction could not have been legitimately given without the limitation that the only expenses with which the defendants could be credited were the actual expense of extracting from the Bella vein the ore for which they were sued. It is this evidence with reference to this matter which was objected to, and admitted over the objection, and respecting which there is no assignment of error. It has been referred to so that the court below, on the subsequent trial, will be guided by this opinion, and therefrom determine the legitimacy of the evidence which the defendants may offer on this subject. By this instruction the court usurped the function of the jury, took the entire case away from their consideration, and for this action we have

been unable to find any precedent in the books, nor has one been cited to us by the learned counsel who represents the defendants in error.

There are other equally fatal errors which will compel a retrial of the case. It is always true that the measure of damages for a trespass of this description is widely variant in two different classes of cases. In both of them the burden is with the defendant to show what he did, the value of what he took, and thereby limit the recovery. Our own supreme court has settled this proposition in the case hereinbefore referred to. It has been settled that a recovery on an innocent trespass is based on a totally different rule from one which is not the result of an honest mistake, and is, therefore, a willful trespass, within the ordinary legal acceptance of this term. In the first class of cases the defendants are undoubtedly compelled to pay only the value of the ore as it was in the mine, and therefore they can limit the recovery—First, by the value of what is taken; second, by the cost of mining and extraction, tramping, and hoisting to the surface, or delivering it at the pit's mouth. This is the value of the stuff to the plaintiff, who would be compelled to stand these expenses if he had mined the ore himself. In this statement there has been no mention of the cost of reduction, for, while this is usually a legitimate item of deduction, it is unimportant to the present discussion. On the other hand, if the defendants had taken out the ore, not as the result of an honest mistake or an honest intention, but under circumstances which showed that they had knowledge of the situation, or the circumstances were such as to legally charge them with this knowledge, they are entitled to no such deduction, and they may not reduce the amount of recovery by proving the cost of mining. Having been guilty of a willful trespass, they shall reap no benefit from their own wrong, and shall pay the value of the ore without credit for the labor incident to its extraction. This doctrine is too well settled to admit of controversy. *Waters v. Stevenson*, 13 Nev. 157; *Manufacturing Co. v. Moses*, 15 Lea, 300; *Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398; *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428, 12 Sup. Ct. 877; *Jewitt v. Dringer*, 30 N. J. Eq. 291; *Little Pittsburg Con. Min. Co. v. Little Chief Con. Min. Co.*, *supra*.

To bring this issue clearly before the jury, and to guide their deliberations, the plaintiff asked some instructions which charged the jury as to the respective rights of the parties, the burden of proof, and the duty of the defendants to find out and ascertain where they were working, and on what lode they were working, and the good faith with which they did it, and charging the jury that, unless they found that the defendants began the work under the honest belief that they were working on their own ground, where they had a right to work, they were not entitled to reduce the recovery by the expenses of mining it. The plaintiff was un-



doubtedly entitled to instructions on this subject. The seventh instruction which the plaintiff requested put this question of good faith before the jury in an intelligible and tolerably satisfactory shape, and the plaintiff was entitled to have the jury instructed on that theory. The situation of the case warranted it. The entry by the Berkin owners across the end line of a patented claim, and the pursuit of that development within its limits, was not done in ignorance of the plaintiff's rights; and in doing that work the defendants took the chances of being called on to respond in damages for whatever they might take out, without regard to the cost of extraction, unless they were entirely able to satisfy the jury that what they did was done in the utmost good faith, and on a fairly well founded belief of what they claimed were their rights. Locators of mining claims which are projected across patented property take all the risks incident to the pursuit of ore within the limits of that claim, and, being found to be trespassers, must respond in damages to the highest limit of recovery unless they are able to satisfy the jury of the honesty of their purpose and the good faith with which they did their work. Manifestly, under such conditions as appear in the record, the plaintiff was entitled to have the jury told what the plaintiff's rights were under such circumstances, and the court was bound to submit to the jury the question of good faith, of honest purpose and fair intention, and tell the jury that, unless they reached the conclusion the trespass was not a willful one, the whole evidence in regard to the cost of extraction was entirely foreign to their deliberations, and should not be taken into account in determining what the plaintiff might recover.

The plaintiff was likewise entitled to an instruction which he asked with reference to the burden of proof respecting the value of the ore which came from the Bella. The defendants having taken the ore by trespass, and mingled it with the ore to which they were legitimately entitled, so that the plaintiff was entirely unable to separate and distinguish and estimate it, the burden was on them to show how much came from the Bella and how much came from the Cash to the satisfaction of the jury. Unless the defendants were able to satisfy the jury on this question, the plaintiff might recover the value of all the ore shown to have been taken out, and the plaintiff's recovery was limited only by his own evidence on this subject. The defendants undoubtedly had the right to show what work they did in the Cash vein, and what ore they took out, so as to give the jury all the light possible respecting the extent and value of the ore which came from the Cash lode, and the extent and value of the ore which came from the Bella. If, from this evidence, the jury were able to separate and determine the value of each, then the recovery might be limited to what they should conclude to be the extent and value of the ore taken from the Bella lode, less whatever le-

gitimate expenses were properly chargeable as against that ore on the lines which are herein indicated. Not otherwise was the evidence respecting the ore taken from the Cash and the work done on it admissible or legitimate. The jury should be plainly told that the cost of the work done on the Cash vein was wholly unimportant, and beside their consideration, except as it might aid them in determining therefrom, if they were able to, what ore came from the Cash lode, that to the extent of this value the plaintiff's recovery should be reduced.

For the manifest errors which the court committed in taking the case from the jury, and in refusing to instruct them on essential matters, this case will be reversed, and sent back for a new trial. Reversed.

(9 Colo. App. 41)

PEOPLE ex rel. SCHMIDT v. COUNTY COURT OF ARAPAHOE COUNTY et al.<sup>1</sup>

(Court of Appeals of Colorado. Dec. 14, 1896.)

CERTIORARI—TO REVIEW AMENDMENT OF JUDGMENT ENTRY—POWER OF COURTS TO CORRECT JUDGMENT—EVIDENCE.

1. Certiorari will lie to review the action of a county court in amending a judgment entry by a nunc pro tunc order after the time for an appeal or proceedings in error from the judgment has expired.

2. A court may base a nunc pro tunc order correcting a judgment entry to conform to the judgment actually rendered on such evidence, either oral or of record, as is satisfactory to itself.

3. A court has power, after the term at which a judgment is rendered, to correct clerical errors or omissions in the record of such judgment, to make it conform to the facts.

Appeal from district court, Arapahoe county.

Certiorari, on relation of Eliza Schmidt, against the county court of Arapahoe county and R. W. Steele, judge. Judgment for defendant, and plaintiff appeals. Affirmed.

McIntyre, Bray & Jarvis, for appellant R. T. Cassell, for appellees.

BISSELL, J. The county court of Arapahoe county made an order amending the judgment entry in the case of Schmidt against Dreyer and Wolaver, the sheriff; and the present proceeding is an attempt to review that action, and restrain the court from further proceeding in the premises. The original judgment was rendered some five or six years before the attempted amendment and the time for an appeal or a writ of error had long gone by. The parties sought to obtain a review of the action of the county court by prosecuting error from the order made after the judgment had been amended. This was adjudged irregular by the supreme court, who held that these matters could only be reviewed on an appeal or writ of error from the final judgment. Since this was impossible, the

<sup>1</sup> Rehearing denied January 11, 1897.

parties would be remediless, unless they were permitted to enforce the present remedy. Its regularity and sufficiency are not questioned, and it is likewise apparently sustained by the authorities. *Schmidt v. Dreyer* (Colo. Sup.) 39 Pac. 1086; *Schwarz v. County Court*, 14 Colo. 44, 23 Pac. 84; *People v. District Court of Lake Co.*, 6 Colo. 534; *Jeffries v. Harrington*, 11 Colo. 191, 17 Pac. 506; *Duggen v. McGruder*, 12 Am. Dec. 527.

This preliminary matter being disposed of, we are brought to the consideration of the main question, which respects the power of the court to correct its record after the term at which the judgment was entered. There are some minor questions suggested as collateral to the main proposition, but practically growing out of it. These will be disposed of in their natural order. We must first state the facts which make up the history of the case. For these we depend on the proof offered in support of the motion. The appellant, Mrs. Schmidt, did not controvert the showing. The facts were conceded, and we are only to ascertain whether the judgment can be sustained. In 1891, Mrs. Schmidt brought suit in replevin against Dreyer and Wolaver, the sheriff of Weld county, to recover certain personal property which the sheriff had taken under an execution issued against Mrs. Schmidt's husband on a judgment which had theretofore been entered against him. Mrs. Schmidt's contention was that she had a lien on the property, and was entitled to its possession, because of the terms of a chattel mortgage which had been given to her to secure a bona fide indebtedness. This suit was tried in the county court, and a judgment rendered for the defendants. In this statement we do not intend to be understood as saying that this was the actual judgment rendered, but simply that it went in favor of the defendants. The case was tried without a jury, and the court took it under advisement, and subsequently rendered judgment. What was done at this time is the subject-matter of the present inquiry. The particular importance of this action springs from the objection which the parties make to the consideration of the testimony by which it is supported. After the judgment was pronounced, the plaintiff, Mrs. Schmidt, prayed an appeal to the district court, and asked the court to fix the bond which should be given to perfect the appeal. The court fixed the bond at \$1,400. The importance of this fact is apparent when we state the conceded value of the property involved in the replevin action was \$700. The plaintiff, Mrs. Schmidt, so stated it, and the defendants admitted it. The appeal was perfected, and a bond in this sum executed. After the cause reached the district court, it was tried to a jury, who disagreed, or the judgment was set aside in some way, and it stood for a new

trial on the issues. Thereafter Mrs. Schmidt dismissed this pending appeal, and went into the county court, and paid the judgment as it then stood. This is somewhat significant, because, as the judgment was in the county court, it was simply for the defendants and for their costs. When suit was brought on the replevin bond which Mrs. Schmidt had given in her suit against Dreyer and the sheriff, the parties were met with the defense that the judgment had been satisfied and paid, and that there was never any judgment rendered for the sum of \$700. As we imagine, the parties in some way discovered the mistake made by the clerk in the entry of the judgment, and, in order to escape their proper responsibility in the replevin action, dismissed the appeal, and paid the judgment as it had been entered. Whatever the motive or whatever the purpose, the fact remains that the parties attempted to get rid of this judgment, and thereby escape any liability to respond for the value of the property which had been taken in the replevin action.

We now come to the history of the case as it is disclosed by the showing made on the application to the county court to amend its judgment. The motion was based on the records in the suit of Schmidt against Dreyer, and, likewise, on the affidavits of one of the attorneys, the stenographer, and the county judge who tried the case. The affidavits fairly and fully show that, when the judge delivered his opinion, it was stated by one of the counsel that the judgment would be assumed to be for the value of the property or its return, to which the court replied, "That is the judgment." When the judge was requested to fix the bond, he fixed it in evident and actual accord with his statement "that is the judgment." This is manifest, because the bond was fixed in the sum of \$1,400, which was just twice the amount of the admitted value of the property. There would have been no authority on the part of the court to fix the bond in any such sum, unless he had rendered a judgment in favor of the defendants for \$700, or the return of the property; otherwise, the bond would simply have been sufficient in amount to cover the costs of the proceedings below and on appeal. The stenographer who took the minutes made a notation that the judgment was for the defendants. This was evidently given to the actual clerk of the court, who thereupon entered a judgment in favor of the defendants, and for their costs. On these facts, and on proof of this description, the present county court, presided over by a different judge, made an order amending the judgment entry so that thereby the judgment was in favor of the defendants, in the sum of \$700, or for the return of the property taken on the replevin suit which the plaintiff had sued out. Mrs. Schmidt now attempts to restrain the county court from further pro-

ceeding in the matter, and enforcing the judgment as amended.

One of her principal contentions is based on the character of the evidence which was offered, and on which the county court based its action. The appellant cites quite a number of cases wherein the question of what proof can be relied on to justify a court in amending its record by a nunc pro tunc order, and thereon asks us to hold the affidavits offered inadmissible, and to restrain the county court from proceeding, because there is no absolute written evidence, like a judge's minutes or other record proof, on which to proceed. While we recognize the precariousness of the tenure by which successful parties to judgments would hold title if it be conceded their rights may be varied, altered, or affected by parol proof as to what was done at the time of the original entry, we are also impressed with the necessity for permitting the introduction of this kind of proof in order to do substantial justice between parties whose rights are affected by an inaccurate entry. Had the rule been otherwise declared, it might have been supported by the irrefragable argument that the parties were bound by the judgment as it stood, because both they and their attorneys were charged with notice of its terms, and responsible for any of its inaccuracies or errors which could at all times have been easily corrected at and during the term in which the judgment was rendered. Negligence in this respect, we concede, ought perhaps, in equity, to bar them. The writer is firmly of the opinion this would be an equitable rule. Parties and attorneys have no business to lie by, and rely on the acts of the clerk, and his accuracy in the entry of judgments, and, when he fails, call on the court, years afterwards, to correct the mistake. It is the duty of attorneys to examine the judgment entries, and see that they are correct, and, when errors have crept in, move promptly for their correction. Whatever may be our opinion respecting it, the law is otherwise written. It is clearly settled the trial court may proceed on evidence satisfactory to itself, whether oral or documentary, whether of record or otherwise, to correct the entry, and make it speak the judgment which the court in fact rendered. This matter has been set at rest by the supreme court of the state, which is in line with the authorities of many other states on the same question. *Doane v. Glenn*, 1 Colo. 454; *Freem. Judgm.* § 63; *Clark v. Lamb*, 8 Pick. 415; *Frink v. Frink*, 43 N. H. 508; *Weed v. Weed*, 25 Conn. 337; *Rugg v. Parker*, 7 Gray, 172; *In re Wight*, 134 U. S. 136, 10 Sup. Ct. 487. These authorities broadly support the power of the court to amend its record, and rest its action on proof which shall be sufficient, in its judgment, to demonstrate the error inherent in the record. Tested by these rules, the

county court was wholly justified in declaring the entry an erroneous one. The recollection of the court, the recollection of counsel, and the recollection of the stenographer, all unite on the one proposition that the judgment which the court, in fact, declared was for the defendants, and for the return of the property or its value, which was fixed at \$700. A judgment which failed to express this result did not accord with the request of counsel, or the announcement of the judge who tried the case. It may, however, be well insisted, there is record evidence to support the motion. The right of appeal was conditioned on the giving of a bond in the sum of \$1,400. This is exactly double the amount of what the judgment would have been and actually was if these affidavits are true. The court would not otherwise have so conditioned the right of appeal. Nor is it conceivable that Mrs. Schmidt would have idly consented to the restriction of her right by the requirement of a bond of this description, unless the judgment had been as the parties now contend. Neither parties nor counsel consent to the giving of extraordinary bonds, unwarranted by the statutes. The difficulty which comes to most litigants in furnishing this class of securities always results in a contest over the amount specified if the court at all transcends his power or his duty in such matters. We therefore conclude that, by the failure to file counter proofs or affidavits, it is practically admitted that the judge did find for the defendants, and did order a judgment entered for the return of the property or the payment of its value, to wit, \$700. On the proof, the present court could not have done otherwise than conclude the entry was erroneous, and that the error came through the mistake of the clerk, who was charged with the duty of its entry.

This proposition being conceded, we are brought to the main question, of the power of the court to amend its records after the term. Of this there is no doubt. The courts everywhere concede authority to make their records conform to the facts. The only possible limitation on the power of the courts in this direction is found in the general expression that, after the term, they are limited to the correction of those errors which may be regarded as of a clerical character, and which, when corrected, will make the records conform to the facts. The order may only interpolate and make part of the record what was, in fact, done. The rule has been declared by both the appellate courts of this state, in harmony with these general authorities. *Kindel v. Lithographing Co.*, 19 Colo. 310, 35 Pac. 538; *Breene v. Booth*, 3 Colo. App. 470, 33 Pac. 1007; *Breene v. Booth*, 6 Colo. App. 140, 40 Pac. 193; *Freem. Judgm.* §§ 68, 70; *Gray v. Brignardello*, 1 Wall. 627; *Inhabitants of Limerick*, 18 Me. 183; *Ross v. Ross*, 83 Mo. 100; *Printing Co.*

v. Green (Ohio Sup.) 40 N. E. 201; Phillips v. Negley, 117 U. S. 685, 6 Sup. Ct. 901; McClannahan v. Smith, 76 Mo. 428; Wooldridge v. Quinn, 70 Mo. 370; De Castro v. Richardson, 25 Cal. 49; Compton v. Cline, 5 Grat. 137.

It must therefore be conceded that the county court had full authority to correct this entry so that it should speak the actual judgment pronounced by the court in Schmidt against Dreyer. We do not understand there is any disagreement between this and the supreme court with reference to this general doctrine, though counsel seek to build up an imaginary difference between them. It is quite true, the court, in the Kindel Case, speaks of judicial errors as being the subject-matter of correction, without stating the limitations which are often declared essential to the statement of this doctrine. We do not, therefore, conclude that the supreme court intended to lay down the general doctrine that judicial errors are always the subject-matter of correction after the term; and we are led to this conclusion because, as appears from the opinion in the Kindel Case, the matter involved in that decision was a clerical error, which may always be corrected, and for the further reason, that the authorities cited in the paragraph do not support the general proposition, except as it may be limited in accordance with the expression of the general line of authorities on this question. We are not called upon, however, to discuss this question at all, or attempt to reconcile the apparent, rather than real, differences between the cases, because in the present matter no such question is presented, and there is no attempt to correct anything other than a clerical error which has crept into the record, and made the judgment something other than that which the court pronounced. The only reason we refer to this matter at all is because of the arguments of counsel on the question. The only difference between the case of Breene v. Booth and Kindel v. Lithographing Co. is found in the intimations of the supreme court that the rule which we announced governing appeals did not accord with their judgment. In the Breene v. Booth Case an individual judgment was entered against Breene, and from it he prosecuted an appeal. Thereafter, by a nunc pro tunc order, the judgment entry was corrected, and the judgment thereupon became a judgment against Breene and Booth, as a co-partnership. On the filing of an amended transcript showing this fact, there was an attempt to prosecute the original appeal on the basis of the amended judgment. This court held it could not be done. When the case came up afterwards, on appeal (6 Colo. App. 140, 40 Pac. 193), and the judgment was affirmed, there was no departure from this general announcement. The supreme court would seem to think otherwise, and to hold that for the protection of the rights of the parties to

the suit, if the judgment should be afterwards corrected, it might be incorporated into the record of the appeal, according to the rule announced in 3 Bing. 346, and the appeal be heard on the amended record. We have found no case of this description which is based on facts at all similar to those presented in the Breene v. Booth Case. Whether, under facts like those, the supreme court would adhere to the doctrine which was intimated in the Kindel Case, we do not inquire. Equitable considerations might possibly support that rule, though a strong argument would be found against it, based on the negligence of the parties and the attorneys to supervise and attend to the entry of the proper judgment at the time when the clerk made the entry. The inconvenience and apparent injustice to the parties is the result of their own folly and their own negligence; and unless the journal entries are matters of which the parties and the attorneys have no supervision, as is the case in the English courts, it might be argued a different rule should prevail. We are not called upon, however, to discuss or dispose of this matter, nor to determine what rule, if any, has been announced by the supreme court. In a case requiring it, we should, undoubtedly, be called on to ascertain what that court had done, and be bound to follow the law as it might have been declared. The action of the district court in the present proceedings, which adjudged the correction made by the county judge entirely regular and proper, is in harmony with the law as we have herein stated it; and, its judgment being entirely correct, it will be affirmed. Affirmed.

(4 Okl. 472)

#### FENTON v. WHITE.

(Supreme Court of Oklahoma. Sept. 4, 1896.)

AMERCEMENT OF SHERIFF — APPEAL TO DISTRICT COURT.

The proceedings upon a motion to amerce a sheriff are in the nature of a civil action, and the order of the trial court is a final adjudication in the matter, and a final judgment, which entitles the defendant, when a hearing has been had in the probate court, to an appeal to the district court for a rehearing of the facts in the case; and, when the appeal is properly taken, the case is in the district court, and must be reheard there.

(Syllabus by the Court.)

Error to district court, Kay county; before Justice A. G. C. Blerer.

Action by C. T. White against George S. Fenton. Judgment for plaintiff. Defendant brings error. Reversed.

White, the defendant in error, brought suit in the probate court of Kay county, on September 26, 1894, to recover judgment against Murray & Moore for \$380 and costs. An execution was on the following day issued upon said judgment, and placed in the hands of the plaintiff in error, George S. Fenton, then sheriff of Kay county, which

execution was returned unserved. The defendant in error, White, thereupon filed his motion in the probate court to amerce the said sheriff, and on the same day the sheriff filed his answer to said motion. The motion to amerce averred the rendition of judgment and the issuance of execution, and declared (1) that Fenton, as sheriff of said county, had wholly refused and neglected to execute the writ of execution which had been placed in his hands; (2) that he had neglected and refused to sell certain goods and chattels by him levied upon under the writ of execution, and had wrongfully released the same; and (3) that he had neglected to return a just and perfect inventory and appraisement of the goods and chattels by him levied upon and taken under the writ of execution. The plaintiff in error, answering, (1) denied that he had neglected to return a just and perfect inventory, and said (2) that he was at all times ready and willing to levy said execution upon the goods belonging to the defendants, or upon any goods shown to him by the plaintiff or his agents belonging to the defendants, and that he had made diligent search for property belonging to defendants, and (3) that plaintiff had shown him property of the defendants, and requested him to make a levy on it, but that such property was claimed by another person, namely, John Blanchard, and was in the possession of Blanchard, and held under a chattel mortgage, duly recorded and sold, presented to this respondent, for the sum of \$2,405; that he had demanded of White, defendant in error, a good and sufficient indemnity bond before he could or would levy on said goods, and that defendant in error neglected and refused to give him such bond; that the bond tendered by defendant in error to plaintiff in error was not good and sufficient to indemnify him; that he had inquired as to the solvency of the sureties offered therein; that, after one of the bondsmen had signed the bond, he demanded to be released from it; that another surety was not solvent, or worth the amount stated in his affidavit; and that he notified the defendant in error that the bond tendered was not good, and refused to accept it for the purposes therein mentioned. Plaintiff in error filed with his answer a copy of the chattel mortgage referred to. Upon the issues thus made up a trial was had upon the 5th day of December, 1894, evidence was produced and heard, and arguments of counsel made, and the probate court thereupon rendered judgment against the plaintiff in error, Fenton, for the amount claimed in the motion for amercement and \$10 costs and 10 per cent. thereon, to which judgment the said Fenton excepted, and thereupon gave notice of appeal to the district court of Kay county, and thereafter filed his appeal bond, which was approved on the 10th day of December, 1894, by the probate judge, and all the papers in the case were thereupon for-

warded to the district court. Thereafter, on February 21, 1895, the defendant in error, White, filed his motion in the district court in said case, moving the court to dismiss the appeal, on the ground that an appeal did not lie to the district court from such an order. This motion was heard by the district court on the 10th day of December, 1895, and sustained, on the ground that the district court had "no jurisdiction of the subject-matter of the appeal" from the order of amercement against the plaintiff, as sheriff. The court thereupon rendered a judgment dismissing the appeal. From this order of the district court of Kay county, the plaintiff in error appeals to this court for a reversal thereof.

Blevins & King, for plaintiff in error. Exline & Jacobs, for defendant in error.

McATEE, J. (after stating the facts). The sole question in the case is whether an appeal lies to the district court from an order of the probate court amercing the sheriff. Section 1506 of the Statutes of 1893 specifies the extent of the appellate jurisdiction of the district court over the probate court as follows: "If questions of fact are to be retried in the appellate court, the appeals shall be taken to the district court of the county in manner and form as appeals are taken from judgments of justices of the peace." The method prescribed by the statute for taking appeals from judgments of justices of the peace, as found in section 4764 of the Statutes of 1893, is that, "in all cases not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered." The fact that the plaintiff in error took the appeal from the action of the probate court, instead of filing his petition in error, was a sufficient indication that it was his purpose, in appealing to the district court, to have the case retried upon the questions of fact. Inasmuch as there was a hearing in the probate court upon issues of fact framed and evidence produced, we think that he was entitled to have a rehearing on appeal, if it should be concluded that that order should either be denominated a "final judgment," or if it should be found that it was, in fact, such an order as finally determined the rights of the plaintiff and of the defendant in error in that matter. It is, in section 4370 of the Statutes of 1893, provided that "all amercements so procured, shall be entered on the record of the court, and shall have the same force and effect as a judgment." And it is provided, in section 4371, that "each and every surety of any sheriff or other officer may be made party to the judgment rendered as aforesaid, against the sheriff or other officer, by action, to be commenced and prosecuted as in other cases. \* \* \* Nothing herein contained shall prevent either party

from proceeding against such sheriff or other officer, by attachment, at his election." And, by section 4372, that "in cases where a sheriff or other officer may be amerced, and shall not have collected the amount of the original judgment, he shall be permitted to sue out an execution and collect the amount of said judgment, in the name of the original plaintiff, for his use." It is not only provided here that the order of amercement "shall have the same force and effect as a judgment," but it is also provided, with reference to the very order of amercement itself, that "to the judgment rendered as aforesaid" each and every surety of any sheriff or other officer may be "made a party"; and, again, the order of amercement is by very strong inference denominated a "judgment," inasmuch as, in the closing section above cited, the judgment from which the execution issued is termed the "original judgment." This last distinction is one which is only proper for the legislator to have used if he meant to distinguish it from that other order or amercement against the sheriff, which may be rendered against him if he "shall not have collected the amount of the original judgment." So that the legislature has not only here declared that the order of amercement shall have the same force and effect as a judgment, but declares the order of amercement to be a judgment itself, and distinguishes it from that other judgment, which was the "original" judgment, and from which, it being itself a judgment, it is necessary to carefully distinguish it.

These provisions of the statute, being a part of the Code of Civil Procedure, are identical with the Code of Civil Procedure of the state of Kansas. The understanding here given is that of the supreme court of the state of Kansas in *Knox v. Merrill*, 22 Kan. 572. It was explicitly stated by Judge Brewer, who declared the opinion of the court in the case, that "the single question is as to when an order of amercement becomes a lien on the real estate of the officer amerced, situate within the county,—whether at the date of the order, or at the time of the levy of an execution issued thereon. The district court held that it became a lien from the day of its date, and we think this ruling correct." In *Wadsworth v. Parsons*, 6 Ohio, 450, upon error from an order sustaining the motion to amerce the sheriff, the supreme court of Ohio, in stating the case, set forth that "the plaintiff seeks to reverse this judgment," and, after considering the case, and making a ruling on it, declared "the judgment affirmed." In *Duncan v. Drakeley*, 10 Ohio, 45, upon a case coming up from the common pleas to the supreme court of that state in the same manner, the court again denominated the order of amercement made by the court of common pleas a "judgment," concluding its opinion that the order should be made of "Judgment re-

versed." In the case of *Graham v. Newton*, 12 Ohio, 210, in a case coming up to the supreme court from a similar order based upon a motion to amerce the sheriff, the court declared: "We shall only consider that error which was taken to the amount of the judgment in amercement,"—and declares that "the whole amount so made up, of the judgment debt, interest, and costs, which makes up the true amount of the judgment to be rendered, or the amercement, which, when so reduced to judgment, will draw interest as other judgments, until collected"; concluding its opinion by again declaring that the "judgment is affirmed." And the court of appeals of Kansas, Southern department, Eastern division, in 1895, in the case of *Reese v. Rice*, 41 Pac. 218, upon error from the district court to the supreme court from a judgment founded upon a motion for amercement of the sheriff, designates the order of the district court to be "a judgment of amercement," and directs that "the judgment of the district court is reversed."

But it is urged by the defendant in error that the order of amercement cannot be a final judgment, for the reason that there are no pleadings in the case. As has been seen, the motion to amerce the sheriff and the answer of the plaintiff in error thereto, while not denominated a "petition" and "answer," yet plainly present the matters of fact in issue; but it was said by the supreme court of Ohio, in *Wadsworth v. Parsons*, cited above: "We know of no practice which requires either plea, or answer, or issue to be made up in form. We have never seen such practice adopted, and there is, in our opinion, no law that requires it." And this view of the law was again adopted by the same court in *Graham v. Newton*, 12 Ohio, 210, in the declaration that, "in *Wadsworth v. Parsons*, 6 Ohio, 449, it has been decided that pleadings are unnecessary on motions for amercement." It is urged by the defendant in error that it was decided, in *Armstrong v. Grant*, 7 Kan. 286, that "the action of the court in such case [amercement] is on a written motion, and not on pleadings. Its determination is an order, and not a judgment." But we consider that the opinion of the court in *Knox v. Merrill*, 22 Kan. 572, referring to the Ohio cases and accepting their view, together with the weight of the Ohio cases themselves, founded upon the provisions of the same Code of Civil Procedure, fully establish the adverse view, and that an order of amercement, founded upon a motion upon which a hearing has been had, is, in fact, a final adjudication, and such a final judgment as entitles the losing party to an appeal, under the provisions of our statute, above cited.

We think the authorities in strict conformity to the reasoning and justice of the case. The proceedings had upon a motion to amerce are in the nature of a civil action,

which is an "ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, or the redress or prevention of a wrong, or the punishment of a public offense." St. Okl. 1893, p. 763, § 3876. This is a proceeding in amercement,—nothing more or less. The order is a final order of the court. Proceedings of this character are often of great importance, placing the whole welfare of the sheriff in the power of the court; and, if there is no appeal, the property and welfare of the sheriff are at the disposition of a single tribunal. It is a case in which this court should strongly favor the appeal, and, as was said in *Haas v. Lees*, 18 Kan. 454, by Chief Justice Horton, do so "as far as possible without obstructing the course of justice," and in which "provisions of the Code are to be liberally construed, with a view to effect its objects and to promote justice." St. Okl. 1893, § 2693. We think that the judgment of the district court should be reversed, and that the case should be heard there upon the facts, and it is so ordered. All the justices concur, except BIERER, J., who presided below.

(4 Okl. 718)

#### BIVERT v. PERKINS.<sup>1</sup>

(Supreme Court of Oklahoma. Sept. 4, 1896.)

#### AWARD OF ARBITRATORS—RES JUDICATA—ENTRY OF JUDGMENT BY JUSTICE.

1. Under the statute in force in this territory in 1890, in a case before a justice of the peace, in which an application and affidavit for change of venue were filed, and an order of removal made thereupon in writing by the justice of the peace, and entered in his docket, and immediately thereafter, and before leaving the court, the parties to the cause agreed to enter into an arbitration under the direction of the court, and at once agreed upon arbitrators, and submitted their testimony to them, and the arbitrators made a finding in writing stating what each party to the controversy should do in order to terminate the litigation, and this finding of the arbitrators, at the request of both the parties, entered upon the justice's docket, and made a rule of court, and a judgment was entered thereupon, and the parties proceeded to and did carry out the finding and order of the arbitrators, then afterwards, upon a trial of the same matters in the district court, it was not error in the court to give an instruction that, if the parties to the litigation had agreed in the justice of the peace court to submit the matters in controversy between them to arbitrators, and that the award or finding of the arbitrators should be entered in the docket of said justice of the peace as a judgment, then the decision of such parties amounted in law to an adjudication and determination of their respective rights.

2. Nor was it error for the said justice of the peace, under the circumstances and at the request of the parties, to retain jurisdiction of the cause, and to enter up such arbitration and judgment thereon.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Action by G. N. Perkins against Louis N. Bivert and others. Judgment for plaintiff, and Bivert brings error. Affirmed.

On March 18, 1893, Donaldson sold to Edwards and Robinson a yoke of oxen, the possession of which is involved in this case. Edwards and Robinson agreed to pay therefor the sum of \$65,—\$50 in cash, which was paid, and \$15 in labor, consisting of breaking and grubbing a 15-acre tract of land. Only a small portion of the work was performed. On May 3, 1893, Edwards and Robinson sold the cattle back to Donaldson, taking his promissory note therefor for the sum of \$50. On May 5, 1893, Edwards and Robinson brought suit in replevin before Brazil, a justice of the peace for Iowa township, Logan county. On May 23d the case was called for trial, when Donaldson filed an application and affidavit for change of venue, which said application was granted, and the case ordered to be transmitted to Nelson Benjamin, justice of the peace for Iowa township. Afterwards, and on the same day, a verbal agreement of arbitration was had before the said A. J. Brazil of the matters in dispute between the said Edwards and Robinson and Donaldson. The arbitrators made a finding and agreed that Edwards and Robinson should return to Donaldson his note of \$50, and pay to him the sum of \$8, and give to him the work already done on the land, and that Donaldson should turn over the oxen to Edwards and Robinson, and that Donaldson was to pay the costs of the lawsuit and to have the crop on the ground. Thereupon the note of \$50 was turned over to Donaldson, the sum of \$8 was paid to him, and by his direction applied to the payment of costs in the case, and he also paid a remaining balance of 45 cents costs. Thereafter Edwards and Robinson went to the place of Donaldson, with the latter's consent, and took possession of the oxen, and took them away. Donaldson, therefore, had performed his part of the arbitration, and Edwards and Robinson had performed their part thereof. Thereafter, and on the 27th day of May, 1893, Donaldson commenced a suit of replevin before McElroy, a justice of the peace for Springsvale township, Logan county, against Edwards and Robinson for the possession of the oxen, and on May 30th a judgment was rendered by said justice of the peace in favor of the plaintiff, Donaldson, adjudging that he (the plaintiff) was the owner and entitled to the possession of the oxen. Thereafter Edwards and Robinson, being indebted to the plaintiff herein, G. N. Perkins, executed a bill of sale to him of the oxen. Subsequent to May 30, and prior to June 15, 1893, Donaldson sold the oxen to John P. Bivert, who again sold them to Louis N. Bivert, the plaintiff in error. On June 15, 1893, the defendant in error here commenced an action of replevin against

<sup>1</sup> Rehearing denied January 7, 1897.

Francis M. Donaldson, John Bivert, Louis Bivert, Richard Roe, and Thomas McElroy, before W. H. McCarver, justice of the peace for the city of Guthrie. Louis Bivert answered, claiming the property and the right of possession therein. The other defendants answered, disclaiming any interest in the cattle. Upon change of venue, the case was tried on June 20, 1893, before Justice Fred M. Morgan, between the plaintiff and the defendant in error, was decided in favor of Perkins, and appeal taken to the district court of that county and territory. Thereafter, on the 20th and 21st days of April, 1894, the case was tried in the district court of Logan county, this territory, to a jury, and a verdict rendered, and judgment entered thereon for the plaintiff, G. N. Perkins, and against the said Louis N. Bivert, for the return of said oxen and \$25 damages, and also adjudging the value of the oxen to be \$65.

Keaton & Cotteral, for plaintiff in error.

McATEE, J. (after stating the facts). Several assignments of error are made by the plaintiff in error. The views which are pressed in the brief are: (1) That the court erred in giving instruction No. 5, to the effect that, if Donaldson and Edwards and Robinson agreed to submit the matter in controversy between them to certain arbitrators, and thereafter agreed that the award or finding of said arbitrators should be entered in the docket of the said A. J. Brazil, justice of the peace, as a judgment, then the decision of such parties amounted in law to an adjudication and determination of their respective rights; and (2) that A. J. Brazil, justice of the peace, had lost jurisdiction to enter any judgment in the case, prior to the said arbitration, for the reason that he had previously granted a change of venue to another justice, and that, hence, he had no jurisdiction of the parties or the subject-matter. The former part of this contention is argued upon the ground that St. Okl. 1890, p. 884, c. 70, art. 26, in force at the time of the arbitration and trial, provides that (section 1) "all persons, except infants and insane persons, may by an instrument in writing submit to the arbitration or umpirage of any person or persons to be by them mutually chosen, any controversy existing between them which may be the subject of a suit at law, except as otherwise provided in the next section, and may agree that such submission may be made a rule of any court of record designated in such instrument." It is provided, in section 9, that "the award shall be in writing, and signed by the arbitrator or arbitrators who agree thereto, and shall be attested by a subscribing witness." While the justice had, in fact, entered upon his docket the change of venue to another justice, the parties to the cause, including Donaldson, did, as a matter of fact, request

the justice to suspend the operation of that order, inasmuch as they had agreed to enter into an arbitration of the matter, and to have the same made the rule of his court, and, under the direction of the said justice, in his court, and with his aid, agreed upon arbitrators, who, after the hearing of the testimony, made a finding in writing, which was entered upon the justice's docket, and agreed thereto, by both the parties thereto, who acted thereon, and carried out the arbitration; the note of Donaldson for \$50 being surrendered to him by Edwards and Robinson, or at their direction, and Edwards and Robinson having paid over, at the direction of Donaldson, the sum of \$6 to the justice of the peace, to be applied by him upon the payment of the costs of the suit, which were, under the arbitration, to be paid by Donaldson, and Donaldson himself having completed the payment of the costs by adding the sum of 45 cents in cash to the justice, and he having surrendered the complete possession and claim of ownership of the oxen to Edwards and Robinson.

We think, before the papers had been transmitted to the district court, the justice of the peace had the right, at the request of both parties to the case, to reassume the jurisdiction of the cause, for the purpose of aiding in this effort to arbitrate the matters in controversy, and that, inasmuch as the arbitration was accepted by both parties, carried out, and completed, and the oxen delivered to Edwards and Robinson on the next day, or the second day thereafter, and that the arbitration was entered up as a judgment by the said justice of the peace, and agreed upon by the parties thereto, that it was not error for the court to direct, "the decision of the parties amounted in law to an adjudication and determination of their respective rights." We find no error in the record, and that the judgment of the district court was correct, and it will be affirmed. All the justices concur, except DALE, C. J., who sat in the trial of the case below.

(4 Okl. 672)

#### PROVINCE v. LOVL1

(Supreme Court of Oklahoma. Sept. 4, 1896.)

EJECTMENT—OCCUPYING CLAIMANT—NEW TRIAL—REFERENCE—OATH—CONFIRMATION OF REPORT.

1. In order to successfully assert a right as an occupying claimant, the party must bring himself within the statutory provisions applicable thereto; and, in the absence of such showing by defendant in an action of ejectment, he should be regarded as a trespasser, without any right to demand a jury to assess the value of the improvements he has placed upon the land.

2. Section 309, Code Civ. Proc., which provides that a referee shall be sworn, while mandatory to the extent of requiring the oath to be taken, yet the precise language of the statute need not be followed in the oath administered; it is sufficient if the substance of the statute be complied with.

<sup>1</sup> Rehearing denied January 7, 1897.



3. Where an objection is made to the report of a referee on the ground that the report is not sustained by the evidence, and the evidence taken by the referee was not before the court on the hearing on the referee's report, it is not error, on the motion to set aside the referee's report, for the trial court to overrule the objection to the confirmation of the report.

4. Where a judgment by default is taken in favor of a plaintiff in an ejectment suit, and no issue has been raised by a defendant as to the right of plaintiff in the possession of the land, section 618 of our Code, which provides for a new trial as a matter of right in an ejectment proceeding, is not applicable. *Hall v. Sanders*, 25 Kan. 538.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice Henry W. Scott.

Action by Charles Lovi against John Province and John Hicks. Judgment for plaintiff, and Province appeals. Affirmed.

R. G. Hays and J. S. Jenkins, for plaintiff in error. A. B. Hammer and J. H. Everest, for defendant in error.

DALE, C. J. November 15, 1893, Charles Lovi instituted an action in the district court of Oklahoma county against John Province and John Hicks, to recover the possession of lots Nos. 3 and 4, and the E.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 11, township 12 N., range 2 W., Oklahoma county, and in such action asked for a judgment against defendants for damages in the sum of \$700, for unlawfully keeping plaintiff out of the possession, waste, and mesne profits. To this petition no answer was filed, and on February 26, 1894, judgment was entered against the defendant Province by default. The record does not show that a judgment against Hicks was asked for, and he does not appear further in the case. Afterwards, but on the same day upon which the judgment was taken by default, counsel for defendant Province filed a motion to strike the petition from the files, because the same was not verified; and, on March 5th following, counsel filed another motion for defendant Province, asking that the default be set aside, and alleging in such motion that, at the time the judgment was entered, defendants were not in default, for the reason that they had at such time a motion on file to strike the petition from the files, because the same was not verified. The motion to set aside the default was overruled, and no further proceedings appear to have been taken in the case until November 7, 1894, at which time a referee was appointed to try the questions both of law and fact regarding the damages claimed in the petition. November 15th the referee filed his oath; and inasmuch as it is contended that the referee obtained no jurisdiction, because the oath was not substantially as required by law, we will set it out as it appears in the record. After entitling the cause, the oath is as follows: "Territory of Oklahoma, Oklahoma county—ss.: I, A. P. Bond, heretofore, on

the — day of November, 1894, appointed referee to take testimony concerning damages in said case, and report herein on questions both of law and fact concerning said damages, do solemnly swear that I will faithfully perform the duties of referee in said cause, according to the best of my ability; so help me God." Following the oath appears the signature of A. P. Bond, and a jurat showing that it was subscribed and sworn to on the 15th day of November, 1894, before W. H. Ebey, clerk of the district court. On November 19th the referee filed his report, and an inspection of it shows that the plaintiff and defendant appeared by counsel before the referee; that no objection was made to proceeding before such referee; in fact, no objection was made to any of the steps taken by him before his report was filed in the district court, on November 19, 1894. On December 13th the defendant Province filed a motion to set aside the report of the referee, urging several grounds in said motion, in substance as follows: That he had a valid defense to the action; that he entered upon the land in good faith, under a contract with one M. Crawford, who defendant believed was in the lawful possession of the same, and under said contract the defendant built a mill, and made other permanent and lasting improvements on the land; that afterwards it was ascertained that the land was a fraction of about six acres, and that Crawford's filing did not cover the same; that the plaintiff, learning of these facts, procured some kind of a filing or claim to the same, well knowing at the time of procuring the filing or claim that the defendant occupied the land in good faith, and had built the mill, and made valuable improvements, as aforesaid; that, when the suit was filed and service had on the defendant, he employed attorneys to file his defense; that his attorneys had failed to file such defense; that on the 15th day of November, 1894, the court appointed A. P. Bond referee, to hear evidence and determine the amount of damages sustained by the plaintiff, and that he (the defendant) had no actual notice of the appointment of the referee, or the time or place of the trial by him, until after the same was concluded; that defendant had no opportunity to be present at the trial with his witnesses; that he had been sick and unable to attend court at an earlier day; that he verily believes that he can show by sufficient proof that plaintiff is not entitled to any amount as damages; that the referee did not take the oath prescribed by law, and had no jurisdiction to try or report on said case; that said referee erred in finding excessive damages in the sum of \$400, and the defendant moved the court to set aside the default, also the report of the referee, and grant him a new trial. This motion was argued, and by the court overruled, and on February 16, 1895, a judgment was entered, awarding pos-

session of the land and damages in the sum of \$400. On the same day upon which the judgment was so entered, a motion for a new trial was filed and demanded, under section 618 of our Code. This motion was also overruled.

There are a number of errors assigned, but, upon the record before us, we cannot consider any but those which go to the ruling of the court upon the motion to set aside the report of the referee and the motion for a new trial, made under section 618 *supra*. The default was entered long after the answer was due, and the motion to set it aside was unaccompanied with any showing whatever, or even a statement that there was a defense to the action. Under such conditions, the court could do no less than overrule the motion. The referee was appointed, without objection, to determine the question of damages. The defendant appeared by counsel before the referee, made no objection whatever to proceeding with the hearing, and no objection was filed before the referee to his findings or conclusions of law. Nearly one month after the report was filed in the district court, the defendant presented a motion to set aside the report of the referee, upon the grounds as above stated. Under this condition of affairs, we find but little to consider, as most of the errors assigned were not properly preserved in the record, and cannot be inquired into here; but, taking up such as are before us, we will first examine the questions raised on the motion for a new trial. It is claimed in said motion that Province entered upon the land in good faith, under a contract with one Crawford, who Province believed was in the lawful possession of the premises, and under such contract made valuable improvements of a permanent and lasting character thereon. In the same paragraph, Province states the character of Crawford's right in the land, and shows that Crawford had no claim of any kind in the same. This showing is insufficient upon which to base the right of an occupying claimant. In order to successfully assert such a right, under our statute, the person so claiming must show "a plain and connected title in law or equity, derived from the records of some public office, or being in quiet possession of and holding the same by deed, devise, descent, contract, bond, or agreement from and under any person claiming title as aforesaid, derived from the records of some public office. \* \* \*" No showing of this kind is attempted, and, as against Lovi, defendant Province was a mere trespasser, without right of any kind in the possession of the premises. Under such circumstances, the court did not err in refusing to call a jury to assess the damages. See *Woodruff v. Wallace*, 3 Okl. 355, 41 Pac. 357, and cases therein cited.

2. It is also asserted in the motion that the

referee had no jurisdiction to hear the cause, for the reason that he did not take the required oath. The oath required by our Code of Civil Procedure is as follows (section 309): "The referee must be sworn or affirmed well and faithfully to hear and examine the cause, and to make a just and true report therein according to the best of his understanding." The oath taken by the referee in the case under consideration is, we think, in substance and effect, that required by our Code. We are of the opinion that the section which requires the oath to be taken does not intend to prescribe the exact wording of the oath. The language of the statute seems to convey the idea that the referee shall be sworn to hear and examine the case, and to honestly report the same, as his understanding and conscience shall determine. There is nothing in the language used in the statute which requires that the words therein contained shall be used in the oath taken, but any language conveying the substance of the meaning may be used in lieu thereof by a person appointed as referee. We think that, where this is done, the referee is sufficiently qualified. The oath taken by the referee in the case under consideration requires him to faithfully perform his duty according to his best ability. The faithful performance of his duty requires a hearing and examination of the case, and the performance of his duty according to the best of his ability is equivalent to a doing of the same according to his best understanding.

3. The court below committed no error in approving the report of the referee upon the question of the amount of damages. The evidence upon which the referee based his finding was not before the court, and, if it was insufficient upon which to base such a finding, it was the duty of the party urging the objection to bring the evidence into his motion, in order that the court might inspect the same. In the absence of the testimony, the court was bound to believe that there was sufficient evidence upon which to base the findings.

4. The last objection to be considered is that which goes to the right of the appellant to a new trial, under section 618 of our Code, which provides "that the party against whom the judgment runs may, at any time during the term at which the judgment is rendered, demand another trial, and thereupon judgment shall be vacated, and the cause stand for trial at the next term." This case was, as heretofore stated, begun November 15, 1893. Personal service was had upon the defendants. February 26, 1894, defendants had failed to answer or demur or otherwise plead, and a judgment was rendered against them by default. No motion for a new trial was filed during the term at which the judgment was taken. Under our Code, that part of the judgment which went to the question of possession must have been

conclusive. It would, however, have been equally binding, having been taken by default, if the motion for a new trial had been filed during the term at which the judgment was taken. *Hall v. Sanders*, 25 Kan. 538.

The only question left after the default was one of damages. Our Code, in section 83, provides that an action of damages for withholding property may be joined with one for possession; but this does not mean, as we take it, that section 618 is applicable where the only question for trial is one of damages. No issue was joined on the right of possession, and upon that question alone section 618 is applicable. In the absence of any issue as to possession, the court did not err in overruling the motion for a new trial, based on section 618, *supra*. The judgment of the lower court is affirmed.

SCOTT, J., having presided at the trial of the cause below, not sitting; the other justices concurring.

(4 Okl. 551)

GOTTHAUER et al. v. CUNNINGHAM.<sup>1</sup>  
(Supreme Court of Oklahoma. Sept. 4, 1896.)

SET-OFF—DEBT TO PARTNERSHIP.

In an action brought by a co-partnership upon a partnership account, an indebtedness due from one member of the firm to the defendant cannot be set off in such action.

(Syllabus by the Court.)

Error from district court, Logan county; before Justice Frank Dale.

Action by H. D. Gotthauer and J. E. Douglass against H. S. Cunningham. Judgment for plaintiffs, and defendant brings error. Affirmed.

E. B. Green and S. L. Overstreet, for plaintiff in error. Keaton & Cotteral, for defendants in error.

TARSNEY, J. This is an action on account, commenced before a justice of the peace, by H. D. Gotthauer and J. E. Douglass, as partners, against H. S. Cunningham, defendant. The bill of particulars filed by the plaintiffs in the justice court states that the plaintiffs were partners in the cabinet-making business in the city of Guthrie from the 1st day of February, 1894, to the 12th day of June in said year, doing business under the firm name and style of Gotthauer & Douglass; that on the 12th day of June, 1894, said firm, by mutual consent, dissolved for all purposes except for the purpose of winding up the business of the firm, paying the debts thereof, and collecting the accounts due the same; that during the months of April and May, 1894, the defendant became indebted to plaintiffs in the sum of \$40.10 for work and labor performed by said plaintiffs for said defendant at the special instance and request of said defendant; that plaintiffs have given credit to said defendant on their said ac-

count in the sum of \$20 for legal services rendered by the defendant for one of said plaintiffs. The defendant in justice's court did not dispute the correctness of the plaintiffs' account, nor the value of the work and labor done and performed, nor the correctness of the amount of credit given, but said defendant claims that he ordered the work from said Gotthauer; that he knew nothing of the firm of Gotthauer & Douglass at the time the work and labor was done and performed, but supposed he was dealing with Gotthauer as an individual. There was no showing, or effort to show, that the partnership did not, as a matter of fact, exist at the time the work was ordered, and services performed, or that there were any representations made that the said work was to be done or was done by said Gotthauer as an individual, or that the work was not in fact done by the co-partnership of Gotthauer & Douglass. Defendant claimed an account for legal services against the plaintiff Gotthauer individually exceeding the amount sued for by plaintiffs, and asked to have the said account for legal services set off against said partnership account. Judgment was rendered in the justice's court in favor of the plaintiffs and against the defendant for \$20.10, the amount claimed by plaintiffs over and above the credit allowed. From this judgment defendant, by petition in error, removed the cause to the district court of Logan county, where the judgment of the justice of the peace was by said district court affirmed. Plaintiff in error duly excepted to the action of the district court, and removed said cause to this court by petition in error.

The only question presented in this record is, can an individual indebtedness from one member of a co-partnership be set off against a debt due to the co-partnership? Our answer must be in the negative. It follows that the action of the court below must be affirmed, and the judgment is accordingly affirmed.

(4 Okl. 321)

CALHOUN v. VIOLET.<sup>1</sup>

(Supreme Court of Oklahoma. Sept. 4, 1896.  
PUBLIC LANDS — HOMESTEAD RIGHTS — UNION  
SOLDIERS—FINDINGS OF LAND DEPARTMENT.

1. Under the act of March 2, 1889, the provision of section 13, which reads as follows: "That \* \* \* until said lands are open to settlement by proclamation of the president no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands, or acquire any rights thereto,"—is applicable to honorably discharged Union soldiers to the same extent as it is to all other citizens.

2. Where a proceeding is brought in a court of equity for the purpose of declaring the holder of the legal title to a tract of land entered under the provisions of the homestead law of the United States a trustee for the benefit of one who claims a superior title in equity, the facts as found by the land department will be accepted as conclusive by the court.

(Syllabus by the Court.)

<sup>1</sup> Rehearing denied January 11, 1897.

<sup>1</sup> Rehearing denied January 11, 1897.

**Error to District court, Oklahoma county; before Justice Henry W. Scott.**

**Bill in equity by Calvin A. Calhoun against Oscar H. Violet. From a judgment sustaining a demurrer to the petition, plaintiff brings error. Affirmed.**

**Amos Green & Son, for plaintiff in error. Selwyn Douglas and MacGregor Douglas, for defendant in error.**

DALE, C. J. This is an action commenced in the district court of Oklahoma county, on March 6, 1895, by Calvin A. Calhoun, against Oscar H. Violet, for the purpose of obtaining in said court a decree in favor of Calhoun, declaring Violet to hold the legal title to lot 10, section 3, in township 11 N., range 3 W., in trust for the use and benefit of Calhoun. The court below sustained a demurrer to the petition, and, to reverse the ruling thereon, the cause is brought here. Briefly stated, the facts, as set forth in the petition, are as follows: On April 23, 1889, Calhoun filed in the Guthrie land office a homestead entry for lots 6, 7, 8, 9, and 10, section 3, township 11 N., range 3 W., situated in Oklahoma county; lots 6, 7, 8, and 9 of such tract lying north, and lot 10 thereof lying south, of the Canadian river. On February 17, 1890, the commissioner of the general land office suspended the entry, for the reason that the tract of land embraced therein lies on both sides of a meandered stream, and, in his letter of suspension, directed the local office to notify the entryman of such fact, and allow him 30 days to elect which portion of his claim he would relinquish, and, in the event of a failure to so elect, his entry would be held for cancellation. Calhoun, under the directions contained in the letter from the commissioner of the general land office, on March 17, 1890, relinquished lot 10, the part lying south of the river. Violet, immediately upon such relinquishment, filed a homestead entry therefor, and on December 29, 1893, made his final proof, and received the receiver's final certificate for the tract. May 15, 1893, Calhoun filed an application to be reinstated in his homestead entry for lot 10, it having been decided in the meantime that the order requiring Calhoun's relinquishment for such lot was erroneous. No appeal was taken from the order of the commissioner requiring Calhoun to relinquish, and no steps appear to have been taken by him to have his entry reinstated from the time of his relinquishment until he filed his application to be reinstated. Shortly after April 23, 1889, the date of Calhoun's homestead filing, numerous contests were filed against his entry, in which contests it was alleged that Calhoun was disqualified from entering lands in Oklahoma Territory by reason of being within the boundaries of the territory opened to settlement under the act of March 2, 1889, subsequent to that date, and prior to noon of

April 22d, following. After Calhoun's relinquishment to lot 10, these contests appear to have been carried on only with reference to that part of the land lying north of the Canadian river, which was embraced in Calhoun's entry after his relinquishment to the portion thereof lying south of such river. As the result of such contests, Calhoun's entry was finally canceled, upon the ground that he was disqualified to enter the land; and, in his final decision upon the motion for review, the honorable secretary of the interior uses the following language: "The testimony of Calvin A. Calhoun himself, as quoted by Messrs. Perkins and Chandler, his attorneys, on pages 17-18 of their brief, shows that he arrived at Oklahoma Station, from Arkansas City, on Saturday, April 20, 1889, after dark, and remained there that night, and left for Arkansas City Sunday morning, at 8:30 o'clock; that on his arrival at Oklahoma Station, on Monday, April 22, 1889, he went with his son directly to the tent which his son had erected on the land in contest; and that he, the entryman, leaving his son in charge of the tent and the land, went immediately to the Guthrie land office, and arrived there in time to secure homestead entry No. 19 on said land. Mr. Calhoun's own testimony is fatal to his right to make entry of said land, or acquire any right thereto."

In the petition filed in the court below, Calhoun alleges that he is an honorably discharged Union soldier, and attaches a copy of his discharge to such effect. It is claimed in the petition and urged as a ground of equitable relief, that the secretary of the interior misapplied the law—First, in holding that Calhoun was disqualified by reason of being within the territory during the inhibited period of time; and, second, that the prohibition contained in the law which excludes those violating the same from acquiring land is not applicable to an honorably discharged Union soldier. The demurrer to the petition alleges a failure to state a cause of action, and the decision of the lower court sustains the same for that reason. We think the law properly applied to the facts as found by the land department is sufficient upon which to base a finding that Calhoun was disqualified to enter the land. It is well settled that a person who was within the boundaries of the land thrown open to settlement under the act of March 2, 1889 (25 Stat. 1005), subsequent to March 2, 1889, and prior to noon of April 22, 1889, and who, by reason of having been therein gained an advantage over those who remained outside, is thereby disqualified from acquiring any land thrown open to settlement under the provisions of the act of March 2d, *supra*. *Smith v. Townsend*, 1 Okl. 117, 29 Pac. 80, and *Id.*, 148 U. S. 490, 13 Sup. Ct. 634. Under the facts as found by the land department, Calhoun had entered upon and occupied a portion of the lands thrown open to

settlement under the provisions of the act of March 2d, supra, during the inhibited time, and such facts so found are binding upon the courts. *Johnson v. Towsley*, 13 Wall. 72; *Marquez v. Frisbie*, 101 U. S. 473; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249, and cases therein cited.

These facts so found by the land department are sufficient to defeat Calhoun's title before the land department, and in the courts also, unless the contention of counsel be correct that honorably discharged Union soldiers are exempted from the prohibition contained in the act of March 2d, supra. The provision of the law upon which counsel rely is found in section 13 of said act, and is as follows: "Provided, that the rights of honorably discharged Union soldiers in the late Civil War as defined in sections 2304 and 2305 of the Revised Statutes shall not be abridged." This is followed by a proviso in the same section, which second proviso reads: "And provided, further, that \* \* \* until such lands are opened to settlement by proclamation of the president, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said land or acquire any rights thereto." Counsel for appellant insist that the latter proviso has no limiting effect upon the former. We cannot assent to this contention. It is, we think, the universally accepted rule of construction, that the natural and appropriate office of a proviso is to restrain and qualify some matter which precedes, and it should be so confined. *Suth. St. Const.* § 233. If, by an examination of the subject-matter of the law, the intent of the makers of the statute be ascertained, then the proviso should always be construed with reference to such intent. In the act of congress of March 2d, supra, we find that congress intended, in opening these lands to settlement, to reserve to honorably discharged Union soldiers certain rights which they then possessed, under sections 2304 and 2305 of the Revised Statutes of the United States. In section 2304 the right was given to such soldiers to file a declaratory statement for land, which statement, when filed, should operate to reserve the land from any other filing for a period of six months. Other provisions of this section changed the law previous to its adoption in force, to the extent only of permitting a soldier, in person or by his agent, to file a declaratory statement, instead of a homestead entry, which declaratory statement should operate to reserve the land for a period of six months, at which time the soldier might file his homestead entry therefor. To that extent, only, did it change the law previously in force. Section 2305 provided that the time which the homestead settler had served in the army, navy, or marine corps might be deducted from the time theretofore required to perfect title, or, if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment should be deducted from the time theretofore required to perfect title, without reference to

the length of time he may have served; but no patent, in any event, was to issue until the settler had resided upon, improved, and cultivated his homestead for the period of, at least, one year after he commenced such improvements and residence. Section 2305 simply modified the law previously in force to the extent of allowing a soldier to have deducted from the five-years residence upon the land, required under the homestead law, the time, not to exceed four years, which he had served in the Union army, navy, or marine corps, and was intended to have no other application. The proviso in section 13 of the act of March 2d, supra, and which is heretofore set out, intended to reserve only such rights as above indicated to the Union soldiers; and the proviso which followed intended to operate alike upon all persons who would seek lands in Oklahoma Territory, irrespective of the fact that they were or were not honorably discharged Union soldiers. The intention of congress, as expressed by the supreme court of the United States in *Smith v. Townsend*, supra, was "to build a wall around this entire territory, and disqualify from right to acquire, under the homestead laws, any tract within its limits, every one who was not outside of the wall on April 22d. When the hour came, the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads. This law applied to all persons, irrespective of their occupation or condition. To give to the law any other effect would be to give to one class of persons a right not enjoyed by all, which would be abhorrent to our theory of government."

We conclude, therefore, first, that Calhoun disqualified himself from entering or acquiring title to the land in dispute by reason of having entered upon a portion of the lands thrown open to settlement by the act of March 2d, supra, after the passage of such act, and prior to noon of April 22d, following; and, further, that the disqualification exists as to honorably discharged Union soldiers to the same extent as it does to any other citizen. The judgment of the lower court is affirmed.

SCOTT, J., having presided at the trial of the cause below, not sitting; the other justices concurring.

(4 Okl. 712)

KEOKUK FALLS IMP. CO. et al. v.  
BEALE.<sup>1</sup>

(Supreme Court of Oklahoma. Sept. 4, 1896.)

APPEAL—DISMISSAL.

Where an appeal is not filed within one year from the date of the judgment, as provided by Laws 1893, p. 858, c. 66, § 574, the appeal will be dismissed.

Appeal from district court, Pottawatomie county; before Justice Henry W. Scott.

Action by Edward J. Beale against the Keokuk Falls Improvement Company and

<sup>1</sup> Rehearing denied January 18, 1897.

others. Judgment for plaintiff. Defendants appeal. Dismissed.

Redick, Lewis & Snyder and Field & Shear, for plaintiffs in error. Selwyn Douglas, Rogers & Howard, and Witten & Mitchell, for defendant in error.

DALE, C. J. This is an appeal from a judgment for costs rendered in the district court of Pottawatomie county in favor of Ed. J. Beale against the Keokuk Falls Improvement Company, W. S. Field, Perry Rodkey, and A. G. Crum, in the sum of \$105.68. The judgment was based upon section 31, c. 70, p. 828, Laws Okl. 1890, and from the record it appears that such judgment was rendered in the district court of Pottawatomie county on the 16th day of December, 1893, and that the appeal in this case was filed in this court on July 1, 1895. The appeal having been filed more than one year after the date of the judgment in the court below, the same cannot be considered in this court, for the reason that this court has no jurisdiction to consider such appeal if not filed within one year from the date of the judgment or the order sought to be reviewed in this court. Laws Okl. 1893, p. 858, c. 66, § 574. The appeal is dismissed, and the judgment of the lower court affirmed.

SCOTT, J., having presided at the trial of the cause below, not sitting; the other justices concurring.

(4 Okl. 599)

**SCHOOL DIST. NO. 17 OF GARFIELD COUNTY et al. v. ZEDIKER et al.<sup>1</sup>**

(Supreme Court of Oklahoma. Sept. 4, 1896.)

**SCHOOL DISTRICTS—CHANGE OF BOUNDARIES—LEGISLATIVE POWERS—DELEGATION—COURTS—JURISDICTION.**

1. A school district is but a subordinate agency of the territory, doing the work of the territory. It is a creature of the legislature. The legislature may create or abolish school districts, or it may change their boundaries without consulting the inhabitants. It may thus change their boundaries for any reason that may be satisfactory to it, and it may do this as well through a subordinate agency or officer as by direct legislative act.

2. By section 5760 of the Statutes of 1893, the legislature intended to provide for a systematic and uniform division of the territory embraced in each county into school districts; that, for that purpose, they invested the county superintendent of public instruction with power to divide the territory or the county into convenient districts, and to change such districts when the interests of the inhabitants of the county required such division or change.

3. The superintendent of public instruction, in making such division or change, is not limited to those cases only where the topographical and physical conditions alone make such division or change necessary. It is not necessary that topographical or physical conditions requiring that changes should be made in the districts should exist as prerequisite and jurisdictional facts before the superintendent of public instruction is authorized to act or make such

changes, if the interests of the inhabitants of the county in other respects require that such changes should be made.

4. The clause of the statute relating to topographical and physical conditions was intended to be directory merely. It was intended by the legislature that the superintendent of public instruction should divide the county into convenient school districts, and change such districts when the interests of the inhabitants of the county required, but that, in making such division or change, he should consider the topographical and physical conditions which might interfere with convenient attendance on the schools.

5. The powers conferred upon the superintendent of public instruction to divide the county into school districts, and to change such districts, are of a judicial nature, and, in their performance, require the exercise of a judicial discretion; and when exercised, unless there has been an abuse of such discretion, the courts cannot interfere.

(Syllabus by the Court.)

Error from district court, Garfield county; before Justice John L. McAtee.

Action by school district No. 17 of Garfield county and others against T. J. Zediker and others. From a judgment for defendants, plaintiffs bring error. Affirmed.

W. H. Robb, for plaintiffs in error. J. W. Clevinger, for defendants in error.

TARSNEY, J. This case arises out of the action of defendant in error T. J. Zediker, as county superintendent of public instruction for Garfield county, in attempting to change the boundaries of the school districts in said county. At the time of such proposed change, plaintiff in error school district No. 17 in said county was composed of sections 1, 2, 3, 10, 11, 12, and the N. ½ of sections 13, 14, and 15, in township 21, range 6, and the change proposed was in pursuance of a plan of redistricting the whole county. It was not made because of any peculiar interests of the inhabitants of said district No. 17, requiring such change at that time. Defendants in error contended that the proposed action by said superintendent of public instruction was a proper exercise of authority vested in him by section 5760 of the Statutes of Oklahoma of 1893 (page 1082), which said section is as follows: "It shall be the duty of the county superintendent of public instruction to divide the county into a convenient number of school districts, and to change such districts when the interests of the inhabitants thereof require it, by making them conform to existing topographical and physical conditions, but only after twenty days' notice thereof, by written notice posted in at least five public places in the district to be changed; but no district shall be formed containing less than eight persons of school age, neither shall a new school district be formed or changed so as to contain more than three miles square, except in counties in the Cheyenne and Arapahoe country and in Beaver county, and all sparsely settled districts in any county, and none having a

<sup>1</sup> Rehearing denied January 11, 1897.

bonded indebtedness shall be so reduced in territory that such indebtedness shall exceed five per cent. of the assessed property valuation; provided, that any person interested may appeal to the board of county commissioners from the action of the county superintendent. Such superintendent shall number school districts and when they are formed, and he shall keep in a book for that purpose a description of the boundaries of each school district and part of district in his county, with plat of same, date of organization, date and full record of all changes of boundaries, and a list of district officers in his county, the date of election or appointment and the time the term of each is to expire." The contention of plaintiffs in error is that when a school district has once been formed, it becomes an incorporated body, embracing certain territory, over which the people of the district have control for the purpose of public schools therein, and that, to secure permanency in the same, the legislature reserved to itself the right to change the boundaries, except for one cause, viz. that when, by reason of topographical or physical conditions, it is in the interest of the people of their district, or any portion of them, to change the boundaries, the superintendent may do so, so as to conform to such conditions; that such conditions requiring such change must exist as prerequisite and jurisdictional facts before the county superintendent of public instruction is authorized to act or make any change. We think this is too narrow a construction of the statute, and would be a limitation upon the duties and powers of the superintendent not contemplated by the legislature. It is argued that because the legislature itself, in 1890, divided the territory into school districts, it shows a legislative intent to retain in the legislature the general control of the matter of redistricting, and that the amendment to the law found in the Acts of 1893, and above cited, was only intended to vest in the county superintendent the right to change the districts when, and when only, it should appear that the topographical and physical conditions of the district required the same. We think the legislature intended, by the act of 1890, and the changes thereof and amendments incorporated in section 5760, supra, to provide a systematic and uniform division of the territory into school districts; that, contemplating that this purpose could be better accomplished by local agencies or officials in the several counties, they provided and made it the duty of the county superintendent of public instruction to divide the county into a convenient number of school districts, and authorized him to change such districts when the interests of the inhabitants thereof required it; but that recognizing that in a new country like this, where streams are unbridged, and other physical conditions exist which might in-

terfere with convenient attendance on the schools, they required that such superintendent should take into consideration such topographical and physical conditions in establishing or changing such districts.

We do not think it was the intention of the legislature to limit the authority of the superintendent in making such changes to those cases only where the topographical and physical conditions alone made the change necessary and proper, but that he is authorized to divide the county into districts, and to change the boundaries of such districts whenever the interests of the inhabitants of the county require the same to be done, and that the provision relating to topographical and physical conditions was intended to be directory upon him; that is to say, that, in dividing the county into a convenient number of school districts, and changing the districting of said county, he should take into consideration, and make such changes so as to conform to, the topographical and physical conditions that might exist. It is true that the primary authority to lay off the territory into school districts, or to make changes therein, is in the legislature; but such power may be delegated to a subordinate body or official, and often it becomes necessary that it shall be so delegated by reason of the fact that a subordinate local body or officer may have, and does have, a better knowledge of conditions than could be possessed by the legislature as a body. We think that the legislature, by section 5760, intended to delegate all the powers it possessed regarding the division of the counties into school districts, and the changing of the boundaries thereof to the county superintendent of public instruction, subject to the restrictions contained in that section. The argument that because a school district is a quasi corporation, exercising certain powers, functions, and authority over an established district, such district cannot be changed in its boundaries except by the inhabitants themselves, is not tenable. The legislature that can create can abolish these districts. It can change their boundaries without consulting the inhabitants. The school district is but a subordinate agency of the state, doing the work of the state. It is a creature of the state, and, if the legislature itself can change the boundaries of a school district for any reason which may be satisfactory to it, it can accomplish this purpose through a subordinate agency or officer. This it has provided for doing by the statute cited. It has provided that the county superintendent of public instruction may divide the county into convenient districts when the interests of the inhabitants thereof—that is, when the interests of the inhabitants of the county—require the same.

Counsel for plaintiffs in error complains that the court below "seems to have ignored the autonomy of the district, and treated the whole county as a unit in school matters."

We think the construction put upon this proposition by the court below was the correct one; that the county is the unit in school matters. The superintendent of public instruction is a county officer, having jurisdiction throughout the entire county. It is, by the language of this statute, made his duty, not to establish school districts, but to divide the county into a convenient number of school districts, and to change such districts when the interests of the inhabitants thereof require it. The district could not be considered a unit, because it was a physical impossibility for the superintendent to change the exterior boundaries of any one district without changing the boundaries of the contiguous districts. If the contention of counsel for plaintiffs in error should be sustained, it would produce inextricable confusion, and result in changes of the boundaries and conditions of several districts upon the initiative of the inhabitants of one. We think the proper interpretation of this law is that the legislature had in design the division of the several counties into convenient school districts when the interests of the inhabitants of the county required the same to be done, but directed him that, in the performance of this duty, he should take into consideration, and make such districts conform to, the topographical and physical conditions which might exist. As the powers thus conferred upon the superintendent of public instruction were judicial in their nature, and in their performance required the exercise of a judicial discretion, unless there has been an abuse of such discretion the courts cannot interfere. We find no substantial error in this record, and the judgment of the court below is accordingly affirmed. All the judges concur.

(5 Okl. 32)

**KEOKUK FALLS IMP. CO. et al. v.  
KINGSLAND & DOUGLAS  
MANUF'G CO. et al.<sup>1</sup>**

(Supreme Court of Oklahoma. Sept. 4, 1896.)

PLEADING AND PRACTICE—PARTIES—SUBROGATION  
—BILLS AND NOTES—PAROL EVIDENCE—AGENCY—CHATTEL MORTGAGE—ATTORNEY'S FEE.

1. A demurrer will not lie against a complaint for the reason that it fails to allege affirmatively a compliance with article 20, c. 18, Laws Okl. 1890.

2. Under the practice act in force in Oklahoma prior to the adoption of the Code of 1893, it was not error to overrule the motion of the defendants for judgment upon the pleadings before the plaintiffs had been ruled to reply to the allegations of new matter set up in the answer.

3. Where a number of parties are jointly sued on promissory notes, and one of the defendants files a supplemental complaint, showing that he has paid in full the indebtedness sued upon, and applies to be made a party plaintiff against his co-defendants in the original action, it is not error for the trial court to order the party, upon such showing, to be subrogated to all the rights of the original payee in the notes.

4. Where the cause of action is not changed,

and all parties thereto submit themselves to the jurisdiction of the court, and no showing is made for a continuance, it is not error for the trial court, after the jury has been impaneled, to make, upon a proper application, one of a number of co-defendants the plaintiff in the action, and to direct the trial to proceed to a final determination.

5. Where a paragraph in an answer does not in specific terms allege that the time of payment in a promissory note was by payees extended for a valuable consideration, no error is committed in sustaining a motion to strike out such paragraph.

6. The right of a trial court to direct the verdict of a jury is undoubted where the only questions to be determined are matters of law arising during the trial of the cause; and, in a suit on promissory notes, where the ownership of the same is undenied, it is the duty of a trial court to instruct the jury that the owner of the notes was entitled to all the rights of the payee named therein.

7. Where a person acting in a private capacity as an agent in signing a promissory note fails to disclose his agency, but where he describes himself merely as a director or trustee or agent for the person or corporation for whom he is signing, and there is nothing in the body of the note showing that it is the obligation of his principal, he is personally bound upon the instrument; and where a suit is brought against him individually, he will not be permitted to avoid his liability by parol proof showing that he signed the note in his agency capacity.

8. Where, upon the face of a note, such an ambiguity exists as makes it impossible for the court to say what the contract does express, parol evidence may be admitted to explain the contract, but not to modify or change it, so that the maker may avoid his liability.

9. Where, by the terms of a chattel mortgage, it is impossible to determine with certainty whether the 10 per cent. named therein as a reasonable attorney's fee in case of foreclosure was to be computed upon the proceeds of the sale of the mortgaged property, or upon the amount of money secured by the mortgage, the attorney fee should be computed upon that sum which will be most favorable to the debtor.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice Henry W. Scott.

Action by the Kingsland & Douglas Manufacturing Company against the Keokuk Falls Improvement Company and others. From a judgment against them, the improvement company and certain other defendants appeal. Modified.

Field & Shear, for plaintiffs in error. H. B. Mitchell and Selwyn Douglas, for defendants in error.

DALE, C. J. This was a suit instituted in the district court of Oklahoma county, on October 14, 1892, by the Kingsland & Douglas Manufacturing Company, to recover judgment upon three promissory notes against the Keokuk Falls Improvement Company and others, in the sum of \$1,795.50 and interest. The record in this case shows that, October 31, 1891, the Keokuk Falls Improvement Company executed to the Kingsland & Douglas Manufacturing Company, a corporation under and existing by virtue of the laws of Missouri, three promissory notes, in the sum of \$700 each, which notes were, on their face, executed by A. G. Cruun, Keokuk Falls Improvement Company,

<sup>1</sup> Rehearing denied January 8, 1897.



Perry Rodkey, secretary, and A. B. Hammer, president, and were indorsed upon the back by A. B. Hammer, Perry Rodkey, C. P. Walker, H. C. Jones, O. A. Mitscher, and Ed. J. Beale. The complaint alleged, in substance, that on October 31, 1891, the Keokuk Falls Improvement Company, being indebted to the plaintiff, on account of certain machinery, goods, and merchandise, in the sum of \$2,100, did on that day make, execute, and deliver, together with the other co-defendants, the promissory notes above described, and to secure the payment thereof the Keokuk Falls Improvement Company executed a chattel mortgage on certain machinery, chattels, and goods belonging to such company. Copies of the notes and mortgage are attached to and made a part of the petition. The mortgage is in the usual form of a chattel mortgage, providing for sale of the property in case any of the notes are not paid at maturity, and in such case that the entire sum shall become due and payable, and further providing that, in case of foreclosure, in addition to the other costs, a reasonable attorney's fee of 10 per cent. for attending to the foreclosure thereof is to be paid, with the other expenses, out of the proceeds of the sale. The property mortgaged consisted of a stationary engine and sawmill machinery. The notes were dated October 31, 1891, and, except as to the time at which they were made payable, were identical. The note which first became due is as follows:

"\$700.00. Oklahoma, Ok. Ty., Oct. 31st, 1891.

"On the 1st day of March, 1892, for value received, we promise to pay to the order of Kingsland & Douglas Manuf'g Co. (\$700.00) seven hundred and no/100 dollars, at the First National Bank, Oklahoma City, O. T., with interest from date until paid at the rate of 8 per cent. per annum, and exchange on St. Louis.

"[Signed] A. G. Crum.

"Keokuk Falls Improvement Co.

"Perry Rodkey, Sec.

"A. B. Hammer, Pres."

And on the back of said note appears the following:

"For value received we guaranty payment of the within note, waiving demand, notice, and protest.

<p>"A. B. Hammer, "Perry Rodkey, "C. P. Walker, "H. C. Jones, "O. A. Mitscher,</p>	<p>} As Directors Keokuk Falls Improvement Co.</p>
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"A. B. Hammer.

"Perry Rodkey.

"Ed. J. Beale."

The second note fell due July 1, 1892, and the third note October 1, 1892. Each note was protested for nonpayment, and all of the makers and indorsers were duly notified by mail of the nonpayment thereof. The complaint further avers that on September 9, 1892, two of the notes became due, and, default having been made in the payment thereof, the plaintiff declared the whole of the sum due upon the three notes, and, in accordance with the terms of the chattel

mortgage, gave the notice required by law of the foreclosure of the same, and, upon the day and at the place named in such notice, offered for sale at public outcry, to the highest and best bidder for cash, the property described in the mortgage; that \$300 was realized from the sale of such property; that the costs of such foreclosure amounted to \$213.50, which plaintiff paid, and the balance \$86.50 was duly credited upon the note first falling due; that the sum of \$220, had been paid by the defendants before foreclosure. Proceedings were instituted, and the amount so paid, together with the sum realized from the sale under the chattel mortgage, reduced the original indebtedness of \$2,100 to \$1,793.50, the amount claimed, with interest at 8 per cent. per annum. The defendants Keokuk Falls Improvement Company, Perry Rodkey, C. P. Walker, O. A. Mitscher, and A. B. Hammer each filed a separate demurrer to the petition, alleging therein that the complaint failed to state a cause of action against the several defendants. The demurrers were overruled, and an exception taken, and afterwards defendants above named answered, denying all the allegations in plaintiff's complaint, and averring, further, that the indebtedness sued upon had long since been fully paid and satisfied. To defendants' answer plaintiff filed a general denial. Afterwards the defendants filed an amended answer, setting up, in addition to the defense in their former answer, "that on or about November 22, 1895, the defendant Ed. J. Beale delivered to the plaintiff his three promissory notes for \$1,872, which were by plaintiff accepted in full satisfaction and discharge of the claim and demand sued upon." This last answer was filed March 28, 1894, and on the 30th of the same month defendants filed their motion for a judgment in their favor upon the pleadings, which motion was on the same date overruled, the defendants excepting. A jury was then duly impaneled and sworn, whereupon Ed. J. Beale, one of the defendants, filed what is termed a "supplemental complaint," which is as follows, omitting the title: "Comes now the above-named defendant, Ed. J. Beale, and represents to the court that heretofore, and since the filing of the plaintiff's complaint, and while the same was pending, he has, in pursuance of his contract of guaranty and indorsement on the notes sued on in this case, and after maturity of said notes, paid the same in full, and settled with said company; and he now comes before the court and asks the court for judgment over against said other defendants by reason of said payment to said company of said debt of defendants on which he was the indorser." Then followed the prayer for judgment in accordance with such complaint. Upon this showing the court ordered that Beale be subrogated to the rights of the plaintiff, the Kingsland & Douglas Manufacturing Company, and that the action proceed in his name, to which order of the

court an exception was saved. The defendant Keokuk Falls Improvement Company filed a general denial to the supplemental complaint of Beale, while the defendants Rodkey, Hammer, Walker, and Mitscher, in a separate answer to such complaint, in addition to a general denial, alleged, in the second paragraph of such answer: "That on or about the 3d day of May, 1892, and again on or about the 15th day of July, 1892, the Kingsland & Douglas Manufacturing Company agreed with the Keokuk Falls Improvement Company and A. G. Crum, in the complaint mentioned, for a valuable consideration, to extend the time of payment of the notes in question sixty days from each of said dates, and that the defendants other than the Keokuk Falls Improvement Company and A. G. Crum had no knowledge of such extension, and did not then nor have they since assented thereto." To the answer of the defendants Rodkey, Hammer, Walker, and Mitscher as contained in the second paragraph thereof, Beale filed a motion asking that the same be stricken from the answer, which motion was allowed, the defendants excepting. The case then proceeded to trial, and upon the issues so joined a verdict was returned in the sum of \$2,207 in favor of Beale, such being the full amount of the unpaid sums due on the notes, together with interest thereon.

Various pleadings in the case and rulings of the trial court in the formation of the issues are set forth at some length and in detail, as some of the assignments of error make such setting out necessary if the decision of this court is to be well understood. An examination of the record of the evidence discloses that, at the time the Kingsland & Douglas Manufacturing Company sold the property for which the notes in the sum of \$2,100 were given, Ed. J. Beale was acting as the agent in the sale of machinery for such company, and that he made the sale of such property as agent, to the Keokuk Falls Improvement Company. The order for such machinery was given by A. G. Crum. The order as made was not accepted by the Kingsland & Douglas Manufacturing Company, and it was agreed by A. B. Hammer, president of the Keokuk Falls Improvement Company, that the directors and some of the stockholders would indorse for the company. Beale, under an arrangement with his company, also indorsed the notes, his indorsement being made about a month later, and they were then turned over to the Kingsland & Douglas Manufacturing Company. After the notes became due, and suit to enforce collection thereof was instituted, Beale paid the same by giving to the Kingsland & Douglas Manufacturing Company his individual notes in lieu of the others. Beale neither at the time of the giving of the notes, nor at the time the suit was tried in the court below, had any interest whatever in the Keokuk Falls Improvement Company. Sep-

tember 10, 1892, the chattel mortgage was foreclosed by public sale, after due notice, as required by law. The sale was in all respects fairly conducted, some of the defendants being present at the time thereof. The mortgaged property brought \$300. There were charged as expenses incurred in the foreclosure proceedings, the sum of \$213.50, \$210 of which was charged as attorney's fee. It appears by a strong preponderance of the evidence that the parties who signed their names inside of the brackets did so believing that they were signing as directors of the company, and that they thereby incurred no individual liability, and it also affirmatively appears that Beale knew of this fact. After the first note became due, and until the foreclosure of the chattel mortgage, there were conversations between Kingsland, a member of the corporation styled Kingsland & Douglas Manufacturing Company, and some of the members of the Keokuk Falls Improvement Company, looking towards a private sale of the mortgaged property, and an application of the proceeds to the liquidation in part of the debt; but no definite arrangement was made, and such negotiations were carried on by the Kingsland & Douglas Manufacturing Company as a friendly act by a debtor towards a creditor. By the record numerous questions are raised and argued in the brief of appellants relative to objection to the rulings of the trial court in joining the issues, which, summarized, are as follows: (1) Error in overruling the demurrer of the defendants, and error in overruling the demurrer of Mitscher and Walker. (2) In not sustaining the motion of the defendants for judgment on the pleadings. (3) In granting permission to Ed. J. Beale to file a supplemental complaint. (4) In striking out the second paragraph of a part of the defendants' answer to the supplemental complaint of Beale. Exceptions were also duly saved to the several instructions of the court, and to the refusal of the court to give instructions asked for by appellants; and it is insisted by the appellants that there were properly joined as issues in the case matters which were not permitted by the court to go to the jury as follows: (1) Were the notes executed by the Keokuk Falls Improvement Company, and did the board of directors sign the guaranty upon the back of said notes as a part of the process of the execution of said notes, or did they sign personally? (2) Were the notes in question paid to the plaintiff by one of the defendants, either in money or by other securities, during the pendency of said action? (3) Was the property included in the chattel mortgage securing said notes delivered to the plaintiff, Kingsland & Douglas Manufacturing Company, without any formal foreclosure, and upon the agreement that the defendants were to have credit for its value? (4) Was the property in question sold in violation of such an agreement, and sold unfairly?

1. Taking up the several questions arising upon the pleadings in the order set forth, we will first consider the demurrer to the petition. Appellants contend that, under the provision of article 20, c. 18, Laws Okl. 1890, the plaintiff was incapacitated to sue, for the reason that it had failed to file in the office of the secretary of the territory a duly-authenticated copy of its charter or articles of incorporation, and had failed to appoint an agent, as required by such law, and that the complaint failed to affirmatively show a compliance with the law as contained in the article and chapter above stated. Without passing upon any question other than that raised by the demurrer, we have this to say: Article 20, c. 18, *supra*, was adopted by our legislature from the Dakota Code, and at the time it was so adopted had received a construction in a case precisely similar to the one we are here considering, in so far as relates to the demurrer. In *Machine Co. v. Moore*, 2 Dak. 281, 8 N. W. 131, decided in 1880, the court held that a demurrer would not lie against a petition for the reason that the petition failed to allege affirmatively a compliance with article 20, c. 18, *supra*. The first section of the syllabus of the case referred to reads as follows: "The foreign corporation plaintiff need not allege in its complaint that such corporation has filed a copy of its articles of incorporation and appointment of an agent upon whom service of process may be had in the office of the secretary of the territory, and, upon demurrer to a complaint without such allegation, held sufficient." The opinion sustains the syllabus, and we therefore conclude that no error was committed by the trial court in overruling the demurrer; and, inasmuch as the same objection is alleged to the sufficiency of the petition by the separate demurrers of the defendants Mitscher and Walker, the ruling of the court below, for the reasons above stated, was correct.

2. It is claimed that the court below committed error in not sustaining the motion of the several defendants for judgment upon the pleadings. The answer at that time was a general denial and a plea of payment and of accord and satisfaction. This answer was filed March 28, 1894, and two days thereafter the defendants filed their motion for judgment. This case was begun and tried under the Code of 1890, and, under such Code, before the court could properly have rendered the judgment desired, the movers for such judgment must have had plaintiff ruled to reply to the answer. Until the court had so ruled, the judgment could not properly have been entered.

3. The next objection brings up the question involved in permitting the co-defendant Ed. J. Beale to file a "supplementary complaint," as the instrument was styled in the court below. After a jury was impaneled in the cause originally instituted, the de-

fendant Ed. J. Beale, over the objection of his co-defendants, was subrogated to all the rights of the plaintiff, upon filing his complaint alleging that he had paid in full all demands of the plaintiff. We do not question the right of a party who is an indorser, guarantor, or surety on a note to settle with the holder thereof, and to be then subrogated to all the rights of such holder against all who incurred the obligation in payment of which the note was given. This principle is as old as the law itself, is founded in natural justice, and does not depend for its application upon the statute, which may be invoked by any person who, upon a contract for the payment of money, has been compelled to pay the debt of another. It is a substitution of a new for an old creditor. A party, being jointly liable on an instrument, may settle with the creditors, and pay the obligation; and he is thereby substituted as a creditor to the full extent of the party to whom the obligation was originally given, less his proportionate share of the obligation. Subrogation is an equitable, and not a legal, right. 24 Am. & Eng. Enc. Law, 191, and cases therein cited.

4. Whether or not the court below erred in permitting the co-defendant Ed. J. Beale to be substituted as the plaintiff at the time such substitution was asked would depend entirely upon the ability of the appellants to show that such action of the court worked injustice to them. Under the uncontradicted evidence in the case, it appears that Beale was not one of the parties who was primarily liable upon the note. The notes were executed by the co-defendants of Beale, and he did not become obligated thereon until long after the notes were so executed and placed in his hands as the agent of the Kingsland & Douglas Manufacturing Company. Under an arrangement with such company, whereby Beale agreed to indorse all notes accepted by him in the sale of goods, Beale indorsed the notes in question, and, after the same became due, and were protested for nonpayment, Beale satisfied them in full; and this fact was, as appears by the pleadings and evidence, well known to all of the defendants before the case was called for trial. The substitution of Beale as plaintiff was, therefore, no surprise. It did not change the cause of action. Defendants made no showing for a continuance; they submitted themselves to the jurisdiction of the court by filing an answer and proceeding to trial; and, as the right of subrogation is unquestioned, we cannot observe wherein the court erred in the premises.

5. Upon the action of the court in striking out the second count of the defendants' answer to the supplemental complaint of Beale error is attributed. By this paragraph of the answer it was sought to show that, on or about May 3, 1892, and July 15, 1892, the Kingsland & Douglas Manufacturing Company agreed with

the Keokuk Falls Improvement Company and A. G. Crum to extend the time of the payment of the notes in question 60 days from each of said dates, and that the defendants other than the Keokuk Falls Improvement Company and said Crum had no knowledge of such extension, and did not then or since assent thereto. This paragraph was, upon motion of Beale, stricken out. It will be observed that the paragraph in question does not allege in positive terms an extension of time, but only an agreement to that effect. It may be stated, as a general rule, that where the owner of a note, for a consideration, grants to the maker thereof an extension of time, without the assent of a guarantor, such extension relieves the guarantor, as the extension of time creates a new contract to which the guarantor is not a party. 2 Daniel, Neg. Inst. 1789. But the allegation stricken out neither alleged an extension of the time of payment nor the receipt of a valuable consideration therefor. If such fact existed, it should have been pleaded in precise language; but, notwithstanding the court struck out such paragraph, the witnesses were permitted to testify fully upon the subject without objection, and it appears from the evidence of the defendants themselves that, at their instance entirely, and without any consideration whatever, Kingsland, one of the members of the corporation of the Kingsland & Douglas Manufacturing Company, was induced to withhold suit for a time under the promise of some of the defendants that a settlement of the indebtedness would be made in the near future. Kingsland could use his own pleasure in doing this, as the notes had been legally protested for non-payment, and this action on the part of Kingsland operated to release none of the guarantors.

6. By the action of the trial court in its instructions to the jury, all questions of fact were taken therefrom, and the jury were directed to return a verdict for plaintiff Beale, in the full sum of the notes, less the sum of \$220 paid in cash, and \$86.50 the amount, after deducting expenses, received on the sale of the mortgaged property. They were also instructed that the defendants were liable on the notes in their individual capacity. To these instructions appellants excepted, and insisted that there were certain questions of fact properly joined under the pleadings and the evidence in the case. The right of a court to direct the verdict of a jury is undisputed where the questions to be determined are matters of law arising upon the trial of a cause; and whether or not a trial court errs in directing the verdict must depend upon the issues as joined in the pleadings, and the evidence offered in support thereof. Under the pleadings the only issue on trial was upon the complaint of Beale alleging a payment of the indebtedness and a general denial by defendants of said allegation. The evidence as to Beale's payment of the notes to the Kingsland & Douglas Manufacturing Company is undenied. The court was, therefore, right in instructing the jury to the effect that Beale was the owner of the notes sued

upon, and entitled to all the rights of the payees named therein.

7. The court below instructed the jury that, under the issues joined by the pleadings, no question was before them as to the liability of the defendants in their individual capacity. This action of the trial court was based upon one of two theories,—either that the general denial raised no issue except as to the ownership of the notes and the signature of the defendants thereon, or that the law held such defendants individually liable, irrespective of the intention of the parties affixing their signatures to the notes. Under the Code of Indiana all pleadings are verified, and the general denial by the defendants put into issue not only the question of the ownership of the notes, but the execution thereof as claimed by the plaintiff below. Beale was asking a judgment against all of the defendants in their individual capacity, and, if Beale had been an innocent purchaser for value prior to maturity, he would have been entitled to such a judgment as the law would fix as the liability of the defendants. But Beale not only purchased after maturity, but with a full knowledge of the intentions of the parties executing the notes, and, under such circumstances, subject to all proper defenses. The defendants Walker, Jones, and Mitscher claimed to have indorsed in their capacity as directors of the Keokuk Falls Improvement Company. Under the ruling of the court this indorsement was held to bind them in their individual capacity, and this ruling of the court presents two questions: First, whether the defendants' liability must be determined solely by the written instruments which they have subscribed, excluding the evidence offered to control this construction; and, second, if so, does the true construction of such written instruments make them individually liable upon the notes? Ample authority may be found in support of or against allowing parol proof to show the agency of the parties in signing promissory notes. It is not our purpose to deal with such authorities only to the extent of aiding us in reaching a correct conclusion in the case under consideration.

In *Manufacturing Co. v. Fairbanks*, 98 Mass. 101, in discussing the question of the admissibility of parol proof in a case where the maker sought to show that he was acting merely as the agent, Mr. Justice Gray said: "It is equally clear that the liability of defendants as drawers of a negotiable instrument must be determined from the instrument itself. This is too well settled to admit of discussion. There is no distinction in this respect between the drawer of a bill of exchange and the maker of a promissory note,"—citing numerous authorities. In *Sturdivant v. Hull*, 59 Me. 172, a cause arose wherein the maker of a promissory note, who had signed the same as follows: "John T. Hull, Treas. St. Paul's Parish,"—sought to show that he was acting merely as treasurer of St. Paul's Parish in signing the in-

strument. The suit was between the original parties to the note. In discussing the right of the maker of the note to introduce parol evidence to show the intention of both parties at the time the note was executed, the court said: "Now, when parties are competent witnesses, and stand ready to testify, if allowed, not only to their own intentions, but to those of the other party to the contract, the wisdom of the long-established rule, which requires all parties to written contracts, at their peril, to state what they mean to abide by in the writing itself, and prohibits them from resorting to oral testimony to contradict or vary its terms, grows more apparent every day. One of the illustrations of this rule, given by Mr. Greenleaf, in his treatise on Evidence (volume 1, p. 320, Ed. 1842, citing *Stackpole v. Arnold*, 11 Mass. 27), runs thus: 'Where one signed a promissory note in his own name, parol evidence was held inadmissible to show that he signed it as the agent of another, on whose property he had caused insurance to be effected by the plaintiff at the owner's request.' When a man has deliberately said, in writing, 'I promise to pay,' and a valid consideration for the promise is shown, right and justice are not very likely to be the gainers by allowing him to retract, and undertake to prove that he did not actually mean 'I promise,' but that he meant, and the other party understood that he meant, that some third party, whose promise the writing does not purport to be, undertook the payment. It is better that a careless or ignorant agent should sometimes pay for his principal, than to subject the construction of valid written contracts to the manifold perversions, misapprehensions, and uncertainties of oral testimony. And upon this point the decisions (although, in cases of like type with this, they are somewhat conflicting, or, at least, distinguished with scarcely a shade of difference, upon the question of the instrument itself) will be found concurring,"—citing a number of authorities. Again, in *Rendell v. Harriman*, 75 Me. 497, the court had occasion to deal with the same question. A note reciting, "We promise to pay," etc., was signed by four individuals, adding, "President and Directors of the Prospect & Stockton Cheese Co." The court held inadmissible evidence offered to show that the note was the obligation of the company, and, in discussing the question, the court, in support of its conclusion, states that the same rule obtains at common law, and that the evidence, if admitted, would not avoid the defendants' liability, unless it had the effect to discharge them from a contract into which they have entered. In the same case, however, the court further states: "When there is ambiguity in the contract, when the language used is equally susceptible of two different constructions, evidence of the circumstances by which the parties were surrounded, and under which the contract was made, may be

given, not for the purpose of proving the intention of the parties independent of the writing, but that the intention may be more intelligently ascertained from its terms." *Mellen v. Moore*, 68 Me. 390, is to the same effect. New York seems to have followed the same rule as laid down in Massachusetts and Maine. *Pentz v. Stanton*, 10 Wend. 271. *Powers v. Briggs*, 79 Ill. 493, is a case where a note contained in its body the words "We, the trustees of the 7th Presbyterian Church, promise to pay," etc., and was signed by four individuals, with the word "Trustees" following their names. Parol evidence was admitted by the trial court, showing that, at the time the note was given, the parties signing the same were the trustees of the church, and that the note was given for the benefit of such church. The supreme court held that evidence was not admissible, basing their decision upon the ground that the notes upon their face created an individual liability against the makers.

We believe the rule announced in the cases above cited has been generally adopted by the older states of the Union when applied to individuals who make notes for private persons or corporations, but it is different where the individual acts for a public corporation, or as the official acting on behalf of some government department; and an examination of the authorities will show that, where the officers of a school district or any public agent sign notes, and use any language indicative of their official character, parol proof is admissible to establish such fact. *Sanborn v. Neal*, 4 Minn. 126 (Gil. 83); *Bingham v. Stewart*, 13 Minn. 106 (Gil. 96); *School Town of Monticello v. Kendall*, 72 Ind. 91; *Story, Ag. § 302*; *Daniel, Neg. Inst. § 445*. But even this rule is not uniform. *Village of Cahokia School Trustees v. Rautenberg*, 88 Ill. 219. Where a suit is brought on a promissory note against an undisclosed principal, it is held by most modern authorities that parol proof is admissible to show that a party signing the note acted in an agency capacity. *Briggs v. Partridge*, 64 N. Y. 357, and cases therein cited. After an examination of the authorities we conclude: First, that where a person, acting in a private capacity in signing a promissory note, fails to disclose his agency, or where he describes himself merely as director or trustee or agent for the person or corporation for whom he is signing, and there is nothing in the body of the note showing that it is an obligation of his principal, he is personally bound upon the instrument, and in such case the owner may bring suit against him individually, and he will not be permitted to avoid his responsibility by parol proof showing that he signed the note in his agency capacity; second, where, upon the face of the note, such an ambiguity exists as makes it impossible for the court to say what the contract does express, parol evidence may be admitted to

explain the contract, but not to modify or change it, so that the maker may avoid his liability. We think these rules are supported by the better and weightier authorities in this country, and that they are in harmony with the common law.

Applying these principles to the case under consideration, we find that there is nothing in the body of the notes implying that they were given for the Keokuk Falls Improvement Company. In the face of the note there appear the words, "We promise to pay," which is a joint and several obligation upon the part of the makers; and the words, "Secretary" and "President," which follow the names of Rodkey and Hammer, respectively, in no manner relieve them of a personal liability. Upon the back of the notes we find this language: "For value received, we guaranty payment of the within notes, waiving demand, notice, and protest." Then follow the names of the several guarantors. Do the words, "As Directors Keokuk Falls Improvement Co.," relieve from individual liability? It does not affirmatively appear, either upon the face or back of the notes, that the debt was an obligation of the Keokuk Falls Improvement Company; and by the terms of the guaranty the parties are severally liable. Their guaranty and signature upon the back of the instrument in their capacity as directors adds nothing to the value of the notes, because the corporation was bound to the full extent of its assets by its name upon the face of the instruments as one of the makers of the notes. There is not that in the words, "As Directors Keokuk Falls Improvement Company," which shows that the parties so signing were doing so for the corporation and as the act of the corporation. Especially is this true when we consider such words with the language of the guaranty, wherein they say that "we guaranty payment," etc. By the use of the word "we" they negative the idea that their intention was only to bind "it,"—the corporation; and, taking all the language used together, it is, we think, clear that the words, "As Directors Keokuk Falls Improvement Co.," should be construed in a descriptive sense, rather than as limiting their liability. This conclusion is supported by much authority. "One who puts his name on negotiable paper will be liable personally, although he acts as agent, unless he says so, and also who his principal is; that is, unless he uses some expression equivalent, to use Lord Ellenborough's language, to 'I am the mere scribe.' For, if the construction may fairly be that, while he acts officially, or at the request of others, yet what he does is still his own act, and it will be so interpreted." 1 Pars. Notes & B. p. 95. In *Manufacturing Co. v. Fairbanks*, supra, this language is used: "In order to exempt the agent from liability upon an instrument executed by him within the scope of his agency, he

must not only name his principal, but he must express, by some form of words, that the contract is the act of his principal though done by the hand of the agent. A mere description of the general relation or office which the person signing the paper holds to another person or corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or exempt the agent from personal liability." To the same effect are the following cases: *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320; *Sturdivant v. Hull*; *Pentz v. Stanton*; *Powers v. Briggs*; *Village of Cahokia School Trustees v. Rautenberg*; *Mellen v. Moore*, supra. If the names of the parties signing as guarantors appeared upon the face of the notes, followed by the words, "As Directors Keokuk Falls Improvement Co.," and the body of such notes indicated that they were given for a debt or obligation of the corporation, then we should hold that the word "as" should be treated in the sense of limiting the liability of the signers, and the authorities cited by counsel for appellant would be in point. But we have no such question before us, and, holding to the view that parol testimony was inadmissible, and that the contract of guaranty upon its face created an individual liability, we perceive no error in the action of the court below in so instructing the jury.

8. The court instructed the jury, in effect, that the extent of liability was the face of the three notes, \$2,100, with interest as expressed therein, less payments of \$220 and \$87.50; and the jury returned a verdict accordingly. The appellants claim that the court misdirected the jury, because the instructions given allowed the sum of \$210 as attorney's fee in the foreclosure of the mortgage, whereas only \$30 should have been allowed for such service. As against this alleged excessive amount allowed as attorney's fees the defendants would have the same right to defend as if Beale had not been subrogated to the rights of the original payee. The mortgage was a part of the petition. Its foreclosure in accordance with law was a matter for the court to pass upon. The expenses which the plaintiff, *Kingsland & Douglas Manufacturing Company*, might reserve from the proceeds of the sale, in so far as it related to the attorney's fee, was also a question which the court must determine from the instrument itself. Whether or not the attorney foreclosing the mortgage would have a right to charge 10 per cent. upon the whole sum secured by the mortgage, or the amount due thereon, or the amount actually collected through the foreclosure proceedings, depends upon the construction given to the statute in force at the time of the execution of the mortgage. The clause in the mortgage which provides for an attorney's fee reads as follows: "And said par-

ties of the first part hereby agree that they will, in addition to the other costs and expenses attending said sale, pay a reasonable attorney's fee of ten per cent. for attending to the foreclosure hereof, to be paid, with the other expenses, out of the proceeds of said sale, and the balance of the proceeds of such sale, after paying all that remains unpaid upon said note, and interest, and all costs and expenses attending such sale, and said reasonable attorney's fee, shall be paid to said parties of the first part, or their legal representatives." This clause must be construed with reference to the statute of the territory in force at the time of the giving of the mortgage, which is as follows (sec. 32, c. 54, Laws 1890): "Such attorney fee as shall be specified in the mortgage may be taxed and made a part of the costs of foreclosure, provided, such mortgage is foreclosed by an attorney of record in this territory, and the name of such attorney appears as attorney in the notice of sale. In no other cases shall an attorney fee be allowed." This section appears to make the attorney's fee a part of the costs of foreclosure, which the mortgagor agrees may be taxed as costs in case a foreclosure is had; and, if the mortgage fixes a sum certain which it is agreed should be taxed as costs under the statute referred to, then such sum governs, provided the contract was not unconscionable. But in the mortgage under consideration we do not find that any certain sum was agreed to as the amount which might be so taxed as costs. The reasonable attorney's fee of 10 per cent, referred to in the mortgage may as well apply to the sum recovered in the foreclosure proceedings as to the entire indebtedness secured in the mortgage. The notes secured by the mortgage are silent upon the question. As the right to collect an attorney's fee depends entirely upon the statute, parties seeking its benefits must bring themselves within its terms. The statute says, "Such attorney fee as shall be specified in the mortgage." This mortgage fails to specify any attorney's fee other than the reasonable one of 10 per cent., "to be paid, with the other expenses, out of the proceeds of said sale." Under the terms of the mortgage, the agreement was to pay 10 per cent. out of the proceeds of the sale. At least, we do not find that there was any agreement to pay 10 per cent. upon the sum secured, regardless of the amount of the proceeds. We think the trial court was not justified in placing a construction upon the terms of the mortgage which would bear most severely upon the mortgagors. To the extent, therefore, of the difference between \$30, 10 per cent. of the proceeds of the sale under the foreclosure proceedings, and \$210, the sum allowed by the court, we think the court below erred.

As to the several issues which counsel for appellants in their briefs insist should have been submitted to the jury, we do not find any authority therefor in the pleadings in this case. If counsel had desired to join issue upon the questions as suggested in their briefs, it was their duty to have set forth in their pleadings such defense as they thought they were entitled to present to the jury, or if, in the trial of the case, it was found that the facts would justify the amendment of the pleadings to conform to the issues as developed by the testimony, it was the duty of counsel to request of the court an opportunity to so amend the pleadings as to present such new questions. The only matter before the court upon the issues as joined in the pleadings was the purchase by the co-defendant Beale of the notes in question, the extension thereof, the amount due thereon, his right to be subrogated to that of the original plaintiff in the action, and the liability of defendants as individuals. The general denial of the defendants only went to those questions. The undisputed evidence in this case shows that Beale was an indorser of the notes in question; that his co-defendants were primarily liable for the entire indebtedness; that he purchased same from the Kingsland & Douglas Manufacturing Company by giving his own notes, secured by mortgages, therefor; that he paid all that there was due upon the notes at the time of his purchase; that he should have been, under the law, subrogated to the rights of the plaintiff; and that he was entitled to a judgment against the defendants for the full sum of the notes, less the amount which had been actually paid thereon. Upon these questions there was no dispute in the testimony. There was nothing in the evidence which would warrant the court in submitting to the jury questions to pass upon. The amount due upon the notes was a mere matter of computation. The only question which might be said to be in dispute was a question which arose upon the construction of the clause in the mortgage providing for an attorney's fee. Under the law it was the duty of the court to say what that clause meant. Holding to these views, it is unnecessary for us to discuss the other questions raised by assignment of errors in the briefs of appellants. The judgment which should have been rendered in this case is erroneous to the extent of \$180, and in that sum was excessive. The cause is remanded, and the court below is directed to modify the judgment heretofore rendered in accordance with the opinion of this court.

SCOTT, J., having presided at the trial in the case below not sitting. The other justices concurred.



(4 Okl. 499)

**McGINNIS v. WOOD et al.<sup>1</sup>**

(Supreme Court of Oklahoma. Sept. 4, 1896.)

**HOMESTEAD RIGHT — MORTGAGE — HUSBAND AND WIFE.**

1. Under the statute of this territory in force in 1891 (St. 1890), exempting a homestead to each head of a family, a wife was not entitled to a homestead out of her own land, nor was the husband entitled to a homestead in lands belonging to his wife.

2. The husband is the head of the family, and under the statute of 1890 reserving to the head of every family residing in this territory, exempt from attachment or execution and every other species of forced sale for the payment of debts (except as otherwise provided), the homestead of the family, and declaring null and void any mortgage upon a designated part of such homestead, does not extend such exemption to the separate property of the wife, although such property is used as a homestead in the ordinary sense, as being the home or residence of the family; and a mortgage executed by the wife upon her separate property so used is not void, under such statute. The exemption is to the husband, as head of the family, and of the property of the husband, being a homestead; and the provision making null and void a mortgage applies only to a homestead under the law—that is, the property of the head of the family.

(Syllabus by the Court.)

Error from district court, Oklahoma county; Henry W. Scott, Judge.

Action by Hattie McGinnis against E. T. Wood and another to foreclose a mortgage. From a judgment for defendants, plaintiff brings error. Reversed.

The facts necessary to be stated herein are: That the defendants in error, W. J. Wood and E. T. Wood, are husband and wife, and were husband and wife at and during all the times hereinafter mentioned. That prior to the year 1890 the land covered by the mortgage in controversy herein was a part of the public domain of the United States, and, together with other lands, was, in the year 1880, settled upon as a town site, under the town-site laws of the United States. That the lot in controversy was settled upon and held by the defendant E. T. Wood, and was deeded to her by the duly-authorized town-site trustees of the United States, prior to the execution of the mortgage in controversy herein; and the said E. T. Wood was the holder of the title to said lot, and the owner thereof, at the time said mortgage was executed and delivered, and has ever since held the title thereto and been the owner thereof. That prior to the making of said mortgage the defendants had erected and built upon said lot a two-story building suitable for use as an hotel, and designed for use as a public hotel. That at the time said building was erected and occupied as an hotel, prior to the making of said mortgage, the family of the defendants in error consisted of the husband and wife and one child, about 9 or 10 years old. That the family occupied certain rooms in said hotel for

family purposes, and used the balance of the building for the purposes of a public hotel, and conducted the business of said hotel for their own use and profit; and that said family had no other home or place of residence. That on the 27th day of February, 1891, the title to said property then being in the said defendant E. T. Wood, the said defendants, E. T. Wood and W. J. Wood, made, executed, and delivered to J. W. Johnson their promissory note for the sum of \$341, with interest at 8 per cent. per annum, due in 12 months. That on the same day the said defendants made, executed, and delivered to said Johnson a mortgage on said property, to wit, on lot numbered 16, in block 25, of the city of Oklahoma City, to secure the payment of said note of \$341. That at the time said note and mortgage was executed the said defendants were husband and wife, and living together and occupying said property as husband and wife. That afterwards the said note was duly transferred, before maturity, for a valuable consideration, to the plaintiff in error. That at the time said note and mortgage was executed the said defendant W. J. Wood had no interest in said property except as husband of the defendant E. T. Wood. That some time prior to the execution of said mortgage the defendant W. J. Wood was indicted for the crime of manslaughter, and at the date of the execution of said mortgage said defendant was at liberty, under bond to answer said indictment, and was living with his said wife and child in said premises, and was conducting the business therein. That subsequently thereto said defendant W. J. Wood was convicted of said crime of manslaughter, and sentenced to imprisonment in the penitentiary at Lansing, Kan., for a period of eight years, and was at the commencement of these proceedings, and at the time this cause was tried in the court below, still confined and imprisoned under said sentence in said penitentiary. That after the conviction and sentence of said W. J. Wood the defendant E. T. Wood continued to reside in said premises, and conduct the business of the hotel, for a short period of time, when she leased the same to another party, to conduct said business, reserving one room therein for the family uses of herself and daughter, paying no rent or board for herself or child, said board and rent being a part of the consideration for such leasing, and the sum of \$35 per month in addition being paid to her by the tenant for the use of said premises. Default having been made in the payment of said note, this action was commenced to recover judgment on said note, and to foreclose the lien of said mortgage upon said premises, in the district court of Oklahoma county; and afterwards, on the — day of November, 1894, said district court made an order referring said cause to J. S. Jenkins, Esq., as referee, to examine and report upon all matters of both law and fact involved

<sup>1</sup> Rehearing denied January 8, 1897.



therein. That afterwards said referee made his report and findings both of law and fact in said cause to said court, and recommended to said court that the plaintiff therein have and recover from the defendants, W. J. Wood and E. T. Wood, the sum of \$441.84, with interest at the rate of 8 per cent. per annum upon said judgment, and also costs. The second finding of law by said referee was that the property in controversy was the city homestead of the family at the time of the execution of the mortgage; that it has been the homestead of the family, and is now the homestead of the defendants. Third. That the husband can claim a homestead in the separate property of the wife, under the statute of 1890. Fourth. That a homestead, under the Statutes of 1890, was exempt to the head of the family without reference to the title, whether it was vested in the husband or the wife, or whether it was community property. Fifth. That no temporary renting of the homestead will be an abandonment of it. Sixth. That the mortgage herein was a mortgage on the homestead of the family, and is absolutely void. Plaintiff in error duly excepted to the rulings and findings of said referee, and filed her bill of exceptions before said referee; the substance of said exceptions and bill of exceptions being the sixth finding of fact by the referee in finding and holding that the property, being an hotel, could be held as a homestead; and to the sixth finding of law by said referee, that the mortgage on said city property was absolutely void; and to the judgment and report of said referee, because he did not report or recommend a judgment or foreclosure of the mortgage. And afterwards plaintiff in error moved the court to set aside the parts and findings following of the report of the referee theretofore filed in the cause, to wit: (1) The sixth finding of fact of said referee's report, because it is contrary to the law and evidence. (2) The second finding of law, because it is contrary to the law upon the facts proven. (3) The third and fourth finding, as being contrary to law. (4) The sixth, as contrary to both law and fact, and contrary to the law arising out of the facts. Which motion, being heard by the court, was overruled, and plaintiff in error excepted thereto. Thereupon the court made and entered up judgment in said cause that the premises in question were the homestead of the defendants; that the mortgage filed in said cause is not a lien on said homestead; that said mortgage, not leaving to said defendants 80 acres of land exempt from mortgage under the statutes, is null and void; and said court entered judgment in favor of the plaintiff in error and against the defendants in error according to the referee's report on said promissory note. To that part of the judgment, order, and decree of the court declaring said mortgage not a lien on the real estate upon which it was executed, and that said mortgage is null and void,

and that said house and lot were a homestead, said plaintiff in error duly excepted, and filed a motion in said court for a new trial. The motion being overruled by the court, and said ruling being excepted to by plaintiff in error, plaintiff in error has duly brought said cause to this court by petition in error for review.

J. L. Brown, for plaintiff in error. Amos Green & Son, for defendants in error.

TARSNEY, J. (after stating the facts). The view which we must take of this case as determining the rights of the parties upon this record renders it unnecessary that we should consider the questions discussed by counsel orally and in their briefs as to whether the character of the occupancy of the premises was such, independent of the ownership of the premises, as to constitute that occupancy required to establish a homestead; and, second, whether the statute in force at the time of the making of the mortgage extended to property occupied by a family in a town or city, so as to make invalid a mortgage executed upon such property, or, in other words, whether the prohibition of the statute against mortgaging of homesteads extended beyond agricultural homesteads.

Section 2860 of the Statutes of 1890 provided as follows: "The following property shall be reserved to the head of every family residing in the territory, exempt from attachment or execution and every other species of forced sale for the payment of debts except as hereinafter provided: First, the homestead of the family." Then followed, under 15 additional paragraphs, an enumeration of various kinds of personal property also exempted. Section 2862 of said Statutes specifically enumerates the different kinds and amounts of property that should be reserved, exempt from forced sale, to persons other than the heads of families. The exemption of homesteads or the place of family residence from seizure or sale for the satisfaction of debt is purely of statutory creation and regulation, and is quite modern in its origin. While there are statutes in nearly every state of the Union which exempt such homestead from forced sale to satisfy debt, the oldest of these statutes are scarce older than the age of the members of this court. Such statutes are not uniform, either as to the extent of the exemption or as to the beneficiaries who may be entitled to and may assert such exemption. Hence there is no uniformity in the decisions of the courts of the several states clearly determining what property is so exempted, or by whom the exemption may be claimed. Nor is there any uniformity in the authorities regarding the construction of such statutes, whether they shall be strictly or liberally construed. In some of the states the exemption is of the homestead to the family, and the exemption is to the family; in others, the exemption is granted to persons who are housekeepers or heads of families; and in others still,—like the statute of this territory,—the exemption is to

the head of the family. Where the exemption is of a family homestead, and the exemption is to the family, it would not be material to inquire in what member of the family the title to the property was vested, as it would be exempt from sale under process against, or from the enforcement of sale to satisfy the debt due from, any member of the family. But where the exemption is to a particular individual, as the head of the family or the housekeeper, it would be idle to argue that the statute did not contemplate that the property thus to be exempted should be the property of the individual thus designated. It could not exempt any other person's property from sale on account of his debts or liabilities, because the property of such other person was not subject to the payment of such debt; nor could it be intended to exempt the property of other persons from liability and sale for their own debts, because the exemption is personal to such householder or head of the family; and it would be meaningless unless it was intended to exempt to him some property right which otherwise might be taken from him in satisfaction of his debts and liabilities.

By section 2861 of said Statutes of 1890 it was provided: "That eighty acres of the homestead upon which the dwelling house is located shall not be subject to mortgage and any mortgage either legal or equitable which does not leave unincumbered eighty acres according to the United States survey containing the dwelling house, shall be null and void, except for the excess of said eighty acres." Without intending to intimate herein our views as to whether this provision in any respect applied or could apply to a dwelling house and lot in a city, but, for the purpose of this case, conceding that it was the intention of the legislature to prohibit the mortgaging of such property, the question must be determined whether the property in controversy in this case was a homestead exempt under the provisions of this act. The record shows the title of the property at the time of the execution of the mortgage to have been in E. T. Wood, who was then living with her husband, the defendant W. J. Wood. If the mortgage was valid at the time it was executed, no subsequent change of the law or of the condition of the parties or occupancy of the premises could render it invalid. The debt and obligation secured by the mortgage sought to be enforced in these proceedings was the debt and obligation of the defendant E. T. Wood, the owner of the property mortgaged. The property may have been used as a homestead by the family, but the exemption of the statute is not to whoever may be the owner of property thus used, but it is to the "head of the family." If there was no such statute, there would be no question that this property is liable to and might be sold to satisfy this mortgage. To bring this property within the exemption of the statute, we must hold either that the wife was in this case the head of the family, or that a husband may claim as a personal exemption a homestead in his wife's sep-

arate property. To hold the latter, would be to extend the statute beyond its terms, and to give to it a meaning not to be derived from its language by the ordinary rules and canons of interpretation; and to hold the former—that the wife was the head of the family, simply because she owned property that gave the family a shelter, or assisted in its support—would be to reverse the common understanding of mankind for hundreds of years, and the almost universal interpretation of the courts for a like period. This court is not inclined to give a forced or unnatural construction to a statute where such construction can only have the effect to deprive a party of the right to recover for a debt contracted in good faith, and which, by every rule of morals and good conscience, ought to be paid. To give to this statute the interpretation and force contended for by defendants in error would be to make of it an engine of fraud and injustice. If the contention of defendants in error were to prevail, then, as this statute reserves to the head of the family, exempt from attachment or execution or forced sale, all implements of husbandry used upon the homestead, and a certain number of horses, work cattle, cows, and other articles of personal property used by the family, then it would also be held that, if the wife had credit, and should purchase implements of husbandry, horses, oxen, cows, or other such personal property, and permit the same to be used by the husband, they would be exempt from seizure or sale for the debts of the wife; and we cannot think that it was the intention of the legislature that such should be the effect of the statute.

In the case of *Davis v. Dodds*, 20 Ohio St. 473, it was held that, where real estate of the wife, held by her as her separate property, is occupied by her husband as a family homestead, he is not the owner of such homestead, within the meaning of the statute relating to the exemption of property from execution. And in *Turner v. Argo*, 14 S. W. 930, it was held by the supreme court of Tennessee that under the statute of Tennessee exempting a homestead to the head of a family a wife is not entitled to a homestead out of her own lands, nor is a husband entitled to a homestead in lands belonging to his wife. In that case the court say: "The lands belonged to Mrs. Argo. The law provides for the exemption of a homestead to each head of a family. In law, though it may be otherwise in fact, the husband is the head of the family. She is not, therefore, entitled to homestead out of her own lands; nor, as contended in argument, is the husband entitled to homestead in lands belonging to the wife." In *Van Doran v. Marden*, 48 Iowa, 186, the court held that the husband is the head of the family, within the meaning of the statute exempting from execution certain property with which he habitually earns his living. Such property belonging to the wife before her marriage, and used for the family support, is not exempt from

execution levied under a judgment against her. In that case the plaintiff was the owner of certain horses used by her husband for the support of the family, composed of himself, wife, and her children. A judgment was recovered against plaintiff, and the horses were seized upon execution issued thereon. She claimed that they were exempt from seizure, under section 3072 of the Code, which provided that a debtor who is the "head of the family" may hold free from levy the team with which he habitually earns his living. Plaintiff insisted that she was the head of the family, and therefore within such provision. In the opinion the court say: "Is the plaintiff 'the head of the family' within the meaning of this statute? It is not claimed that the wife is generally regarded as the head of the family, but that in this case, where she is the owner of property which, if held by the husband, would be exempt from execution, she is within the provision of the statute, and is to be regarded as the head of the family. Whether the plaintiff is to be so regarded is a question of law, and not of fact. The term 'head of the family' is used in reference to the relation existing between the members of the family as recognized by law and the usage of society. There may be a head of the family when there is no marriage relation existing. When, however, marriage relation does exist, the headship of the family cannot depend upon the circumstances of property held by the parties. If this were so, the question involving the headship of the family would be one of fact, and never of law. That it is a question of law when the husband is resting under no disability, we think, cannot be doubted. One reason, and only one, for this conclusion need be given. It is this: The universal sentiment of the people is, and has been for ages, that the husband is the head of the family. The term was used by the legislature in the statute in question in its universally accepted significance." In *Whitehead v. Tapp*, 69 Mo. 415, the court held that "any man who has a wife is the head of a family, within the meaning of the homestead act." And in *Brown v. Brown's Adm'r*, 68 Mo. 388, the same court held that, "while a marriage de jure exists, the husband is the head of the family."

The only authorities which we have been able to find which even apparently support a contrary doctrine to that of the cases above cited are *Broome v. Davis* (Sup. Ct. Ga.) 13 S. E. 749, and *McPhee v. O'Rourke* (Colo. Sup.) 15 Pac. 420. In the former of these cases *Broome*, as head of a family, was the owner of the homestead, consisting of 167 acres of land in Green county, in the state of Georgia. On July 19, 1870, this homestead was exchanged, with the approval of the ordinary, under the laws then in force, to one *Tappan*, for a tract of land in the same county, containing 128.6 acres, and

the deed from *Tappan* was made to Mrs. *Broome*. On February 2, 1882, she executed a mortgage on the last-named tract to C. A. Davis, to secure a note given by her on that date to Davis, due October 1, 1882. At the time of the exchange of the land, *Broome* went into possession of the 128.6 acres as trustee of his wife and minor children, and has remained ever since. At the time of the litigation *Broome* was still living, as also some of the minor children. The mortgage of Davis was regularly foreclosed and levied on the land, and said land was claimed by *Broome* as trustee of his wife and minor children. The trial court held the property subject to the mortgage. The supreme court, on appeal, reversed the trial court, but upon a principle entirely distinct from the one involved in the question at bar; the Georgia court, holding it to be settled law that property paid for in full with other property previously set apart in due and proper manner under the homestead and exemption law takes the place of the latter, and is impressed with a homestead character. In *McPhee v. O'Rourke* it appears that the statute of Colorado concerning homesteads provided that every householder, being the head of a family, should be entitled to a homestead exempt from execution, attachment, etc. Mrs. *O'Rourke* was the owner of a certain house and lot in the city of Denver used as a family residence, and the premises were occupied by her husband, herself, and children. The property was levied upon and sold under an execution issued upon a judgment obtained against her and her husband jointly. She brought an action to set aside such sale on the ground that she was entitled to hold such property exempt from seizure or sale upon any execution or process, she being a householder, being the head of a family, and such property having been designated as a homestead. The opinion in the case was by the supreme court commission, and upheld the contention of Mrs. *O'Rourke*; the reasoning of the commissioners by which the exemption was upheld being: "When the wife is the owner of the property occupied as the home of the family, she is the only one capable of investing it with the exemption character provided by the statute. Under our statute the married woman never did occupy the dwarfed position that afflicted her under the common law. Since the act of our legislature of 1874, the married woman has been without disability concerning her property and property rights; and at the time of the passage of the homestead act in 1868 she owned and controlled all property she brought to the marriage, independent of her husband, had power to carry on business in her own name, to sue and be sued as if single, and to acquire property by her earnings and business, and to hold the same as if single. So we conclude that in the nature of things and in the legislative mind the husband and wife both possess the

character of a householder and head of the family, at least to the extent to enable either of them owning the home they occupy as such to designate it as a homestead." This reasoning is fully answered by the supreme court of Iowa in *Van Doran v. Marden*, supra, wherein the court, construing a statute, similar to the Colorado statute, in relation to the emancipation of the wife from the rules of the common law, and her changed status as to property and other rights, say: "Code, § 2202, clothes the woman with the same right and authority touching her own property as is possessed by the husband over property owned by him. But this provision bestows rights. It does not create exemptions, which only exist under explicit provisions. A consideration which we may mention here gives strength to our view of the case. If, when the wife holds property, she is the head of the family, the husband must be deposed of his headship, or the family will have two heads. The first position cannot be admitted. The second is contrary to reason, for in that case the property of each 'head' would be exempt, and thus there would be a double exemption, which is surely not contemplated by the statute." The reasoning of the Colorado commissioners would make the headship of a family a question of fact, and not of law; would make it to depend upon property and other conditions as uncertain as the varying conditions of different families.

We know of no legislation or any adjudication other than the Colorado case cited which assumes to change the relation of husband and wife and parents and children so as to give the headship of the family to whatever member of the family may for the time being be the owner of the property which shelters the family, or which may be the source of its income and support. So long as the relation of husband and wife continues to exist in fact, the husband is the head of the family. Upon him devolves the duty of the support of the family. They are dependent upon him in law. That duty can be enforced by law. The law provides machinery to compel him, by reason of his headship, to provide such support. It would be an anomalous position to assume that the wife, while living with the husband, should be regarded by the law as the head of the family, that the husband was dependent upon her, that she owed him the duty of support, and yet the law provides no machinery to enforce against her the performance of such duty. And it is still more anomalous to assume that there can be two equally responsible heads to the same organization, especially to an organization occupying the relations of those of the family. We do not overlook the purposes for which homestead laws are enacted,—that they are enacted for the conservation of the family, for the benefit of the family, but still more for the benefit of the state, which has its foundation and

security in the family; nor do we deny that the state may determine what property shall be dedicated to the family and secured as a homestead by reasonable rules against alienation or incumbrance, or exempted from any species of forced sale; but all such laws and rules being in derogation of the common law, and in derogation of the rights of creditors, the extent of such sequestration and the property that may thus be withdrawn from the payment of the just debts of the owner should be clearly defined in the statutes, and it is not for the court to enlarge such statute, or to make property subject to such exemption that is not reasonably clearly exempted by the statute, or to extend such exemption to others than those that are explicitly designated in the statute. For the reasons stated, we are of the opinion that the husband alone, while living with a family, is, under our statute, the head of the family; that that statute only exempts from seizure and sale, to satisfy debts, property owned by such husband; that a wife who has mortgaged her separate property, though it may be the home of the family, cannot claim such property as exempt from sale to satisfy her debt; that there is no homestead exemption to the wife when she is not the head of the family; that the court below erred in finding and adjudging that the premises in question were the homestead of the defendants, that the mortgage filed in said cause was not a lien on said premises, and that said mortgage was null and void, and in refusing to enter judgment for the foreclosure of said mortgage. The judgment of the court below is therefore reversed, and remanded, with instructions to the court below to enter judgment therein in accordance herewith.

(4 Okl. 303)

JAFFREY et al. v. WOLF et al.<sup>1</sup>

(Supreme Court of Oklahoma. Sept. 4, 1896.)

FRAUDULENT CONVEYANCES — DEMURRER TO EVIDENCE — CHATTEL MORTGAGE — EVIDENCE OF FRAUD — KNOWLEDGE OF MORTGAGEE — SALE — RIGHTS OF SELLER — ATTACHMENT — AMENDMENT — CONFLICT OF LAWS.

1. A chattel mortgage was given on December 15, 1890, by W. & Son, upon a stock of goods, wares, and merchandise, to V., of which V. immediately took possession. The plaintiffs forthwith sued W. & Son, on December 17, 1890, for an amount claimed to be due them, and seized the goods under a writ of attachment, alleging that (1) the defendants had sold and conveyed and otherwise disposed of their property with the intent to cheat or defraud their creditors, or to hinder or delay them in the collection of their debts, and (2) that the defendants fraudulently contracted the debt and incurred the obligation for which the suit was brought. Plaintiffs alleged that the claim was, according to the provisions of the contract, due on the 1st day of May, 1891. Upon the hearing of the case in April, 1891, the plaintiffs applied to the trial court for leave to amend their complaint and attachment affidavit by a showing that the goods sold by plaintiffs to de-

<sup>1</sup> Rehearing denied January 7, 1897.

defendants had been disposed of by them, and that, as a consequence, no suit for recovery of the specific goods sold could be effective. The application to amend the complaint was allowed. The application to amend the attachment affidavit was refused. Upon the hearing of the cause, the plaintiffs' evidence having been introduced, the defendants demurred. The cause was tried under the Indiana Code of Civil Procedure, which went into force in this territory December, 1890. The rules of that Code, and their interpretation and construction by the supreme court of the state of Indiana, governing the trial and rendition of judgment, provide that the jury, if a jury has been impaneled, would be discharged by the court, and such evidence only as had been offered tending to make out the case in behalf of the plaintiffs would be considered. All the evidence tending to make out the case in behalf of the defendants would be excluded, and the sole question would be, is there any evidence legally tending or conducing to support the allegations of plaintiffs' petition? In this case the court sustained the demurrer to the petition. Being thus required to examine the evidence, and to pass upon the fact as to whether there was any evidence of fraud legally tending to support the allegations of plaintiffs' petition and affidavit in attachment, and finding that such evidence existed, it is our conclusion that the judgment should be reversed, and that the finding and judgment should have been for the plaintiffs for the amount claimed in their petition, and that the attachment should be sustained.

2. For the argument upon the demurrer to the evidence, the rule which must guide the court under the Indiana Code of Civil Procedure is that all of the adversary's evidence must be admitted as true, and that all of the defendants' testimony, so far as any has been adduced up to that point, shall be considered as withdrawn or false, and, if any legal evidence whatever has been adduced tending to make out the plaintiffs' case, the ruling will be in favor of the plaintiffs, the demurrer being overruled, and judgment will be rendered accordingly.

3. The chattel mortgage having been executed to V., for himself and other mortgagees, under an authority to him to obtain for them such security as he could, and evidence having been produced to show fraud in the taking of the said chattel mortgage, which fraud was known to V., knowledge of the fraud will also be chargeable to the other chattel mortgagees, and the mortgage will be regarded as altogether fraudulent.

4. If a chattel mortgage is affected with fraud in part, in the intention to fraudulently hinder or delay creditors, it will be regarded as fraudulent altogether, and will be set aside in behalf of the suing creditors.

5. If the mortgagee in a chattel mortgage be otherwise abundantly secured, the taking of additional security by the chattel mortgage will itself be considered as evidence of fraud, for creditors will not be permitted to pile security on security unnecessarily, to the detriment of other creditors.

6. If credit be extended and a debt incurred by means of fraudulent representations, the creditor is entitled to sue at once for payment for the amount due under the contract, whenever the fraud is discovered, notwithstanding the fact that the debt by its terms may not then be due; and the plaintiffs are not limited to an action for damages if they see fit to sue prior to the maturity of the debt under the contract.

7. If goods be shipped to this territory purchased in New York, the laws of the state of New York will apply in the interpretation of the contract, and to all facts determining the maturity of the amount due.

8. An amendment asked for by the plaintiffs to the attachment affidavit, showing that the defendants had entirely disposed of property purchased of plaintiffs, and which had been pur-

chased upon fraudulent representations, and that it was out of the power of the plaintiffs, therefore, to recover by replevin, was proper, and should have been allowed.

Dale, C. J., dissenting.

(Syllabus by the Court.)

Error to district court, Logan county.

Action by E. S. Jaffrey & Co. against William F. Wolf and another. From a judgment for defendants, plaintiffs bring error. Reversed.

Wisby & Horner and Keaton & Cottrell for plaintiffs in error. Harper S. Cunningham, for defendants in error.

McATEE, J. This case was passed upon by this court (1 Okl. 312, 33 Pac. 945), and is now here upon petition for review. This suit was begun by the filing of the complaint in the district court of Logan county on December 17, 1890, in which the plaintiffs in error here alleged that the defendants were indebted to them in the sum of \$5,250 for goods, wares, and merchandise sold and delivered to the defendants, which sum would be due on the 1st day of May, 1891, and that the defendants refused to pay for the same. At the time of the filing of the suit, the plaintiffs also filed their affidavit for attachment, alleging that the defendants had sold, conveyed, and otherwise disposed of their property with the intent to cheat or defraud their creditors, or to hinder or delay them in the collection of their debts, and that the defendants fraudulently contracted the debt and incurred the obligation for which the suit was brought. The plaintiffs also alleged that the claim became due on the 1st day of May, 1891. The defendants, prior to 1890, had been engaged in the mercantile business in the city of Topeka, Kan., but removed part of their stock of goods to Oklahoma City, and the remainder thereof to the city of Guthrie, about the 1st of June, 1890, opening up in each of those cities a dry goods, clothing, and general merchandise store. They were, at the time of removal of the stock, indebted to Tootle, Hosea & Co., Henry W. King & Co., the Central National Bank of Topeka, the Bank of Topeka, A. H. Vance, and to A. H. Vance, D. A. Harvey, and T. J. Clark, as sureties, in the sum of \$22,000. The defendants, prior to the contraction of the debt herein sued for, had been possessed of real estate in the city of Topeka, but on the 5th of July, 1887, Louis H. Wolf deeded lot No. 15, in Potwin's subdivision of the city of Topeka, and owned no real estate there after that. In May, 1890, W. F. Wolf and Louis H. Wolf transferred lots Nos. 21, 22, and 23, in block 34, in Oklahoma City, for a consideration stated at \$4,700, to the wife of W. F. Wolf and the mother of Louis H. Wolf, Georgia H. Wolf, by transferring the town-site title, for which she subsequently procured the town-site deed. This conveyance was made for \$11,000, borrowed some years previously. On July 26, 1890, W. F. Wolf

and Georgia Wolf, his wife, granted lot No. 20, Greenwood avenue, in Potwin's Place, Topeka, by warranty deed, to Laura V. Vance, their daughter, and the wife of A. H. Vance, the expressed consideration being \$6,500. On this property there was a mortgage of \$4,000. Neither of the defendants owned any real estate thereafter. On July 29, 1890, the defendants, desiring to purchase goods upon credit from the plaintiffs, gave to them the following statement of their financial condition:

Stock in Oklahoma City.....	\$17,000 00
Guthrie stock .....	35,000 00
Real estate in Oklahoma City.....	12,000 00
Topeka real estate.....	20,000 00

Making total firm assets of defendants .....	\$84,000 00
Liabilities .....	27,000 00

Leaving total worth of the firm of ..... \$57,000 00

The statement was false and fraudulent, but the plaintiffs, relying upon the representations contained in it, sold the goods, to recover the value of which this suit was brought. At various times from June 7, 1890, to August 22, 1890, the same statement was made to various other large wholesale mercantile firms, from all of whom goods were thereupon purchased, to the total amount of about \$16,000. On December 13, 1890, A. H. Vance, representing Tootle, Hosea & Co., Henry W. King & Co., the Central National Bank of Topeka, the Bank of Topeka, himself on his own account, and also D. A. Harvey, T. J. Clark, and himself as sureties on indebtedness to the foregoing creditors, came from Topeka, Kan., to Oklahoma, and received from the defendants a chattel mortgage covering the stock of goods in Guthrie and Oklahoma City, and, in fact, all the property which defendants then owned. The mortgage provided that "if said debt and interest be paid as above specified, this sale and transfer shall be void; otherwise, to be in full force and effect. The possession of the said above-described property is hereby surrendered to the said parties of the second part, and the said parties of the second part shall sell the same at public or private sale, with or without notice, and, after satisfying the aforesaid debt and interest thereon, and all necessary and reasonable costs and expenses incurred, out of the proceeds of the sale, they shall return the surplus to the parties of the first part or to their legal representatives." This mortgage was delivered on the morning of the 15th of December, 1890, at Guthrie, and recorded in the county clerk's office, and possession forthwith given to Vance, through whom it was turned over to W. L. Harvey, brother-in-law of D. A. Harvey, who is the brother-in-law of Vance. Vance, on the morning of the 15th of December, 1890, went to Oklahoma City, and immediately took possession of the stock there the mid-

dle of the forenoon, and that was also turned over to W. L. Harvey. Vance knew, at the time, that this was all the property the defendants had, and that they were largely in debt to other creditors not secured by the chattel mortgage; that a judgment had been obtained against the defendants recently on a claim which they were unable to pay; and that he feared an execution on their property. Their checks had frequently gone to protest during the latter part of November and the early part of December, and a large amount of their indebtedness to the attaching creditors was due, which they were unable to pay. On December 15, 1890, the indebtedness of the firm, outside of the amount secured by the chattel mortgage, was \$19,000. An indebtedness claimed in the mortgage to be due to A. H. Vance was the same sum of money for which, on July 26, 1890, W. F. Wolf and his wife had by warranty deed granted lot No. 20, Greenwood avenue, Potwin's Place, Topeka, Kan., to Laura V. Vance, their daughter, who was the wife of A. H. Vance, subject to a mortgage of \$4,000; the consideration expressed in the deed being \$6,500.

Thereafter, upon April 2, 1891, the defendants filed their answer and confession of judgment to plaintiffs' complaint, consenting that judgment go against them for the sum of \$5,250. The court thereupon passed an order sustaining the attachment in the case, and ordering payment to the plaintiffs of the proceeds of the sale of the attached property. Thereafter, on April 7, 1891, the defendants filed their motion to set aside the judgment rendered April 2, 1891, for the reasons (1) that an issue as to the validity of the attachment proceedings had been formed and no trial had thereon, and (2) because the judgment was rendered by mistake, and (3) because the judgment was rendered on default and without a hearing; and on May 2, 1891, the court rendered judgment setting aside the judgment rendered on April 2, 1891. Evidence having been produced at the hearing of the cause and upon motion to dissolve the attachment, the defendants demurred to all the evidence introduced by plaintiffs on the ground that all the evidence does not show that the defendants, W. F. Wolf & Son, have sold, conveyed, or disposed of their property, with fraudulent intent to cheat or defraud their creditors, or to hinder or delay them in the collection of their debts. The demurrer was sustained, the plaintiffs excepting. On January 20, 1892, the plaintiffs asked leave of the court, by application duly sworn to, to file the amended complaint and attachment affidavit, in order that they might conform to the facts proved in the cause, and in the furtherance of justice. The court refused to allow the amended attachment affidavit to be filed. The plaintiffs filed their amended complaint, and thereafter, on January 21, 1892, judgment was finally rendered,

sustaining the defendants' demurrer to plaintiffs' evidence, dissolving the attachment, dismissing the case, and denying the plaintiffs' application to amend their complaint and attachment affidavit. To all of which the plaintiffs saved exceptions. Error is assigned (1) in sustaining the defendants' motion to set aside the judgment of the court rendered April 4, 1891; (2) in sustaining the defendants' demurrer to the evidence introduced in said case; and (3) in overruling the plaintiffs' application to amend the complaint and attachment affidavit.

Upon the second proposition it is to be said that, in section 11 of the organic act of May 2, 1890 (St. Okl. 1893, p. 44), it was provided that "the chapters upon the Code of Civil Procedure contained in the Compiled Laws of the State of Nebraska in force November 1st, 1890, in so far as they are legally applicable, and not in conflict with the law of the United States or with this act, are hereby extended and put in force in the territory until the adjournment of the first session of the legislative assembly of said territory." This suit was brought December 17, 1890, and was governed, until December 25, 1890, when the first legislature of the territory adjourned, by the Nebraska Code of Civil Procedure. After that date "in all actions already commenced, the pleadings to be had, the manner of procuring testimony, the examination of parties, the trial and rendition of judgment, and all other proceedings, shall conform to the provisions of this act, so far as applicable." Thereafter the provision of the Code of Civil Procedure as contained in the Statutes of 1890, which is the Code of Practice and Proceeding as then adopted from that of the state of Indiana, were applicable to the further proceedings in the case in respect to the demurrer to the evidence, the effect of the demurrer, the discharge of the jury, and the rule for the determination of the case, and the rendition of judgment when the demurrer was filed and argued; and the court here will follow the principles of interpretation and construction placed upon that Code by the supreme court of the state of Indiana. That rule is that, when the defendant demurs to the evidence introduced by the plaintiff, all the evidence which might have been introduced tending to make out the case in behalf of the defendant will be excluded from consideration by the court. Upon the filing of the demurrer by the defendant to the evidence offered by the plaintiff, the jury, if a jury has been impaneled, will be discharged by the court, which takes entire control of the case for consideration, and the court will proceed to consider such evidence only as has been offered tending to make out the case in behalf of the plaintiff. If any evidence has been adduced tending to support the contention of the defendant demurring, it will be excluded from consid-

eration, and the sole inquiry will be, is there any evidence tending or conducing to make out the allegations of plaintiff's petition? The question will not be whether there is sufficient evidence to make out the contention of plaintiff, for that would be to invade the province of the jury, and to commit to the court the power to pass upon the weight and sufficiency of the evidence. But the sole question will be, is there any evidence legally tending or conducing to support the allegations of the plaintiff's petition? This will be so even if the plaintiff's own witnesses should testify to some facts tending to make out the plaintiff's case, and to some facts which tend to support the defense set up in the pleading of the defendant. For the argument upon the demurrer, the rule which must guide the court is that all of the adversary's evidence must be admitted as true, and that all of the defendant's testimony, so far as any has been adduced up to that point, shall be considered either as withdrawn, or as false and untrue; and, if any legal evidence whatever has been adduced tending to make out the plaintiff's case, the ruling will be in favor of the plaintiff, the demurrer being overruled, and judgment will be rendered accordingly.

The Indiana cases are uniform upon the subject from the earliest constitution of the supreme court of that state up to the present time, and there is no diversity as to the rule except such as may arise from that variety in the expression of the law which necessarily occurs in the declaration of the same doctrine by different individuals and at different times. It is said in the various cases that, "if the evidence conflicts, the party demurring must admit that his adversary's evidence is true, so far as it conflicts with his own"; and that the demurrer admits "all of the facts which the evidence tends in any degree to prove," and the court will not consider that which favors the demurrant; and "the appellant, by demurring, withdraws from the consideration of the court whatever was favorable to himself, and consents that whatever reasonable inference could be, should be drawn from the evidence demurred to"; and "if there is anything in the evidence from which the jury might draw the presumption against the party demurring, the demurrer should be overruled"; and "the demurrer admits all the facts proven,—admits the existence of the facts of which there is evidence tending to prove, and all the reasonable inferences which may be drawn from the facts in evidence"; and "the question, therefore, is this: Does the evidence, considering only that which is favorable to the appellant, and yielding to him the full benefit of all the reasonable inferences which it supplies and furnishes, entitle him to recovery?" *Railroad Co. v. McLin*, 82 Ind. 444; *Ruff v. Ruff*, 85 Ind. 431; *Golden v. Knowles*, 120 Mass. 336; *Whart. Ev.* § 840;



Hagenbuck v. McClaskey, 81 Ind. 577; Vigo v. Brumfiel, 102 Ind. 146, 1 N. E. 382; Adams v. Slate, 87 Ind. 573; Palmer v. Railroad Co., 112 Ind. 250, 14 N. E. 70.

The question, then, to determine in this case is whether, upon an examination of all the evidence theretofore introduced, any evidence was adduced tending to show, in behalf of the plaintiffs, or from which the jury might form a reasonable inference, that the defendants, in executing the chattel mortgage, had sold and conveyed or otherwise disposed of their property with fraudulent intent to cheat or defraud or hinder or delay their creditors in the collection of their debts. The testimony shows that, a short time prior to July 26, 1890, the defendant firm borrowed the sum of \$1,900 from Laura V. Vance, the daughter of W. F. Wolf and Georgia Wolf, and that thereafter, on July 26, 1890, W. F. Wolf and Georgia Wolf, his wife, deeded lot No. 20, Greenwood avenue, in Potwin's Place, Topeka, Kan., to Laura V. Vance, for the expressed consideration of \$6,500, by warranty deed, there being at the time a mortgage upon the property of \$4,000. The consideration for this conveyance was stated to be the sum of \$1,900 borrowed from Laura V. Vance. The conveyance shows that the warranty deed represented an absolute sale, and that the debt of \$1,900 was, therefore, extinguished. There is evidence to show that the property, instead of being worth \$6,500, was worth \$10,000 or \$12,000. It was testified by A. H. Vance, the chattel mortgagee, and husband of Laura V. Vance, that at the time the deed was made to her the property was worth \$8,000 or \$9,000. The deed was filed for record on the 15th day of December, 1890. This loan of \$1,900, thus paid on the 28th day of July, 1890, by the conveyance of an equity of redemption, testified to in the evidence as worth from \$8,000 to \$9,000, was again set up as a consideration in the chattel mortgage of December 15, 1890, then grown to the sum of \$2,300, for which the defendant firm then undertook to mortgage their stock of goods, wares, and merchandise to A. H. Vance, the husband of Laura V. Vance, and undertook to use that consideration, as a cover for a certain proportion of the said stock, which had been already paid off and discharged six months before. This was a patent and flagrant fraud. It hindered and delayed creditors in the collection of their debts, was calculated to cheat and defraud them, and will be considered as a disposal of property with fraudulent intent.

There is testimony in the case to show that A. H. Vance was the agent of the mortgagees, and that he was authorized by them to take any security that he possibly could get for their benefit, without being specifically directed to take this chattel mortgage. Inasmuch as the debt of \$1,900 due to Laura V. Vance, his wife, had been paid off and discharged by the conveyance of the equity of redemption, valued in the evidence at from \$8,000 to \$9,000, on July 26, 1890, we hold that there was evidence

tending to show that he was aware of the fraud sought to be perpetrated upon the creditors of the defendants by the taking of the chattel mortgage in question, by which the claim of \$1,900, then claimed to amount to an indebtedness of \$2,300, was sought to be inserted as a shield and protection between the defendants and their creditors, going to hinder and delay the latter from the collection of the debt due to them, and that all of the mortgagees in the chattel mortgage, whom he thus represented as agent, were and are chargeable with knowledge of the fraud then sought to be perpetrated in the execution of the chattel mortgage, under and by which they then and now seek protection. There is a diversity of judgment of the supreme courts of the various states as to whether such an overstatement of a debt simply indicates fraud, or whether such an overstatement of its very self avoids the instrument. But there is no diversity of opinion, nor room for any, as to whether such an overstatement as existed and was made in this case was a fraud or not. The fact that the mortgage was then given and existed in contemplation of insolvency simply emphasizes the fraudulent degree of the transaction, and does not change its character. Carson v. Byers (Iowa) 25 N. W. 826; Taylor v. Woods (N. J. Ch.) 5 Atl. 818; Hoey v. Pierron (Wis.) 30 N. W. 692; Lombard v. Dows (Iowa) 23 N. W. 649. Whatever the character of the remaining indebtedness of the chattel mortgage, the fact that the instrument was executed in part with the intention, participated in by both parties, to mortgage the whole property of the firm, and that part of the consideration was fraudulent, will vitiate the whole instrument, and destroy it as a support against the legal attacks of attaching creditors. If it is fraudulent in part, it is fraudulent altogether. It will not be sustained to cover even the actual debt which is honestly stated in the mortgage. Winstead v. Hulme, 32 Kan. 568, 4 Pac. 994; Marbourg v. Manuf'g Co., 32 Kan. 636, 5 Pac. 181; Wallach v. Wylie, 28 Kan. 138.

Even if the transaction with Vance was not of the character here described; even if the conveyance of the real estate by warranty deed had not been declared in the testimony, as well as in the warranty deed, to be a sale and absolute conveyance, and a discharge of the debt; and if, in fact, the provision of the mortgage to secure and pay the consideration of \$2,300 to A. H. Vance entered in the chattel mortgage was simply an additional incumbrance upon the property of defendants, to secure the debt of \$1,900 loaned a few months before, which had not then been paid by the sale and conveyance of the real estate,—the taking of the additional security by the chattel mortgage would itself be considered as an evidence of fraud, for creditors "will not be permitted to pile security on security unnecessarily to the detriment of other creditors." Such a transaction would amount to a cov-



ering up of the defendants' property, and its tendency would be to deter creditors from and delay them in attempting to have the property applied to the payment of their debts, and must necessarily be regarded as suspicious, and, if not satisfactorily explained, fraudulent, and, under any circumstances, and however explained, is yet such evidence of fraud as should go to a jury, and be submitted to them, to be passed upon for sufficiency. When, upon the 5th day of July, 1887, the defendant Louis H. Wolf deeded lot No. 15, Greenwood avenue, Potwin subdivision, in the city of Topeka, to his own wife; and when, in May, 1890, the defendants transferred lots 21, 22, and 23, in block 34, in Oklahoma City, stated in the deed to be worth about \$4,700, to the wife of the defendant W. F. Wolf and the mother of the defendant Louis H. Wolf; and when, on July 26, 1890, the defendant W. F. Wolf and Georgia Wolf, his wife, deeded lot No. 20, Greenwood avenue, in the city of Potwin Place, Topeka, Kan., to their daughter, Laura V. Vance, who was the wife of A. H. Vance, the mortgagee in the chattel mortgage in question,—the fair, open, honest, natural, and proper course of proceeding by the grantees, the mother, daughter, and wife, respectively, of the defendants, and the son-in-law and brother-in-law of the defendants, respectively, would have been to place these conveyances immediately upon record. They conveyed property variously estimated in the evidence at from \$25,000 to \$30,000, but they were withheld, in one case for three years and a half, in another for eight months, and in another for six months, while the defendants proceeded falsely to represent that they owned real estate in Oklahoma City valued at \$12,000 and real estate in Topeka valued at \$20,000, and to procure upon such representations large extensions of credit, including that sued for in this case, to which extensions of credit, so fraudulently obtained, the grantees of the various parcels of real estate mentioned directly contributed by withholding deeds therefor from the record, and concealing the same; and, when the chattel mortgage now under examination was executed and recorded by A. H. Vance, acting for himself and for Laura V. Vance, his wife, and as agent for the other beneficiaries of the chattel mortgage, the deeds for the real estate were, therefore, simultaneously produced and filed for record.

When it is considered, as shown by the evidence, that the said A. H. Vance was an attorney of considerable experience; that all the parties interested as beneficiaries in the chattel mortgage were persons of either large business experience or considerable means, and of a high degree of intelligence with respect to business methods; that the deeds for real estate were all made to and in the hands of the grantees, all connected by the

closest ties of blood and marriage, and by such close connection likely to be the depositaries of the most secret confidences of the defendants; and that all of said deeds, having been theretofore reserved from record, were then simultaneously recorded at the same point of time with the chattel mortgage in question,—we must regard all as parts of one transaction, long considered and prepared for, and then consummated when A. H. Vance, for himself and as agent, knew that one suit had been brought against the defendants, judgment obtained, and that execution was likely to issue thereon at any time, and that they had long been in an insolvent and failing condition, and were unable to pay their debts when they left Topeka and opened the stores at Oklahoma City and Guthrie. There are, in this transaction, and in the care with which, through a long period of time, the conveyance made by the chattel mortgage was prepared for, many evidences of fraud reflecting upon the chattel mortgage itself, either of which would be sufficient to require that the evidence in the case should be balanced and weighed for sufficiency,—a circumstance requiring that the evidence should be passed upon by a jury sworn to try the facts truly, or by a court trying the facts. The previous grants of real estate to the nearest relatives for sums of money amounting to \$30,000, not recorded; the withholding of the deeds, and the placing of these deeds upon the record simultaneously with the taking and recording of the chattel mortgage; the whole transaction being in charge of a practicing attorney of long standing, acting in behalf of business men of wide experience; the whole constituting a transaction not consummated until suits were pending and execution impending, when the world must know of the insolvency of the defendants; and the chattel mortgage showing false recitals, and that the mortgage itself was not turned over to the chattel mortgagees to take satisfaction for their debts, but upon the provision that they were to convert the whole into money, and to pay themselves out of the proceeds (that is, money), and to pay the balance of the money over to the mortgagees,—such a collocation of evidences of fraud so reflects upon the execution of the chattel mortgage itself that we shall hold that the finding of the court upon the demurrer should have been in behalf of the plaintiffs instead of the defendants, and that judgment should have been rendered for the plaintiffs accordingly.

It was also, however, assigned by the plaintiffs that the court erred in overruling the plaintiffs' application to amend their complaint and attachment affidavit. Under this assignment the plaintiffs contended that the manifest fraud perpetrated to secure the extension of credit, and the fraudulent character of the chattel mortgage, entitled them

to sue at once for payment upon the contract when the fraud was discovered, and that the plaintiffs were not limited to an action for damages. We think this contention should be sustained. The goods were shipped from New York as the result of a correspondence, begun by the defendants in error, making a proposition to purchase the goods of plaintiffs, whose business was located in New York. While the goods were shipped to Guthrie and Oklahoma City, the freight upon them was paid by the defendants in error from New York City, the defendants took possession of them at that point, and the contract of sale was completed when they were delivered to the railroad depot there. New York City was, therefore, the place of the contract, and the rule is that the place of the contract governs the terms of the contract, and will also govern as to all facts determining the maturity of the amount due. It has in that state been held with uniformity that, if the defendants purchase and obtain possession of goods upon a credit procured by fraudulent representations, plaintiffs need not wait until the expiration of the time named in the contract in order to sue and recover, but may sue at once upon the discovery of the fraud, and may sue upon the contract, and are not required to sue in an action which shall sound in damages. *McGoldrick v. Willits*, 52 N. Y. 612; *Roth v. Palmer*, 27 Barb. 652; *Masson v. Bovet*, 1 Deno, 69; *Wigand v. Sichel*, 42 N. Y. 120; *Kingman v. Hotelling*, 25 Wend. 423; *Muser v. Lissner*, 67 How. Prac. 509; *Drake, Attachment*, § 29. We think, upon the strength of these authorities, and inasmuch as the fraudulent contraction of the debt was alleged in the attachment affidavit, that the amendment of the attachment affidavit was unnecessarily sought for by the plaintiffs by which they sought to show that the defendants had entirely disposed of the property purchased of plaintiffs, and that therefore it was out of their power to recover by replevin, and that, having the right to rescind the contract as to the time of payment, and sue forthwith for the amount due, the court should have permitted the filing of the amended attachment affidavit, showing the further fact that the defendants had entirely disposed of the property. *St. 1890*, p. 619, § 4435; *Bunn v. Pritchard*, 6 Iowa, 56a; *Hanna v. Barrett* (Kan. Sup.) 18 Pac. 497; *Greenman v. Cohee*, 61 Ind. 201; *Hedrick v. Hedrick*, 55 Ind. 78; *Ferguson v. Ramsey*, 41 Ind. 511; *Tilton v. Cofield*, 93 U. S. 163; *Sherrill v. Bench*, 37 Ark. 560; *Nolen v. Royston*, 36 Ark. 561; *Abshire v. Mather*, 27 Ind. 381. The judgment of the court below is reversed, and judgment will be entered for the plaintiffs for the amount of their claim, and the attachment proceedings are sustained.

SCOTT and TARSNEY, JJ., concur. DALE, C. J., dissents. BIERER, J., did not sit.

(16 Wash. 203)

PHINNEY et ux. v. CAMPBELL et al.

(Supreme Court of Washington. Dec. 14, 1896.)

EJECTMENT—RIGHT OF POSSESSION—ESTOPPEL IN PAIS—INSTRUCTIONS.

1. Plaintiff took possession of lands according to an erroneous duplication of the corners made after the government survey, believing that the land which he took was that purchased by him. A purchaser of adjoining land took possession according to the same erroneous duplication, taking a strip of land which was, according to the correct survey, included in plaintiff's deed. Held, that the possession of such strip by the adjoining owner and his grantees under the mutual mistake did not deprive plaintiff of the "right to the possession thereof" (Code Civ. Proc. § 529), required to maintain ejectment therefor.

2. On an issue of whether plaintiff was estopped to dispute a boundary line, an instruction that if plaintiff, knowing the true boundary between his land and that of the adjoining owner, pointed out a fence to defendants, in answer to their inquiry, as being the boundary, and defendants, relying thereon, bought of the adjoining owner, plaintiff was bound by his acts, and defendants took the land to the fence, is sufficiently favorable to plaintiff where the evidence was conflicting on every question of fact referred to by the instruction.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by John B. Phinney\* and Mary A. Phinney, his wife, against Jennie Campbell and Alexander Campbell, her husband, to recover possession of land. From a judgment entered on a verdict in favor of plaintiffs, defendants appeal. Affirmed.

S. M. Bruce and O. P. Brown, for appellants. W. H. Harris and Charles H. Hurlbut, for respondents.

DUNBAR, J. This action was prosecuted in form of ejectment to recover possession of real estate. Prior to 1886 one Eugene Canfield was the owner of the N.  $\frac{1}{2}$  of section 7, township 38 N., range 3 E. (by the government survey). There had been a duplication of the west line corners of this section, and stakes were set, and survey marks made, indicating the southwest corner, some 258 feet north of the location made by the United States surveyor general. Adjoining Canfield's holding on the south, one Kellogg had platted a tract of land, known in his record as "Kellogg's Second Addition," which addition had been staked off, and stakes set in the ground according to the stakes set 258 feet north of the government survey. In 1886 respondent bought a piece of land, comprising 10 acres, of Canfield, and took from him a contract for a deed calling for the following lands: The S.  $\frac{1}{4}$  and S. 15 feet in width of W.  $\frac{1}{2}$  of S.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$ , township 38, range 3 E. It is conceded that, if this description is read by the official survey, the southwest corner of lands called for lies 258 feet south of where respondent located; and, if read by the duplicate corners and marks, the lands exactly meet the calls in the deed. The tract of land immediately

south of the respondent's tract, viz. block 32 of Kellogg's addition, came, by mesne conveyances from one Nicklin, into the ownership and possession of one Barley, who occupied it, and reduced it to cultivation. A division fence was built between Barley and the respondent, although built by the latter, and a portion of it before Barley took possession of said block 32. This fence, which was recognized for a time as a division fence, is 259 feet north of the true or legal line, as called for in the deed; so that, if the rights of the parties are to be considered with reference to the proper survey as called for in the deed, the respondent's line would be moved south 259 feet, taking in land a portion of which had been occupied by Barley. In 1803 the lot above described, which was occupied by Barley, was sold to the appellant Jennie Campbell. She entered into the possession of the same, and this action is brought to dispossess her.

If the statements made in appellants' brief were justified by the record, this case would involve some very close questions of law. It is asserted that there is no conflict in the testimony; that the undisputed facts show that respondent Phinney bought this land from Canfield; that it was pointed out to him by an agent of Canfield, as it was presumed to lie on the face of the earth; that he entered into possession of the land as the land which he had purchased, without regard to the description in the deed, but as having bought it actually designated by metes and bounds observed; that, upon the occupation of the adjoining land by Barley, the division fence was made and recognized as the actual and legal division between the two lots of land, and that the legal line of division was ignored by the two occupants; further, that, when the appellant went upon the land to purchase the same from Barley or his agent, the respondent pointed out to her the boundary line which was marked by the fence above referred to, and told her that the line was established there; that she bought upon this representation of the respondent, and would not have bought otherwise. This is really the gist of the affirmative defense pleaded in the answer. It is the contention of the appellants that the respondents should now be estopped from asserting title or right of possession to the land which they pointed out, and they have cited an array of authorities to show that, where boundary lines have been adopted or agreed upon between adjoining proprietors, they will be estopped from denying the legal existence of said boundary. But such is not the undisputed testimony. However, before we pass to that, on the first proposition, that the ejectment was a proper remedy in this case, we think the undisputed facts show that there was not such possession, under the statute, in the appellant or her grantors, as would prevent this action.

On the question of estoppel, conceding,

without deciding, that it has been sufficiently pleaded, and that Mrs. Phinney would be bound by the representations of her husband, the testimony is about as conflicting as testimony can well be. There is some testimony by Mrs. Campbell and her daughter with reference to the representations that were made by Phinney at the time they went to purchase the place, but they do not assume to be very definite. It is certainly not sufficient to overcome the presumption that the land intended to be sold or purchased was the land described without any ambiguity in the deed. The testimony of Mr. Bruce, who was the purchasing agent of the appellant, is more definite, and, if uncontradicted under proper pleadings, might go far to establish an estoppel in pais. Mr. Bruce rehearsed a conversation at some length, but stated substantially that Mr. Phinney pointed out to him, as the Barley land, the land in controversy, with the other portion of the land; that he stated to Mr. Phinney that he was looking at it with a view to buying it, and wanted to know something of its boundaries; and that Mr. Phinney told him, among other things, that the boundary was indicated by the fence. This statement, however, is contradicted by Mr. Phinney himself. His testimony was as follows: "When he first came out to look at the land, he himself was alone. The ladies were not with him. I didn't know who he was, but he pointed to my fence, and asked, 'Is this the division between the farms?' And I don't think Barley's name was mentioned, for I know mine was not, for I would have asked who he was; and I looked for him to say more. And the next I saw of him was with two ladies. I found that the ladies were there to purchase the place. I knew it was for sale, and I wanted to make the correction after I made the statement; and I said to him, 'According to recent survey or correct survey, the line is quite a way south, and state this for your information;' and that is all the conversation that occurred, and I said no more." If it be true, as testified by Mr. Phinney, that he told the purchasing agent that the line, according to recent or correct survey, was quite a way south, and that he told him this for his information, it was certainly enough, at least, to put the purchaser upon investigation, and was, in fact, an absolute disclaimer of the fact that the fence was really the division line between the two places.

Neither does the record bear out the contention that this fence was established as a real boundary or division line between the two places, without regard to the legal calls of the deed; for, while it does not appear that the man who pointed the land out to the respondent Phinney when he purchased it was an agent, or in any way connected with the grantor, Canfield, it can fairly, we think, be gathered from the testimony of Phinney himself that he thought at the time that the deed called for the land that he actually occupied, which was

north of this fence. That is as far as the testimony goes. There is no testimony showing that it was the intention of either Phinney or Barley, the respondent's grantor, to arbitrarily and conclusively establish the division line along the fence, or anywhere outside of the line called for by the deed. In fact, the testimony undisputably shows that, as soon as the mistake in the survey was ascertained, which was in 1892 (and the deed from Barley to Mrs. Campbell was not executed and the sale made until 1893), the new survey was immediately recognized and respected, and Barley waived all his rights to the land north of the true line. Barley testified that, until the fall of 1892, he did not know that there was much error in the location of the fence line, but afterwards was convinced that other parties had misinformed him. When asked to state when and under what circumstances he first knew definitely the location of the true boundary line between his land and that of the respondents, his answer was: "In the fall of 1892, Mr. Campbell, surveyor, New Whatcom, found one of the bearing trees, and told me of it. I then saw it for myself, made the measurements from the section corner, and found I was occupying some of J. B. Phinney's land." Now, if it had been the understanding between these adjoining owners that the line which they established by the fence was to have been the actual settled boundary line between them, Mr. Barley would not have been interesting himself in any measurements. But his testimony further on shows beyond any question that such was not the understanding. He says: "We agreed to let said rail fence remain as the line fence until the proper line could be located. I never claimed the land adjoining Mr. J. B. Phinney's rail fence after finding the proper line between us, and was ready to give it up at any time." To the query whether or not he had expressed any such willingness to Mr. Phinney or any other person, his answer was: "I was quite ready for the fence to be moved, and stated so to Mr. J. B. Phinney, and think I told some of our neighbors the same." It is evident from this testimony, if it was given to the jury under proper instructions, and was believed, that no agreement had ever been entered into between the respondent and Barley which would tend to establish the fact that the respondent had waived the right to have his land bounded by the true line, as called for by the deed, but that the exact reverse was the fact, and that Barley disclaimed any right to the possession of the land in dispute. It must be uncontradicted that the appellant could not stand in any more favorable position, so far as the rights of the respondents are concerned, than could her grantor; so that, if she has any defense at all, it would be that founded upon the representations that she alleges were made by the respondent; and as we have before said, even conceding that this defense was properly pleaded, the testimony concerning it is conflict-

ing. These questions were properly submitted to the jury, and on this appeal must be deemed settled by the verdict.

We think no fault can be found by the appellants with the instructions given by the court. If their view of the facts was borne out by the testimony, the instructions would have warranted a verdict in their behalf. After reciting, in substance, the affirmative defense, the court instructed the jury as follows: "In regard to one of the issues which I mentioned to you in the pleadings in reference to these defendants relying upon some disclosures made by Phinney as to where the boundary line between these two places was, I would instruct you that if you find from the evidence that, prior to the defendants' buying the land or taking possession, they found one George S. Barley in the possession, and, before buying the same of him, they made inquiries, either in person or by agent, of the plaintiff John B. Phinney as to where the boundary line between said Barley's land and plaintiff's land existed, and that said Phinney, in response, pointed out such line or designated such line on the ground, and that the defendants, believing the line so pointed out to be the true line, purchased the land from Barley, relying upon the fact that the line so pointed out was the correct line, and the plaintiff, at the time of pointing out such line, was advised where the legal line was, and you also find that the line so pointed out by the plaintiff, if he pointed it out, was a fence dividing plaintiff's land from Barley's, then the plaintiff is bound by such action, and the defendants would hold the land up to this fence." It is plain to see that under this instruction, if the jury believed the facts to be as represented by appellants, a verdict in their favor would have been inevitable. Both this instruction and the others which the court gave were, to say the least, as favorable to the appellants as they ought to have been under the law governing such cases.

There is one objection made by the appellants to the introduction of the testimony, the acceptance of which over his objection he alleges as error, viz. the permitting the witness Phinney to state a conversation with Requa and Barley. We think, under the circumstances of the claim made by appellants of the agreement between Barley and Phinney in regard to the establishment of this line, that this testimony was admissible.

What we have said in regard to the conflicting character of the testimony answers the objection of the appellants that the instruction to the jury that the respondents could not recover if there had been a division fence between them and Barley, or if respondents had pointed out to appellants the lands as belonging to Barley, was disregarded by the jury. The judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

(16 Wash. 178)

**FELKER v. CITY OF NEW WHATCOM.**

(Supreme Court of Washington. Dec. 14, 1896.)

**MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS  
—NOTICE—SALE OF PROPERTY FOR NON-  
PAYMENT OF ASSESSMENT—DEED.**

1. The validity of a notice by a city of a street improvement is not affected as to property taxable therefor by the fact that in a second publication it includes an additional improvement not affecting such property.

2. Under the charter of the city of Whatcom (Laws 1883, c. 9), providing that in making street improvements, the cost of which is chargeable on abutting property, a survey shall be first made, and a diagram and estimate filed with the city clerk for the inspection of all persons interested, such estimate is the basis of the notice of the improvement required to be published, and it is not necessary that the notice should set out the particulars as to the character or cost of the improvement.

3. In the absence of charter provision requiring it, the completion of a street improvement is not necessary before a valid sale can be made of property for nonpayment of an assessment against it therefor.

4. The assessment and sale of property by a city for a street improvement in the name of S. D. Henning, instead of S. W. Herring, who was the true owner, is not such an inaccuracy as will render the proceedings invalid.

5. Under Laws 1883, p. 153, § 13 (Charter of Whatcom), providing that proceedings for the assessment and sale of property for street improvements should be governed by the provisions of the Code concerning the sale of real estate for delinquent taxes, a deed to property sold by the city for nonpayment of such an assessment was properly made in the name of the territory.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Ejectment by G. W. Felker, administrator, against the city of New Whatcom. Judgment for defendant, and plaintiff appeals. Affirmed.

John T. Pidwell, H. J. Miller, and S. M. Bruce, for appellant. D. W. Freeman, for respondent.

**DUNBAR, J.** This is an action of ejectment, prosecuted by G. W. Felker, as administrator of the estate of Samuel W. Herring, deceased, against the city of New Whatcom, to establish title to and recover possession of lot 5 in block 33 in said city. This land was sold in 1884 for an assessment tax bid in by one Pettibone, and afterwards, by legal conveyance, conveyed to the city of New Whatcom. Samuel W. Herring, who was the owner of the property, died in 1879. In 1894 the appellant was appointed administrator of the estate of S. W. Herring, deceased, and shortly after proceeded to bring this action. The appellant contends that the tax deed made to Pettibone is void, and conveyed no title, for the reasons, as alleged by him: (1) That no notice of intention to improve said streets was ever given; (2) that the pretended notice to improve did not inform the property owners of the materials to be used or of the character of work proposed, from which an estimate of the cost could be made; (3) that no

ordinance was ever passed fixing the time within which property owners might comply in making the improvement; (4) that the work was never completed, and the property owners cannot be compelled to pay an assessment therefor; (5) that the name and initials used in the assessment and sale of the land are not the name and initials of the owner; (6) that the tax deed is void upon its face in not being made in the name of the city as grantor. The seventh assignment, under the view we take of the law, need not necessarily be discussed here. No statement of facts has been settled. The case was tried by a judge, a jury having been waived. The judge made findings of fact, which are not excepted to, and the only question for us to determine is whether or not the findings of fact justify the conclusions reached by the lower court; the lower court holding that the city of New Whatcom was the owner in fee simple of the lot in dispute, and that the plaintiff has no interest whatever in said lot. The court found that the city of New Whatcom is a municipal corporation; that prior to the 22d day of August, 1879, Samuel W. Herring was the owner in fee simple of the lot; that on March 14th and 21st the city of New Whatcom caused a notice to be published in the newspaper doing the city printing. It is not necessary to set the notice out in full here, but the improvements to be made were described as follows: "To be piled and planked," and the other street "to be excavated and filled, and the whole of said streets to be sidewalked as follows," describing the width of the sidewalks on the different streets. Appellant contends that no notice of intention to improve said street was ever given; that there were two notices published, but that the second notice made a material departure from and alteration in the first by adding the words, "between E street and the Colony Wharf Reserve"; that this made a new notice, and took in new territory for improvement, and the former publication was without effect. We do not think there is any merit in this contention. The notice of the street improvement was published March 14th and 21st, and it is not disputed that the property in question was properly described in that notice, and the property which was properly described is not affected by a further publication which gives notice of an improvement not given in the first publication. Notice was given to this property owner as the law required, and, if any one can complain of a want of notice, it is the owners of the property which was omitted from the first notice and included only in the last. The owner of this particular property had longer notice than the law required of the city's intention to improve this street by the publication of the notice on the 14th and 21st of March.

The next proposition—that the notice did

not inform the property owner of the materials to be used, or of the character of work proposed, from which an estimate of the cost could be made—is based largely upon the decision of this court in *Buckley v. City of Tacoma*, 9 Wash. 253, 37 Pac. 441; but, while we would not extend the doctrine announced in that case as against a municipal corporation, we do not think that that case is applicable to the one at bar. Under the Tacoma charter the first step required was the passing of the resolution stating the intention of the council to improve the street, and the kind of improvement to be made; but under the charter of the city of Whatcom the first step is a survey, diagram, and estimate. This estimate is filed in the office of the city clerk under the provisions of section 1, c. 9, p. 151, Laws 1883, for the inspection of all persons interested, and is really the basis of the notice that is published; and the notice refers to the diagram, survey, and estimate, and all the information that could be furnished by the diagram is made a part of the notice and furnished by the notice, so that the owner of the property has an opportunity to obtain all necessary knowledge as to the character and cost of the improvement. The finding shows that the city made a tabulated list of all the lands to be assessed, showing the value, etc., which was required by the law, and from this list there was no difficulty in the property owner determining how much would be assessed upon his property; that it showed what amount was proportioned against the lot in controversy; and that, the same not being paid within the time required by law, the clerk of the city, under orders of the city council, issued an order to the marshal of said city commanding him to sell said lot; finds that said lot was never redeemed, and that the city executed to Pettibone a deed, and that Pettibone went into the immediate possession of the lot under the deed. The owner of the lot, then, under these findings, we think had notice of this improvement. He had sufficient notice before the work commenced, and under section 5 of c. 9 of the charter of the city of Whatcom, if he considered himself aggrieved by the appraisal and assessment, he could apply to the council for a modification of said assessment, which the council was authorized by law to modify as seemed to them best, and there is nothing as shown by the findings in this case that would warrant the assertion that the owner was in any way deprived of his right to make the improvement in front of his property if he had desired to do so within the time allowed him. We fully agree with the counsel for appellant that where there is an entire failure to perform a jurisdictional act in the time required, the city council has no authority to proceed with the work; but we do not think that the law announced is applicable

to this case. It is found by the court that all the other notices relative to the improvement and required by the charter were regularly given and duly published.

The fourth assignment is that the work was never completed, and that the property owners cannot be compelled to pay an assessment therefor. On that proposition the finding of the court is: "That all the work in assessment district No. 3 was completed, according to the aforesaid ordinances, notices, etc., excepting that no sidewalks were laid down in said district. That as much work was done in front of this property, the aforesaid lot 5, block 33, as anywhere in the district. That the reason the sidewalk was not laid in accordance with the plans, specifications, notices, and ordinances was because the estimate of the engineer was exhausted, the work being done by days' labor. After the issuance of the certificate of purchase to C. J. Pettibone, the work was completed; and that there is now a good sidewalk and pavement the entire length of the streets included in district No. 3, and the same was done without additional cost to S. W. Herring, his heirs or personal representatives, nor is there now a charge against this lot 5, block 33." We do not find anything in the charter requiring the work to be completed before the sale of the property. The council was required to levy an assessment when the stipulated statement had been proved. This was done, and the assessment roll was delivered to the city treasurer, and, if the property owners did not pay within 10 days, the council was authorized to issue a warrant of collection to the marshal, and require him to forthwith sell the property for assessments. The finding of the court, however, in relation to the work having been finished without any additional expense to the owner, and that it is not a lien upon the land, is a sufficient answer to this assignment.

It seems, however, that the property was listed in the name of S. D. Henning, instead of the name of S. W. Herring, and it is insisted by the appellant that these names do not fall under the rule of *idem sonans*. The recitals in the deed contain the name of S. D. Tanning instead of S. D. Henning in one place, but further on the right, title, interest, and property of S. D. Henning is conveyed by the deed, so that the only important question to our minds is whether S. D. Henning is sufficiently like S. W. Herring to make them *idem sonans*. We have examined all the authorities cited by appellant and respondent on this proposition, and we think that the discrepancy, slight as it is, between Henning and Herring, ought not to defeat the respondent's title in this case; and nearly all the cases hold that the difference in the middle initial of names is not material. A great many cases hold that it is not necessary that the

property should be listed in the name of the owner at all. We held to the contrary in *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, and 36 Pac. 286, but that was in the case of a general tax. It is doubtful if the same rule ought to apply in cases of street assessments. Mr. Elliott, in his work on *Roads and Streets* (pages 431, 432), after stating that a reasonably certain description is all that is required, because it is not just to assume that the proceedings are necessarily hostile to the interests of the property owners, because the law which authorizes them to levy the assessment proceeds upon the theory that the improvement is for the benefit of the owners of the property assessed, goes on to say: "The persons against whose property the assessment is directed should be identified in some appropriate method, and this is generally done by naming them. It is obvious, however, that it is not always possible to accurately name the owners; and where this is so it seems unjust to deny any force to the assessment. If the property is well described, and the officers have done all that reasonable diligence enabled them to do, the assessment should be upheld. Immaterial inaccuracies in naming the owners ought not to be allowed to defeat the proceedings. Where the assessment is made by a municipal corporation, and for the improvement of a street, there is much reason for giving little weight to errors in names if the property assessed is properly described, since from the nature of the proceedings and the character of the improvement it is hardly conceivable that an owner can be ignorant of what has been done; and, if he knows the facts, he must know, as a matter of law, that his property is liable for the assessment." We think the deed was properly made, under the provisions of the law, in the name of the territory. With this view of the legality of the tax title, it becomes unnecessary to enter into a discussion of the questions raised in defense by the respondent. The judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS, and GORDON, JJ., concur.

(16 Wash. 156)

**DOOLY v. HANOVER FIRE INS. CO. OF NEW YORK.**

(Supreme Court of Washington. Dec. 10, 1896.)

**FIRE INSURANCE—CONDITIONS IN POLICY—PROOF OF LOSS.**

1. A policy containing a condition that it shall be void "if the subject of insurance be \* \* \* on ground not owned by the insured in fee simple" is not vitiated by the fact that the insured had not received a deed from his vendor, though he had paid the price in full, where the insured was asked no questions concerning the title, and made no representations relative thereto with the intent to deceive.

2. No proof of loss is necessary when the insurer disclaims liability.

Appeal from superior court, Yakima county; Carroll B. Graves, Judge.

Action by E. W. Dooly against the Hanover Fire Insurance Company of New York to recover on a fire insurance policy. From a judgment for defendant, plaintiff appeals. Reversed.

H. J. Snively and Fred Miller, for appellant. Reavis & Englehart, for respondent.

DUNBAR, J. This action was brought in the superior court of Yakima county by the plaintiff (appellant herein) to recover from the respondent upon an insurance policy. The policy was issued on the 12th day of June, 1895, in consideration of the payment by the plaintiff to the defendant of the premium of \$33.80, the amount of the policy being \$1,000 upon building, \$200 upon furniture and fixtures, and \$1,000 upon stock of wines, liquors, and cigars. The lot upon which the property insured was situated was held by plaintiff under a contract of purchase with one Walter N. Granger, a trustee. The plaintiff testified that, at the time of the issue of the policy, he had paid the purchase price in full, and was entitled to a deed therefor. The building was burned, and a certain amount of fixtures, and stock of wines, liquors, etc., destroyed. No adjustment could be made, and suit was brought to recover the amount of the policy.

The defense in this action, so far as it is necessary to discuss it here, was based upon a condition in the policy which was as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the interest of the insured in the property covered by said policy be other than unconditional or sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property, and be or become incumbered by chattel mortgages." This provision of the policy was especially pleaded, and upon the close of plaintiff's testimony, on motion of the appellant, the case was taken from the jury, and dismissed, at plaintiff's cost. No written application was made for this policy, and the undisputed testimony is that no questions were asked the insured concerning the title to the land. It also developed in the trial of this cause that there was a mortgage upon certain of the goods, but the testimony of the plaintiff was to the effect that he made this known to the agent of the insured. The testimony was as follows: "Q. What did you say about this mortgage? A. He wanted to know whether the property was incumbered, and I said it was, and he wanted to know for how much, and I told him I couldn't tell without looking it up,—there was a mortgage on the Zillah property and a mortgage on the North Yakima property to satisfy a debt of Rothchild Brothers. \* \* \* Q. Did he

ask you anything about the ownership of the property? A. No, sir. Q. Did you make any statement whatsoever about the ownership of the property? A. No, sir." Further on, in direct examination, after being recalled, the following appears: "Q. Who was the owner of this property that was destroyed? A. I was. Q. Both the real property and the personal property? A. Yes, sir. Q. And the buildings? A. Yes, sir. Q. Now, I want to ask this question,—I am not sure that I covered it entirely: Did you make any statement to Mr. Leeper; that is, the agent? I believe I asked you whether he asked you any questions about the title. A. Yes, sir. Q. And his answer was 'No.' Did you make any statement to him about the title? A. No, sir. Q. None whatever? A. No more than I told him there was a mortgage upon the property. Q. Did you make any statement except about this mortgage on the property,—this mortgage to Rothchild Brothers? A. That is all."

There having been no written application in which questions were asked and answered concerning the status of the property, we think, under the authorities, and as a question of right, that this condition, which is injected into the policy among numerous other conditions, more or less technical, and hard to understand by the ordinary mind, ought not to prevent a recovery, in the absence of any misrepresentation on the part of the insured. The insured as a matter of fact ordinarily knows nothing about the policy until it is made out and returned to him, after the payments for the same have been made to the agent at the time the contract was made; and the insurer, having failed to obtain this information, must be held to have done so at its peril. Even where an application has been made, which is the instrument to which the insured's attention is especially called, and upon which he relies, it is held that, where the language of the questions contained in the application calls for answers which may be to some extent a matter of opinion, if the insured answers in good faith, he will be excused, though he does not give the desired answer. May, Ins. § 166. The ordinary layman is not presumed to know what a fee-simple title is, and, in the absence of any questions which would tend to enlighten him as to the true definition of that phrase, he might very well conclude that he was the owner in fee simple if he was the owner and in possession, and had such title to the property as is testified to by the assured in this case. Much more liberally ought the language to be construed when it is found in the policy alone, and not in an application, to which the assured is directly a party. "The issuing of a policy," says Mr. May, in the section above referred to, "on an application which, without fraud, contains no answer to certain questions, is a waiver of answer to those questions, even though, in answer to another

question, the insured may have said there were 'no other circumstances affecting the risk'; and, to avoid the policy in such cases, the insurers must prove untrue statements other than those inquired about." The rule as announced by Wood, Ins. § 212, is as follows: "When no inquiries are made, the intention of the insured becomes material, and, in order to avoid the policy, they must find, not only that the matter was material, but also that it was intentionally fraudulently concealed." And in *Insurance Co. v. Bachler* (Neb.) 62 N. W. 911, it was held that "where the insured was not questioned as to incumbrances on his property, and did not intentionally conceal the facts, the existence of a mortgage thereon did not invalidate the policy,"—following *Van Kirk v. Insurance Co. (Wis.)* 48 N. W. 798. The court in that case found that the existence of the mortgage on the property was a fact material to the risk, but that, no inquiries having been made by the agent of the insurance company as to the condition of the title to the property, and the insured having said nothing about the existence of the mortgage for the reason that he did not know that it was his duty to disclose the existence of the mortgage, it was not, under the circumstances, a representation that the insured property was free from the mortgage. In *O'Brien v. Insurance Co. (Mich.)* 17 N. W. 726, it was held that "where insurance is applied for orally, and the applicant is unaware of any provision in the policy regarding incumbrances, and is not guilty of any misleading conduct, his bare silence cannot be deemed a misrepresentation; and if the agent in such a case did not read the policy to the applicant, or call his attention to the clause relating to incumbrances, the existence of a mortgage would be no impediment to a recovery from the insurance company." "If an insurer," said the court, "is apparently indifferent whether a property is unincumbered, and is content to insure without in any way suggesting an interest in the question, the bare silence of the applicant upon it cannot be deemed a misrepresentation." In *Clark v. Insurance Co.*, 8 How. 235, after giving the general rule concerning the answering of questions, the court says: "But the relation of the parties seems entirely changed if the insurer asks no information and the insured makes no representations. That is the chief novelty in this question, as hypothetically stated in the bill of exceptions. We think that the governing test on it must be this: It must be presumed that the insurer has, in person or by agent, in such a case, obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him." And further on the court says: "But when representations are not asked or given, and with only this general knowledge the insurer chooses to assume the risk, he



must, in point of law, be deemed to do it at his peril. 'With this knowledge, and without asking a question, the defendant underwrote; and by so doing he took the knowledge of the state of the place upon himself,' etc.,—citing 1 Marsh. Ins. 481, 482; Carter v. Boehm, 3 Burrows, 1905. And a distinction is made between cases of fire insurance and of marine insurance, because, in the case of fire insurance, the subject insured is usually situated on land, and nearer, so as to be examined more easily by the company or its agents, and the circumstances connected with it are more uniform, and better known to all. To sustain this is cited Jolly's Adm'r v. Society, 1 Har. & G. 295; Burrill v. Insurance Co., 5 Hill, 192. The same doctrine was announced in Washington Mills Emery Manuf'g Co. v. Weymouth & Braintree Mut. Fire Ins. Co., 135 Mass. 503, where the court, in the course of its argument, said: "The plaintiff made no misrepresentations and no concealment as to its title. The policy is upon the buildings. The defendant saw fit to issue this policy without any specific inquiries of the plaintiff as to the title to the land, and without any representations by the plaintiff upon this point. It was its own carelessness, and it cannot avoid the policy without proving intentional misrepresentation or concealment on the part of the plaintiff. An innocent failure to communicate facts about which the plaintiff was not asked will not have this effect,"—citing many prior Massachusetts cases. A great many other cases might be cited to sustain this doctrine. It is true that the cases are not entirely uniform on this proposition, but we think the great weight of authority and the better reasoning sustains the appellant's contention.

So far as the question of notice of proof was concerned, the testimony was overwhelming that the company had disclaimed responsibility for the loss. Under such circumstances, no proof was necessary. The judgment will be reversed, with instructions to overrule the motion for a nonsuit.

HOYT, C. J., and SCOTT, GORDON, and ANDERS, JJ., concur.

(16 Wash. 215)

INTERSTATE SAVINGS & LOAN ASS'N  
v. CAIRNS et al.

(Supreme Court of Washington. Dec. 15,  
1896.)

MORTGAGE—PAYMENT.

Where the amounts paid by a mortgagor to a building and loan association as interest and dues were equal to the amount which the mortgage was given to secure, a complaint for foreclosure will not be sustained.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by the Interstate Savings & Loan Association, a corporation, against Edward Cairns and others, to foreclose a mortgage.

From a decree in favor of defendants, plaintiff appeals. Affirmed.

The findings of fact upon which question is raised upon this appeal are as follows, the other findings being merely formal: "(2) That Ewen K. Crosby, since deceased, of whose estate the defendant David R. Crosby is the duly appointed, qualified, and acting administrator, and the defendant Edward Cairns, became members of the plaintiff association by subscribing for and receiving twenty (20) shares of its capital stock, under date June 10, 1889; and, by reason thereof, the said Ewen K. Crosby and Edward Cairns were entitled to borrow from the plaintiff, upon assigning to the plaintiff said stock as collateral security for any loan that might be made by said Cairns and Crosby from said plaintiff, and, in addition thereto, giving to plaintiff such additional real estate security as it might require and approve. (3) That on September 10, 1889, the said Cairns and Crosby, for the purpose of procuring a loan from the plaintiff to the amount of fifteen hundred (\$1,500) dollars, assigned to the plaintiff their said twenty (20) shares of stock, and executed and delivered to plaintiff their certain promissory note dated on that day, wherein and whereby they jointly promised to pay to the plaintiff sixty-six (66) months after said date, for value received, the said sum of fifteen hundred (\$1,500) dollars, with interest thereon at 6 per cent. per annum, and premium thereon at 7 per cent. per annum, both payable on or before the tenth day of each month; and, contemporaneously with the execution and delivery of said note, said Edward Cairns and Ewen K. Crosby, and the defendant Lillian Crosby, wife of said Ewen K. Crosby, executed and delivered to plaintiff their certain mortgage, covering lots one (1) and two (2) in block twelve (12) of Snohomish City, eastern part, in Snohomish county, Washington territory (now state), which said mortgage was duly acknowledged and certified, and afterwards, on September 24, 1889, was duly filed for record in the office of the auditor of said county, and was recorded in Volume 6 of mortgages, at pages 356 to 359; and, upon giving said note and said security, the said Cairns and Crosby received from plaintiff the said loan. \* \* \* (6) That said Cairns and Crosby, by themselves and by the personal representatives of said Crosby, paid to the plaintiff on account of said loan, in numerous installments, beginning at the time of receiving said loan, and ending on the 15th day of April, 1885, the sum of twenty-one hundred and fifty-seven and 70-100 (\$2,157.70) dollars, which said sum, paid as it was paid, as aforesaid, fully repaid the said loan of fifteen hundred (\$1,500) dollars, with interest thereon at six per cent. per annum, and premium at seven per cent. per annum from the date of its execution, and left a balance in excess of said sum of more than seventy-five (\$75) dollars. (7) That the

plaintiff, by and through its duly-authorized agent, John B. Ault, solicited said loan from said Cairns and Crosby, and, to induce them to make said loan, the said Ault represented to them that, after giving said security as aforesaid, they would repay said loan in full, by making to plaintiff sixty-six (66) monthly payments of thirty-one and 25-100 (\$31.25) dollars each, together with a small fine for each month, in which they might default in prompt payment; that the plaintiff never showed, nor caused to be shown to the said Cairns and Crosby, or either of them, its by-laws or any of the literature promulgated by it prior to the execution of the papers hereinbefore mentioned; that the said Cairns and Crosby relied upon the representations of said Ault in making said loan; and that they did since, and long prior to the commencement of this action, and prior to the 15th day of April, 1895, fully repay said loan in accordance with such representations,—i. e. they paid in excess of sixty-six (66) monthly payments of thirty-one and 25-100 (\$31.25) dollars each, and all fines properly chargeable to them."

The following are the court's conclusions of law: "(1) That, by reason of the matters and things set forth in the foregoing findings of fact, the defendants Cairns and Crosby became indebted to the plaintiff on the 10th day of September, 1889, in the sum of fifteen hundred (\$1,500) dollars, with interest thereon and premium thereon payable at the rate of six and seven per cent. per annum, respectively; that prior to the 15th day of April, 1892, the said Cairns and Crosby paid, and caused to be paid, the full amount of their said indebtedness to plaintiff, and were thereupon entitled to the cancellation of the note mentioned in the foregoing findings of fact, and to a complete release and discharge of the mortgage therein mentioned."

The appellant duly served and filed its exceptions to the findings and conclusions, as follows: "(1) The plaintiff excepts to so much of the second finding of fact as reads as follows: 'And, by reason thereof, the said Ewen K. Crosby and Edward Cairns were entitled to borrow from the plaintiff, upon assigning to plaintiff said stock as collateral security for any loan that might be made by said Cairns and Crosby from said plaintiff, and, in addition thereto, giving to plaintiff such additional real estate security as it might require and approve.' (2) The plaintiff excepts to the third paragraph of the findings of fact in so far as it finds that the said loan of \$1,500 was to be repaid sixty-six months after it was made. (3) Plaintiff excepts to paragraph six of the findings of fact, which reads as follows [given above], and to each and every part thereof. (4) The plaintiff excepts to the seventh finding of fact, which reads as follows [given above], and to each and every part thereof. (5) The plaintiff further excepts to that portion of the conclusions of law which reads as fol-

lows: 'That prior to the 15th day of April, 1895, the said Cairns and Crosby paid, and caused to be paid, the full amount of their said indebtedness to plaintiff, and were thereupon entitled to the cancellation of the note mentioned in the foregoing findings of fact, and to a complete release and discharge of the mortgage therein mentioned.'"

Shank & Smith, for appellant. Coleman & Hart, for respondents.

**PER CURIAM.** An examination of the record in this case satisfies us that the findings of fact made by the court below were justified by the testimony, and that the conclusions of law announced were justified by the findings. The defendants, according to the undisputed testimony, borrowed this money on the representations of an agent of the plaintiff. The obligation which they signed was properly construed by the court, and the method of computation that was adopted was the method which carried out the intention of the parties to the contract. The judgment will be affirmed.

(57 Kan. 585)

**LAWRENCE v. ATCHISON, T. & S. F. R. CO.**

(Supreme Court of Kansas. Jan. 8, 1897.)

**REVIEW ON APPEAL.**

In case of a personal injury by a collision with a locomotive engine and train at a highway crossing, where the answers of the jury to particular questions of fact show contributory negligence on the part of the plaintiff, and the general verdict is for the defendant, and only a part of the evidence is preserved, and no material error appears in the instructions, and the court overrules the plaintiff's motion for a new trial, and renders judgment on the verdict, *held*, that such judgment should be affirmed, although the defendant may not have been free from fault.

(Syllabus by the Court.)

Error from district court, Franklin county; A. W. Benson, Judge.

Action by Esther A. Lawrence against the Atchison, Topeka & Santa Fé Railroad Company. Judgment for defendant. Plaintiff brings error. Affirmed.

John W. Deford and H. P. Welsh, for plaintiff in error. A. A. Hurd, W. Littlefield, and O. J. Wood, for defendant in error.

**MARTIN, C. J.** This was a suit brought to recover \$25,000 damages for personal injuries sustained by the plaintiff, August 19, 1892, about 6 o'clock p. m., at a crossing of the defendant's Emporia Branch Railroad, about one-half mile south of Pomona, in Franklin county. A verdict was returned and judgment was rendered in favor of the defendant January 19, 1893, and, the plaintiff's motion for a new trial being overruled, the plaintiff brings the case here, alleging error.

The record does not contain all the evi-

dence, sufficient being preserved, however, to show the applicability of the instructions given. From this, and the answers of the jury to particular questions submitted to them, the material facts appear to be as follows: The plaintiff and her sister-in-law, Lennie F. Lawrence, were driving north upon the highway in a two-horse, single-seated, top carriage, the side curtains being up or off. The plaintiff was on the right-hand or east side, driving the horses. The railroad crosses the highway east and west almost at right angles, bearing slightly to the north going east. To the west the track is straight to the Marias Des Cygnes river, a mile and a half distant. The railroad embankment is 4 to 6 feet in height. The depot for Pomona station is 192 feet west of the highway crossing, on the north side of the main track. The cattle chute and pens are 302 feet west of the crossing, and on the south side of the passing track, which starts out from the south side of the main track, 2,057 feet west of the crossing, and extends a considerable distance east thereof. The section house is 2,083 feet west of the crossing. There is a stub switch, starting from the north side of the main track, 725 feet west of the crossing, and extending on the north side of the depot and across the highway. The distance between the passing track and the main track from center to center is 16 feet, and from the center of the main track to the north end of the stock chute 21 feet 10 inches. This structure extends 80 feet south to the stock pens, built of boards and posts about 6 feet high, and the chute being of the same height for the first 40 feet, and from that point northward sloping upward to correspond with the railroad embankment, thus raising its northern extremity to a point 9.7 feet above the south rail. South and west of the stock pens and chute were growing corn and some weeds. There is a hedge fence on the west side of the highway, but it extends north only to a point 372 feet south of the railroad crossing. The ladies were driving at a trot. They saw a hand car coming from the east, and crossing the highway, and they made some remarks to the effect that the train could not be very near, as the hand car was on the main track. They drove to a point within 15 feet of the crossing, when they saw the fast freight train approaching from the west, and not far away. They were frightened, and Lennie F. Lawrence struck one of the horses with the whip, and they sprang forward onto the track when the train came upon them. Mrs. Lawrence was killed, as also one of the horses, and the plaintiff sustained very serious, and perhaps permanent, injuries. The station whistle, which was quite prolonged, was sounded about 4,500 feet west of the crossing, but the ladies did not hear it, there being a slight breeze from the east. When the engine was about 2,000 feet west of the crossing, the engineer saw

the team and vehicle about 250 to 300 feet south of it. The findings are not entirely satisfactory as to the point where the crossing whistle was sounded. There was no whistling post there, and, in answer to one question, the jury found that the whistle was blown 1,200 or 1,300 feet from the crossing; but in answer to another they stated that it was sounded about one-third of the distance from the stock chute to the section house, which would be about 896 feet from the crossing. The bell was rung from about the end of the stub switch, and the plaintiff testified that they heard the ringing of the bell and the whistle almost simultaneously, and this was her first knowledge of the approach of the train. The engineer endeavored to stop, but the engine had gone 20 or 30 car lengths beyond the crossing before he succeeded in stopping. The grade was slightly descending going east. The jury found that, at a point 30 to 31 feet south of the crossing, the ladies could have seen to the stub switch, and at a point 27 feet south to the section house; that, after passing the north end of the hedge, they could have seen the train to the bridge, a mile and a half away, and could have seen the smokestack and the top of the engine and cars over the stock pens and the cattle chute, or by looking between the bars. The plaintiff had crossed the track very frequently. The speed of the train was about 30 miles an hour. The day was clear and the sun shone brightly.

It seems strange that this disaster should have occurred, and the jury must have believed that, in driving upon the crossing under such circumstances, the ladies did not exercise ordinary care. The train must have been in plain view from the time that the ladies passed the north end of the hedge. Yet, when they first saw it, and Mrs. Lawrence struck the horses with the whip, it could not have been more than 200 feet distant. The case is somewhat like that of *Young v. Railway Co.*, 57 Kan. —, 45 Pac. 583, where a demurrer of the plaintiff's evidence was sustained by the trial court, and the judgment was affirmed by this court. Complaint is made as to several instructions given. We have carefully considered each, but find no material error in the instructions, especially in view of the facts found by the jury. The judgment must be affirmed. All the justices concurring.

(57 Kan. 576)

ROCKFORD INS. CO. v. WINFIELD.

(Supreme Court of Kansas. Jan. 8, 1897.)

INSURANCE—AGENCY—DUAL RELATIONS—PROOF OF LOSS—WAIVER.

1. J., the agent of an insurance company, was the cashier of one bank, and the president of another. W., a dealer in grain and seeds, was indebted to the banks in an amount exceeding the value of the property in store, and she issued warehouse receipts to them, covering sub-

stantially all of it. J. wrote for W. a policy of fire insurance upon said property, and duly notified the company, but gave no information touching the relation of himself and the banks to the insured property. The risk was declined for other reasons, and J. was so notified by mail, but he did not receive the notice until two or three days before the destruction of the property by fire, and he did not notify W. until after such destruction. W. had not actually paid the premium, but it was advanced by J., and, on the declination of the risk, was passed to his credit by the company, and afterwards returned to him. *Held*, that on account of the dual relations of J., whereof W. had knowledge, the policy cannot be enforced against the company.

2. W. made only informal proof of the loss, and it is *held* that, upon the facts stated, there was no waiver of formal proof by the company. Martin, C. J., dissenting.

(Syllabus by the Court.)

Error from district court, Neosho county; L. Stillwell, Judge.

Action by M. A. Winfield against the Rockford Insurance Company. From a judgment for plaintiff, defendant brings error. Reversed.

On February 19, 1892, M. A. Winfield filed her petition against the Rockford Insurance Company, to recover \$2,000 and interest on a policy of insurance of date December 4, 1891, alleging the loss of the insured property by fire, January 23, 1892. The insurance in favor of M. A. Winfield was described in the policy as being "on her stock of implements, buggies, spring wagons, sewing machines, separators, steam engines, horse power and machine fixtures, baled broom corn, baled hay, grain and seeds of all kinds, and such other merchandise as is usually kept in a grain and implement store and warehouse, her own or held by her in trust or on commission, or sold, but not delivered, all contained in the first story of the one and two story stone and brick, metal-roofed building, situated on lot 1, block 35, New Chicago (now Chanute), Kansas: \$3,500. Other concurrent insurance permitted." The policy was signed by the president and the secretary of the insurance company, and countersigned at Chanute, by J. O. Johnston, agent. Johnston was at the same time cashier of the Bank of Chanute, and president of the First National Bank of Erie. M. A. Winfield was largely indebted to said banks, and, to secure the claims, certain notes were deposited as collateral security, but the banks relied mainly upon certain warehouse receipts of the form following: "No. ——. Chanute, Kansas, Nov. 3, '91. Received in warehouse at Chanute, Kansas, from the First National Bank of Erie, Kansas (or the Bank of Chanute, Kansas), five thousand bushels of prime flax seed, No. one, subject only to the order hereon of the said bank, and the surrender of this receipt. No charges are to be made for the storage of this property, and it is understood that it is absolutely the property of the said bank, to be disposed of at their will and pleasure, and it is only in our possession for storage and safe-keeping. Loss

by fire or heating at our risk. M. A. Winfield." These receipts covered nearly all the grain and seeds in the warehouse at the time of the fire, and the indebtedness to the banks was in excess of the value of such grain and seeds. Charles F. Prange was a dealer in agricultural implements, separators, horse power, and machine fixtures, and for some years past he had kept his goods in the one-story part of the building, paying storage thereon to M. A. Winfield, and she insuring the property as in his instance, without any mention of the real ownership. Johnston did not advise the insurance company as to the nature of this business, and he made no mention of the fact that the banks of which he was an officer substantially owned all the grain and seeds in the warehouse. On the day that the policy was issued, Johnston made a report thereof to the company in the usual manner, and on December 24th he remitted to it the premiums on this and certain other policies, less his commissions. The risk was declined by the company December 21st, in a notification to the agent, who was credited with the premium, and ordered to cancel the policy without delay; but the direction upon the envelope was to "Joe Johnston, Agt., Chanute, Kansas," and this misdirection probably led to its detention for a time in the post office at Chanute, for Johnston had not received it on January 6, 1892, when he started on a trip East; but the letter followed him to New York City, where it was delivered to him by the Chemical National Bank on January 20th or 21st. He opened it hastily, with other mail there, and testifies that he put it into his pocket, and forgot it, until he was on his way back as far as Kansas City, about the last of January, when he heard of the loss of the property by fire. Soon after his arrival at Chanute, and about February 1st, he was called upon by special agents representing the Rockford Company and two others, which had issued policies amounting to \$2,500 in addition to that held by the Rockford Company. These special agents made partial inquiry as to the loss, and went away, but returned again about two days thereafter, and their investigation was resumed. They requested from S. Winfield, the husband and agent of M. A. Winfield, an itemized statement of the property destroyed. He explained to them that all his books of account, weigh books, etc., had been destroyed by the fire, and that it was impossible to make an exact statement, especially as to the grain and seeds. They then told him that the company was not liable for the Prange property, and that they would not consider the loss as to the grain and seeds unless it was eliminated. At length, on or about February 6th, Winfield delivered to them a written document, directed to them, containing an itemized statement of the quantity and value of the different kinds of grain, seeds, machinery,

and property destroyed by the fire; the amount for grain, seeds, etc., being \$2,721.95, and that for the machinery being \$2,977.27, or a total of \$5,699.22. This list, after the direction to the several companies, was headed by the following words: "Gentlemen: I hereby submit to you the following itemized statement of my loss of property insured by you, which occurred by fire January 23, 1892. [Signed] M. A. Winfield." The document was not verified, and there was no certificate of a magistrate or other officer that he verily believed the assured had without fraud sustained loss of the property insured to an amount certified by such magistrate, as required by the terms of the policy, and the foregoing was the only proof of loss made by the assured. On the night of February 6th said special agents wrote a letter, of which the following is a copy: "Chanute, Kansas, February 6th, 1891. To M. A. Winfield, Chanute, Kas.: You are hereby notified that the statement presented by you through Samuel Winfield (who represents himself to be your attorney in fact), and purporting to show a claim against the companies represented by us, is not sufficient, and cannot be accepted by us. From it we are unable to ascertain from what source or to what extent in amount your purchases have been, or what the amount of your sales or consignments were at any time during the year 1891, and prior to the date of the alleged fire, you having alleged that everything in the nature of data relating thereto for the year 1891, and up to and including the date of the alleged fire, has been destroyed. We are not in a position to admit or deny liability at this time. You are hereby requested, as required by the printed conditions of our policies, to produce certified copies of all bills or other evidence of your purchases, either for cash or on credit, or of any property consigned to you on commission from any and all parties with whom you have transacted business during the year 1891, and up to and including the date of the alleged fire, and alleged to have been destroyed or damaged; also, certified copies of all shipments or consignments or sales made by you during the year 1891, and up to and including the date of the alleged fire; also, certified copies of your general banking account with any bank or banks showing the amounts drawn by you, by checks or otherwise, for the purchase of any property during the year 1891, and up to and including the date of the fire; and any other data or evidence which you have or can procure bearing upon your alleged claim. In making these requests, it is understood we waive none of the conditions of our policies, but shall expect a strict compliance with the printed conditions thereof on your part. The Liverpool, London & Globe Ins. Co., by M. W. Van Valkenburg, Spa. The Milwaukee Mechanics' Insurance Co., by M. W. Van Valkenburg, Spa. Rockford Insurance Co., by F.

T. M. Wenie, Spa." This letter was brought by one of the special agents to Topeka, whence it was forwarded to M. A. Winfield, by registered mail, and she received it February 8, 1892. Her husband and agent testified that a compliance with the request contained in said letter was impossible, because the grain and seeds were purchased in small quantities, from a great number of persons, residing in several counties, and that all accounts of these transactions were destroyed by the fire. On April 27, 1892, each of said banks commenced an action against M. A. Winfield upon said indebtedness, and they proceeded by garnishment against said insurance companies; and in July, 1892, the Bank of Chanute recovered a judgment for \$3,069.31, and the First National Bank of Erie obtained a judgment for \$1,189.50. This cause was tried before the court and a jury at November term, 1892, and the plaintiff recovered a judgment for \$2,092. A motion for a new trial being overruled, the defendant insurance company prosecutes its petition in error in this court.

Jones & Mason, for plaintiff in error. J. L. Denison, for defendant in error.

MARTIN, C. J. (after stating the facts).

1. When the policy was written, J. O. Johnston was the agent of the insurance company, the cashier of the Bank of Chanute, and the president of the First National Bank of Erie. The assured was indebted to these banks in a sum exceeding the value of all the grain and seeds in store, and these were substantially covered by the warehouse receipts held by the banks. This condition of affairs was not disclosed to the insurance company by its agent. So far as it related to the grain and seeds, the policy was issued for the use and benefit of these banks. It is an elementary doctrine, subject to certain exceptions not applicable here, that an agent cannot, in the same transaction, represent two principals whose interests are conflicting or antagonistic. The law has too much regard for the infirmities of human nature to sanction such a double relation. When an insurance company employs an agent to solicit business for it in a particular locality, it has a right to expect that he will act only in its interest in that business. He would not be authorized to write a policy upon his own property, for as to this he would not be the agent of the company, and it would not be bound thereby, unless, being fully informed of the facts, the principal officers of the company should accept the risk. Story, Ag. §§ 10, 210; May, Ins. § 125. In New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85, 91, it is said: "It is not necessary for a party seeking to avoid a contract on this ground to show that an improper advantage has been gained over him. It is at his option to repudiate or to affirm the contract, irrespective of any proof

of actual fraud." The purpose of the doctrine is to remove the temptation to fraud and imposition on the part of those occupying fiduciary relations, by divesting them of the legal power to make such fraud or imposition effective. In this case the insurance company declined the risk, but the assured was not advised of the declination until after the loss, and this may have been the result of the negligence of the company in misdirecting the letter. Had Johnston been the agent of the company, in fact and in law, as to this transaction, the result of the delay in notification should have been visited upon the company; but as to this insurance Johnston did not sustain that relation, and the company, not accepting, but declining, the risk, was not bound by the terms of the policy. See, further, *Bentley v. Insurance Co.*, 19 Barb. 595; *Spare v. Insurance Co.*, 19 Fed. 14; *Zimmermann v. Insurance Co.* (Mich.) 68 N. W. 215.

2. It was the duty of the assured, under the policy, to make proofs of her loss substantially as prescribed therein; and this she failed to do, although she had ample time after the receipt of the letter of date February 6th, and before the expiration of the 30 days from the loss. Indeed, she brought suit within less time, although the policy provided that the loss should be payable 60 days after the proofs should be received at the office of the company. The letter distinctly informed the assured that the statement presented was not sufficient, and could not be accepted, and that the special agent waived none of the conditions of the policy, but would expect a strict compliance with the printed conditions thereof; yet the assured did nothing further towards a compliance with the terms of the policy and the demands of the insurance company. The reasons assigned by the assured for noncompliance are deemed insufficient by a majority of this court, although the evidence tends to show, and, for the purpose of sustaining, the judgment should be held to prove, that the special agent declined to consider the loss, unless the claim for the Prange implements and machinery should be detached or eliminated; and a compliance with the requirements specially pressed in the letter was impracticable, if not entirely impossible. The writer is of opinion that the claim of the assured ought not to be defeated on this ground. The special agents called to investigate and adjust the loss within little more than a week after the fire, and before they had any right to expect formal proofs of loss. They then required an itemized statement, which was made during the investigation. It was not verified, and there was no certificate of a local magistrate. If the assured had been able to give the information requested in the letter as to purchases and shipments for 1891, and up to the time of the fire, yet this would have been of no value without knowing the quantities and the

kinds of grain and seeds in the warehouse at the beginning of 1891. The ultimate fact was the amount of each kind of grain and seeds in store at the time of the fire, and not when or how it was placed there, and partial information as to the facts requested would tend to obscure, rather than to disclose, the truth. In respect to the verification and the certification, the statement of loss was informal; but as the special agents had investigated the matter on the ground during the greater part of a week, and, in writing, the letter made no special objection for these reasons, but, on the contrary, required information which the assured could not give, and as they refused to consider the loss unless the claim for the greater part of it was abandoned, the writer is of opinion that formal proofs should be held to be waived, and that the rights of the assured ought not to be sacrificed upon a technical insistence, devoid of substantial merit. The judgment must be reversed, and the cause remanded for a new trial.

JOHNSTON and ALLEN, JJ., concurring. MARTIN, C. J., dissenting from second proposition of the syllabus, and from the corresponding portion of the opinion.

(57 Kan. 539)

ATCHISON, T. & S. F. R. CO. v. GREEN.

(Supreme Court of Kansas. Jan. 8, 1897.)

TRIAL.—SPECIAL QUESTIONS.—PROVINCE OF JURY.

1. In answering special questions, the jury need not necessarily accept the testimony of any single witness, but may deduce the truth from the statements of all the witnesses, and, on the circumstances related by all of them, may sometimes properly find that all the facts have not been accurately stated by any one witness.

2. G. was engaged as an employé of the defendant in an ash pit cleaning an engine. When the engine was moved off, his head was caught and crushed between a bolt head protruding from the heel of the pilot and a plate on the end wall of the pit. One witness for the plaintiff testified that he was first struck by the shaker bar, and another, by the links under the engine. The jury found that he was first struck by the ash pan, though no witness so testified in terms. It was shown by other testimony that the shaker bar on this particular engine was inside the ash pan, though on some other engines the shaker bars were outside. Held, that the jury were warranted, on consideration of all the testimony in the case, in finding that the ash pan was the first thing that struck G., and knocked him against the wall of the pit.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Action by Maggie Green against the Atchison, Topeka & Santa Fé Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

A. A. Hurd and Stambaugh & Hurd, for plaintiff in error. J. D. Houston and J. F. Craig, for defendant in error.

ALLEN, J. W. H. Green, who was the husband of the plaintiff, was employed by

the railroad company to clean the fire boxes and other parts of its engines at Arkansas City. On the 16th of March, 1890, he went into a pit dug between the rails of one of the company's tracks, 30 feet long and 3½ feet deep, for the purpose of cleaning an engine. He had nearly completed his work, and was standing between the end of the ash pan of the engine and the south end of the pit, when the engine was backed off the pit, and his head was crushed between the end of a bolt that protruded from the heel of the pilot and an iron plate on the top of the south wall of the pit, causing his death. This action was brought by his widow to recover her damages for causing the death of her husband. A general verdict for \$3,000 was rendered in her favor, and judgment entered thereon. The railroad company seeks a reversal of this judgment.

The first error assigned is with reference to the exclusion of certain testimony, but is not of sufficient importance to merit a statement in the opinion.

The principal contention is on the merits of the case. A demurrer to the evidence was overruled. An instruction to find for the defendant was refused, and the court overruled the defendant's motion for judgment on the special findings. Complaint is made of all these rulings. There was evidence showing that the engine was started, without notice to Green, before he had finished his work; and the circumstances testified to by plaintiff's witnesses indicate that the first part of the engine that struck Green was the ash pan. It is insisted that the testimony of the plaintiff's own witnesses is opposed to the finding of the jury to that effect. Counsel calls attention to the fact that J. C. Smoykefer testified that the links were the first thing that struck Green, and that Cliff Williams testified that it was the shaker bar. The witness Jacks does not appear to have seen Green until he was struck by the heel of the pilot. Witnesses for the defendant testified that, on this particular engine, the shaker bar was inside the ash pan, so that it could not have struck the deceased. In this state of the evidence it is insisted that the finding of the jury that the ash pan was the first thing that struck Green is contrary to the evidence. We do not find the direct statement of any witness that he saw the ash pan strike Green. The testimony of Williams shows that Green was standing up behind the ash pan, fixing something about the damper; that the engine was suddenly started; that no signal was given, and nothing was said about starting; that the shaker bar, which stuck down back of the ash pan, struck Green, and knocked him down, so that his head lay on top of the south wall of the pit; that the ash pan held him down, and that a bolt on the under part of the pilot caught his ear, and crushed his head against an iron piece that runs across the top of the end of

the pit; that, after he was first knocked down, Green kicked, as though there was something the matter with his foot; and that there were two pieces of cord wood and a board in the bottom of the pit. Williams did not appear to be positive that it was the shaker bar that first struck Green. If the main facts testified to by witnesses for the plaintiff were accepted by the jury, and if they also believed, from all the testimony in the case, that the shaker bar of this engine was inside the ash pan, so that it could not have hit Green, the most reasonable conclusion is that it was the end of the ash pan that hit him, and that Williams was mistaken in that particular, though truthful as to the essential facts. It would make very little difference whether it was the shaker bar, protruding behind the ash pan, or the ash pan itself, that first struck him. The effect would probably be the same in both cases.

J. E. Drennan, testified, as a witness for the defendant, that he was the hostler in charge of the engines at that roundhouse; that he was standing by the engine directing Green with reference to his work; that he told him to take the props out of the back damper; that Green went under the ash pan, to the back end of it, and took them out; that he then told him to stoop down good and low; that Green did stoop down; and that, when he saw that he was down, he said to Downing, who was standing right there by him, waiting, "All right, get up and back her up"; that Downing then stepped on the engine, and started to back up slowly; that he then started away, and walked probably 30 feet, when he heard some one "holler," and ran back, and saw that Green was hurt. Other witnesses for the defendant testified that the bell was rung, and that the engine was moved off slowly. The jury evidently did not believe the witnesses for the defendant. There was an irreconcilable conflict between their testimony and that of the witnesses for the plaintiff. It is not our province to say that they were wrong, and that they should have believed the statements of the defendant's witnesses. If the statements of the witness Drennan are true, it seems quite strange that Green should have been killed. When he had once assumed a position of perfect safety, with knowledge that the engine was moving, it does not seem probable that he would raise up to permit the pilot to catch his head. On the other hand, if the engine was started without warning, it is quite easy to understand how he might have been knocked down by the ash pan, or any other protruding portion of the engine, and being thrown against the wall, and rendered partially or totally insensible by the shock; that he should not have been able to get into a position of safety before being struck by the bolt in the pilot which caused his death. Where the testimony of the wit-

nesses is conflicting, it is the province of the jury to extract the truth from all of it as best they can, and, in reaching a conclusion, they have a right to exercise their judgment on the reasonableness and probability of the statements made by the opposing witnesses.

The plaintiff in error presented a long list of special questions to be answered by the jury, and most of them were submitted and answered. Numerous criticisms are made in the brief on the various findings, and it is urged that some of them are not supported by the evidence, that there are contradictory findings, and that they conflict with the general verdict. We find nothing substantial in any of these claims. While there was evidence warranting different findings from those returned by the jury, there was also evidence to uphold the findings actually made. We perceive no error in the record. The judgment is affirmed. All the justices concurring.

(57 Kan. 606)

**BRANCH v. AMERICAN NAT. BANK et al.**  
(Supreme Court of Kansas. Jan. 8, 1897.)

**APPEALABLE ORDER—APPROVAL OF ASSIGNEE'S REPORT.**

A ruling of the district court setting aside an order approving and allowing an annual report of the assignee of an insolvent estate, and reopening the matter for consideration upon the merits, is not reviewable.

(Syllabus by the Court.)

Error from district court, Mitchell county; Cyrus Heren, Judge.

W. T. Branch, assignee of the Security Investment Company, brings error from an order setting aside the allowance of his report on motion of the American National Bank and others. Dismissed.

D. M. Thorp, A. W. Hicks, V. H. Branch, and J. W. Tucker, for plaintiff in error. Clark A. Smith and Caldwell & Ellis, for defendants in error.

**JOHNSTON, J.** W. T. Branch was appointed as assignee of the Security Investment Company of Cawker City in February, 1891, and made his first annual statement or report in March, 1892. Branch v. Bank, 57 Kan. 282, 46 Pac. 305. In 1893 he made his second annual report, and on April 17th, which was the first day of the April, 1893, term of the district court, he obtained an ex parte order approving and allowing the report. Three days later, and during the same term of court, the creditors appeared, and asked that the order be set aside, and the approval and allowance of the report be reopened for consideration. The application was granted, and the matter was set down for hearing at a fixed time, due notice of which was required to be given. This ruling is assigned for error, but is it reviewable?

The estate is unsettled, and the question of

the approval of the report is before the district court for determination. The ex parte order, which may have been improvidently granted, was promptly set aside, leaving the matter open for consideration upon the merits at an early day, when all interested parties could appear and be heard. The ruling reopening the matter is not a final order; nor is it one of the reviewable orders mentioned in the Code. Civ. Code, §§ 542, 543; McCulloch v. Dodge, 8 Kan. 476; Short v. Nooner, 16 Kan. 220; Kermeyer v. Railway Co., 18 Kan. 215; Flint v. Noyes, 27 Kan. 351. See, also, Branch v. Bank, supra. The questions argued by the plaintiff in error are therefore not open to our consideration; but, even if the ruling were reviewable, it would hardly avail him, as the district court is invested with a wide and extended discretion in the opening up and in the revising or setting aside of orders, if it does so during the term at which such proceedings are had or orders made. State v. Hughes, 35 Kan. 626, 12 Pac. 28; State v. Sowders, 42 Kan. 312, 22 Pac. 425. The proceedings in error will be dismissed. All the justices concurring.

(57 Kan. 619)

**GARDNER et al. v. ANTHONY NAT. BANK.**

(Supreme Court of Kansas. Jan. 8, 1897.)

**ATTACHMENT—SUFFICIENCY OF LEVY.**

It is a requirement of a valid levy upon personally that the officer take such actual and exclusive possession as the nature of the property will permit. Constructive possession of a species of property admitting of actual and exclusive possession is insufficient as against a chattel mortgagee of such property who obtains such possession without committing a trespass or a fraud.

(Syllabus by the Court.)

Error from district court, Harper county; G. W. McKay, Judge.

Action by the Anthony National Bank against John S. Gardner and F. P. Privett. Judgment for plaintiff. Defendants bring error. Affirmed.

Stanley & Vermillion, for plaintiffs in error. Geo. B. Crooker and T. A. Nofztger, for defendant in error.

**MARTIN, C. J.** The original action was replevin, brought by the bank against Gardner, who was sheriff, and Privett, who was deputy sheriff, to recover 125 head of cattle, 67 head of calves, 97 head of hogs, 19 brood mares, 1 stallion, 2½ sets of harness, and 2 lumber wagons. A trial was had before the court and a jury at January term, 1892, resulting in a judgment in favor of the plaintiff below. Prior to February 1, 1889, this property belonged to F. B. & S. S. Singer, who held the same on two large tracts of land, four or five miles apart, one being known as the "Silver Creek Place" and the other as the "Home Farm of S. S. Singer." On November 21, 1888, H. W. Lewis, president and trustee of the Kansas Na-



tional Bank, commenced an action against S. S. Singer, F. B. Singer, and others on a promissory note to recover the sum of \$4,130 and interest, and on January 30, 1889, he caused an order of attachment to be issued. In the action to the sheriff, and it was placed in the hands of Privett, the deputy sheriff, for service. He testifies, in substance, that on Friday, February 1st, he went to Silver Creek first, and found 130 head of cattle, which he levied on there; no person being present. But Joseph Hutchinson testifies that he was in charge of those cattle at the time, and that he did not see Privett there. Privett further says that he then went from Silver Creek to the Singer farm, and inquired for S. S. Singer, who was absent; that he then levied on other property, consisting of cattle, hogs, horses, mules, etc., that were in certain lots and in a barn; that he had a conversation with Ned Griffin, an employé of Singer, in which Griffin agreed that he would take charge of and hold the property until the former could go and summon appraisers; that Singer came home, and said that he was sorry a levy had been made, as he could arrange the matter, and it was then agreed that Privett should return on Monday to appraise the property, unless there was some further understanding about it. Privett then left the place, and did nothing further until the following Monday. F. B. & S. S. Singer were largely indebted to the Anthony National Bank, and on or about January 15, 1889, they executed to F. D. Denlinger, cashier of said bank, a chattel mortgage to secure certain promissory notes, amounting in all to \$7,385, the mortgage being dated January 1, 1889. Late in the afternoon of February 1st, and after the conversation between Privett and S. S. Singer, the latter went to the bank, and told the managing vice president, H. M. Denlinger, that he wanted to secure the bank by chattel mortgage, the indebtedness having largely increased since the giving of the first mortgage. What occurred there is a matter of some controversy, but it resulted in the giving of another chattel mortgage, amounting to \$4,988.15, on said property, as also upon certain corn, oats, hay, and millet on the place, and S. S. Singer executed a lease of his farm to the bank. These papers were dated February 1st, although the transaction was probably not completed until after midnight. Both mortgages were filed for record on the afternoon of February 2d. T. A. Nofztger was one of the attorneys for the bank, who assisted in the transaction, and very early the next morning he started to S. S. Singer's farm, where he arrived about 7 o'clock a. m., having the lease and the mortgages, or copies thereof, in his possession. He told Singer that he wanted possession of all the mortgaged property at once, and to this Singer assented. Nofztger then employed three or four men on and about the place to feed and take care of the live stock, and he engaged board for them and for himself. On Saturday afternoon, at Singer's request, Hutchinson brought the cattle from the Silver Creek place, and turned

them in with the others on the S. S. Singer farm. Nofztger and the men employed by him remained at or about the farm, in charge of the property, until Monday, when Privett came, and demanded it, saying that he had levied upon it on the preceding Friday; but Nofztger told him that he was in possession of the property for the bank, and would retain it, unless forced to give it up. Privett then left, saying that he would return and take it. Thereupon Nofztger had the gates to the lots and the doors to the barn nailed up, but on the next day Privett returned with about 20 men, broke open the gates and doors, and took away the property; at least all that was replevied in this action, which was commenced February 9, 1889. No evidence was given tending to impeach the good faith of the indebtedness of F. B. & S. S. Singer either to the bank or to Lewis. As to the latter, the first mortgage given to the bank was not valid on February 1st, because there is no pretense that he had any notice of it, and it had not then been filed for record. It will therefore be seen that the decisive question in the case is whether the proceedings of the deputy sheriff were or were not sufficient to inaugurate and continue a lien which was in force when Nofztger took possession for the bank. There is no doubt that Nofztger's acts and doings were sufficient to constitute a possession good against the Singers, and as against all the world, so far as appears, except the deputy sheriff. If the latter then had a lien, the possession of Nofztger for the bank would be subject to it. There was some evidence on the trial and on the motion for a new trial tending to show that when S. S. Singer went to the bank on Friday afternoon he told the vice president that Privett had been at his place, pressing a claim, and with an order of attachment, a copy of which Singer had with him, and exhibited to the officers of the bank; and it is shown in the testimony in behalf of the bank that they knew that Privett had been at Singer's farm, seeking to collect a claim. One creditor may, however, legally obtain a preference over another by the consent of the debtor. S. S. Singer may have acted treacherously with Privett, but the bank sustained no relation, either to the deputy sheriff or to Lewis, preventing it from deriving an advantage, even by Singer's bad faith to them. In taking possession under the mortgages, the bank assumed the risk of any prior lien or incumbrance, whether it had knowledge of the same or not. There is an intimation that the bank may have obtained possession through connivance with Griffin; but there is no evidence of this, and perhaps Griffin considered that he had no duty to perform in relation to the property after the conversation between Privett and S. S. Singer, for we understand from the evidence that he did nothing towards taking charge of or caring for the property, and that he asserted no authority whatever over the same. Indeed, he had no means of caring for the property until the succeeding Monday, even had he been allowed to occupy

the farm, for he had no feed, and no help, and, so far as appears, no way of obtaining them. Neither did the deputy sheriff go on Friday prepared to take charge of the property upon which he formally levied. Though he had obtained a lease of the farm, he could not have kept the live stock for a single day without help and feed; yet no provision was made for either, notwithstanding he seems to have contemplated doing nothing further until Monday. On Saturday morning, when Noftzger reached the Singer farm, certainly nobody but the Singers had the actual dominion and control over the property. Privett, as deputy sheriff, had not the actual custody and possession, either by himself or Griffin. He had adopted no measure whereby he might actually hold the property subject to the order of the court. It is a requirement of a valid levy upon personalty that the officer take such actual and exclusive possession as the nature of the property will permit. Privett had at most only constructive possession of a species of property which admitted of actual and exclusive possession, such as was in fact obtained by Noftzger for the bank; and like possession might have been obtained by Privett by driving and taking the property away and caring for it afterwards, or perhaps by taking charge of it on the Singer farm, and thereafter controlling it so that nobody could have obtained possession without committing a trespass or a fraud; but it is impossible to sustain the validity of this levy without disregarding principles heretofore recognized by this court. *Lyeth v. Griffin*, 44 Kan. 159, 24 Pac. 59; *Throop v. Maiden*, 52 Kan. 258, 34 Pac. 801. See, also, 1 Shinn, *Attachm.* §§ 244, 247, 256, 257, 264.

Several questions are raised as to the testimony, the instructions of the court, and the refusal to give instructions requested by the defendants below. We have examined them all, but everything hinges upon the validity of the levy by the deputy sheriff, and as to this the jury was properly instructed, and there was a general verdict without findings upon any particular question of fact; and we do not find that any material error was committed in the trial of the cause. The judgment will be affirmed. All the justices concurring.

(57 Kan. 573)

UNITED STATES NAT. BANK OF ATCHISON, KAN., v. MAGNUSON et al.

(Supreme Court of Kansas. Jan. 8, 1897.)

CORPORATIONS — STOCKHOLDER'S LIABILITY — ENFORCEMENT.

In a summary proceeding to enforce the individual liability of stockholders under paragraph 1192 of the General Statutes of 1889, a creditor who held several separate judgments against the insolvent corporation undertook to include all of them in one notice, copies of which were served upon all of the stockholders. *Held*, that the notice was insufficient.

(Syllabus by the Court.)

Error from district court, Marshall county; R. B. Spilman, Judge.

Action by the United States National Bank of Atchison, Kan., against Charles G. Magnuson and others. From a judgment dismissing the petition, plaintiff brings error. Affirmed.

W. W. & W. F. Guthrie and Samuel K. Woodworth, for plaintiff in error. W. J. Gregg and John A. Broughton, for defendants in error.

JOHNSTON, J. This was a proceeding to enforce the individual liability of the stockholders of an insolvent corporation. The State Bank of Irving had failed, and the United States National Bank of Atchison had obtained six several judgments against it in the district court of Marshall county. Executions had been issued thereon, and returned unsatisfied, when the United States National Bank instituted this proceeding by filing motions seeking to charge the defendants, 15 in number, as stockholders, and to obtain an order for execution against them to satisfy the unpaid judgments of the insolvent bank. It was attempted to group all the judgments in a single proceeding, and only a single notice was issued, in which all the stockholders were named, and a copy of which was served upon each of them. Subsequently the defendants filed motions to quash and set aside the service of the notice upon the grounds that it was insufficient and was not properly served; that it was irregular, in that it included in one notice a multiplicity of actions or proceedings, and that the parties were improperly joined therein. The motions were sustained, and, no application being made to correct the defects, the proceeding was dismissed.

The notice was clearly insufficient. There were, as we have seen, six separate judgments rendered in six distinct and independent actions, and yet only one notice was issued. The notice could only be filed with the papers in one of the cases, and who could tell in which one of the six different cases it belonged? Not only were all the judgments embraced in one proceeding, but all the stockholders were united together in the motion and notice, as if the liability of all was joint, and as if all must, of necessity, make the same defense. It is well settled, however, that the liability is several, and not joint. A stockholder is in no sense a party to the judgment against the corporation; and, while the liability of all may arise by reason of their connection with the corporation, each may make a separate and independent defense, in which the other stockholders may have no concern. In an action to charge stockholders it was held that, their liability to the creditors being unequal, limited, and several, rather than joint, each must be sued separately. *Abbey v. Dry-Goods Co.*, 44 Kan. 415, 24 Pac. 426. The summary method of

proceeding by motion in the action in which the judgment was rendered was attempted here, but the summary character of the proceeding does not affect the liability of stockholders, nor does it change or limit the defenses which they may make. Of necessity, the same rule must apply whether the creditors proceed by original action or by motion. Neither is it regular to issue a single notice for several separate proceedings. It has been ruled that the proceeding by motion is independent in its nature, and that the notice thereof partakes of the nature of an original process, and a proper service of the notice is therefore essential. *Howell v. Manglesdorf*, 33 Kan. 194, 5 Pac. 759. See, also, *Wilson v. Railway Co.* (Mo. Sup.) 18 S. W. 286; *Wilson v. Seligman*, 144 U. S. 41, 12 Sup. Ct. 751. It is substantially the same as original process, and a single notice will not cover several distinct proceedings any more than a single summons would be sufficient for several original actions. We think the court ruled correctly in quashing the notice. As there was no request for leave to amend the motions or to correct the mistakes, there was nothing remaining for the district court to do but to dismiss the proceeding, and its order and judgment will therefore be affirmed. All the justices concurring.

(57 Kan. 594)

**BARTHOLOMEW v. FIRST NAT. BANK OF SALINA et al.**

(Supreme Court of Kansas. Jan. 8, 1897.)

**ASSIGNMENT OF MORTGAGE—PAYMENT BY VOLUNTEER—SUBROGATION.**

1. The rule of equitable assignment is never applied in aid of a mere volunteer, nor where it will operate as an injustice to the creditor.

2. Ordinarily, the creditor is entitled to full satisfaction of the debt before right of subrogation may be invoked. The surety may not meddle with any of his rights and securities so long as any portion of the debt remains unsatisfied.

3. The evidence examined, and held to be sufficient to sustain the findings and judgment of the trial court.

(Syllabus by the Court.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action by the New England Loan & Trust Company against Aaron Zeiner and wife. The First National Bank of Salina, J. B. Bartholomew, and others were made parties. Judgment for plaintiff, and Bartholomew brings error. Affirmed.

Action by the New England Loan & Trust Company to foreclose a mortgage given by Aaron Zeiner and wife on a tract of land in Saline county, to secure the payment of a debt of \$7,000. The same parties had executed two mortgages upon the same land to the First National Bank of Salina, Kan.,—one to secure the payment of two promissory notes, one for \$4,008.40, due December 4,

1889, and one for \$2,337.94, due December 1, 1891, and another mortgage to secure a note for \$258.10, due December 1, 1891. The mortgage securing the notes of the First National Bank of Salina was taken subject to that of the New England Loan & Trust Company, and the First National Bank of Salina was a party in the action, and asked for the foreclosure of its mortgage. John Norton, who had purchased an equity in the Zeiner land, and J. B. Bartholomew, who acted for him, took up the note for \$4,008.40. They were made parties in the action, and asked to be subrogated to the rights of the First National Bank of Salina, and that the claim should be declared a second lien on the land, subject only to that of the New England Loan & Trust Company. The Zeiners did not defend, and the only controversy was between the bank and Bartholomew and Norton.

The cause was tried by the court, without a jury, and the following findings of fact and of law were made:

"Findings of fact: (1) That, for about five years last past, the said J. B. Bartholomew has done business at Topeka, Kansas, under the name of Bartholomew & Co. (2) That, during the early part of the year 1889, defendant John Norton, through his agent, said Bartholomew, purchased the equity of redemption in the lands described in the answer and cross petition of said Bartholomew herein, and that since said purchase said Bartholomew has had charge of and looked after said lands for said Norton. (3) That during the month of April, 1889, some correspondence was had between said Bartholomew and said bank, in which the latter made some statement to the former as to the incumbrances on said lands, and said Bartholomew requested the bank to send to him the Zeiner payments and interest notices, and they should receive prompt payment. (4) That on the 3d day of December, 1889, said Bartholomew wrote and sent to said bank a letter as follows: 'Dec. 3, 1889. First National Bank, Salina, Kansas—Dear Sir: Your notice of the note of Mr. Zeiner coming due early in this month will be inconvenient to meet at the present time. It will be necessary for you to carry that a short time. Respectfully, yours, Bartholomew & Co.' (5) That after the receipt of said letter, dated December 3, 1889, and prior to 30th day of that month, a number of letters passed between said Bartholomew and said bank concerning the payment of said promissory note for \$4,008.40, to be made by the former to the latter; and in said letters propositions were submitted by each party to the other for such payment, in installments, at different times. On the 30th day of December, 1889, as the result of said correspondence, T. F. Garver, who was duly authorized by the bank to act for it, met said Bartholomew at Topeka, Kan., where said Bartholomew made and delivered to said Garver, for the bank, a written guaranty, of which the following is a copy, to

wit: In consideration of an extension of the time for payment of the note hereto attached, made by Aaron Zeiner and Lucinda Zeiner, for \$4,008.40, as hereinafter stated, we guaranty the payment of the balance due on the same as follows: One thousand dollars in sixty days, one thousand dollars in ninety days, one thousand dollars in four months, one thousand dollars in six months, with interest on said sums at the rate of 8 per cent. per annum from this 30th day of December, 1889. Said sums to be in full for said note, on condition of consent of makers of note to the extension. Topeka, Kansas, Dec. 30th, 1889. Bartholomew & Co.' (6) That, at the time said guaranty was made, said Bartholomew paid to Mr. Garver, for the bank, on said note, \$313.87, which was then indorsed by said Garver on said note, leaving still due on said note, as agreed by said parties, the sum of four thousand dollars. (7) That, soon after said guaranty was made, the makers of the note for \$4,008.40, at the request of said bank, agreed to the extension of its payment, as provided for by said guaranty. (8) The first one thousand dollars named in said guaranty was paid about the time it became due, and the second one thousand dollars was paid on the 5th day of May, 1890. (9) The third and fourth installments mentioned in said guaranty remaining unpaid, certain correspondence was had during the time from the 26th of June to July 17, 1890, between the bank and said Bartholomew, in which it was agreed that, in place of said guaranty, said Bartholomew should execute and deliver to said bank his two notes for \$1,000 each, bearing 10 per cent. interest, to be dated July 1, 1890, one payable 90 days after date, and the other payable 120 days after date; and that said notes should take the place of said guaranty; and that said note for \$4,008.40 should be held by the bank as collateral security for their payment. In pursuance of said agreement, said Bartholomew, on or about the 15th day of July, 1890, made and delivered to said bank his two notes for \$1,000 each, as agreed upon, and said bank then surrendered to him his said guaranty. (10) That the note for \$1,000 made by Bartholomew to said bank, dated July 1, 1890, payable 90 days after date, was paid in full to said bank by the maker thereof, on or about the 2d day of October, 1890. The other note for \$1,000 made by said Bartholomew to said bank was not paid at its maturity, but was renewed from time to time, and was not fully paid until the 21st day of November, 1891. (11) That a copy of said note for \$4,008.40, with certain indorsements thereon, is attached to the answer and cross petition of said Bartholomew herein; and the amounts of money and interest payments, as shown by said indorsements, excepting the first, were paid by said Bartholomew to said bank under said guaranty, and the two promissory notes for \$1,000 each,

hereinbefore described, and were indorsed on said note for \$4,008.40 by said bank at the time they were made; but said Bartholomew did not know that said indorsements, excepting the first, had been made on said note until it had been surrendered to him. (12) That there was no agreement or understanding between said bank and said Bartholomew that the former should sell, assign, or transfer to the latter said note for \$4,008.40, but said Bartholomew paid said note. (13) That on or about the 1st day of December, 1891, said Bartholomew requested said bank to assign said note for \$4,008.40 to him, but said bank refused to so assign it, but did then deliver it to him.

"Conclusions of law: (1) That said Bartholomew, by said payment, extinguished said promissory note for \$4,008.40. (2) That said Bartholomew is not entitled to be subrogated to the rights of the payee of the said promissory note for \$4,008.40 and the mortgage given to secure the same. (3) That said Bartholomew is not entitled to recover in said action on said note for \$4,008.40 against Aaron Zeiner and Lucinda Zeiner."

Bartholomew excepted to the findings of fact and of law, and has brought the case here for review.

Douthitt & Wolfe, for plaintiff in error. Wilson & Wilson, for defendants in error.

JOHNSTON, J. (after stating the facts). The only contention here is between J. B. Bartholomew, who took up one of the Zeiner notes, and the First National Bank of Salina, Kan., the payee of the note. Bartholomew claims that he purchased the note, and was entitled to be subrogated to the rights of the bank, and to have the mortgage securing the note foreclosed in his favor. The bank insists that there was no purchase or assignment of the note, and that only payment was contemplated by either party. The claim that the testimony fails to support the findings of fact cannot be sustained, and this is the principal error assigned. In the negotiations between Bartholomew and the bank, nothing is said indicating a purpose on his part to purchase the note, or of the assignment of the same to him. When arrangements were made for the taking up of the note by Bartholomew, he paid \$313.87, which was indorsed upon the note as any payment would have been. This amount appears to have been indorsed upon the note as a payment in the presence of Bartholomew, and no objection was then made nor any claim that it should be treated as a purchase. According to the testimony of Bartholomew, he had no interest in the land to protect, was under no obligation to assume the burden of this debt, and had no agreement with the debtors that he would assume or pay the same. The bank appears to have proceeded upon the theory that Norton, who held the equity in the Zeiner land, was a member of the firm of Bartholomew & Co., and that, therefore, Bartholomew

was interested in the payment of the incumbrance against his land for the protection of his own interests. He claims, however, that he was only acting as the agent of Norton, and had no interest in the equity which Norton had purchased. From the testimony, it would seem that the object of the bank was to secure the payment of a part of the mortgage debt, so that the security would be sufficient for the portion remaining unpaid. The lien of the bank was subsequent to the \$7,000 mortgage of the New England Loan & Trust Company; and, when the transaction was had with Bartholomew, it held another note, secured by the same mortgage, amounting to nearly \$2,500, and still another note, for \$258.10, together with accumulated interest, secured by another mortgage upon the same land. Under the testimony and findings, we must assume that there was no assignment nor intention that Bartholomew should be substituted for the bank when payment was made. In view of the large incumbrance which was prior to that of the bank, and of the fact that only a little more than half of the secured debt to the bank was paid by Bartholomew, there is much plausibility in the claim of the bank that they were seeking to reduce the indebtedness by payment, so that the security would safely cover the unpaid portion of the debt. The bank would have little to gain by the sale and assignment of the note if Bartholomew was to be substituted, and given a lien as against the bank for the unpaid portion of the mortgage debt, which at the time of the trial amounted to considerably more than \$3,000. The bank was not required to assign the debt, and the rule of equitable assignment is never applied in aid of a mere volunteer, nor where it will operate inequitably upon the creditor. If Bartholomew was to be treated as a surety, he would not be entitled to subrogation, because only a portion of the mortgage debt has been paid. "The creditor is entitled to full satisfaction of the debt before the right of subrogation may be invoked. The surety may not meddle with any of his rights and securities so long as any portion of the debt remains unsatisfied." 24 Am. & Eng. Enc. Law, 200, and cases cited. In our view, there is sufficient testimony to support the findings of the court, and its judgment must be affirmed. All the justices concurring.

(57 Kan. 601)

DALE et al. v. ATCHISON, T. & S. F. R. CO.  
(Supreme Court of Kansas. Jan. 8, 1897.)

CONFLICT OF LAWS—PENAL STATUTES—DEATH BY WRONGFUL ACT.

1. Penal statutes have no extraterritorial force, and the courts of this state will not enforce the penal statutes of another state or territory.

2. A statute of the territory of New Mexico provided that whenever any person should die from any injury occasioned by the negligence of an agent or servant managing any locomotive or train of cars, the corporation in whose employ such agent or servant should be should "forfeit and pay for every person or passenger

so dying the sum of \$5,000, which may be sued for and recovered, first by the husband or wife of the deceased, or second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child, or children, of the deceased." In an action by the minor children of a person whose death was so caused, and who left a widow surviving him, brought more than six months after the death, *held*, that the courts of this state will not enforce the liability created by the statute of New Mexico, it being in part penal, and giving a right of action to persons other than the one who would be entitled to recover under the laws of this state in a similar case arising here.

(Syllabus by the Court.)

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Action by Edwin Tom Dale and others against the Atchison, Topeka & Santa Fé Railroad Company. From a judgment for defendant, plaintiffs bring error. Affirmed.

Fenlon & Fenlon, for plaintiffs in error. A. A. Hurd and Mills, Smith & Hobbs, for defendant in error.

ALLEN, J. Edwin Tom Dale and two other minor children of Edwin Dale, deceased, brought this suit against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for the death of said Edwin Dale, which it is alleged was caused by the negligence of the defendant in the territory of New Mexico on the 18th day of July, 1888. This action was commenced on the 31st day of July, 1890, and recovery is sought under a statute of New Mexico, which reads as follows: "Sec. 2308. Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employé whilst running, conducting or managing any locomotive, car or train of cars, or of any driver of any stage coach or other public conveyance while in charge of the same as driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car or in any stage coach or other public conveyance, the corporation, individual, or individuals in whose employ any such officer, agent, servant, employé, engineer or driver shall be at the time such injury was committed, or who owns any such railroad locomotive, car, stage coach, or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying the sum of \$5,000, which may be sued and recovered, first by the husband or wife of the deceased, or second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased, or third, if such deceased be a minor and unmarried then by the father and mother who may join in the suit, and each shall have an equal interest in the judgment, or if either of them be dead then

by the survivor. In suits instituted under this section it shall be competent for the defendant for his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency." The petition alleges that no personal representative of the estate of said Edwin Dale has ever been appointed, and that, although more than six months had elapsed after the death of said Edwin Dale, no action had been brought by Sarah Ann Dale, his widow, to recover damages therefor; and that by reason thereof the cause of action given by said statute had vested in the plaintiffs. A demurrer to the amended petition was sustained by the district court, and judgment entered thereon in favor of the defendant. Error is assigned on the ruling of the court sustaining the demurrer.

The principal question in the case, and the only one necessary to decide, is whether an action can be maintained in this state by the minor children under the statute of New Mexico above quoted. It is the same, in substance, as the statute of Missouri, under which a recovery was sought in the case of *Hamilton v. Railroad Co.*, 39 Kan. 56, 18 Pac. 57. It is held by the courts of Missouri that in an action founded on the statute of that state the recovery must be of the full amount provided in the statute, or nothing; and a verdict for \$2,500 was set aside by the court of appeals. *Rafferty v. Railroad Co.*, 15 Mo. App. 559. In *Carroll v. Railway Co.*, 88 Mo. 239, an instruction directing the jury, if they found for plaintiff, to assess her damages at the sum of \$5,000, was approved by the supreme court. In the case of *McCarthy v. Railroad Co.*, 18 Kan. 46, the right of an administrator appointed in Kansas to recover for injuries received in Missouri by plaintiff's intestate, from which he afterwards died in Kansas, was denied by this court; and in the case of *Limekiller v. Railroad Co.*, 33 Kan. 83, 5 Pac. 401, it was held that an administratrix appointed in Missouri could not maintain an action under section 422 of the Code of Civil Procedure of this state for an injury received in this state causing the death of the plaintiff's intestate, on the ground that no such action could have been maintained in Missouri if the death had been caused in that state. In the case of *Vawter v. Railway Co.*, 84 Mo. 679, it was held that an administrator appointed in Missouri could not maintain an action there under the statute of Kansas for the death of the intestate in Kansas. There is great diversity in the decisions of the courts as to whether an action of this kind may be brought in one state to recover under the statute of another state for a death caused there. Some courts refuse all relief in such cases, while others allow the action to be maintained where the statutes of the two states are substantially similar, and where both are remedial in character. A leading case of the latter class is that of *Dennick v. Railroad Co.*, 103 U. S.

11, where it was held that an administrator appointed under the laws of New York could maintain an action in that state for the death of his intestate in New Jersey, and might recover under the provisions of the statute of the latter state. The statute of New Jersey authorized a recovery by the administrator for the exclusive benefit of the widow and next of kin, to be assessed by the jury with reference to the pecuniary injury resulting from such death to the wife or next of kin. It is said in the opinion that there was a statute of New York similar in its provisions to that of New Jersey. The cases of *Leonard v. Navigation Co.*, 84 N. Y. 48; *Knight v. Railroad Co.*, 108 Pa. St. 250; *Burns v. Railroad Co.* (Ind. Sup.) 15 N. E. 230; *Railroad Co. v. McMullin* (Ind. Sup.) 20 N. E. 287,—are to the same effect. The case of *Herrick v. Railway Co.*, 31 Minn. 11, 16 N. W. 413, goes further, and holds that an action may be maintained under a statute of Iowa for an injury received there, notwithstanding the want of a similar statute in Minnesota. In the case of *Railway Co. v. McCormick*, 71 Tex. 660, 9 S. W. 540, a recovery was sought under the statute of Arkansas for an injury received there. Under the laws of Arkansas the action was authorized to be brought by the personal representative, and, if there be no personal representative, then by the heirs at law, and the amount recovered to be distributed for the exclusive benefit of the widow and next of kin, in the same proportions as the estate of the decedent would be distributed. Under the law of Texas the amount recovered was to be divided among the persons designated in the statute, in such proportion as the jury on the trial should determine. It was held that the statutes of the two states were so different that an action could not be maintained in the courts of Texas to enforce the liability created by the laws of Arkansas. In the case of *Ash v. Railroad Co.* (Md.) 19 Atl. 643, the court of appeals of Maryland held that an administrator appointed in Maryland could not recover there under the statute of West Virginia, for the death of his intestate, because of the dissimilarity of the statutes of the two states. This action is brought by the minor children of Edwin Dale, and it appears that they alone are authorized to sue under the statute of New Mexico after the expiration of six months. The widow's right of action, which was full and complete during that period, is utterly lost. Under section 422a of the Code of Civil Procedure of this state, where no personal representative is appointed, the widow only can maintain the action. Whether the damages recovered by her are for her sole benefit, or subject to distribution to the parties who would have been entitled thereto if recovered in an action by the personal representative, may be a matter of some doubt. It thus appears that, if a recovery be allowed in this case, it will be had by persons who could not maintain the action if

the injury causing the death had been received in this state. Another, and perhaps more serious, difficulty lies in the penal character of the statute of New Mexico. Although it is argued that the law of that territory provided for the payment by the wrongdoer of a sum of money to his widow or minor children, and that they are the ones usually, if not invariably, most injured by his death, and that the money to be paid under that statute subserves really the same purpose as money paid under the laws of Kansas, and compensates them in some degree for the loss of the husband and father, it yet is apparent that the theory of the law of the two states is different. In Kansas it is strictly compensatory. In New Mexico it may be strictly penal, for it might happen that the person killed was a burden upon his family, contributing nothing to them. In *Marshall v. Railroad Co.*, 46 Fed. 269, it was held that the statute of Missouri was penal, and that an action could not be maintained thereon in the circuit court of the United States in Ohio, and the case of *Phillpott v. Railroad Co.*, 85 Mo. 164, was cited as authority for the proposition that "the law, as well as being compensatory, is of a penal and police nature, and can, without objections, subserve both purposes at one and the same time." The case of *Adams v. Railroad Co.* (Vt.) 30 Atl. 687, was an action brought in Vermont to recover for a death caused in Massachusetts under the statute of that state, which provided for a recovery of damages not exceeding \$5,000 nor less than \$500, to be assessed with reference to the degree of culpability of the corporation. It was held that the statute was penal in character, and that it would not be enforced by the courts of Vermont. It is elementary that penal statutes have no extraterritorial force, and that the principles of comity prevailing among the states do not go to the extent of enforcing in the courts of one state the penal statutes of another. *Story, Conf. Laws*, § 621; *Lindsay v. Hill*, 22 Am. Rep. 564; *Bank v. Price*, 3 Am. Rep. 204. If we were to attempt the enforcement of the statute of New Mexico to the extent to which it is compensatory only, we should find ourselves in the position of having to resort to that statute to create the liability, and then measure that liability by the principles obtaining in this state, for the law of New Mexico has but one fixed and rigid measure,—the definite sum of \$5,000 in every case where liability exists; while in this state it is in all cases limited to the damages actually sustained by the party for whose benefit the action is prosecuted. In the case before us we are asked to enforce a statute of a territory, penal in part, at least, and which confers a right of action on persons other than the one that would be authorized to maintain an action in this state under a similar state of facts. Under the statute of New Mexico an adult child would have no right of recovery

if there were minor children. Under the authorities the obstacles in the way of affording the plaintiffs any relief in this case appear insurmountable, and we feel constrained to hold that the courts of this state will not undertake the enforcement of a statute penal in part, and so dissimilar in principle from the law of our own state. The judgment of the district court is affirmed. All the justices concurring.

(57 Kan. 629)

## JONES v. JOHNSON.

(Supreme Court of Kansas. Jan. 8, 1897.)

## INJUNCTION—PETITION AS EVIDENCE.

The verification of a petition is not to be treated as evidence on the trial of an action for a perpetual injunction; and, where the petition in such a case is demurrable, any answer thereto which does not cure the defects of the petition is sufficient, and it is error for the court to grant a perpetual injunction without evidence.

(Syllabus by the Court.)

Error from district court. Reno county; F. L. Martin, Judge.

Action by Nannie J. Johnson against J. N. Jones. Judgment for plaintiff. Defendant brings error. Reversed.

John W. Roberts and H. Whiteside, for plaintiff in error. Davidson & Williams, for defendant in error.

MARTIN, C. J. On January 9, 1891, Nannie J. Johnson filed her petition against John W. Jones, sheriff, to enjoin him from selling a certain tract of land in said county, of which she claimed to be the owner, upon an execution issued to him out of said district court in an action wherein Julius Kuhn was plaintiff, and Constant & Johnson were defendants; the sheriff having levied upon the land, and advertised the same for sale, and she not being a party to said action. She set up, as an exhibit, a copy of her deed to the property, and it shows the conveyance to have been made April 1, 1889, by C. P. Johnson to her, and that the same was recorded April 3, 1889; and these are all the facts alleged in the petition which was verified by said Nannie J. Johnson, and upon which a temporary injunction was granted. The sheriff duly filed an answer, and afterwards an amendment thereto. These contained a general denial, except as to facts thereafter admitted. It was then stated that the sheriff had levied said execution, and also another, wherein Long Bros. were plaintiffs, both being against Charles P. Johnson and Hiram Constant; said Charles P. Johnson being the husband of Nannie J. Johnson, and the real owner of said land, and he having made said deed without consideration, and for the purpose of hindering, delaying, and defrauding his creditors; and, further, that said Charles P. Johnson was about to engage in the grocery business, and to become largely indebted to said Julius Kuhn and Long Bros., and to the Hutchin-

son Mill Company; and said Nannie J. Johnson well knew said fraudulent purpose of her husband in the execution of said deed; that she simply holds said deed to prevent the application of the land to the payment of the just debts of her husband; that the conveyance to her is void; and that Charles P. Johnson and the estate of Hiram Constant are insolvent. The defendant prayed that the deed be set aside, and that said judgment be decreed a first lien upon said land, and that the same be sold, and the proceeds applied to the satisfaction thereof. The plaintiff below replied by a general denial.

The cause was called for trial March 28, 1892; and, a jury being waived, the issues were submitted to the court, which held that the burden of proof was on the defendant below. Certain evidence was offered by him, when the plaintiff objected to the introduction of any testimony, on the ground that the answer and the amendment did not state facts sufficient to constitute a defense, and this was sustained, whereupon the plaintiff below moved for a perpetual injunction, and for costs, which motion was sustained. The motion of the defendant below for a new trial was overruled December 1, 1892; and the defendant below duly excepted to these rulings and orders of the court. He now insists that plaintiff's petition did not state facts sufficient to constitute a cause of action, and in this he is right, for the issue of an execution presupposes a judgment, and there is no allegation of its date. It may have become a lien before the delivery of the deed from Charles P. Johnson to Nannie J. Johnson. The answer throws some additional light upon the transaction, by stating that Charles P. Johnson, against whom two judgments were rendered, was the husband of Nannie J. Johnson; but it is quite obscure, and there is no allegation that Johnson was insolvent, or even indebted, at the time he executed the deed to his wife. Neither party seems to have been willing to plead the facts, and each, perhaps, deemed it best to rely chiefly on vague conclusions of fact and of law. The qualified general denial, with the other facts or conclusions pleaded, did not justify the court in granting to the plaintiff below a perpetual injunction without evidence, for the verification of the petition cannot be treated as evidence on the final hearing. The pleadings ought to have been recast before the trial. The judgment will be reversed, and a new trial awarded. All the justices concurring.

(57 Kan. 632)

#### CITY OF GARDEN CITY v. TRIGG.

(Supreme Court of Kansas. Jan. 8, 1897.)

##### CONTRACT BY CITY—VALIDITY.

A city of the second class entered into an agreement with a contractor for the building

of sidewalks, to be paid for out of the proceeds of an assessment to be levied on the abutting property benefited by the improvement, stipulating that, if the fund so provided was not sufficient, or available at a specified time, payment should be made out of any unappropriated moneys in the city treasury. At the time mentioned, the funds derived from the assessment were insufficient to meet the warrants issued to the contractor for the improvement. *Held*, that the contract was valid, and that the city became absolutely liable on the warrants remaining unpaid after the time stated.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. Abbott, Judge.

Action by H. C. Trigg against the city of Garden City. Judgment for plaintiff. Defendant brings error. Affirmed.

Dodd Cartwright and A. J. Hoskinson, for plaintiff in error. H. F. Mason, for defendant in error.

JOHNSTON, J. H. C. Trigg brought this action against the city of Garden City to recover \$2,084.27, with interest at 7 per cent. from the 15th day of July, 1889, upon warrants issued by the city in favor of Jacob Holloway for the construction of certain sidewalks. The warrants provided that the amount of each should be paid out of a specific sidewalk fund arising from an assessment on particular lots, and that, if not paid by July 15, 1889, it should be paid out of any funds not otherwise appropriated. It appears that in May, 1887, petitions were presented to the city council, asking that sidewalks be constructed upon a number of the streets. The petitions were granted, and a resolution was passed and published that the sidewalks were deemed to be necessary. On June 25, 1887, an ordinance was enacted providing for the construction of the sidewalks, and the committee on streets was authorized to contract for the building of the same in the name of the city "on such terms as may seem best." It also provided for levying an assessment against the abutting property according to the front foot thereof, to be collected as other taxes, giving to the lot owners the privilege of building the walks at their own cost at any time prior to August 1, 1887. On October 22, 1887, the city entered into a contract with Holloway to build the walks in accordance with certain specifications, and that when the work, or any part thereof, had been completed and duly approved, warrants should be issued by the city for the amount necessary to pay for such sidewalks, payable out of the fund produced by the special assessment. But it further provided that, if any of said warrants were not paid by July 15, 1889, they should become payable out of any funds in the city treasury. The sidewalks were built in accordance with the contract, warrants were issued, and a portion of the same were paid from the special fund arising from the assessments. On July 15, 1889, the warrants



in question remained unpaid by reason of the failure of the owners of some of the property to pay the amounts assessed against it. On that day the warrants were presented, and payment demanded. There was then in the city treasury no money belonging to the special fund, but there was in the general fund money sufficient to have paid a part of said warrants; but the treasurer on the instruction of the city council, refused to pay the same. The trial court ruled that the city was liable upon the warrants and gave judgment for the amount of the same.

The contention that the city had no power to make the contract that was made cannot be sustained. Garden City is a city of the second class, and the statute specifically empowers such cities to build sidewalks, and they are authorized to make all contracts necessary to the exercise of the corporate powers conferred. Gen. St. 1889, pars. 759, 788. While the statute provides for assessing the cost of the improvement against the property benefited, the city is not limited to that method of making payment. It has been determined that this provision requiring an assessment to be made for the improvements relates to the ultimate liability therefor, and is for the purpose of raising a fund to reimburse the city for the amount paid for such improvements. *City of Wyandotte v. Zeitz*, 21 Kan. 649; *City of Atchison v. Leu*, 48 Kan. 138, 29 Pac. 467; *King v. City of Frankfort*, 2 Kan. App. 530, 43 Pac. 983. The same authorities hold that it is competent for the city to contract for the building of a sidewalk, payment to be made when the work is completed, and to give a suitable acknowledgment of the indebtedness. It is true, the city might have made a contract to build the sidewalks stipulating that payment should be made solely from the proceeds of the special assessment, but perhaps the delay and uncertainty of that course made it impossible to make an advantageous contract for the work. The course adopted was a combination of the two methods. The contractor was to build the sidewalks, and take his pay from the proceeds of a special assessment, provided the taxes were paid within the prescribed time. The sidewalks appear to have been completed in the early part of 1888. The earliest annual tax to which the special assessment could be added was that of 1888. The first half of the tax would therefore be due on December 20, 1888, and the second half on June 20, 1889. Moneys collected by taxation for the city must be turned over to the city treasurer on July 15th, and obviously the contract was made with reference to these dates, as the warrants were made payable absolutely on July 15, 1889. Such improvements being in great part for the benefit of the general public, and the use and conven-

ience of the whole city, it is primarily liable for them; and no reason is seen why the city may not enter into such a contract as was made in this case. The statute contained no restrictions as to the manner of payment, and the ordinance authorized the committee to contract for the building of the sidewalks in the name of the city on such terms as might seem best. The contract is not unreasonable in its terms, nor does it appear to be in conflict with either the statute or the ordinance. The district court ruled correctly in holding the city liable upon the unpaid warrants, and its judgment will therefore be affirmed. All the justices concurring.

#### BROWN v. CRABTREE et al.

(Supreme Court of Kansas. Jan. 8, 1897.)

##### CASE-MADE—TIME FOR SERVING—EXTENSION.

The court cannot extend the time for serving a case-made after the expiration of the time allowed for serving the same has expired.

Error from district court, Scott county; V. H. Grinstead, Judge.

Action between P. W. Brown and C. C. Crabtree and others. There was a judgment for the latter, and the former brings error. Dismissed.

Wm. Osmond, for plaintiff in error. Travis Morse, for defendants in error.

PER CURIAM. On June 18, 1892, judgment was rendered in favor of the defendants in error against the plaintiff in error for \$2,-202.36; and the plaintiff in error was allowed 90 days to make and serve a case-made. On August 25th following, this time was extended an additional 30 days from the expiration of the time originally given. On October 18th following, another order was made, purporting to extend the time to and including November 30, 1892; and the case-made was served on the day last mentioned. In the certificate of settlement of the case-made, the trial judge stated that the case-made was served in due time. The defendant in error challenges the right of the plaintiff in error to be heard, on the ground that the time to make a case fixed by the first order, and extended by the second, expired on October 16th, and the court had no power to make a further extension on October 18th; and this point must be sustained, on the authority of *Insurance Co. v. Koons*, 26 Kan. 215, 218, and cases cited, and *Investment Co. v. Love*, 43 Kan. 157, 23 Pac. 161. The period of 120 days elapsed on October 16th, and, as that day was Sunday, probably the case-made could have been served on Monday, October 17th (section 722, Code Civ. Proc.); but the extension was not made until October 18th, and this was too late. The petition in error must be dismissed.

(57 Kan. 635)

## MISSOURI, K. &amp; T. RY. CO. v. LYCAN.

(Supreme Court of Kansas. Jan. 8, 1897.)

RAILROADS—LIABILITY FOR FIRES—NEGLIGENCE—  
REALTY—WHAT IS—MEASURE OF DAMAGES  
—EVIDENCE—HARMLESS ERROR.

1. A petition which alleges that the plaintiff was the owner of certain lands particularly described, upon which there were standing and growing certain fruit, shade, and ornamental trees, shrubs, and vines, also particularly described, and that the defendant negligently permitted fire to escape from its locomotive, which spread, burned and destroyed such trees, shrubs, and vines, alleges an injury to the freehold. Trees growing on the land of the owner, for fruit, shade, or ornament, are part of the realty; and no other facts than these need be stated in the petition to show that they are such.

2. In an action against a railway company to recover damages for negligently permitting fire to escape from one of its locomotives, where it is alleged that the defendant was negligent in failing to provide such locomotive with a sufficient spark arrester, and in the manner of operating its engine, and also in that it negligently permitted tall grass, weeds, and other combustible material to remain on its right of way, *held*, that a finding of negligence in not burning off the right of way, based on sufficient evidence showing that the fire started in and spread from such grass and weeds, will support a general verdict for the plaintiff, notwithstanding findings in favor of the company on the other charges of negligence.

3. In such an action, evidence as to the value of the trees while growing on the land, and as a part of it, is competent for the purpose of showing the amount of the plaintiff's damages. Where a particular thing attached to the soil, and therefore a part of the realty, but which has a distinct value as such, susceptible of definite measurement, is injured or destroyed, the evidence in an action to recover damages therefor may properly be directed to the value of such specific thing as a part of the land, and, in actions of this kind, is ordinarily the best and most satisfactory evidence. It is only where the damages to one part of the land affect other parts, and are incapable of more definite and direct proof, that the evidence is necessarily confined to proof of the value of the whole tract before and after the injury, though the actual damages can never, in any case, exceed the difference between such values.

4. Certain errors in the admission of testimony considered, but *held* not to have substantially affected the rights of the plaintiff in error.

(Syllabus by the Court.)

Error from district court, Crawford county; J. S. West, Judge.

Action by Belle Lycan against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

The petition in this case, filed in the court below by Belle Lycan, as plaintiff, alleged: That the defendant was a corporation operating a line of railroad in Crawford county. And, second, "that this plaintiff, on the 18th day of October, 1891, and for a long time prior thereto, was the owner of and possessed of the following described lands, to wit: 'The southeast quarter and the east half of the southwest quarter of section four, township twenty-eight, of range twenty-two, in Crawford county, Kansas,'—upon which said lands there was growing and standing large and valuable trees, shrubs,

vines, apples, rick of straw, as follows, to wit: [Here follows a particular description of the number and kind, and value of each:] and all of the foregoing items, consisting of trees, vines, bushes, apples, and straw, were the property of this plaintiff, and were of the aggregate value of \$7,383. \* \* \* Fourth. Plaintiff says that on or about the 18th day of October, 1891, the said defendant was operating its said railroad hereinbefore mentioned, and did run a large passenger train, No. 4, drawn by locomotive engine numbered —, along and over said railroad in Crawford county, Kansas; and when said passenger train and locomotive or engine was passing through and over said section 4, township 28, range 22, in Crawford county, Kansas, at about 12:30 o'clock p. m. of that day, near to this plaintiff's land, said defendant carelessly, negligently, and unlawfully permitted large flames and sparks of fire and live cinders to escape from its said locomotive or engine, by carelessly, negligently, and unlawfully failing to provide and have sufficient safety screens or spark arresters attached to its said engine to prevent fire and sparks from escaping from its said locomotive or engine; and by reason of the said defendant's negligent, unlawful, and careless manner in which it was operating said railroad, the grass beside said line of railroad, and on said defendant's right of way, became and was ignited by and from sparks and coals of fire emitted and thrown from its said locomotive or engine. Fifth. Plaintiff says that the said defendant carelessly, negligently, and unlawfully permitted tall grass and weeds, and a large amount of combustible material, to grow, be, and remain on the right of way of the said railroad company; and by reason of said defendant's said careless, negligent, and unlawful manner of operating said railroad, by failing to provide sufficient safety screens and spark arresters for its said engine or locomotive, and permitting said grass, weeds, and combustible material to grow, be, and remain on its said right of way, it permitted fire and sparks to escape from its said locomotive or engine, and which said fire and sparks so escaping or thrown or permitted to escape or be thrown from its said locomotive or engine, the grass, weeds, rubbish, and combustible material so carelessly, negligently, and unlawfully permitted to be and remain along by and adjacent to said line of railroad became and were ignited; and the said defendant carelessly, negligently, and unlawfully permitted said fire to spread and communicate to the premises of this plaintiff, and which said fire burned and destroyed the apple trees, budded peach trees, seedling peach trees, walnut trees, cherry and plum trees, hedge fences, gooseberry bushes, grapevines, blackberry vines or bushes, apples and straw hereinbefore set forth, and the property of this plaintiff, to her damage in

the sum of \$7,383." To this petition the defendant demurred, and the demurrer was overruled. Thereafter an answer, containing a general denial and other matters of defense, was filed. The jury returned a general verdict in favor of the plaintiff for \$2,140 damages, and \$175 attorney's fees, and also made answers to special questions, among which are the following: "(9) What property belonging to the plaintiff was burned and destroyed by this fire, if any, stating fully all items? Answer: 287 apple trees, of various kinds, killed, \$1,435; 516 forest trees, of various kinds, killed, \$129; 41 budded peach trees, various kinds, killed, \$41; 160 seedling peach trees, various kinds, killed, \$40; 10 grape vines, various kinds, killed, \$5; one-half acre blackberries, killed, \$25; 30 bunches gooseberries, killed, \$6; 120 rods hedge fence, killed, \$60; 164 apple trees, body and limbs damaged, \$320; plums and cherries, \$28; 87 walnut trees, \$43,—\$2,140." "(34) Is it not a fact that all of the apple trees, peach trees, walnut trees, plum and cherry trees, gooseberries, grape vines, and blackberry vines and bushes were planted and growing upon said land for the fruit they would produce, and for no other purpose whatever? Answer: Yes, except peach and walnut, which were for shade and wind break also." "(43) Is it not a fact that said engine and the safety screen and spark arrester were examined by Engineer S. J. Thurber on arrival of said engine at Sedalia, Missouri, on the evening of October 18, 1891, and on the morning of October 19, 1891, the safety screen and spark arrester were then in good condition, and properly adjusted? Answer: Yes. (44) Is it not a fact that said engine was carefully and prudently handled and managed by said Engineer S. J. Thurber and his fireman, S. Bowser? Answer: Yes. (45) You may state what, if anything, the defendant, its employés, agents, or servants, could have done that they did not do to prevent a communication of said fire to the plaintiff's land? Answer: Burned off right of way. (46) If defendant had cleaned off and burned its right of way, would fire have been communicated to the land claimed by the plaintiff? Answer: No. (47) Is it not a fact that a 4x4 mesh netting is the closest that can be used in coal-burning engines? Answer: Yes." "(66) If you find said fire of October 18, 1891, which destroyed the property described by plaintiff in her petition, was caused by the negligence of defendant, you may then state fully all the negligence of the defendant which caused said fire. Answer: By not burning off right of way." "(74) State whether the fire of October 18, 1891, which destroyed the property described by plaintiff in her petition, was accidental? Answer: No." The defendant moved for judgment on the special findings, and also for a new trial. Both motions were overruled, and judgment entered for the amount of the verdict and at-

torney's fees. The defendant now seeks a reversal of this judgment.

T. N. Sedgwick, for plaintiff in error.  
Wells & Woolley and J. D. McCleverty, for defendant in error.

ALLEN, J. (after stating the facts). There are 17 specifications of error in the brief. Most of them, however, merely present in different forms the same proposition, the substance of which is that the defendant failed to allege and show that the property destroyed was a part of the freehold, and added to the value of the farm, and that the destruction thereof diminished its value. It is urged that the petition is insufficient for the purpose of a recovery as for an injury to the land, and that the case was erroneously tried on that theory. The petition alleges that the plaintiff was the owner of the land, and that the trees, etc., were growing and standing upon it; that the defendant negligently permitted fire to escape from its engine; and that such fire spread and burned them. We fail to perceive any essential fact omitted from the petition. A fruit tree, bush, or vine kept standing or growing for its fruit, or a shade or ornamental tree or bush, is a part of the realty, and presumably adds to the value of it. There is nothing whatever in the petition or evidence indicating that the orchard that was destroyed bore any different relation to that realty than orchards usually do to the land on which they stand, and it hardly seems a question open to discussion whether orchards and ornamental trees and shrubs are to be treated as a part of the realty. There is no question here concerning nursery stock or severed timber. The question as presented by objections to the testimony offered varies but little, in substance, from that raised on the demurrer to the petition. It is that proof was made of the amount of damages to the farm, without any corresponding averment in the petition, which states the value of the different trees and shrubs destroyed and injured. The facts stated in the petition show an injury to the freehold, and it concludes with the statement that that injury was to plaintiff's damage in the sum for which she asked judgment. It is never necessary, nor even proper, to plead conclusions of law, nor deductions from the facts on which a cause of action arises. It is always desirable that the pleader state concisely the facts constituting his cause of action, and thereupon demand the relief he is entitled to. The trial court rightly held that testimony concerning the value of the trees should be confined to their value to the farm, and as a part of it. The defendant also objected to witnesses being allowed to state the value of the trees and other things destroyed as a part of the freehold, on the ground that this was allowing them to assume the province of the jury, and fix the plaintiff's damages. It is contended that the question should have been confined to the value of the farm as a whole before and after the injury,

leaving the jury to compute the damages by deducting one from the other. While this is, undoubtedly, the regular and proper method of arriving at such damages as cannot be itemized and definitely measured in detail, it does not preclude the use of the best evidence which the nature of the case affords. Where a thing, whether it be a building, a tree, or shrub, is destroyed by a wrongdoer, the most natural and best measure of the damage is the value of the thing destroyed as an appurtenant to or part of the realty, and, ordinarily, the value of the thing destroyed would be the measure of the injury to the freehold. If, for any reason, the injury to the realty should be in fact less than the value of the thing destroyed, the plaintiff's recovery would be limited to the actual diminution in value of the realty. While this might be shown either on cross-examination of the plaintiff's witnesses or as a matter of defense, it does not prevent proof of the value of the thing destroyed as a part of the realty by the plaintiff, as was done in this case.

There are a number of other assignments of error on the admission of testimony. One is that the court erred in admitting the records from the office of the register of deeds, of various deeds, in the chain of the plaintiff's title to her farm. She produced three original deeds, one of which was from her mother to herself, and the record was the only proof of the other conveyances in her chain of title. The objection is that it was not shown that the originals were not in her possession. Though the evidence adduced was not very satisfactory, the testimony of her brother tended to show that he had charge of all her papers relating to the land, and that the deeds produced were all she had. In some cases a trial court might with propriety have insisted on more strict preliminary proof, but in this case it appeared, without contradiction, that the plaintiff was in possession of the land, claiming to hold it under the deed from her mother. This was clearly sufficient as a *prima facie* showing of title, and, there being no evidence against it, an error in admitting the records, if error there was, would be immaterial.

Complaint is also made of the admission of the testimony of the section foreman, Jury, that two fires were reported as set out by that train, and, also, of the admission of the testimony of Henry Gintzell, to statements made to him by the claim adjuster of the company, with reference to the fires that were started, and especially the one that burned the plaintiff's property. If, as claimed by the defendant in error, the witness Jury meant merely to state what fires he reported to the company as having occurred on his section, perhaps the evidence was admissible; but the testimony of Gintzell as to what the adjuster told him appears objectionable. The error in its admission is unimportant, however, for the testimony of the witnesses for the defendant, as well as those of the plaintiff, all tended to show that this particular fire was started by the engine of the defend-

ant, and that, at least, one other fire was also started by it near by, on the same trip. The fire that burned the plaintiff's property is not accounted for in any other manner than by having escaped from the defendant's engine, and there really was no conflict in the evidence on that point. No witness on either side attempted to account for it in any other manner, while the witnesses for the plaintiff testified that they saw the fire start on the right of way just after the train passed, and the plaintiff testified that she saw a fire start down the road, south and west from the one that passed over her place, and that she watched and saw this fire start just as the train passed. The defendant had the engine examined after it arrived at Sedalia, because it was reported that fires had been started. Although no witness testified to having seen a spark pass from the engine to the dry grass, and start a flame, the connection of the fire that burned the plaintiff's property with that of the defendant's engine is made by the proof in the case about as well as a prairie fire can often be traced to a locomotive engine, and by evidence which is quite harmonious so far as it goes.

G. S. Mosteller testified at length concerning the number and kinds of trees and shrubs killed and injured, and their value. He was examined and cross-examined minutely with reference to all the particulars. Thereafter A. J. Baker was called, and testified to having been through the orchard in June, before the fire, trimming the trees; that he was in it a few days after the fire; that he appraised the damages to the orchard with Mosteller and Linton. He was then asked: "Q. I wish you would go on and state to the jury to what extent— State the number of trees. Court: Q. Did you hear Mr. Mosteller's list given here? A. Yes, sir. Court: Q. Is that correct? A. Yes, sir; his expression is mine exactly. Q. Did you three appraisers agree upon the number of trees, and value of each tree? A. Yes, sir." This question was objected to by the defendant as incompetent and irrelevant, and the objection was overruled by the court, for the purpose of saving time. Similar questions were asked the witness Linton, and a similar ruling was made. This is certainly a very objectionable method of examining witnesses. One witness ought not to be called on to either indorse or criticize the statements of another with reference to the assessment of damages in such a case as this. His statements of fact should be only of what he himself knows, and the estimates of value should be his individual judgment, unbiased by the opinions or expressions of others. This error requires a reversal of the judgment, unless we can say with a fair degree of certainty that the jury were not influenced in their assessment of damages by the objectionable testimony. The estimate made by the witness Mosteller aggregates over \$3,500. The defendant called several witnesses, who testified on the same

subject. C. E. Stoner gave a detailed statement of the number and grades of trees killed and damaged, and a very exact estimate of the values of those killed, and the damages to those injured. His estimate fixed the total amount of damage to apple trees at \$1,820.90. I. B. Garrison was not very definite in his statements, but fixed the number of trees killed and damaged at 384, and the damages at four dollars and some cents each. He made no estimate on the other items. J. D. Watson, also a witness for the defendant, who appears to have made an examination of the orchard with Mr. Garrison, testified that they estimated 384 apple trees damaged and killed, and estimated the average damage at \$4.50 per tree; and that the total amount of all the damage, as estimated by them, was something over \$2,000. He had lost his memorandum, and could not tell the exact sum. One witness for the defendant estimated 120 rods of hedge as damaged to the amount of 38 cents a rod. No witness for the defendant appears to have given an estimate of the damage to the budded peach, walnut, plum, and cherry trees. In answer to the ninth special question submitted, the jury gave the items of damage allowed by them, from which it appears that \$1,755 only was allowed for apple trees killed and injured. This was \$65.97 less than the estimate of the defendant's witness Stoner, and \$27 more than that stated by Watson. From this it will appear that the allowance was below the average of the estimates of the defendant's own witnesses. The total amount allowed was \$2,140. Stoner, who gave the only detailed estimate made by any witness for the defendant, testified to items aggregating \$1,961.57, but omitted several items named by other witnesses. It is therefore evident that the jury, in fixing the amount of the plaintiff's recovery, accepted the testimony of the witnesses for the defendant in the main, and that the verdict was not materially influenced by the objectionable testimony. The whole amount allowed is but \$140 over \$2,000, and the defendant's witnesses allowed something, though we do not know how much, over \$2,000. The difference between the verdict and the estimate of Mosteller is so very large that it is evident they did not to any material extent accept his estimate, or that of the other witnesses for the plaintiff, who merely indorsed his statements. It is clear, therefore, that the objectionable testimony did not work such substantial injury to the defendant as would warrant a reversal of the judgment.

The second instruction asked by the defendant does not correctly state the law, and was rightly refused. The instructions as to the measure of damages, which the court gave, were correct; and the question discussed with reference to them has already been sufficiently considered while speaking of the sufficiency of the petition.

47 P.—34

The action of the court in striking out a large number of the special questions asked was entirely proper. Most of those which the court refused to submit were more in the nature of a cross-examination of the jury than of properly framed questions, calling for special findings. Seventy-four questions were asked, and, of these thirty-one were submitted and answered. It follows from what has already been said that the court did not err in rendering judgment on the verdict, and that that judgment must be affirmed.

We are asked by the defendant in error to impose a penalty of 5 per cent. on the amount of the judgment, under sections 576 and 578 of the Code of Civil Procedure. Whether this court has the power to impose such penalty in any case or not, we do not deem it necessary to decide now. No practice of the kind indicated in section 578 has ever been followed in this court; but, whether it is authorized or not, we think, there were reasonable grounds for the proceeding in error in this case. All the justices concurring.

(57 Kan. 610)

COMMERCIAL UNION ASSUR. CO., Limited, OF LONDON, ENG., v. NORWOOD et al.

(Supreme Court of Kansas. Jan. 8, 1897.)

INSURANCE — CONDITIONS — VALIDITY — CONSTRUCTION — VARIATION BY PAROL.

1. A provision in a policy of insurance that "this entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," is valid, and enforceable, when not waived or abrogated in any manner.

2. Where there is indorsed on a policy containing such a provision written consent for the procurement of a stated amount of additional insurance; the procurement of insurance in excess of the amount authorized will avoid the policy.

3. Where such a policy of insurance is indorsed with permission for \$32,500, additional and concurrent insurance, and other insurance to the amount of \$35,800 is taken out, \$16,000 of which was procured after the date of the policy in controversy, and all in force at the time of the loss, it is incompetent, for the purpose of avoiding the forfeiture of the policy, to show a parol agreement between the agent of the insurance company and the insured, made prior to the date of the policy, that the insured should be permitted to carry policies to the amount of \$40,000, such evidence being solely for the purpose of varying the terms of the written contract, made in pursuance of the prior parol agreement.

(Syllabus by the Court.)

Error from district court, Pawnee county; S. W. Vandivert, Judge.

Action by O. F. & E. R. Norwood against the Commercial Union Assurance Company, Limited, of London, England. From a judgment for plaintiffs, defendant brings error. Reversed.

This action was brought by O. F. & E. R. Norwood, partners, against the Commercial Union Assurance Company, Limited, of London, England, on a \$2,500 policy of insurance on a stock of merchandise in Larned, Kan. Attached to the plaintiff's petition is a copy of the policy, which contains this provision: "This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." A copy of the proofs of loss furnished by the plaintiffs to the defendant was also attached to the petition, from which it appears that a slip was attached to the policy, reading as follows: "\$32,500 additional insurance allowed in form and concurrent herewith. This slip is attached to and forms a part of policy No. 100,115 of the Commercial Union Assurance Company of London, England, Larned, Kansas, Nov., 189-. J. H. Ormandy, Agent." The proofs also show that at the time of the fire there was other insurance on the property to the amount of \$35,800, under 13 policies issued by other companies at various dates from October 1, 1892, to January 26, 1893. The property was totally destroyed by fire on the 7th of February, 1892. The defendant answered, alleging for a third defense that the policy contained the provision above copied, and averred that the amount of concurrent insurance was expressly limited by the indorsement on the policy to \$32,500; that the plaintiffs procured other insurance in excess of the amount permitted, and that the policy was thereby rendered void. To this answer the plaintiff replied: "That they contracted with the agent of the defendant, authorized by the defendant so to contract, for said insurance, under a statement and agreement made at the time and concurrent with said contract, and a part thereof, that the total insurance, including the policy issued by the defendant, upon the property insured, of the plaintiffs, should amount in the aggregate to the sum of \$40,000; and that the policy of the defendant to be issued to the plaintiffs should contain an agreement for such additional and concurrent insurance as that the policy to be issued by the defendant would amount in the aggregate to the sum of \$40,000; and that thereafter, and upon the receipt of said policy, the plaintiffs, relying upon said contract and agreement so made as aforesaid, received and accepted said policy from the defendant upon the belief that said agreement had been fully carried out, and that said policy permitted concurrent and additional insurance so as aforesaid agreed upon; and, so relying on such contract and agreement, the plaintiffs wholly neglected and failed to read said policy until after the occurrence of the fire which destroyed the

property covered thereby. That by reason thereof, and of the facts aforesaid, the defendant ought not now to be permitted to assert as a defense in this action the facts set forth in the third defense contained in said answer, for that it is estopped to deny its liability on the grounds and for the reasons therein stated." The defendant demurred to this part of the reply, which demurrer was overruled. The case was tried to a jury. O. F. Norwood, one of the plaintiffs, testified that in the fall of 1890 he purchased the stock of goods, and made arrangements with Mr. Ormandy and Mr. Charles for insurance on them to the amount of \$40,000, and that he took out policies to that amount running for one year. "Q. This policy is dated 21st of November, 1891. Prior to that time, what, if any, talk had you with Mr. Ormandy—this same man who signed this policy—as to insurance from that fall on, or from the time your other policies expired which had been taken out in 1890? A. Mr. Ormandy came into the store, and wanted to know about the insurance. He came into the store, and wanted to know if he could have the insurance again; and I told him he could; and I wanted permission to carry \$40,000 of insurance on the stock. Q. What further was said about how much he was to carry, or how much any one else was to carry? A. I asked him then, after Smith had been there to see me— I asked him whether we had better let Smith have 10,000, and he said, 'Very well, let him have 10,000.' Q. What amount did he say he would take, if any? A. 30,000. Q. What arrangement, if any, was made as to how these policies were to be issued by him? A. I told him I wanted him to scatter them out, so as not to let the premiums all come due at once. I told him I wanted the premiums to come due in, say two, three, and four weeks, such like, so I wouldn't have the premiums to pay all at once. Q. You may state if he delivered you any policy of insurance afterward. A. Yes, sir; he did. Q. State from whom you received this policy in suit. A. J. H. Ormandy. Q. You may state whether at the time you received it you read its terms and conditions or not. A. I did not. Q. You may state what you did with it when you received it. A. I put it in the safe with some others that I had there. \* \* \* Q. When you told Mr. Ormandy that you wanted \$40,000 of insurance for the succeeding year, in the fall of 1891, what did he say about writing that much insurance on the stock? A. He said that we could have it; that he would make the policies out to that effect; that we should be permitted to carry the 40,000 on the stock. Q. You may state if you knew, at the time you received this policy, that the policy, by its terms, limited the concurrent insurance to \$32,500. A. No, sir; I did not." He further testified that he had no further conversation with Ormandy with reference to

the amount of insurance, and that Ormandy brought in the policies from time to time, and that he thought he got 10 policies through him. The jury were instructed that if they found that Ormandy was the general agent of the company, and that the plaintiffs had no notice of any limitation on his authority; "that if the said Ormandy agreed with the plaintiffs to issue to them policies of insurance to the extent of \$30,000 upon the property covered by the policy in controversy, and that such policies should show the right to have the total insurance upon such property to the amount of \$40,000; and if you should further find that pursuant to such agreement the policy in question was issued, and that plaintiffs received the same without knowledge of the fact that the additional insurance provided therein was limited to an amount much less than the amount of insurance upon said property; and that they, relying on said agreement, received said policy, and paid the defendant, through its said agent, Ormandy, the premium charged,—then, and in such case, you are instructed that the fact that there was \$37,500 of a total insurance upon the property covered by said policy would not avoid said policy, notwithstanding the conditions therein contained." The jury rendered a general verdict in favor of the plaintiffs for the full amount of the policy, and also returned answers to special questions, finding, among other things, that the value of the goods destroyed was \$50,000, and that the total amount of insurance at the time of the fire was \$38,300. Judgment was entered on the verdict, and the defendant brings the case to this court.

Sylvester G. Williams and Elrick C. Cole, for plaintiff in error; C. N. Sterry, George W. Finney, and W. H. Vernon, for defendants in error.

ALLEN, J. (after stating the facts). The pleadings, evidence, and instructions in this case squarely present the question whether a prior parol agreement, made with the general agent of an insurance company, concerning the amount of concurrent insurance to be carried on the property insured, controls and defeats the express terms of the policy. It appears without dispute, that one of the conditions of the policy was that it should be void if the insured should procure any other insurance on the property without the consent of the insurer, and that consent was indorsed on the policy for \$32,500 only, of concurrent insurance. The prior parol agreement with Ormandy, with reference to the total amount of insurance to be carried on the property, and the fact that the plaintiffs had neglected to read the policy before the fire, are alone relied on to avoid the condition above mentioned. There is no more wholesome or well-settled rule of law than

that parol evidence of prior or contemporaneous conversations, and oral agreements, is inadmissible to contradict or vary the terms of a written contract. *Drake v. Dodsworth*, 4 Kan. 159; *Cornell v. Railway Co.*, 25 Kan. 613; *Brenner v. Luth*, 23 Kan. 581; *Hopkins v. Railway Co.*, 29 Kan. 544; *Windmill Co. v. Piercy*, 41 Kan. 703, 21 Pac. 793; *Willard v. Ostrander*, 46 Kan. 591, 26 Pac. 1017; *Lock Co. v. Huston*, 55 Kan. 104, 39 Pac. 1035. Provisions in policies of insurance providing that the policies shall be void if other insurance be taken without the consent of the insurer, are valid. 2 May, Ins. § 304. And subsequent insurance, taken out without the consent, either expressed or implied, of the insurer, avoids the policy. *Allen v. Insurance Co.*, 31 Am. Rep. 243; *Funke v. Association*, 29 Minn. 347, 13 N. W. 164; *Bard v. Insurance Co.*, 153 Pa. St. 257, 25 Atl. 1124. And taking insurance in excess of the amount consented to avoids the policy. *Allen v. Insurance Co.*, 123 N. Y. 6, 25 N. E. 309; *Union Nat. Bank v. German Ins. Co.*, 18 C. C. A. 203, 71 Fed. 475. Counsel for the defendant in error do not question these propositions, but they insist that the company had notice of the intention to take out insurance to the amount of \$40,000, and expressly assented thereto; and that it is estopped from denying liability by the parol agreement made with Ormandy, as agent. The cases of *Insurance Co. v. McLanathan*, 11 Kan. 549; *Insurance Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291; *Insurance Co. v. Wood*, 47 Kan. 521, 28 Pac. 167; and numerous other cases, decided by courts of other states,—are cited in support of this position. We are entirely satisfied with the law as declared in all the cases heretofore decided by this court, cited on behalf of the defendants in error. The difficulty in this case is that there is no proof, either of the existence of insurance on the property in excess of the amount authorized at the time the policy was issued, or that the company, or its agent, was informed at any time before the fire of the full amount of insurance taken out. It appears that of the policies mentioned in the proofs of loss five policies, aggregating \$17,300, were issued prior to the one sued on; that another, for \$2,500, was issued on the same day; and that all the others bear date subsequent to the one issued by the defendant. Although it is shown that the plaintiffs had carried \$40,000 insurance during the preceding year, it nowhere appears from the evidence whether the whole or any part of the old insurance was still in force when this policy was issued. It was incumbent on the plaintiffs, when seeking to charge the insurance company with knowledge that the property was insured, at the time the policy was issued, to an amount exceeding that authorized by the consent indorsed on it, to prove the fact. This was not done, and,

so far as we are informed by the evidence in the record, the whole amount of concurrent insurance, at the time this policy was issued, was \$19,800. Although Norwood testified that he got ten policies from Ormandy, the agent of the defendant, it does not definitely appear that the last one received from him rendered the whole amount of insurance on the property more than \$35,000. It cannot be said, then, that at the time the policy was issued either the company or its agent, Ormandy, had notice of the existence of so much insurance as would avoid the policy; nor can it be said that at any subsequent time Ormandy knew that the condition of the policy had been violated, and received, or even retained, the premium paid on it. There is, therefore, no element of estoppel in the case. The plaintiffs rested on the bare proposition that Ormandy had verbally agreed, prior to the date of the policy, that there should be \$40,000 insurance on the property. Afterwards, when the written contract was made, the total insurance was limited to \$35,000. Do the prior parol negotiations control, or the subsequent written contract? Unquestionably the latter.

We have carefully considered the case of *Insurance Co. v. Norwood*, 69 Fed. 71, 16 C. C. A. 136, which arose on one of the policies of insurance on this same stock of goods, issued on the 5th of November, 1891. We find ourselves unable to concur in the conclusion reached by that eminent court that "by delivering the policies with knowledge, through their agent, of the amount of insurance intended to be taken, the companies waived the condition as to other insurance, and were estopped to set the same up after a loss." We think there is a clear distinction between a case where there is knowledge of the existence of a fact which would avoid the policy and this, in which it is merely claimed that there was a prior agreement, contradicting the terms of the written contract, as to the amount of insurance the party should be permitted to carry. We are better satisfied with the reasoning of Judge Sanborn in his dissenting opinion, than with the views of the majority of the court.

In the case of *Union Nat. Bank v. German Ins. Co.*, 71 Fed. 473, 18 C. C. A. 203, it was held that "parol negotiations leading up to a written contract of insurance are merged in the contract, which cannot be controlled by parol evidence of the understanding of the parties." If it were claimed that the indorsement on the policy was a mistake, under proper averments and proof it might have been corrected, and the policy enforced according to the real agreement and intent of the parties. But no such claim is made in this case. The plaintiffs maintained from first to last that the prior parol agreement overturned the written contract on which they based their

suit. This position is untenable. The judgment is reversed, and a new trial ordered. All the justices concurring.

(57 Kan. 625)

**GEUDA SPRINGS TOWN & WATER CO.  
v. LOMBARD et al.**

(Supreme Court of Kansas. Jan. 8, 1897.)

**FORECLOSURE OF MORTGAGE—STAY OF EXECUTION  
—SALE.**

1. The six-months stay of execution, required where lands are to be sold without appraisal under a mortgage foreclosure, begins to run from the date of the judgment directing such sale; and where a judgment is rendered against the principal defendant, and also against divers parties claiming liens on the property, one of whom afterwards succeeds in having the judgment opened and the case dismissed as to him, such dismissal does not affect the stay of execution, nor delay the plaintiff in the enforcement of the judgment.

2. Where a sheriff is commanded by an order of sale to sell disconnected tracts of land, it is his duty to offer and sell them separately, unless there be some valid reason for doing differently; but where no request is made by the debtor to have the lands offered in separate parcels, and where the order of sale directs that all of the parcels be sold subject to a prior mortgage covering them all, a sale of the whole property en masse should be confirmed.

3. It is not a valid ground for setting aside a sale of lands, made subject to one prior incumbrance, that an action is pending in which a third party seeks to foreclose another mortgage, and to have the same declared a first lien on the property; the judgment under which the sale is made being clear and explicit in its terms as to what should be sold.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by Frank G. Lombard against the Geuda Springs Town & Water Company and others. From the judgment, the water company brings error. *Affirmed.*

Joseph O'Hare, for plaintiff in error. Madden & Buckman, for defendants in error.

ALLEN, J. This is a proceeding to obtain a reversal of an order of the district court of Cowley county confirming a sale of lands made by the sheriff of Sumner county. A motion is made to dismiss the petition in error, which is overruled, on the authority of *Hammerslough v. Hackett*, 30 Kan. 57, 1 Pac. 41; *Hill v. Bank*, 42 Kan. 364, 22 Pac. 324; *Bridge Co. v. Fowler*, 55 Kan. 17, 39 Pac. 727. On the 7th of September, 1889, Frank G. Lombard brought suit against the Geuda Springs Town & Water Company, George A. Masters, the Crane Brothers Manufacturing Company, L. C. Fisher, and O. B. Taylor to recover the amount of a certain installment note executed by the town and water company, and to foreclose a mortgage securing the same. On the 3d of May, 1890, judgment was duly entered in accordance with the prayer of the petition in favor of the plaintiff for \$3,385.93, and ordering the lands described in the mortgage, part of which were located in Cowley county, and part in Sumner county, to be sold subject



to a prior mortgage for \$20,000, held by the Farmers' Loan & Trust Company of New York. The case was continued for service of summons on the Crane Brothers Manufacturing Company, Fisher, and Taylor. On the 25th of September, 1890, a judgment was entered declaring the lien of the plaintiff superior to that of all the defendants, directing a sale of the mortgaged premises, and barring and foreclosing all the defendants of any interest therein. Afterwards, on the motion of O. B. Taylor, the judgment as to him was opened and set aside; and on the 7th of June, 1892, an order was entered dismissing the action as to him, without prejudice. The order of sale, under which the sale confirmed by the court was made, was issued on the 14th of October, 1892; and the first contention is that the sale was made without appraisalment within six months after the rendition of final judgment in the case. The judgments against all the defendants, except Taylor, were rendered more than two years before the date of the order of sale under which the sale was made. The date of the dismissal of the case as to Taylor is unimportant. The plaintiff in error has had the benefit of a much longer stay than the law requires.

The second ground relied on is that a number of separate lots and parcels of land were sold together. It does not appear that any request was made by the plaintiff in error at the sale that the land be sold in separate tracts. The rule requiring a sale of disconnected pieces of land to be made separately is not an arbitrary one, but is enforced when necessary to protect the rights of the debtor, and to insure the best prices that can be obtained for the property. Circumstances may exist which render it altogether impracticable to realize reasonable prices from separate sales, and this case appears to be such a one. The property consisted of a tract on which there was a large bath house, and a considerable number of town lots, all of which were covered by a mortgage for \$20,000. It is not probable that the lots, which some of the evidence tends to show were not worth more than about \$500 apiece, could have been sold separately at any price, under the circumstances. Burdened with such a heavy incumbrance, a sale of the whole property together would seem to be most advantageous to all parties concerned. *Bell v. Taylor*, 14 Kan. 277; *Johnson v. Stevens*, 7 Cush. 435; *Webster v. Foster*, 15 Gray, 31; *Wilson v. Twitty*, 14 Am. Dec. 569. The rule requiring each parcel to be offered separately is a wholesome one, and should be rigidly enforced when there is no valid reason for a sale of all en masse. But where there is a blanket incumbrance, exceeding in amount the value of any separate parcel, each purchaser would be subjected to the danger of a sale of his tract to satisfy the prior incumbrance; and it might be a matter of much difficulty, if not of impossibility, to obtain an apportionment of the lien.

The third objection is that the sale was made while the Taylor foreclosure suit was pending

in Sumner county. If the plaintiff in error had desired protection against the disadvantages arising from the pendency of that suit, and from any controversy over the priority of the Taylor mortgage, it should have been sought when the order was made dismissing the case as to Taylor. The judgment under which this sale was made directed that the lands be sold subject to the \$20,000 mortgage; and it was too late when the motion to confirm the sale was heard to ask the court for protection against the Taylor mortgage. Under the judgment rendered, the sale was, in this particular, entirely regular; and in this proceeding no error is predicated on the judgment rendered in the district court. The order of the district court is affirmed. All the justices concurring.

(57 Kan. 647)

# SUPREME LODGE OF ORDER OF SELECT FRIENDS v. RAYMOND.

(Supreme Court of Kansas. Jan. 8, 1897.)

BENEFICIAL ASSOCIATIONS — RESORT TO COURTS.

1. It is competent for a fraternal organization, which provides for the payment of benefits, to make reasonable rules or laws requiring those claiming benefits to submit their claims to designated officers or tribunals of the organization for investigation and allowance before the claims are made the subject of litigation in the courts; but a requirement of this kind does not abridge the right of members to resort to the courts when their claims have been submitted to and finally rejected by such officers and tribunals.

2. The right of resort to the courts will not be deemed to have been taken away by mere inference, and, if it can be done at all, it will only be where the restriction is stated in the clearest and most explicit terms.

(Syllabus by the Court.)

Error from district court, Anderson county; A. W. Benson, Judge.

Action by Charles Raymond against the Supreme Lodge of the Order of Select Friends. Judgment for plaintiff. Defendant brings error. Affirmed.

J. L. Denison and L. C. Boyle, for plaintiff in error. Oscar Foust & Son, for defendant in error.

JOHNSTON, J. This was an action by Charles Raymond to recover \$3,000 on an insurance or benefit certificate issued to him by the Supreme Lodge of the Order of Select Friends. The order is a fraternal one, and its objects are to advance the principles of friendship, hope, and protection among those who are eligible to and do become members, and to aid members in business and obtaining employment. A relief fund has been established, from which benefits are to be paid, not exceeding \$3,000, upon the death or total disability of members who have complied with the rules and regulations of the order. In the matter of benefits, a claim by a member on account of accident or disability is first made to the supreme medical director, and, if he refuses to recommend

payment, an appeal may be taken to the supreme executive committee, and, if the decision of that committee is adverse, the claimant may appeal to the supreme lodge, where the claim will be determined by a majority vote of all present and entitled to vote thereon. Raymond, a member of the order, and to whom a certificate had been issued, presented a claim under a certificate upon the ground that he had become totally and permanently disabled. His application for a benefit was regularly presented to the supreme medical director, who rejected it. Appeal was taken from his decision to the supreme executive committee, who also refused to allow his claim. He thereupon appealed to the supreme lodge, and that tribunal decided adversely to his claim. He then instituted the present action, and, a trial being had before the court and a jury, a verdict was rendered in his favor for the sum of \$2,983.16. Raymond appears to have been a member of the order in good standing, whose assessments had been paid, and the disability of which he complained was organic disease of the heart and muscular rheumatism. There was testimony tending to sustain the claim of disability, and that the claim was properly presented and the appeals regularly taken is conceded; but it is contended that the claim having been rejected by the tribunals created by the order, and, the decision of the supreme lodge of the order being adverse, and standing unreversed and unmodified, it was a full and final adjudication of the plaintiff's claim, and no resort to the courts can be had. It is argued that, provisions having been made by the laws of the order for the investigation and allowance of benefits, a member who subscribes to those provisions is bound by them, and by the decisions of the tribunals which he himself has helped to create. One article of the constitution of the order is that "no claim for any benefit from the relief fund shall be paid until all the laws or rules of the order have been fully complied with, and the requisite proof of the justness of the claims has been made in accordance with the general laws of this order." For the purpose of sustaining the position that a resort to the courts is not permissible, attention is called to the laws of the order already mentioned, and also to the following provision of the constitution: "The supreme lodge, when convened agreeable to the provisions of the constitution and laws of the order, shall have original and exclusive jurisdiction over all subjects pertaining to the welfare of the order, and absolute control of all appeals from the grand or subordinate lodges and members; and its decisions upon all questions and appeals, when properly presented and heard, are the supreme law of the order." Instructions were asked to the effect that, in the absence of fraud, the decisions of the tribunals of the order were final and conclusive; but these were refused, and instead

the court charged the jury as follows: "If you find from a preponderance of the evidence that the plaintiff has paid all dues and assessments as provided by the by-laws, and was in good standing in the order, and that he duly presented his claim, and took the various appeals as provided by the constitution and laws of the order, and that the defendant order, through its grand lodge, finally acted upon and rejected the said claim, then he may maintain an action thereon in this court, and may recover thereon, provided he proves by a preponderance of the evidence the existence of the total disability as claimed."

Fraternal organizations like this one may doubtless adopt rules and by-laws which will be controlling as to all questions of discipline, doctrine, or internal policy. Persons who voluntarily become members are bound by all reasonable rules and regulations, and with the determination of questions of the character named the courts will ordinarily not interfere. It does not follow, however, that the contract or property rights of members are beyond the reach of the courts or the protection of the law. In a recent case it was held that, while courts will not undertake to direct or control such societies in the matter of discipline or internal policy, they are nevertheless subject to the laws of the state and the jurisdiction of the courts in proper cases, and that the courts will not hesitate, where property rights are involved, to entertain jurisdiction, and afford relief. *Reno Lodge No. 99, I. O. O. F., of Hutchinson v. Grand Lodge I. O. O. F. of Kansas*, 54 Kan. 73, 37 Pac. 1003. In some cases it has been held that, in the absence of fraud, the decision of the organization, or one of its tribunals, as to the right of a member to benefits, is final, and no resort to the courts can be had. *Van Poucke v. Society*, 63 Mich. 378, 29 N. W. 863; *Canfield v. Knights of Maccabees*, 87 Mich. 628, 49 N. W. 875; *Fillmore v. Knights of Maccabees (Mich.)* 61 N. W. 785; *Anacosta Tribe v. Murbach*, 13 Md. 94; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Vandyke's Case*, 2 Whart. 312; *McAlees v. Iron Hall (Pa. Sup.)* 13 Atl. 755; *Rood v. Benefit Ass'n*, 31 Fed. 63. While other cases are to the effect that it is not competent for societies, in advance of a dispute, to make a by-law or stipulation which will deprive a member of the right to resort to the ordinary legal remedies for the protection or enforcement of his contract or property rights, nor to oust the jurisdiction of the courts by a provision that the decision of the organization itself or one of its tribunals shall be final as to such rights. *Bauer v. Samson Lodge*, 102 Ind. 262, 1 N. E. 571; *Order of Chosen Friends v. Garrigus*, 104 Ind. 133, 3 N. E. 818; *Supreme Council of the Order of Chosen Friends v. Forsinger (Ind. Sup.)* 25 N. E. 129; *Insurance Co. v. Morse*, 20 Wall. 445; *Scott v. Avery*, 5 H. L. Cas. 811; *Stephen-*

son v. Insurance Co., 54 Me. 55; Burlington Voluntary Relief Dept. v. White (Neb.) 59 N. W. 751; Danher v. Grand Lodge (Utah) 37 Pac. 245; Austin v. Searing, 69 Am. Dec. 665; Bac. Ben. Soc. §§ 400, 450; Nibl. Ben. Soc. § 317. Courts are created by the sovereign power, and, when established, should be open and accessible to all for the protection of their civil or property rights. Societies like the plaintiff in error cannot be regarded as purely charitable organizations, nor the benefits promised by them gratuities. The members pay for insurance, and the certificates issued to and accepted by them are, in effect, contracts of insurance. Although the insured is a member of the organization, and must generally be held bound by all reasonable and valid rules which it makes, yet, as to the insurance, he is in a certain sense a stranger to the organization, and their relations in that regard are somewhat antagonistic. In making the contract the organization deals with him as an individual, rather than as a member, and for an injury to his contract rights can he be barred from invoking the jurisdiction of the courts? Will a provision that the decision of the organization or of one of its tribunals shall be final preclude him from resorting to the ordinary legal remedies which the law affords? It may well be doubted whether a society can confer upon its own tribunals plenary power to decide finally and conclusively upon the property rights of insured members, but the determination of the question is not necessary to the disposition of this case. No attempt has been made to prevent members from resorting to the courts to recover benefits, nor has any stipulation been made that the decisions of the order of controversies as to benefits shall be final and conclusive. The constitutional provision of the order that the supreme lodge shall have original and exclusive jurisdiction over subjects pertaining to the welfare of the order was certainly not intended to oust the courts of their ordinary jurisdiction, and the further provision that the decisions of the supreme lodge upon questions and appeals shall be the supreme law of the order cannot be regarded as applicable to controversies over contracts of insurance between the order and the insured. The right of resort to the courts will not be deemed to have been taken away by mere inference, and, if it can be done at all, it will only be where the restriction is stated in the clearest and most explicit terms. The provision in the constitution of the order that no claim or benefit shall be paid until the rules of the order have been fully complied with, and the requisite proof of the justness of the claim has been made in accordance with the general laws of the order, is a reasonable regulation, and no reason is seen why it may not be enforced. It is generally held to be competent for the organization to provide

that claims for benefits shall be submitted to the tribunals of the order before they are made the subject of litigation in the public courts. In this way an opportunity is given to the order to fully investigate the nature and justness of the claims; and provisions of this character are not uncommon in insurance contracts. This provision, however, affords no justification for the contention that the order has abridged the right of members to resort to the courts when their claims for benefits have been rejected. It has been said that: "Courts of justice are freely open to those who seek money due them upon a contract, and the party who asserts that the right to invoke the aid of the court has been curtailed must show a clear agreement abridging the right. If a man has a legal right, and the society to which he belongs adds others,—that of submitting his claim to the society for adjustment, and that of appeals to the superior governing bodies,—the added rights are merely cumulative. They are not exclusive. Positive words only can take away an existing right. Conferring a right to pursue a given course does not destroy an existing right. In order to destroy such a right, proper limiting words must be employed." Nibl. Ben. Soc. § 313. The supreme court of Illinois, having before it an interpretation of a provision which it was claimed made the decisions of the society and its tribunals as to claims for benefits final and conclusive, held that where the society itself and one of the parties to the controversy is sought to be made the final judge, that "the courts will hesitate, and even refuse, to treat its decisions as final and conclusive, unless the language of the contract is such as to preclude any other construction. The judicial mind is so strongly against the propriety of allowing one of the parties, or its especial representative, to be judge or arbitrator in his own case, that even a strained interpretation will be resorted to, if necessary, to avoid that result." Benefit Ass'n v. Robinson, 147 Ill. 159, 35 N. E. 168. We think the district court placed a proper interpretation upon the rules of the order and the provisions of the contract of insurance, and that the instruction complained of correctly stated the law of the case. Its judgment will be affirmed. All the justices concurring.

(57 Kan. 657)

## STATE v. SMITH.

(Supreme Court of Kansas, Jan. 8, 1897.)

## EMBEZZLEMENT BY AGENT.

A person employed by an express company to take charge of its business at a local office, who receives and consigns express matter, collects charges thereon, keeps an account of the business of the office, makes reports thereof, and transmits balances of moneys received to the company for a commission on the receipts of the office, and is not bound to devote his whole or any particular portion of his time to the busi-

ness of his employer, is an agent, within the meaning of the second clause of section 88 of the act regulating crimes and punishments (Gen. St. 1889, par. 2220), and may be charged with and convicted of embezzlement thereunder.

(Syllabus by the Court.)

Appeal from district court, Ford county; Francis C. Price, Judge.

Thomas C. Smith was convicted of embezzlement and appeals. Affirmed.

E. H. Madison and M. W. Sutton, for appellant. F. B. Dawes, Atty. Gen., and J. M. Kirkpatrick, for the State.

ALLEN, J. The defendant was the local agent of the United States Express Company at Dodge City. He also acted as the station agent of the Rock Island Railway Company, and transacted the business of both companies in the same room. As compensation for his services to the express company he received a commission of 10 per cent. on the net earnings of the express business of his office, and one-third of the charges on money orders sold. He was charged, under the second clause of section 88 of the act regulating crimes and punishments (Gen. St. 1889, par. 2220) with the embezzlement of \$203.24 of money of the express company, which he neglected and refused to pay over to his employer on demand. On this charge he was tried, convicted, and sentenced to the penitentiary for a term of two years. The contention by counsel for the appellant is that he was a clerk or servant of the express company, rather than an agent, and this question was raised by a motion to quash the information, objections to testimony, and exceptions to the instructions given. The instruction mainly criticised is the eleventh, which reads as follows: "The court instructs you that an agent is one who undertakes to transact some business, or to manage some affair, for another by authority and on account of it; and, in this case, if you find from the evidence beyond a reasonable doubt that the defendant was employed by the United States Express Company to take charge of and exercise control over the business of its express office at Dodge City, Kansas, as charged in the information, and that as such employé it was his duty to receive and consign express from and over the said company's lines at such point, to collect charges thereon, keep the books of the company at said office, make reports to said company, and issue and sell express money orders, and collect and receive charges therefor, keep an account thereof, transmit balances, and make reports to the company of his doings in that particular, and to maintain an office in said city for said purpose, and that under the terms of such employment the defendant did, in fact, take charge of the said company's office at said city, and did, in fact, under the authority of said company, consign and receive express from and over the said company's lines at said point, collect charges thereon, make reports to said company, issue and sell

express money orders, collect and receive charges therefor, and did keep an account thereof, have charge and control of said office, and the books and business thereof, under the management and direction of said company, and that under the terms of his employment he was to and did receive as his full and only compensation for services rendered said express company ten per cent. of the charges on consignments, and one-third of the charges on money orders,—then the court instructs you that the defendant would be the agent of the United States Express Company within the meaning of the statute under which this prosecution is brought." It is urged that under the authority of *State v. Yelter*, 54 Kan. 277, 38 Pac. 320, the defendant was a servant, rather than an agent. It is perhaps somewhat unfortunate that the legislature has made a distinction between embezzlement by clerks and servants and by agents, for it is a matter of extreme difficulty in many cases to determine which is the more proper term to designate the relation existing between employer and employé. Both agents and servants transact business for an employer for hire. Both are subject in a greater or less degree to the management, direction, and control of the master or principal. It would be extremely hazardous to attempt definitions of the words so comprehensive as to furnish guides for the determination of every case. There are, however, many cases which can be readily assigned to the one class or the other. We apprehend that very few people would speak of an express agent, such as the defendant in this case was, as either a clerk or a servant of the express company, though perhaps, if so designated in a pleading, where it was sought to charge his employer with liability for his acts, no difficulty would be found, for a clerk or servant is often designated as an agent, and an agent is, in a sense, a servant. Persons who perform such services as the defendant performed for the express company are, however, almost invariably spoken of as express agents. While they are bound to follow and obey the rules and directions of the company, they are not under the immediate and continual direction and control of the employer. They are required to attend to certain business of the company, but as to the particular time and manner of attending to each part of it the agent determines for himself. His possession of the money he receives for his employer is exclusive until he delivers it to some other person, authorized by the company to receive it. With reference to the custody of funds the case is clearly distinguishable from that of a clerk who works in the store or bank of his employer, and who places all the money he receives in the till, to which the employer has at all times direct access. The defendant in this case received moneys from time to time from the patrons of the express company. It was his duty to keep an account thereof, to report the same to the company, and at stated intervals to remit the amount due the company, less his commission.

The instruction quoted contains a summary of the duties of the defendant under his employment, and we think a person who undertakes to discharge such duties is clearly an agent, within the meaning of the statute, as well as within the ordinary meaning of the term; and that, if he refuses to deliver the moneys in his hands, due to his employer, after deducting his commissions, where the same have not been lost by means beyond his control, and where he has not been permitted by his employer to use the same, he is guilty of embezzlement, under the second clause of the section of the statute cited. *State v. Bancroft*, 22 Kan. 170; *Campbell v. State*, 35 Ohio St. 70. The judgment is affirmed. All the justices concurring.

(57 Kan. 661)

**GREAT WESTERN MANUF'G CO. v. RICHARDSON.**

(Supreme Court of Kansas. Jan. 8, 1897.)

**APPEAL—DISMISSAL—DEFECT OF PARTIES.**

A petition in error by one of five defendants, against whom a judgment was rendered jointly for the recovery of certain specific personal property or the value thereof, to which the other defendants are not made parties, either as plaintiffs or defendants in error, must be dismissed for want of necessary parties.

(Syllabus by the Court.)

Error from court of appeals, Southern department, Central division.

Action by the Great Western Manufacturing Company against True Richardson. Judgment for plaintiff, and True Richardson brought error to the court of appeals. Judgment reversed (43 Pac. 809), and the manufacturing company brings error. Judgment of court of appeals reversed, and petition in error dismissed.

Baker, Hook & Atwood and James Lawrence, for plaintiff in error. A. E. Parker, for defendant in error.

ALLEN, J. The only question in this case requiring our consideration arises on the motion to dismiss, which the court of appeals overruled. The action in the district court was brought by the Great Western Manufacturing Company against True Richardson, Horace Pardee, Emma Pardee, Eugene Pardee, and A. G. Forney. The record shows that all the defendants were served with summons; that True Richardson and A. G. Forney filed separate answers; and that the Pardees made default. A trial was had, with a jury, and a verdict rendered in favor of the plaintiff. On this verdict, judgment was entered against the defendants for the recovery of certain specific property described in the verdict, for the value thereof in case a return of such property could not be made, and for costs of suit. The proceeding in error, from the district court, was instituted by True Richardson alone, and the Great Western Manufacturing Company only was made defendant in error. The

other defendants took no part in the preparation of the case made, which was not served on them, and have not been made parties to the proceeding in error.

It is argued here, in support of the ruling of the court of appeals, that it does not affirmatively appear that the other defendants would be prejudicially affected by a reversal of the judgment; that True Richardson was the only necessary defendant in the lower court; and that the entry of judgment against the Pardees and Forney was a mistake, which might be corrected in that court. The answer to these claims is obvious. We can no more assume that the trial court would release these parties from the judgment by a *nunc pro tunc* entry than that it would release Richardson on his motion. It does not appear that a correction of the journal entry has ever been asked for, and the absent defendants do not seek a reversal of it. The claim that Richardson was the only person against whom judgment ought in any event to have been rendered indicates only a greater necessity for making the other defendants parties in the appellate court; for if Richardson should obtain a reversal of the judgment against him, and be successful on the second trial, it would leave the Pardees and Forney liable to the plaintiff for the return of the property, or for its full value, without any remedy over against Richardson. The rule is well settled, and has often been enforced by this court, that all persons against whom a joint judgment has been rendered must be made parties to a proceeding to reverse such judgment, and that a failure to join any of them, either as plaintiffs or defendants, is ground for a dismissal of the case. A long line of reported cases might be cited in support of this proposition, but we shall refer only to the following: *McPherson v. Storch*, 49 Kan. 313, 30 Pac. 480; *Central Kansas Loan & Inv. Co. v. Chicago Lumber Co.*, 53 Kan. 677, 37 Pac. 132; *Norton v. Wood*, 55 Kan. 559, 40 Pac. 911; *Hyde Park Inv. Co. v. First Nat. Bank*, 56 Kan. 49, 42 Pac. 321; *Bain v. Insurance Co.*, 3 Kan. App. 346, 40 Pac. 817; *Bonebrake v. Insurance Co.*, 3 Kan. App. 708, 41 Pac. 67. Many cases have been dismissed on this ground which are not reported. The judgment of the court of appeals is reversed, and the petition in error is dismissed. All the justices concurring.

(57 Kan. 663)

**BOLINGER et ux. v. BRAKE.**

(Supreme Court of Kansas. Jan. 8, 1897.)

**COVENANT OF SEISIN—BREACH—DAMAGES.**

On a partial breach of the covenant of seisin, where the possession of the covenantee has never been disturbed, as a general rule, subject to certain exceptions, he will be entitled to recover as damages that proportion of the whole consideration (without interest) which the part lost bears to the full title attempted to

be conveyed. *Dale v. Shiveley*, 8 Kan. 276, and *Scantlin v. Allison*, 12 Kan. 85, followed.

(Syllabus by the Court.)

Error from court of appeals, Northern department, Eastern division.

On May 29, 1891, L. A. Brake obtained a judgment against L. Bollinger and Rosa Bollinger, husband and wife, in the district court of Bourbon county, for the sum of \$529.62 as damages for a partial breach of the covenant of seisin in a deed for certain lots in Mapleton, in said county. The judgment was affirmed by the court of appeals July 31, 1896. 45 Pac. 950. The rule applied by the district court and approved by the court of appeals as the measure of damages being earnestly challenged by the plaintiffs in error, this court ordered the certification of the record here for review. Affirmed.

J. D. McCleverty, for plaintiffs in error.  
J. H. Crider and W. P. Dillard, for defendant in error.

MARTIN, C. J. We are satisfied with the decision of the court of appeals, and will only add some observations upon the principal point at issue. The consideration paid for the lots was \$1,100. It was shown by the evidence that Brake had obtained from the defendants the title to an undivided four-ninths of four lots in block 40, and to an undivided five-ninths of the lots in block 39; and the court instructed the jury to assess the plaintiff's damages at five-ninths of the consideration paid for the lots in block 40 and four-ninths of the consideration paid for block 39, together with interest at 7 per cent. per annum from November 18, 1885, the date of the deed; but, the jury having returned in their verdict the amount allowed for interest, the same was afterwards struck out by the court, and judgment was rendered only for the proportionate amount of the consideration paid, the plaintiff below never having been disturbed in his possession. We think the rule of damages laid down by the trial court was correct. It was held long ago in this state that the covenant of seisin is a personal one, not running with the land, and that it is broken as soon as the deed is executed if the title be bad, and an action lies thereon at once without waiting for a disturbance of the possession. *Dale v. Shiveley*, 8 Kan. 276; *Scantlin v. Allison*, 12 Kan. 85. In *Dale v. Shiveley*, supra, it was held that the measure of damages upon breach of the covenant of seisin is, as a general rule, the consideration money and interest; but, where the vendee buys in the paramount title, his recovery is limited to the amount paid therefor and interest; and this rule was followed in *McKee v. Bain*, 11 Kan. 569. These early cases were cited with approval in *Scott v. Morning*, 23 Kan. 253, and *Chambers v. Cox*, Id. 393. It is now contended, however, that where a grantee receives the possession from his grantor, and is not disturbed therein, and pays nothing to buy in the outstanding title,

and incurs no expense by reason thereof, he can recover nominal damages only on an admitted breach of the covenant of seisin. This would be to construe away by judicial decision the force and efficacy of a covenant of seisin as heretofore interpreted by our own decisions. It is said that, no matter how bad the title conveyed may be, yet the true owner may not assert his right until after the statute of limitations has barred it, and thus the grantee may obtain a good title by adverse possession. Therefore he ought not to be allowed to maintain an action on the covenant of seisin until after he has been evicted or has purchased in the outstanding title. In other words, the risk of disturbance by the true owner is shifted from the grantor, who has, for a consideration, expressly assumed it, and it is thrown upon the grantee for whose benefit the covenant was made. According to our Kansas doctrine, a right of action accrues immediately upon the execution of the deed with covenant of seisin if the title be bad, and therefore it will be barred within five years thereafter, unless saved by some exception to the statute of limitations. An adverse claimant may bring his action within 15 years, and sometimes even later; and if he should succeed therein the grantee under the covenant of seisin is without remedy, for when he goes to his lawyer he is advised that his right of action under that covenant has been barred for several years. A construction of the covenant of seisin broken at the delivery of the deed, which requires that the covenantee must wait until his right of action is barred, unless the adverse claimant brings his suit before that time, is apparently so unreasonable as to carry its refutation with its statement. We are not authorized to construe away the covenant of seisin because there was also a covenant of warranty in the same deed, for the grantee was entitled to the benefit of both. Under the former he had a personal right of action against the grantors as soon as the deed was made; under the latter there could be no breach until an eviction under a title paramount, or something equivalent to it. By the former he was under no obligation to wait until the latter should also be broken, and the grantors perhaps dead or insolvent, before commencing his action for damages. To illustrate this principle, take an example: A. and B. own a tract of land in equal undivided shares. A., without the knowledge of B., in consideration of \$1,000, the full value of the land, makes a deed to C., with a covenant of seisin, and C. goes into possession. He afterwards learns that he has the title to the undivided one-half only, and, while undisturbed in his possession, he brings his suit against A. to recover the \$500 paid without consideration on the faith of the covenant that A. was seised of the full title; but he is met with the answer that the breach is only technical, and he can recover no more than nominal damages until

B. asserts his title, or he buys it in. C. is not prepared to pay for the half interest a second time. He dismisses his action, or takes a judgment for nominal damages. Years thereafter B. commences his action against C. for partition and ejectment, and recovers one-half in value of the land. C. then commences his action against A. to recover damages for breach of the covenant of seisin. If he dismissed his former suit without prejudice, he is met with the plea of the bar of the statute of limitations; if he took judgment for nominal damages, he is confronted with the further plea of *res adjudicata*. Thus, by a sort of legal jugglery, C. loses his \$500, and A. keeps that much for nothing. Counsel say, however, that B. may never assert his title, or may do so too late, and that A., who for the sum of \$500, by his covenant of seisin, expressly assumed the risk, should be relieved of it, and the court should impose it upon C., who paid his \$500 to be assured against it. This is a manifest perversion of the law of contracts respecting real estate as established by the decisions of this court. If a grantor does not desire to be bound by a covenant of seisin, he ought not to enter into it. When he does so, the courts ought not to annul it for his profit and to the injury of the grantee for whose benefit it was made. There are many cases in which the covenant should not be allowed to recover the full consideration money, or the proportion thereof corresponding to that part of the title which is lost. If in the example above cited C. should purchase the outstanding title from B. for \$250, he is made whole by the payment of that amount by A., and should not recover more, as held in *Dale v. Shiveley*, *supra*, and *McKee v. Bain*, *supra*. If in the foregoing example, before C. should bring his suit, A. should buy in the outstanding title of B. in his own name, this would inure to the benefit of C., and make good his title, as in *Scoffins v. Grandstaff*, 12 Kan. 467, and the damages to C. from the breach of the covenant would be nominal only. Where the only breach of a covenant of seisin and against incumbrances is an outstanding easement detracting somewhat from the market value of the land, the damages will be limited to the extent of the depreciation by reason of the easement, as in *Smith v. Davis*, 44 Kan. 362, 24 Pac. 428. Perhaps it may be said where the title has been cured by adverse possession and the lapse of time, by estoppel, or otherwise, without cost or expense to the grantee, his recovery for a breach of the covenant of seisin should be limited to nominal damages. It may not be going too far to say that in any case where there has been a breach of this covenant, but the title has been healed, or all danger of its hostile assertion has passed away, or the covenantee has lost nothing, and is in danger of no loss or lia-

bility, no more than nominal damages are recoverable. The case of *Hammerslough v. Hackett*, 48 Kan. 700, 29 Pac. 1079, comes within the principle last mentioned. The statement in the opinion in *Scoffins v. Grandstaff*, 12 Kan. 471, referring to the covenant of seisin, that "where the grantee takes possession of the property under his deed, and retains the uninterrupted possession thereof, without paying anything to purchase in the paramount title, he can only recover nominal damages," is obiter, and too broad. In so far as *O'Meara v. McDaniel*, 49 Kan. 685, 31 Pac. 303, is in conflict with this decision, it must be regarded as overruled. Of course, a title may be perfect, while the record thereof is very defective; and what we have said has reference to the actual title, and not to any particular kind of evidence whereby it may be supported or defeated. It would be bootless to review the decisions in other states upon the measure of damages on a breach, either total or partial, of the covenant of seisin, where the covenantee remains in possession. In states like Iowa and Wisconsin, where it is held that this covenant runs with the land until the damage has arisen by eviction or other actual injury, it is entirely logical to hold that no substantial damages are recoverable until after the happening of such an event. The effect of this doctrine is to abolish the distinction between a covenant of seisin and a covenant of warranty, or rather to merge the former in the latter. We think, however, that there is a broad distinction between the two covenants, which the courts cannot properly ignore. The covenant of seisin is of the present tense, and, if the covenantor has not the title, there is a breach of the covenant as soon as it is made. It is strictly a covenant for title. The covenant of warranty is of the future tense, and binds the covenantor to defend the title when it shall be assailed, and to make good the loss, within certain limitations, which may then be sustained. It is essentially a covenant against the loss of possession, and a right of action upon it does not accrue until the covenantee is disturbed. The legislature has the power, perhaps, to abolish this distinction for the future, but, this court having recognized it from an early day, and it being well supported by the authorities, we would be loth to disregard it now, even though we thought it would be good policy for the legislature to change the rule; but of this we are by no means convinced. As indicated before, if a grantor does not wish to be bound by a covenant of seisin, or any other running in the present tense, he ought not to make it. The judgment of the court of appeals will be affirmed.

ALLEN, J., concurs. JOHNSTON, J., dissents.

(57 Kan. 670)

**NELSON et al. v. WARE.**

(Supreme Court of Kansas. Jan. 8, 1897.)

**TENANCY FROM YEAR TO YEAR—TERMINATION.**

The method of terminating a tenancy from year to year is regulated by statute, and, in order to determine such a tenancy, the tenant is not required to give notice to the landlord of his intention to sever the relation, and to quit the premises.

(Syllabus by the Court.)

Error from court of appeals, Southern department, Eastern division.

Action by E. F. Ware against C. A. Nelson and N. B. Weedon. Judgment for defendants. Plaintiff brought error to the court of appeals, where the judgment was reversed (45 Pac. 923), and defendants bring error. Reversed.

Biddle, Boyle & Sheppard, for plaintiffs in error. H. L. Heald, R. W. Neal, Cory & Hulbert, and E. F. Ware, for defendant in error.

**JOHNSTON, J.** In the latter part of 1884, C. A. Nelson and N. B. Weedon, partners as Nelson & Weedon, rented a building from E. F. Ware, in which to conduct the grocery business. A written lease was executed, which stipulated that the tenancy should continue for one year, at a monthly rental of \$65, payable monthly in advance. About a year later, the parties agreed to continue the lease for the year 1886, and an indorsement to that effect was made thereon. At the end of that year, it was verbally extended for the year 1887, and they continued to hold over from year to year, until the end of 1891. The rent was reduced in 1888, and after that no change was made in the rent, and the tenants continued to occupy the premises without any special renewal or further agreement respecting the lease. In December, 1891, Nelson & Weedon asked for a further reduction of the rent; and before the negotiations concerning a reduction had been concluded, and on December 15, 1891, they gave Ware written notice that they would quit the building at the end of the year. Before December 31, 1891, they moved out; and on that day they attempted to deliver the keys to Ware, but, on account of his absence from home, they were unable to do so. The keys were actually delivered on the next day, and since that time they have treated the relation as severed, and have refused to pay any rent. Ware claimed that the lease had not been terminated by the tenants, and that they could only do so by giving him three months' notice of their purpose to quit. This is the controverted point in this action, which was brought to recover rent for the first three months of the year 1892.

Under the facts stated, it must be regarded as a tenancy from year to year, and upon

this proposition all the parties are agreed. How may such a tenancy be terminated, and is the lessor entitled to any notice? In the absence of an express agreement or a statute regulating the termination of such a tenancy, due notice to either party is ordinarily required from the other, in order to sever the relation of landlord and tenant. Under the common law, six months' notice is required to determine a tenancy from year to year; but in most of the states the character and time of the notice are regulated by statute. Where the common-law rule obtains, it is generally held that notice is a reciprocal right, and that neither landlord nor tenant can sever the relation, or deprive the other of his rights under the tenancy without due notice. We cannot apply that rule here, as it has been superseded by a statute which expressly specifies how such a tenancy may be terminated. It reads: "All tenancies from year to year may be determined by at least three months' notice in writing, given to the tenant prior to the expiration of the year." Gen. St. 1889, par. 3614. The language of the statute is clear and unequivocal in defining what is necessary to determine a tenancy from year to year, and the only requirement is a written notice for, at least, three months to the tenant. In effect, it dispenses with notice to the landlord, although the lack of notice must operate as an injustice to him in many cases. It is an explicit statute, however, which covers the subject, and leaves no room for construction. It was a question of policy for the legislature to decide, and, its meaning being obvious, we have no other duty to perform than to carry out the legislative will, regardless of our own views of the wisdom or justice of the statute. It appears that the matter of notice to the landlord did receive legislative consideration, as the paragraph immediately preceding the quoted one provides that if either party desires to terminate a tenancy at will, or for terms of three months or less, he must give the other notice. Why an exception was made of a tenancy from year to year is not easy to understand; but we are not permitted to supply the omission, or to give the statute a meaning not justified by any language employed in it. The character and time of notice necessary to terminate any tenancy by either party may be fixed by express agreement; and, when so fixed, the agreement will control. No notice being required in this case, the landlord was not entitled to recover rent after possession of the premises was surrendered. The possession appears to have been yielded at the end of the year 1891, and up to that time the rent was paid. The judgment of the court of appeals will therefore be reversed, and the judgment of the district court will be affirmed. All the justices concurring.



(57 Kan. 673)

## STATE v. SMITH.

(Supreme Court of Kansas. Jan. 8, 1897.)

## WARRANT—STATEMENT OF CHARGE—FORMER CONVICTION—FRAUD—CROSS-EXAMINATION.

1. Where the preliminary examination had upon a criminal charge affords the defendant reasonable notice of the general character and outlines of the offense alleged in the information, it will be deemed sufficient to authorize a trial, although the offense was not set forth in the warrant of arrest with the fullness and precision necessary in an information.

2. Where a person who has assaulted and seriously wounded another fraudulently procures himself to be prosecuted and convicted before a justice of the peace, who imposes an insignificant penalty, and it is done for the purpose of avoiding a real prosecution and punishment for the offense committed by him, such conviction is not a bar to a prosecution brought in good faith, where the state is a party in fact as well as in name.

3. The defendant having become a witness in his own behalf, and testified that he had acted in self-defense, it was competent to inquire of him upon cross-examination whether he had not voluntarily gone before the justice of the peace, and admitted that he had assaulted the prosecuting witness.

4. Facts averred in the information constituting an offense under section 38 of the act relating to crimes and punishments (Gen. St. 1889, par. 2159); and the offense defined in section 42 of the crimes act was fairly included in that charged in the information.

(Syllabus by the Court.)

Appeal from district court, Trego county; Lee Monroe, Judge.

Philetus H. Smith was convicted of wounding another, under such circumstances as would have constituted manslaughter in the fourth degree had death ensued, and he appeals. Affirmed.

H. J. Harwi, for appellant. F. B. Dawes, Atty. Gen., and Bond & Osborn, for the State.

JOHNSTON, J. Philetus H. Smith was convicted of wounding Adelbert J. Alsop, under such circumstances as would have constituted manslaughter in the fourth degree if death had ensued. In his appeal he alleges several errors, one of which is that the charge in the information was not the same as the one stated in the warrant upon which he was arrested, and that, therefore, he has not had a proper preliminary examination. There is nothing substantial in this claim. In each it is alleged that Smith unlawfully and feloniously, and with malice aforethought, made an assault upon Alsop with a deadly weapon, to wit, a four-tined pitchfork, and did then and there feloniously, on purpose, and with malice aforethought, strike, beat, and wound Alsop. In the one it is averred that he struck, beat, and wounded Alsop with intent to maim him, while in the other it is alleged to have been done with intent to wound and maim. The same fullness of statement necessary in an information or indictment is not required in a warrant or any of the preliminary

papers. The defendant should have reasonable notice of the nature and character of the offense charged against him; but, for the purpose of authorizing a trial, it is only necessary that the defendant should be given a fair opportunity to know, by a preferred preliminary examination, the general character and outlines of the offense charged against him. He is required to take notice from the evidence introduced by the state on the preliminary examination, as well as from the papers in the case, of the nature and character of the offense charged against him. We think the charge in the warrant afforded the defendant reasonable notice, and that the principal purposes of a preliminary examination have been subserved in his case. *State v. Bailey*, 32 Kan. 83, 3 Pac. 769; *State v. Tennison*, 39 Kan. 726, 18 Pac. 948.

The information is not open to the charge of duplicity, and the court ruled correctly in denying the motion to quash. It set forth facts sufficient to constitute an offense under section 38 of the act relating to crimes and punishments (Gen. St. 1889, par. 2159); and the facts as thus set forth were also sufficient to constitute the offense of wounding under such circumstances as would constitute manslaughter if death had ensued, under section 42 of the crimes act. The crime of which he was convicted was fairly included in that charged in the information. *State v. Burwell*, 34 Kan. 312, 8 Pac. 470.

By way of a plea in bar, the defendant alleged that he had previously been charged with the same offense before a justice of the peace, and upon a trial had been adjudged guilty of assault, and to pay a fine of five dollars and costs. He alleged the fine and costs had been paid, and that he had been discharged from custody. The answer to the plea was a general denial, and it was further alleged that the complaint made against the defendant before the justice of the peace was a pretense, filed at his request, and that he procured the charge to be filed against himself, so as to avoid punishment for the real offense committed by him. It was further averred that the complaint was filed, the plea of guilty offered and accepted in the absence of Alsop, and without his knowledge or consent. The demurrer to the answer was properly overruled, and the testimony was amply sufficient to sustain the averments of the answer. It appears to have been a collusive and fraudulent transaction, begun at the instance of the defendant, with a view of defeating the law and avoiding the consequences of a prosecution brought in good faith, where the state was a party in fact as well as in name. A conviction so obtained is a nullity, and the proceedings do not bar a bona fide prosecution. *Com. v. Dascom*, 111 Mass. 404; *State v. Little*, 1 N. H. 257; *Com. v. Jackson*, 2 Va. Cas. 501; *State v. Green*, 16 Iowa, 239; *Watkins v. State*, 68 Ind. 427;

McFarland v. State, 68 Wis. 400, 32 N. W. 226; 1 Bish. Cr. Law, § 1010.

At the trial on the merits, the defendant became a witness in his own behalf. He denied material statements made by witnesses of the state in regard to the occurrence, claiming that he acted in self-defense. Upon cross-examination he was asked whether he had not voluntarily gone before the justice of the peace, and admitted that he had assaulted the prosecuting witness. An objection to the question was overruled, and of this complaint is made. We think the testimony was competent. It would not have been admissible for the purpose of proving a record of the conviction, but it is proper to give to the jury for what it is worth, as an admission by defendant against his own interests. Having taken the witness stand in his own behalf, and testifying that he had acted in self-defense, it was proper to show an admission previously made, wholly inconsistent with his claim.

Complaint is also made of an instruction as to the offense punishable by section 42 of the crimes act, in which it was contended the court eliminated the question of intent. This contention is not justified. The court had previously instructed the jury with reference to the offense defined in section 38, charging that the criminal act must have been done with malicious intent. In the instruction with respect to section 42, the court stated that, to convict under that section, it was unnecessary to prove that the assault complained of was made with malice aforethought. The jury were properly charged upon the different degrees of manslaughter, including the essential ingredient of intent. The testimony appears to be sufficient to sustain the verdict and judgment, and, after a careful examination of all the specifications of error, we find no reason for disturbing the judgment. It will therefore be affirmed. All the justices concurring.

(5 Kan. A. 50)

**KANSAS TOWN CO. v. CITY OF ARGENTINE et al.**

(Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.)

**MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS.**

1. An assessment levied upon certain lots in a city of the second class, to pay the cost of improvements made on a street upon which such lots abut, is not invalid merely because the ordinance authorizing such improvement was passed before the expiration of 20 days after the last publication of the resolution declaring the necessity for the same, when the ordinance was not published, and no other steps were taken towards the doing of the work, until after said 20 days, and when no objection was made by property owners until after the work had been completed.

2. The levying of an assessment on abutting property for street improvements duly authorized by resolution will not be enjoined merely because the ordinance providing for the same

embraces certain portions of the street in excess of the limit fixed by the precedent resolution, when the excess is comparatively insignificant, and can be easily and definitely separated from the legally authorized work, both as to quantity and cost.

3. The preliminary estimate made by the city engineer for the cost of a proposed street improvement should be based upon the cost thereof for cash; but the subsequent proceedings will not be held void from the mere fact that such estimate was based upon payment in city bonds at 90 cents on the dollar, when the cost for cash can be ascertained readily and certainly from the estimate made, and when the contract price for the work is less than such ascertainable cash estimate.

(Syllabus by the Court.)

Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by the Kansas Town Company against the city of Argentine and others. Judgment for defendants. Plaintiff brings error. Affirmed.

Thomes J. White, for plaintiff in error. H. A. Bailey, for defendants in error.

GARVER, J. The validity of the special taxes or assessments in question is attacked on three grounds: First, that the ordinance providing for the making of the improvements was unauthorized and void because enacted before the expiration of 20 days from the last publication of the resolution declaring that the improvements were necessary; second, that the ordinance was unauthorized and void because it included certain portions of Strong avenue which were not embraced by the previous resolution; and, third, because the contract for the work was let without there being first made by the city engineer an estimate of the cost thereof, as required by law.

It is conceded that the city council, by resolution duly passed, declared that it was necessary to macadamize Strong avenue from Fourth to Eleventh streets, as was thereafter done. This resolution was last published August 30, 1894. An ordinance was enacted September 19, 1894, and published in the official paper September 20, 1894, providing for the macadamizing of Strong avenue from the east side of Fourth street to the west side of Eleventh street; said ordinance purporting to be enacted pursuant to the previous resolution. It is contended by the plaintiff in error that all proceedings had under this ordinance were invalid and void, for the reason that it was enacted by the city council on the 20th day after the last publication of the resolution, when the statute expressly provides that the resident owners of property liable for taxation for the proposed improvements have 20 days from such last publication within which to protest against the proposed improvements, and that the council has no power to take any steps towards the doing of the work until the expiration of such time. Even conceding that the action of the council was premature in this respect, we do not think it can have the effect claimed

for it. The ordinance had no validity or legal force until after its publication in the official paper; and, as no protests of property owners were presented, it is not unreasonable to say that the work was not authorized to be done by the ordinance until after the time had expired within which protests could be filed. But, if this is not the case, still we think the premature passage of the ordinance would be a mere irregularity in one of the steps required for the doing of the work, which is not a sufficient ground on which to base an objection to an assessment levied after the work has been completed. This step is not a jurisdictional one, and mere irregularities in the manner in which authorized work is done do not have the effect contended for.

Is the ordinance invalid because it provides for the macadamizing of the squares at the intersections of Fourth and Eleventh streets with Strong avenue? The resolution declares the necessity for the improvement of Strong avenue from Fourth to Eleventh streets, while the ordinance provides for the improvement of Strong avenue from the east line of Fourth to the west line of Eleventh street. The ordinance and contract under which the work was done call for the same character of work along the entire length of Strong avenue to be improved. The estimate was made, and the contract was let, at a certain price per square yard. The number of square yards of macadam from Fourth street to Eleventh street could be calculated with ease and certainty, and a definite determination made of that part of the work. The excess of the work actually done under the ordinance was therefore separable from that declared for by the resolution. The ordinance would have been without objection, and would have fully authorized the work done, had it provided for the macadamizing of Strong avenue only from the west line of Fourth street to the east line of Eleventh street. The mere insertion of an insignificant, but unauthorized, excess of work, should not invalidate the entire ordinance, when its validity is questioned, for the first time, after the work has been completed. The excess can and should be disregarded, and the assessment sustained for the work done within the limits prescribed by the original resolution. This was the view taken by the learned judge of the trial court. The property of the plaintiff situated east of Fourth street, upon which assessments were made for the improvement of the intersection of Fourth street and Strong avenue, was relieved from the assessment, and the assessments were sustained only as to such lots as were situated between Fourth and Eleventh streets. These, it was held, were liable to bear their proportionate share of the cost of macadamizing Strong avenue between said streets.

The engineer's estimate of the cost of the proposed improvement was \$1.03 per square

yard for a total of 9,950 square yards, based on bonds of the city at 90 cents on the dollar. This should have been an estimate of the cost for cash, or bonds at par. But the actual cost for cash is readily ascertained from the estimate made; and, as the contract price for the work was less than such estimated cost for cash, we think the erroneous basis used by the engineer is not of sufficient importance to invalidate the subsequent proceedings. It appears, also, when the work had been completed, that the number of square yards of macadam exceeded that stated in the preliminary estimate by 1,571 square yards. It is not necessary that an estimate should have been made of the total amount of the work to be done, or of its gross cost; but it is sufficient if it was for the cost per square yard, as was done in this case. *Gilmore v. Norton*, 10 Kan. 491. Such estimate is controlling as to the price at which the improvement may be contracted. The contract that was entered into for the work was at a certain price per square yard. This estimated cost was the essential fact to be ascertained and observed in the making of the improvement. A mere error by the engineer in his original estimate of the number of square yards in the surface to be improved can certainly not have the effect to invalidate all subsequent proceedings.

Perceiving no error in the record, the judgment is affirmed.

(5 Kan. App. 881)

# NEW HAMPSHIRE BANKING CO. v. WALLER.

SAME v. BYRNES et al.

(Court of Appeals of Kansas, Southern Department, C. D. Jan. 5, 1897.)

## USURIOUS INTEREST—RECOVERY—KNOWLEDGE OF AGENT.

1. Where a party obtains a loan of \$500, and there is included in the note given for said loan an amount of usurious interest, and there are paid thereon afterwards certain amounts by way of usurious interest, in a suit on the note given in renewal of said loan the makers of the note are entitled to have deducted from said note all moneys paid thereon by way of usurious interest.

2. Where the promissory note given for the loan of money is negotiated, and the payee in said note is a loan broker, and loaning money for himself and other parties, and discounting notes, and has large amounts of funds on deposit belonging to other parties to loan and to discount notes, and keeps an account current with such parties, and where he takes notes on loans made with his own funds, or of those discounted by him, and in the transfer of such notes he charges his patrons with the amount of the note, and continues to receive the interest paid on said notes, and, when received, gives the holder of the note credit therewith, and reinvests the same in other loans or discounts, held, that he is the agent of the party holding such note, and the knowledge he may have of usurious payments of interest on loans and discounts is the knowledge of the principal.

(Syllabus by the Court.)

Error from district court, Sumner county; James A. Ray, Judge.

Actions by the New Hampshire Banking Company against Minerva L. Waller, and by the same plaintiff against William Byrnes and others. Judgments for plaintiff, and it brings error. Affirmed.

Adams & Adams, for plaintiff in error. W. W. Schwinn, for defendants in error.

JOHNSON, P. J. This is a suit to recover the sum of \$575 upon a promissory note, with interest thereon at 12 per cent. per annum from the 28th day of June, 1889. The defendants below admitted the execution of the note, and alleged payment by way of usurious interest, which they claim to have paid at different times, sufficient to discharge the note. The case was tried by the court, without a jury, and a judgment was rendered against the defendants below for the sum of \$281, as principal and interest due on said note. The plaintiff excepted to the judgment of the court, and brings the case here for review.

The transaction out of which this controversy grew was commenced on the 1st day of January, 1886. The defendant William Byrnes borrowed \$500 from William C. Little, and gave him a promissory note therefor for the sum of \$575. The \$75 was included in the note as interest for six months. It is claimed that \$45 of this sum was usurious interest. On the 1st day of July, 1886, William Byrnes paid on said note to William C. Little, as interest, \$75. It is claimed that \$45 of this amount was usurious interest. This note was sold and transferred before maturity by William C. Little to the Songhegan National Bank of Milford, N. H., Little guarantying payment of the same. On January 1, 1887, the note was sold by the Songhegan National Bank to William C. Little, and he again became the owner and holder of the same. On the same day, William Byrnes, as principal, and M. T. Hall, John Alter, and D. M. Waller, as sureties, in order to extend the payment of said loan, executed and delivered to William C. Little the promissory note sued on in this action. On the 5th day of January, 1887, William C. Little sold and transferred this promissory note to the New Hampshire Banking Company. Five payments of interest were made on this note at the end of each succeeding six months thereafter.

It is claimed by defendants below that in each of the payments of interest on said note usurious interests were received. The defendants below claim that the New Hampshire Banking Company was not an innocent holder of said note, without notice of the usurious transaction in relation to said loan. William C. Little was a loan broker, doing business in the city of Wichita, Kan., and was engaged in making long-time loans on real-estate mortgages, and short-time loans on promissory notes secured by individuals, and discounting notes and mort-

gages. He had money on deposit belonging to several moneyed institutions to loan for them, and to use in discounting notes and mortgages. Sometimes he loaned his own money, and took notes therefor, and sometimes he discounted notes with his own money, and frequently transferred these notes to those for whom he held deposits, and was loaning their money, and discounting notes for them, and, when he transferred notes taken for loans or discounts made with his own money, he charged the parties to whom he transferred the notes with the amount thereof on his books, and sent the notes so taken or discounted to the party to whom it was transferred, and guarantied the payment of the same. He continued to collect interest on the notes, and, when collected, would credit the amount thereof on his books, and reinvest the same for the holders of the notes. On all the evidence given on the trial of this case, the court found that usurious interest had been exacted and received on said loan from time to time, and that the plaintiff in error had full knowledge thereof, and that William C. Little was the agent of the plaintiff, and knew of all the transactions in relation to the loan, the giving of the note, and the exacting and receiving usurious interest thereon, and that the amount paid on said note by way of usurious interest should be deducted from the amount of said note and interest at 12 per cent. per annum, and that the plaintiff below was entitled to judgment for the amount found to be due thereon as principal and interest, after deducting the usurious interest paid upon said loan.

We think there was no error in the judgment of the district court in rendering the judgment it did in this case. William C. Little was acting as the agent of the plaintiff in error in all the transactions connected with the sale and transfer of the note, and knew all about the loan, and the demand and receipt of usurious interest thereon; and the knowledge of the agent was the knowledge of the principal. D. M. Waller, one of the securities in this note, died before suit was commenced, and Minerva L. Waller was duly appointed as administratrix of his estate, and the claim against the estate of D. M. Waller was duly presented in the probate court of Sumner county, and the amount thereof duly allowed by the probate court; and the case was thereafter appealed to the district court of Sumner county, and there tried by the court, and resulted in a judgment for the plaintiff below for the sum of \$281. The plaintiff below duly excepted, and brings the case to this court, being case No. 146, and the two cases are here considered together, and this opinion is the determination of both cases. There being no error shown in the record and proceedings in the district court, these judgments are affirmed. All the judges concurring.

(5 Kan. App. 631)

**CITY OF ELDORADO v. DRAPEERE.**

(Court of Appeals of Kansas, Southern Department, C. D. Jan. 5, 1897.)

**APPEAL—PRESUMPTIONS—NEW TRIAL.**

1. Where the record is silent as to the date of the filing of a motion for a new trial, and it appears that the motion was heard and passed on nearly a month after the rendition of the judgment, it will be presumed by this court that the motion was not made in time, and therefore the court below did not err in overruling it. *Hover v. Tenney*, 27 Kan. 133.

2. The special findings in this case are supported by the evidence, and are not in conflict with each other.

(Syllabus by the Court.)

Error from district court, Butler county; C. A. Leland, Judge.

Action by Francis Drapeere against the city of Eldorado. Judgment for plaintiff. Defendant brings error. Affirmed.

B. R. Leydig, for plaintiff in error. G. P. Alkman, for defendant in error.

COLE, J. This action was brought by defendant in error for damages on account of injuries alleged to have been received through a defective sidewalk. There was a verdict and judgment against the city of Eldorado, from which it brings the case here for review.

Defendant in error insists that the record is not in such condition as will permit the alleged errors to be reviewed in this court. It appears, from the record, that the judgment in this case was rendered on the 20th day of October, 1891, and a motion for a new trial was heard and overruled on the 16th day of November, 1891, but the record fails to show when said motion for a new trial was filed, nor does it appear for what reasons the motion for a new trial was refused. Under such circumstances, it must be held that no error can be predicated upon the overruling of the motion for a new trial. *Hover v. Tenney*, 27 Kan. 133; *Association v. Wolff*, 53 Kan. 323, 36 Pac. 711.

It is, however, contended by counsel for plaintiff in error that the vital question in this case is whether a defect in a sidewalk, of the character developed by the testimony, of which the city had no actual notice, is sufficient to constitute negligence on the part of the city, and render it liable for injuries sustained by reason thereof. We have examined the testimony in connection with the special findings in this case, and can see no reason for reversing the judgment of the lower court, even if all the questions presented by plaintiff in error were properly before us. The special findings are not inconsistent with each other, and are supported by the testimony; and we surely could not say, as a matter of law, that where a patent defect, like the one shown to have existed in this case for eight days or more, causes a personal injury, the corporation is not liable for the same. Nor does the fact that the evidence discloses that the defendant in error passed the defective portion of the side-

walk but a few hours prior to the accident, in daylight, conclusively establish contributory negligence. The question of contributory negligence is one of fact for the jury, and they have determined in this case against the plaintiff in error. The judgment of the district court is affirmed. All the judges concurring.

(5 Kan. App. 636)

**ARKANSAS CITY LUMBER CO. v. SCOTT.**

(Court of Appeals of Kansas, Southern Department, C. D. Jan. 5, 1897.)

**AFFIDAVIT ON ATTACHMENT—AMENDMENT.**

Where the jurat to an affidavit for attachment is by mistake postdated, so that the same appears to have been sworn to subsequent to the issuance of the writ, it is error to refuse to permit an amendment to said affidavit, and to dissolve an attachment on account of such erroneous jurat.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by the Arkansas City Lumber Company against S. B. Scott. Judgment for defendant. Plaintiff brings error. Reversed.

Pollock & Love, for plaintiff in error.

COLE, J. Plaintiff in error brought its action in the district court of Cowley county upon a promissory note, and at the time of commencing such action filed an affidavit for the issuance of a writ of attachment in said cause, which writ was duly issued; and afterwards a motion was filed, and heard by the judge of said court at chambers, asking the dissolution of said attachment upon several grounds, and the judge dissolved said attachment upon the ground "that the attachment affidavit on which the said order of attachment was issued did not show upon its face that it had been or was sworn to at the time such order of attachment was issued." From this order the plaintiff in error brings the case here for review.

In dissolving the attachment for the grounds stated, the judge of the district court committed error. It appears from the evidence that the affidavit in question was made prior to the time when the writ issued, but that by an error of the officer the jurat attached to said affidavit was dated one day subsequent to the issuance of said writ. There can be no question, under the evidence, but what the affidavit was properly sworn to, and the defect complained of was merely one of form, and not of substance. The district judge had the power, at chambers, to hear the motion to dissolve, and also the power to permit an amendment of said affidavit; and, when it was clearly shown that the date in question was erroneous, and that the affidavit had been properly sworn to and filed, it was the duty of the judge to permit an amendment thereto, so that it might conform to the facts, and it was error to refuse permission to make such an amendment.

Stout v. Folger, 34 Iowa, 71; Shakman v. Schwartz, 89 Wis. 72, 61 N. W. 309; Wells, Fargo & Co. v. Danford, 28 Kan. 487. This being the only ground upon which the dissolution of the attachment was allowed, the ruling of the district court must be reversed, and this cause remanded, with direction to permit the amendment in question to be made, and for further proceedings in accordance with this opinion. All the judges concurring.

(5 Kan. A. 638)

**WRIGHT v. HAYTER.**

(Court of Appeals of Kansas, Southern Department, C. D. Jan. 5, 1897.)

**MALICIOUS PROSECUTION—BURDEN OF PROOF—MALICE.**

1. In an action for malicious prosecution, the burden of proving that the prosecution was malicious is upon the plaintiff. If want of probable cause is shown, malice may be inferred; but the jury are not bound to so infer it. Want of probable cause and malice are both necessary to sustain an action, and both must be sustained by affirmative proof.

2. A charge to the jury, in such case, that if they are satisfied that there was not probable cause, they should also find malice, *held* erroneous.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by Richard Hayter against W. O. Wright. Judgment for plaintiff. Defendant brings error. Reversed.

McDermott & Johnson, for plaintiff in error. Charles J. Peckham and Ed L. Peckham, for defendant in error.

JOHNSON, P. J. The defendant in error brought this action in the district court of Cowley county to recover damages against the plaintiff in error for malicious prosecution, and alleges that on the 5th day of December, 1890, the defendant below maliciously, unlawfully, and without probable cause made complaint before a justice of the peace of Cowley county, Kan., charging the plaintiff below with the crime of petit larceny, and caused him to be arrested and tried before such justice, where he was duly acquitted of said charge; that said prosecution was without probable cause, and was begun and carried on by defendant below from malicious motives towards plaintiff below, and to wrong and injure him. Issues being joined on petition of plaintiff below, the case was tried before the court with a jury, and resulted in a verdict and judgment for defendant in error. The plaintiff in error now brings the matter to this court, and assigns two grounds of error.

The first error complained of is that the court erred in overruling the demurrer of the defendant below to the evidence of plaintiff below. The evidence on the trial of the case shows that on the 5th day of December, 1890, the defendant below made complaint, under

oath, before L. H. Webb, a justice of the peace of Cowley county, Kan., charging plaintiff below with unlawfully stealing, taking, and carrying away one wagon load of hay, of the value of three dollars, the personal property of W. O. Wright; and thereupon such justice of the peace issued a warrant for the arrest of the plaintiff below, and upon such warrant he was arrested and taken before the justice of the peace, and tried on the complaint, and acquitted of the charge. The evidence shows that defendant below had been a tenant living on the farm of plaintiff below, and that, as such tenant, the year previous, he raised a crop on the farm, and cut and stacked a large quantity of hay thereon; that by the terms of his tenancy he was to have a certain share of the crop grown on the farm; that plaintiff and defendant undertook to divide the hay in the stack, and really did divide the same, but there seemed to be some dispute as to which party was to receive a certain small stack of hay; and, after plaintiff below removed from the farm, he caused one load of the hay in the disputed stack to be taken and hauled away, and for this act the complaint was filed, and the arrest and trial had. All the circumstances connected with the division of the crop and the taking and hauling away the hay were in evidence before the court and jury. There was some evidence tending to prove the facts necessary to entitle the plaintiff below to recover. It is true that, in an action for malicious prosecution, the question of probable cause is one of law for the court. If, upon the undisputed facts, there was no probable cause, it is the duty of the court to so find; but when there is conflicting evidence, or the proof of probable cause depends upon the surrounding circumstances, then the court should submit the case to the jury, giving them proper instruction, and state to them what facts, when found from the evidence, constitute want of probable cause. It was not error for the court to overrule the demurrer. There was sufficient evidence to require the court to submit the questions of fact to the jury, under proper instructions as to their duty under the law as they found the facts to authorize.

The second assignment of error is that the court erred in giving the following instruction to the jury: "(3) The third proposition above mentioned, as is usual in such cases, is the real battle ground of the case, so far as the plaintiff is concerned. The burden is on the plaintiff to satisfy you by the evidence that the defendant instituted the prosecution against him maliciously and without probable cause. By the term 'maliciously,' we mean, simply, that condition of one's mind which would induce him to do another an intentional wrong or injury. The term 'malice,' in law, means any wicked or evil purpose in one's mind which moves or impels him to do another an intentional injury. The phrase 'without probable cause,' as we use

it here, is by us used in the ordinary acceptation and meaning of that phrase, giving to the words their usual and ordinarily accepted meaning. In ascertaining whether the defendant had probable cause for instituting the prosecution complained of, or not, you are to say whether any person of ordinary caution, care, and prudence, in the exercise of reasonably fair good judgment, would have, or might have, caused the prosecution to have been instituted against the plaintiff, under all the facts and circumstances surrounding the defendant, at the time when he instituted the same; and, if you are satisfied that he would, then you ought to find that defendant did not institute the prosecution without probable cause. But, if you are satisfied that such a person as we have described would not have instituted the prosecution, in the light of all the facts and circumstances surrounding the defendant, then you ought to find that the defendant instituted the prosecution without probable cause. After you are satisfied that the defendant instituted the prosecution without probable cause, then you ought also to find that he did so maliciously, because, in that case, he has done the plaintiff an intentional injury." We think this instruction is erroneous. The court ought to have told the jury whether the undisputed facts shown on the trial constituted probable cause or not, but by the instruction the court gave to the jury the question of probable cause, and left to them to determine what facts would constitute probable cause. Probable cause, and want thereof, is a question of law, to be determined by the court. *Bell v. Keepers*, 37 Kan. 64, 14 Pac. 542.

We think the instruction is also erroneous in directing the jury that, "after you are satisfied that the defendant instituted the prosecution without probable cause, then you ought also to find that he did so maliciously, because, in that case, he has done plaintiff an intentional injury." To sustain the action for malicious prosecution, two things are essential,—malice and want of probable cause. Malice is not of itself sufficient. Neither is want of probable cause. Both must concur. Affirmative proof of malice is as necessary as affirmative proof of absence of probable cause. Both are issues to be submitted to the jury, and both must be found, from the testimony, as facts, by the jury, to sustain a verdict for the plaintiff. This instruction told the jury that, after they were satisfied that defendant instituted the prosecution without probable cause, they ought to find that he did so maliciously; that, if the jury found the prosecution was without probable cause, they must be convinced of the existence of malice. This was clearly erroneous. The evidence might clearly show that defendant acted in the best of faith, but upon an entirely innocent mistake of fact. The jury might be fully satisfied of the entire absence of probable cause. In such a case, the rule as given the jury by the court be-

low would compel them to find the prosecution was malicious. The real effect of the instruction would be that the jury would find one of the essential facts, and the court find the other, and compel the jury to adopt its finding. *Malone v. Murphy*, 2 Kan. 258. For the error of the court in charging the jury that, if they found the prosecution was instituted without probable cause, they ought to find, also, that it was malicious, the judgment will be reversed, and the case remanded to the district court for a new trial. All the judges concurring.

(5 Kan. App. 643)

GREER v. THOMPSON et al.

(Court of Appeals of Kansas, Southern Department, C. D. Jan. 5, 1897.)

APPELLATE COURT—JURISDICTION.

Section 542a of the Code of Civil Procedure deprives this court of jurisdiction to review the order made by the district court in allowing the sheriff for feeding and caring for live stock taken on an order of attachment, as the same is a part of the costs incident to the main action, and is the only matter in controversy in this case.

(Syllabus by the Court.)

Error from district court, Butler county; C. W. Shinn, Judge.

Action by J. F. Greer against R. S. Thompson and others. Judgment for defendants, and plaintiff brings error. Dismissed.

John A. Eaton, for plaintiff in error. Redden & Schumacher, for defendants in error.

JOHNSON, P. J. On the 21st day of February, 1895, J. F. Greer commenced an action in the district court of Butler county, Kan., against R. S. Thompson and the Elk Grove Land & Cattle Company to recover damages for breach of contract. On filing the petition and the necessary affidavit and undertaking, he procured the issuance of an order of attachment therein, directed to the sheriff of said county; and thereafter, under the direction of the plaintiff below, certain cattle of the defendants below were seized by the sheriff, under the order of attachment; and thereafter the attachment proceedings were dismissed, and J. W. Middleton, sheriff of Butler county, Kan., moved the court to make an order of allowance for the feed and caring for said cattle attached, while they remained in his possession and under his charge as such sheriff, and that the same be taxed up as costs in said action; and upon said motion the court heard the evidence of the parties respecting the seizure, care, and feeding of the cattle, and, after due consideration of all the evidence, made the following findings and order therein: "The said plaintiff appeared in person, and by John A. Eaton, his attorney; and the sheriff appeared in person, and by T. A. Kramer and Redden & Schumacher, his attorneys; and J. W. Dunn, the person in whose actual custody the sheriff left his cattle as his agent, also appeared

in person, and by Redden & Schumacher, his attorneys. Thereupon the evidence pro and con was heard by the court on said motion and application, and the court took the matter under advisement until the 11th day of April, A. D. 1895. Now, on this 11th day of April, 1895, being one of the regular days of the court of the March term of 1895 of said court, this cause came on to be heard upon the matters upon which it was continued from March 28, 1895. The parties appeared the same as that day, and also came on to be heard at the same time the motion of the sheriff of this county for an order dismissing the attachment heretofore issued in this cause, and for judgment on behalf of the sheriff for the costs incident to the attachment, and for the expense of keeping and caring for the stock attached, which motion was heard by the court. And the court, being sufficiently advised, finds that heretofore, to wit, on the 6th day of March, 1895, the plaintiff in this cause filed a written dismissal of the attachment heretofore issued in this cause. And the court further finds, upon the matter taken under advisement that the sheriff necessarily and properly incurred expenses to the amount and in the sum of \$227.83 in the feeding, caring, and providing for the stock levied upon under said attachment, itemized as follows: Clay, with team, \$30; Birney Dunn, with team, \$3; Sigman, with team, \$18; Darnell, labor, \$18; J. W. Dunn, services, \$16; corral used, \$16; straw, \$5; sheriff's releasing cattle, \$5.50; fodder, \$43.12; corn in shock, \$83.21,—which said amount was allowed by the court to said sheriff in addition to his fees under the order of attachment. It is further considered, ordered, and adjudged by the court that the attachment be, and the same is hereby, dismissed, without prejudice as to the right of plaintiff to issue other orders of attachment in this case, and that the defendants R. S. Thompson and the Elk Grove Land & Cattle Company have and recover of and from the plaintiff, J. F. Greer, the costs incident to the issuance and service of said order of attachment, and for said sum so as aforesaid found as the reasonable expense of the sheriff in the keeping, feeding, and care of said cattle, together with the clerk's costs in said motion, and the attendance and mileage of the witness Clay, the whole taxed at \$——. Hereof let execution issue."

There is nothing involved in this controversy except the amount allowed by the court as expense of the sheriff in the feeding, care, and keeping of the attached property. The property seized by the sheriff under the direction of the plaintiff below consisted of live stock, which he was required, under the law, to take into his possession and keep the same. It necessarily involved the cost of feeding and care in the keeping thereof, and he was entitled to a reasonable allowance by the court for the care and necessary expense of feeding the same, and the cost necessarily

incidental to the action, and to carry out the object of the attachment proceedings instituted by the plaintiff below. Section 542a of the Code of Civil Procedure reads: "No appeal or proceeding in error shall be had or taken to the supreme court in any civil action unless the amount or value in controversy, exclusive of costs, shall exceed one hundred dollars (\$100) except in cases involving the tax or revenue laws, or the title to real estate, or an action for damages in which slander, libel, malicious prosecution or false imprisonment is declared upon, or the constitution of this state, or the constitution, laws or treaties of the United States, and when the judge of the district or superior court trying the case involving less than one hundred dollars (\$100) shall certify to the supreme court that the case is one belonging to the excepted classes." This case does not fall within the excepted class of cases in the section just quoted, and, not involving any amount or value except the costs incidental to the main action, the petition in error is therefore dismissed. All the judges concurring.

(5 Kan. App. 633)

#### NATIONAL MORTGAGE & DEBENTURE CO. v. LASH et al.

(Court of Appeals of Kansas, Southern Department, C. D. Jan. 5, 1897.)

##### PAYMENT TO AGENT—REVIEW ON APPEAL.

1. Where an agent is authorized in writing to negotiate a loan of money to be secured by mortgage on real estate, and is furnished by the mortgagors with the note and mortgage to perfect the loan, and receives the money from the mortgagees on the delivery of the note and mortgage, the payment of the money to the agent is a payment to the principal, and the mortgagee is not liable for a failure of the agent to pay the money over to his principal.

2. Where there is evidence on the trial of a cause tending to prove each fact necessary to entitle the party to recover, and the jury returns a verdict in his favor, and the same has been approved by the trial court, the appellate court will not disturb the verdict or judgment rendered thereon, although this court would have come to a different conclusion on the entire evidence; but, where there is an entire lack of evidence to prove some material fact necessary to enable the party to recover, this court will reverse the judgment of the lower court, and remand the case for new trial.

(Syllabus by the Court.)

Error from district court, Reno county; L. Houck, Judge.

Action by Ephraim J. Lash and others against the National Mortgage & Debenture Company. Judgment for plaintiffs. Defendant brings error. Reversed.

McKinstry & Fairchild, for plaintiff in error. Wright & Stout and Waggener, Horton & Orr, for defendants in error.

JOHNSON, P. J. This action was commenced by the defendants in error, in the district court of Reno county, to recover an amount claimed to be due them for the con-



sideration of the execution of a certain note and mortgage to the plaintiff in error. The plaintiffs below alleged: "Now come the plaintiffs, by their attorneys, Wright & Stout, and allege that the defendant is a foreign corporation, organized and existing under the laws of the state of Massachusetts, having a Western office at the city of Topeka, Shawnee county, Kansas, and doing a general loan business in the state of Kansas, on, before, and since the 16th day of May, 1889. Plaintiffs further allege that on or about the 16th day of May, 1889, the plaintiffs entered into a written contract with the defendant, by the terms of which these plaintiffs were to receive a loan of twenty-two hundred and one and  $\frac{35}{100}$  (\$2,201.35) dollars, which sum of money was to be paid by the defendant to these plaintiffs at the time of the completion of a certain two-story frame dwelling house to be constructed by said plaintiffs upon lot five (5), block eighteen (18), in Miller & Smith's addition to the city of Hutchinson, as shown by the recorded plat thereof; that said plaintiffs, about the time of the execution of the said contract, and to secure to the defendant the payment of said money according to the terms and conditions of said contract, made, executed, and delivered to the defendant their certain promissory note in writing of that date, whereby they agreed to pay to the defendant the sum of twenty-five hundred dollars in five years from the date thereof, with interest thereon at the rate of seven per cent., payable semi-annually. Plaintiffs further allege that, at the time of the execution of the said promissory note, they made, executed, and delivered to the defendant their one certain mortgage deed in writing of even date therewith, whereby they conveyed to the defendant all of lot five (5), in block eighteen (18), in Miller & Smith's addition to the city of Hutchinson; that said mortgage deed was duly acknowledged in accordance with the laws of the state of Kansas, and filed for record in the office of the register of deeds of Reno county, Kansas, on the 16th day of May, 1889, and recorded in volume —, at page —, all of which more fully appears by a copy of said mortgage hereto attached, marked 'Exhibit A,' and made a part hereof. Plaintiffs further allege that the said written contract and promissory note hereinbefore mentioned and described are in the possession and under the control of the defendant herein; that plaintiffs have made due efforts to secure said contract and promissory note, or copies thereof, from the defendant, but at the time of filing this petition they have been wholly unable to secure the same, or to attach copies thereof as exhibits to this petition. Plaintiffs further allege that the said building above referred to has been duly completed and finished according to the terms and conditions and specifications mentioned in said agreement, and the same has been duly examined and accepted by the said defendant

that said building was so completed and accepted by said defendant company on or about the 15th day of August, 1889, and said plaintiffs have in every respect performed and completed all the terms and conditions of said contract, and by reason thereof are entitled to the payment of the said sum of twenty-two hundred and one and  $\frac{35}{100}$  dollars from the defendant according to the terms and conditions of said contract; that the said defendant fails, neglects, and refuses to pay to these plaintiffs the aforesaid sum of money, or any part thereof, though demand has been frequently made since the completion of the building, and before the institution of these proceedings; that there is now due, unpaid, and payable to these plaintiffs from the defendant, by reason of the premises, the sum of \$2,201.35, and interest thereon at the rate of six per cent. per annum from the 15th day of August, 1889. Wherefore plaintiffs pray judgment against the defendant in the sum of twenty-two hundred and one and  $\frac{35}{100}$  (\$2,201.35) dollars, and interest thereon at the rate of six per cent. per annum from the 15th day of August, 1889, together with costs of this action." To this petition is attached a copy of the mortgage given to secure the payment of the promissory note.

Ephraim J. Lash and Robert H. Smith made a written application to V. P. Caffry, a loan agent at Hutchinson, for a loan of \$2,500 on a certain lot in the city of Hutchinson. Caffry was an agent for the Kansas Mortgage Company of Topeka, Kan. The application was as follows:

**"Application for a Loan on City Real Estate.**

"The undersigned, Ephraim J. Lash et al., of Hutchinson post office, county of Reno, state of Kansas, hereby appoints the Kansas Mortgage Company of Topeka, Kansas, agents to procure a loan of two thousand and five hundred (\$2,500) dollars for the term of five years, at seven per cent. per annum, payable semiannually, principal and interest to be paid at such places as the lender may direct; to be secured by a first mortgage on one lot in the city of Hutchinson, Reno county, Kansas, to wit, lot five (5), block eighteen (18), Miller and Smith's addition, as shown by the duly-recorded plat thereof. This lot has a frontage of 45 feet, almost equal to ordinary lots.

"To be answered and subscribed by applicant: (1) What is the size of each of the lots above described? A. 45 ft. frontage by 165 ft. deep. (2) Do you have access to rear of property by ample alleyway? A. Yes. (3) Are the lots up even with the established grade of street? A. Two ft. above grade. (4) Is the frontage north, south, east, or west? A. North. (5) How far is the property from business street? A. 1-12 blocks. (6) Size and description of outbuildings (give size, height, material, etc., fully). A. 24x36,

two-story frame, tin roof, one bay window, two porches 6x12, 6x14, contains nine rooms, three closets, stone foundation, all lathed, plastered, painted, hard wood, oil finish inside. Value, \$4,000.00. (7) Kind and quality of fences. A. None. Fine lawn 2 ft. above grade. (8) What other improvements? A. All necessary outbuildings, trees, etc. Value, \$400.00. (9) Cash value of the land exclusive of the improvements valued above. A. \$3,000.00. (10) Total cash value of the property at this date. A. \$7,400.00. (11) When did you buy the property, and what did you pay for it? A. 1889. \$3,000.00. (12) What is the value of the improvements made since buying? A. All, \$4,400.00. (13) Give date when last improvements were finished. A. April. Cost of same, \$4,400.00. (14) Selling price per lot of unimproved lots similarly located. A. Lot of 25 ft. frontage, two blocks west, \$1,500.00. (15) What amount of fire insurance will you assign to the lender? A. \$2,500.00. (16) Is the property incumbered by mortgages, unpaid taxes, or liens of any kind? A. None. (17) Nature of present incumbrance and by whom held. A. Nothing; clear. (18) Will payment be accepted and release given? A. ——. (19) Is the neighborhood well improved? A. Yes. What class of people are living near? A. Good citizens; fine residences. (20) What is the population of your city? A. 20,000. (21) On what railroads is it located? A. A., T. & S. F.; C. K. N.; C. K. W.; M. O. P.; N. G. (22) Is the property well supplied with water? A. Yes; well and hydrant. (23) What is the value of all your personal property? A. \$4,000.00. (24) What other real estate do you own? A. Value, \$10,000.00. (25) What incumbrance, if any, upon it? A. \$2,200.00. (26) What is the amount of your indebtedness not hereinabove mentioned? A. Nothing. (27) In whom is the title to the property applied or vested? A. Applicant. (28) By whom are the premises occupied? A. Applicant. (29) For what purpose is the property used? A. Family residence. (30) What is the annual rental value? A. Not rented. Would rent for \$480.00. (31) Your wife's (or husband's) name in full. A. Anna M. Lash. Smith is single. Age 20 years. Your age. A. Lash, 30; Smith, 36. (32) In what business are you engaged? A. Builders, architects, contractors. (33) Purpose for which money is wanted? A. Pay balance due on house. (34) When is money wanted? A. As soon as possible.

"I am in peaceable possession of the aforesaid premises, and my title thereto is not questioned, nor do I know of anything that may give rise to any adverse claims to my title in such property. There are no judgments unsatisfied or suits pending against me in any court of record in the state of Kansas or of the United States. There are no unrecorded deeds or mortgages. I owe no money for work done or material fur-

nished for improvements on said property, and I am neither principal nor surety on any bond or other contract which is by law a lien upon said premises, except such as are shown by abstract submitted, and these shall be removed before the loan herein applied for is completed.

"The statements made in this application are true in every particular, and are made by me to be used by the Kansas Mortgage Company of Topeka, Kansas, as my agents for the purpose of obtaining a loan of money, and they are hereby authorized to perfect any flaws in my title of record at my expense.

"Dated April 30th, 1889.

"Ephraim J. Lash.  
"Robert H. Smith."

This application was sent to the Kansas Mortgage Company at Topeka, and the loan was secured thereon from the defendant below, and the note and mortgage were prepared by the Kansas Mortgage Company of Topeka, Kan., and sent to Caffry at Hutchinson for execution, and also a blank order for the applicants to sign, designating a party to whom the proceeds of the loan should be paid. Caffry procured the execution of the note and mortgage, and also claimed to have procured the execution of the order directing the Kansas Mortgage Company of Topeka to pay the proceeds of the loan to V. P. Caffry. The order was a blank form sent out with the papers in each loan made by the company, and was designated as the "Blue Order," being printed on blue paper. It was the custom of the Kansas Mortgage Company to send a blank with all loan papers sent out for execution, and have some person designated to receive the proceeds of the loan. The order was as follows:

"Note E 4,569.

"Hutchinson, May 9th, 1889.

"Pay V. P. Caffry, or order, the proceeds of the loan by you negotiated for us with the Nat'l Mortgage and Debenture Company, and this shall be your receipt therefor.

"Ephraim J. Lash.  
"Anna M. Lash.  
"Robert H. Smith.

"To the Kansas Mortgage Company, Topeka, Kansas.

"Note: This order is to be signed by the party borrowing at the time of executing the papers, and must be sent to us with note and abstract showing mortgage filed for record. Draft will be remitted by return mail, or currency by express, as requested."

The written contract mentioned in the petition of plaintiffs below is as follows:

"The Kansas Mortgage Company, Topeka, Kansas.

"Bond for Completion of Improvements.

"Know all men by these presents, that we, Ephraim J. Lash and Annie M., his wife,

and Robert H. Smith, unmarried, as principals, and V. P. Caffry and J. M. Vaughan, sureties, all of the county of Reno and state of Kansas, are held and firmly bound unto the Kansas Mortgage Company, a corporation organized and existing under the laws of the state of Kansas, in the sum of five thousand dollars, to the payment of which we hereby bind ourselves, our executors and administrators. This obligation is made upon the following conditions: That whereas, the above-named Ephraim J. Lash and Annie M., his wife, and Robert H. Smith, unmarried, have borrowed of the said Kansas Mortgage Company, for the term of five years, the sum of twenty-five hundred dollars, payable, with interest, according to the terms of a certain promissory note of even date herewith, executed by said Ephraim J. Lash and Annie M., his wife, and Robert H. Smith, unmarried, to the said Kansas Mortgage Company, and the payment of which said note is secured by a mortgage of the same date upon the real estate hereinafter described; and whereas, the said Ephraim J. Lash and Annie M., his wife, and Robt. H. Smith, unmarried, in order to make the said real estate satisfactory security for the payment of the said note, have promised and agreed to and with the said the Kansas Mortgage Company that they will, on or before the 10th day of August, 1889, erect, make, and complete, in a good and workmanlike manner, on the said real estate, to wit, lot 5, block 18, Miller & Smith's addition to Hutchinson, situate in the county of Reno and state of Kansas, the buildings and improvements hereinafter described in detail: Now, therefore, if the said Ephraim J. Lash and Annie M., his wife, and Robert H. Smith, unmarried, shall well and truly perform the said agreement and promise, and make and erect and complete the said buildings and improvements in the manner and within the time so promised, and so fully pay for the same that no mechanic's lien shall be filed, either for material or labor, so as to affect said real estate, then this obligation to be void; otherwise, to be in full force and effect. The said buildings and improvements so agreed to be erected and made are in detail to be as follows: A second-story frame, shingle-roofed building, 24x36 feet; addition 14x18 feet, one story, tin roofed; one bay window; two porches, 6x14 feet each; nine rooms, three closets, and pantry, all lathed, plastered, and painted, finished in inside and hard wood and oil; stone foundation,—all finished complete in a good and workmanlike manner. Witness our hands, this 16th day of May, 1889.

"Attest:

Ephraim J. Lash.

"Annie M. Lash.

"Robert H. Smith.

"V. P. Caffry.

"J. W. Vaughan."

To the petition and cause of action of the plaintiffs below, the defendant below made

the following answer: "And now comes the said defendant, the National Mortgage & Debenture Company, and for answer to the petition of the said plaintiff says: First. That it denies each and every allegation contained in the petition of the said plaintiff. Second. And for a second and further defense to the petition of the said plaintiff, this defendant says that any and all moneys that were ever due and payable, or claimed to be due and payable, to said plaintiff, by or from this defendant, for and on account of the loan, mortgage, and promissory note, in the petition of the said plaintiff mentioned, have been fully paid by this defendant to the said plaintiff in the manner following, to wit: On the 5th day of May, 1889, and when certain sums of money claimed to be due, owing, and coming to said plaintiff for and on account of the loan, mortgage, and promissory note mentioned in the said plaintiff's petition were in the hands of this defendant, the said plaintiff made, constituted, and appointed in writing one V. P. Caffry as his agent to receive the said moneys in the hands of this defendant. The said written appointment and authority to receive the said moneys was dated May —, 1889, was signed by the said plaintiff, and directed this defendant to pay to the said V. P. Caffry, or order, the proceeds of the loan mentioned in said plaintiff's petition, and stated that the said order and authority to pay said moneys and the proceeds of said loan should be this defendant's receipt therefor. A true copy of said order is hereto attached as an exhibit, and made a part of this answer. And this defendant avers that the said V. P. Caffry duly presented and delivered the said written order and authority to this defendant, and demanded the proceeds of said loan, and that, upon such presentation, this defendant paid to the said V. P. Caffry the proceeds of said loan, and all the moneys in the hands of this defendant due or coming to the said plaintiff, and retained the written order and authority as its voucher and receipt for said payment. Wherefore, this defendant prays judgment for its costs."

The plaintiffs below, for reply to answer of defendant, denied each and every allegation therein contained, which is verified by the affidavit of Ephraim J. Lash, as follows:

"State of Kansas, Reno County—ss.: Ephraim J. Lash, of lawful age, being first duly sworn, deposes and says that he is one of the plaintiffs herein, that he has read the foregoing reply, and the facts therein set forth are true in substance and in fact.

"Ephraim J. Lash.

"Sworn to before me, and subscribed in my presence, this 24th day of October, 1889.

"W. T. Atkinson, Notary Public."

Upon the issues joined, the case was tried before the court with a jury, and a verdict was returned for the plaintiffs below for the

sum of \$1,622.79, and judgment rendered thereon.

Plaintiff in error brings the case to this court, and asks for a reversal of the judgment, and presents six grounds of error for the consideration of this court. We think there is but one question properly before us to determine, and that is, did the court err in overruling the motion of defendant below for a new trial, and in rendering judgment for the plaintiffs below under the pleadings, evidence, and verdict of the jury? There were no objections raised as to the pleadings, evidence, or the instructions of the court to the jury, and no instructions requested by the defendant below and refused by the court. The controversy in this suit grows out of what is known and termed a "building loan" to secure the erection of certain buildings on mortgaged property. The application for the loan and the loan itself were made before the building was constructed; in fact, the loan was made to enable the plaintiffs below to erect a building on the proposed mortgaged premises. The plaintiffs below made their application in writing, upon which they sought to procure a loan of \$2,500, and in their application they made the Kansas Mortgage Company of Topeka, Kan., their agent for the purpose of obtaining such loan. All the papers necessary to procure the same were perfected through V. P. Caffry, of Hutchinson, who was acting in the matter for the Kansas Mortgage Company of Topeka, Kan. At the time of making the written application for the loan, and appointing the mortgage company their agent, the plaintiffs below entered into a written agreement with the mortgage company conditioned that they would construct a two-story house upon the premises to be mortgaged to secure the loan. When the application for the loan and the written agreement were received at Topeka, the mortgage company thereunder negotiated the loan with the National Mortgage & Debenture Company, defendant below, on behalf of the plaintiffs below, and, when the mortgage company received the note and mortgage from the mortgagors, the plaintiff in error paid the money over to the Kansas Mortgage Company of Topeka, Kan., and received from it the note, mortgage, abstract of title, and the blue order directing the money to be paid over to V. P. Caffry. Ephraim J. Lash, one of the plaintiffs below, gave his deposition at Gainesville, Tex., taken on behalf of the plaintiffs below, which was read in evidence on the trial. He testified in chief (no cross-examination being had) as follows: "Q. 28. Did you execute a bond for the completion of this building according to the terms of the application for the loan? A. Yes; Smith and I did. Q. 29. State fully how the proceeds of this loan were to be disbursed, and by whom. A. Said proceeds were to be disbursed by paying for the lot, the material that went into the house that Smith and I were building, and for carpenter work on said house. If

there was any balance left, Smith and I were to get it." The evidence throughout shows that the transaction by which this loan was procured was by and through the Kansas Mortgage Company of Topeka, Kan.; that the negotiations were made by it with the defendant below, and the papers to perfect the loan were prepared by it, and when the papers were executed at Hutchinson and sent to the mortgage company at Topeka the blue order was with them; and on the delivery of the note, mortgage, application for the loan, abstract of title, and the blue order, the money for the loan was then paid over to the mortgage company, and the papers delivered to the plaintiff in error. If, as claimed by the plaintiffs below, the blue order was never executed by them, their agent was the party who used it, together with all other papers affecting this loan, and represented that it was genuine, and the plaintiffs below were bound by the acts and representations of their agent in and about the procuring of this loan and obtaining the money thereon. Having been authorized in writing to negotiate the loan, and after having negotiated it under the appointment as agent, and having been intrusted with all the papers necessary to perfect the loan, and the defendant below having paid the money over to the agent authorized to negotiate the same, it was not responsible for the further application of the money loaned. It had made the loan, received the papers on which it made the same, and had a right to pay the money over to the agent authorized to negotiate the same, and, having done so, was not liable to plaintiffs below for the acts of their own agent. If the Kansas Mortgage Company of Topeka, after having received the money, failed to account to plaintiffs below, they could maintain their action against their agent for failure to pay over the money received on their account. Lash testified that the proceeds arising from the loan were to be disbursed by paying for the lot, the material that went into the house that Smith and himself were building, and for the carpenter work on said house, and, if there was any balance, Smith and himself were to get it. He does not say who was to disburse the proceeds, nor does the evidence show whether the money was disbursed by the mortgage company in the way stated by him or not, and does not show the cost of the building, or whether there was any balance to be paid over to him and Smith. The evidence shows that the plaintiff in error and the Kansas Mortgage Company of Topeka, Kan., were separate corporations.

Where there is any evidence tending to prove each fact necessary to entitle a party to recover, and the jury have returned a verdict in his favor, and the same has been approved by the trial court, the appellate court will not reverse the judgment of the district court founded thereon, although it would have come to a different conclusion upon the whole evidence; but, where there is an entire lack

of evidence to prove any material fact necessary to entitle the party to recover, this court will reverse the judgment of the lower court, and remand the case for a new trial thereon. The evidence in this case fails entirely to show anything which would authorize a recovery against the National Mortgage & De-benture Company, and the motion for a new trial should have been granted on motion of defendant below. The judgment is reversed, and the case remanded to the district court, with direction to set aside the verdict and judgment, and grant a new trial therein. All the judges concurring.

(5 Kan. A. 880)

ROBINSON v. MILES.

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 9, 1897.)

APPEAL—RULES OF COURT—DISMISSAL.

An appeal will be dismissed when appellant fails to comply with the rules relating to the specification of errors, and the quoting of the substance of the evidence claimed to have been erroneously admitted, or the stating of the particular pages of the record where the evidence referred to may be found.

Error from district court, Geary county; James Humphrey, Judge.

"Not to be officially reported."

Action by R. H. Miles against S. F. Robinson and others to recover a deposit in bank. From a judgment for plaintiff, defendant S. F. Robinson brings error. Affirmed.

Bertram & Nicholson, for plaintiff in error. W. P. Seeds and Stambaugh & Hurd, for defendant in error.

CLARK, J. For two or three years prior to March 1, 1888, S. F. Robinson and W. P. Robinson were members of a partnership engaged in the banking business at Hope, Dickinson county, under the name of the Farmers' Bank of Hope, and were president and cashier, respectively, of said bank. During the same period, these parties, together with one C. L. Gibson, were also engaged in the mercantile business at Hope, under the firm name of Robinson Bros. & Co. About January 1, 1889, one R. H. Miles, the plaintiff in error herein, became a resident of Hope, and a few months thereafter became a depositor in this bank. In the spring of 1889, S. F. Robinson moved to Oklahoma, where he engaged in business. But he made at least two trips to Kansas in 1891, and at such times took charge of the business of the bank during the temporary absence of his brother W. P. Robinson. Some time in 1892 the bank failed, and Miles, being a creditor, commenced this action against several parties, including S. F. Robinson, to recover the amount due him from the bank. S. F. Robinson filed a verified general denial. Upon the trial, evidence was introduced tending the show that about the 1st of March, 1888, W. P. Robinson retired from the mer-

cantile firm of Robinson Bros. & Co., and that about the same time the plaintiff in error, S. F. Robinson, retired from the banking firm, and thereafter had no further interest therein. Notice of the dissolution of the firm of Robinson Bros. & Co. and of W. P. Robinson's retirement therefrom was duly given by publication in a newspaper, but no such notice was given of the retirement of S. F. Robinson from the banking firm. In answer to the question as to when, if at all, S. F. Robinson retired from the firm comprising the Farmers' Bank of Hope, the jury answered, "Not retired;" and, to the question as to whether Miles commenced transacting business with the bank after S. F. Robinson actually retired therefrom, they answered, "No." In addition to these special findings, a general verdict was returned in favor of the plaintiff for \$900.10. A motion for a new trial was overruled, and judgment rendered in accordance with the general verdict. S. F. Robinson is here, complaining of that judgment; but, in doing so, he has failed to comply with the requirements of the rules of this court with reference to the specification of the errors relied upon, the quoting of the substance of the evidence claimed to have been erroneously admitted, or stating the particular pages of the record where much of the evidence referred to in the brief may be found.

An earnest effort to ascertain as to whether the record discloses the commission by the court of prejudicial error would necessitate a careful examination of nearly 200 pages of typewritten matter. This we do not feel warranted in doing, especially as a hasty perusal of the evidence would indicate that the special findings of fact are not without support. It was partially to obviate the necessity of such examination that induced this court to adopt rules upon the subject of briefs. A substantial compliance therewith is essential to the orderly dispatch of business; "and a disregard of their plain requirements by a plaintiff in error, without valid excuse, is of itself a sufficient reason for the affirmance of the judgment or the dismissal of the case." *Baker v. Sears*, 2 Kan. App. 617, 42 Pac. 501; *Insurance Co. v. Barnes*, 2 Kan. App. 642, 42 Pac. 938; *Eldridge v. Deets* (Kan. App.) 45 Pac. 948; *Tatum v. Roberts* (Kan. App.) 46 Pac. 983; *Busenbark v. Park* (Kan. App.) 47 Pac. 324. The judgment will be affirmed. All the judges concurring.

(5 Kan. A. 880)

MISSOURI PAC. RY. CO. v. BROWN.

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 9, 1897.)

JURY—CHALLENGE—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. When the record shows that there was a full and fair trial of the case, and that the verdict of the jury is fully sustained by the evidence, the ruling of the court overruling a chal-

lenge to one of the jurors who sat in the case, on a suspicion of prejudice against the unsuccessful party, and when it does not appear that any substantial rights were prejudiced by such ruling, it, of itself, is not sufficient ground to justify a reversal of the judgment.

2. When evidence is admitted in the trial of a case to a jury, over the objections of a defendant stricken out, and the jury instructed to disregard it, the error, if any, committed in its admission, will be cured, unless it appears that the losing party was materially prejudiced thereby.

3. While it is the right of a defendant to have the jury find upon particular questions of fact, the court is not required to submit questions which are immaterial, irrelevant, or mere repetition in another form of questions already submitted.

(Syllabus by the Court.)

Error from district court, Saline county; R. F. Thompson, Judge.

Action by Joseph Brown against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Waggener, Horton & Orr and Wilson & Wilson, for plaintiff in error. Garver & Bond, for defendant in error.

GILKESON, P. J. The defendant in error, as plaintiff below, brought this action against the defendant railway company, to recover damages by him sustained from fire alleged to have been negligently set out by the defendant. The negligence charged is as follows: "That on the 28th day of July, 1890, the defendant, in the operation of its railroad, negligently and carelessly operated said railroad, by running a defective engine, and one that did not have proper spark arresters in good repair, and by carelessly and negligently managing said engine; \* \* \* that by such carelessness and negligence did cause fire to escape therefrom, set fire to, destroy, and injure the growing timber of plaintiff."

There are numerous errors assigned by plaintiff in error, and, after a very careful examination and consideration of this case, we are constrained to hold that, if any occurred, they are immaterial, and did not prevent the defendant below from having a fair and impartial trial.

The principal error urged is the overruling of defendant's challenge to Juror Wheeler for cause; and we should be unwilling by a decision to weaken the guard thrown around the jury box; yet we cannot say that the action of the court in this respect was erroneous. The record shows that this case was fully, carefully, and ably tried by the learned counsel for both sides, and the facts fully presented to the jury by the evidence, and were carefully weighed and considered by them, as shown by their special findings returned.

The next error urged is in permitting the plaintiff to prove the character of the coal used by the engine, but, as this was stricken out by the court, we cannot understand how

the defendant was prejudiced thereby. But it is contended by counsel that the mischief was done before it was stricken out. This, in some cases, might be true; and, if there was the slightest intimation in this cause that the jury were influenced thereby, it would be a strong reason for reversal; but the plaintiff in error has failed to point out wherein it was prejudiced thereby, and the jury, by their answers to special findings as to the cause and origin of this fire, negative any such inference. Their answers upon this proposition are: "Q. 60. Was the engine which is charged with setting out the fire complained of provided, at the time, with suitable modern appliances for the prevention of the escape of fire? Ans. No. Q. 61. If the next preceding question is answered 'No,' then state in what particular said engine was not so provided. Ans. Spark arrester. Q. 62. If Q. 60 is answered 'Yes,' then state whether or not said appliances were at the time in good repair. Ans. Was not. Q. 63. If the next preceding question is answered 'No,' then state in what particular the said appliances were not in good repair at said time. Ans. We don't know. Q. 64. Was the condition of the engine good or poor, so as to cause said fire? Ans. Poor. Q. 65. If the next preceding question is answered that the condition of the engine was poor, or that in substance, then state particularly and in what respects the condition of the engine was poor, so as to cause said fire. Ans. Spark arrester. Q. 66. Were the engineer and fireman who had control of the engine that is charged with setting out the fire complained of competent and efficient men for the business in which they were engaged? Ans. Don't know." "Q. 68. Was the engine charged with setting out the fire complained of operated in the usual and ordinary manner at the time it is claimed that that fire was set out? Ans. We don't know."

It is further assigned as error the refusal of the court to submit certain particular questions of fact to the jury. We cannot agree with counsel in this contention. We think these questions were embodied in other questions asked and answered by the jury. They all have reference to the measure of damages, the value of the land immediately before and immediately after the fire. Upon this proposition the court instructed the jury: "If you find from the evidence that the plaintiff is entitled to recover herein, then the measure of his recovery is the value of the property destroyed or injured; and, in determining the value of the property destroyed or injured, you should ascertain what was the value of the land on which the timber was immediately before the fire and its value immediately after the fire, and the difference, if any, should be the amount the plaintiff is entitled to recover. If at all, for the destruction or injury by fire." We think this instruction is correct (*Dwight v. Railroad Co.*, 132 N. Y. 199, 30 N. E. 398).

and has been adopted in this state (Railroad Co. v. Willits, 45 Kan. 110, 25 Pac. 576). Under this instruction the following special questions were submitted to the jury, and answered by them: "Q. 41. What was the value of the said land where the timber was, with the timber that remained immediately after the fire? Ans. Thirty-five dollars. Q. 43. If you find a general verdict for the plaintiff, state how much you allow as the damage for the difference in the value of the land on which the timber was immediately before and immediately after the fire. Ans. Three hundred dollars." "Q. 48. If you find a general verdict for the plaintiff, state how much you allow as damages by reason of the destruction of said walnut, elm, boxelder, and cottonwood trees. Ans. Three hundred (\$300) dollars." "Q. 80. If you find a general verdict for plaintiff, state how much you allow as damages for the destruction of said timber by fire. Ans. Three hundred dollars." And while it is the undoubted right of the defendant, under the Code, to have the jury find upon particular questions of fact, we do not understand this provision of the Code as compelling the court to submit every question presented, even though immaterial, irrelevant, or repeating in a different form the same question or one already submitted. We are forced to the conclusion in this case that the defendant below had a full, fair, and impartial trial of this case. The general verdict and special findings are supported by the evidence. The judgment of the court below will be affirmed.

CLARK, J., concurs. GARVER, J., not sitting, having been of counsel.

(5 Kan. App. 246)

#### BRANCH v. MILFORD SAV. BANK.

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 4, 1897.)

#### CORPORATIONS—INSOLVENCY—TRUST FUND—PROOF OF CLAIMS.

1. Richard Lewis and wife executed their mortgage deed to the Security Investment Company to secure the sum of \$700, by the terms of which they agreed to insure the buildings on the premises for the benefit of the said Security Investment Company, and did procure, in accordance with the terms of the mortgage, a policy of insurance upon such premises, in the sum of \$225, indorsed payable to the mortgagee or its assigns. The investment company assigned this mortgage and the note secured thereby to the Milford Savings Bank. After it was assigned the property was destroyed by fire, and the amount of the policy paid to the investment company and retained by them. Afterwards, the investment company becoming insolvent, W. T. Branch was appointed, and now is, the assignee thereof, and this sum was turned over to him as a part of the general assets of the company. *Held*, that the money became a trust fund, and not an asset of the company, and the bank has a right to follow and reclaim the fund from the assignee.

2. And, further, *held*, that the failure of the bank to present its demand to the assignee will

not prevent it from maintaining an action for the recovery of the trust fund.

(Syllabus by the Court.)

Error from district court, Mitchell county; Cyrus Heren, Judge.

Action by the Milford Savings Bank against W. T. Branch, assignee of the Security Investment Company, insolvent, to recover the proceeds of an insurance policy as a trust fund. From a judgment for plaintiff, defendant brings error. Affirmed.

D. M. Thorp and S. S. Spencer, for plaintiff, in error. Clark A. Smith, for defendant in error.

GILKESON, P. J. The findings of fact made by the court are as follows: He finds "that the plaintiff is a corporation and was such corporation at the date of the commencement of this action, and that the Security Investment Company was, prior to the commencement of this action a corporation, doing business in the state of Kansas; that on the 7th day of February, 1891, the Security Investment Company made an assignment of all its property for the benefit of its creditors; that W. T. Branch was at the date of the commencement of this action, and prior thereto and ever since said date has been, the duly qualified and acting assignee of said Security Investment Company; that on the 1st day of November, 1887, one Richard H. Lewis executed to the said Security Investment Company his bond and mortgage of that date, due five years after date, for the sum of \$700, the said mortgage being given to secure said bond in said amount,—the said mortgage having been given as security for said bond on lot 10, block 8, in the city of Glasco, Cloud county, Kan.; that the allegations of the terms of said mortgage in the petition, which were not denied under oath by the defendant, are that 'by the terms of said mortgage said Richard H. Lewis contracted to insure, and did procure a policy of insurance upon, the dwelling house situated on said lot, in the sum of \$225, insuring said Richard H. Lewis and the holder of said bond and real-estate mortgage against loss or damage by fire in said sum of \$225'; that the allegations of the terms of said policy which are not denied under oath by the answer, but denied generally, are 'that by the terms of said policy of insurance it was expressly stipulated that the loss, if any, occurring thereunder, was to be paid to the Security Investment Company, or its assigns, as mortgagee, as its or his interest might appear'; that the conditions of the mortgage itself, as introduced in evidence upon the question of procuring insurance, provided that the said first party shall keep the buildings on said premises insured in some responsible or approved company or companies for the benefit of said second party in the sum of not less than \$300, and shall deliver the policies and renewal receipts to the said second party, and, 'should said first party neglect so to do, said second party may effect such in-

surance, and recover of said first party the amount paid therefor and interest at 12 per cent. per annum, and this mortgage shall stand as security therefor,' which provision in said mortgage is the only provision therein contained referring to insurance; that on the 29th day of November, 1887, the said Security Investment Company, by V. H. Branch, its secretary, transferred the bond and mortgage to the plaintiff; that the assignment was without recourse, save that it guaranteed—First, the prompt payment of the interest thereon at 7 per cent. per annum, payable semiannually, until the principal is fully paid, and, second, the payment of the principal within two years from maturity; that at the date of the commencement of this action the plaintiff was the owner and holder of said note and mortgage; that the said Lewis did procure insurance upon said property, and that there was paid by the insurance company executing the policy to the Security Investment Company the sum of \$225, by reason of their liability or supposed liability upon such policy of insurance; that said money so received by the said Security Investment Company was applied by the said Security Investment Company in the discharge of certain coupons upon this and other indebtedness from the said Lewis to the said Security Investment Company, some, if not all, of which they had prior thereto paid by reason of their guaranty; that the said sum has ever since been retained by the said Security Investment Company, and commingled with the general funds of said company, and at the time of the assignment of the estate it was included, after being so commingled with the other property assigned to W. T. Branch as the assignee; that, prior to the commencement of this action, upon request of plaintiff's attorney, the assignee declined to pay the said amount to the plaintiff; that on the 3d day of August, 1891, the bond executed by Richard H. Lewis, and secured by said mortgage, was presented to and allowed as a contingent claim by the assignee of the Security Investment Company, in the principal sum of \$700 and interest of \$37.61, making a total of \$737.61; that at the time of such presentation there was no mention made of insurance or mortgage, nor was there any special findings or finding of any kind of the assignee relative to the mortgage or insurance; that, some time after such allowance, to wit, about April 20, 1892, the plaintiff's attorney, in conversation with the assignee and V. H. Branch, who had previously acted in the capacity of secretary and president of such company, learned that said amount of \$225 as insurance money had been paid to the said Security Investment Company; that there is now in the hands of the assignee the said sum of \$225, together with 6 per cent. interest thereon from the 20th day of April, 1892, to this date, amounting in all to \$238.50, belonging to the plaintiff." These are not only sustained by "some," but by ample, testimony, and will not, therefore, be disturbed.

The conclusions of law are as follows: "As

conclusions of law, the court finds that the said sum of \$238.50 is in equity a trust fund, and that the title thereto is in the plaintiff, and that the assignee, W. T. Branch, should deliver over to the said plaintiff said amount in his hands as such assignee, conditioned that the said plaintiff will, upon receipt thereof, credit the amount on the claim heretofore proved up before the assignee, thereby reducing the amount so proved up from \$737.61 to \$499.11,"—which we think are correct. At the time the secretary of the investment company received the proceeds of this insurance policy, the relations of debtor and creditor did not exist between it and Lewis and wife, but, on the other hand, with respect to this specific fund, the relation of principal and agent existed between the investment company and the bank, and it was held by the investment company in a fiduciary capacity. It became a trust fund, never belonged to the investment company, and its creditors cannot be injured, therefore, by its being turned over to the bank, and, even if it has been mixed with the other funds of the company, this cannot prevent the plaintiff from following and reclaiming it. *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499.

The other point made by plaintiff in error is that the bank, having failed to present its claim for this fund to the assignee, is precluded from availing itself of its equitable lien against the assets of the estate of the company. This point cannot be sustained. *Myers v. Board*, 51 Kan. 89, 32 Pac. 658. The judgment will be affirmed. All the judges concurring.

(5 Kan. App. 626)

#### RICHARDSON v. WOODLAWN TOWN CO.

(Court of Appeals of Kansas, Southern Department, C. D. Jan. 5, 1897.)

#### SALE OF LAND—CONTRACT—OPTION TO DECLARE VOID.

Where, in a written agreement for the sale of land, the parties stipulate, "In case the second party shall fail to make the payments aforesaid, and each of them, punctually, and upon the strict terms and times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid, strictly and literally, without any failure or default, then this contract, so far as it shall bind the first party, shall become utterly null and void, and all rights and interest thereby created or then existing, in favor of or derived from the second party, shall utterly cease and determine, and the right of possession and all equitable and legal interests in the premises hereby contracted shall revert to and revert in the said first party, without any declaration of forfeiture, or act of re-entry, or any other act by the said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully, and perfectly as if this contract had never been made."—the meaning of such clause is that such agreement is void only at the election of the vendor or seller, who can avoid it or enforce it at his option. *Chambers v. Anderson*, 32 Pac. 1098, 51 Kan. 385.

(Syllabus by the Court.)



Error from district court, Sumner county; James A. Ray, Judge.

Action by the Woodlawn Town Company against John C. Richardson. Judgment for plaintiff. Defendant brings error. Affirmed.

On the 12th day of December, 1890, the Woodlawn Town Company commenced its action in the district court of Sumner county, Kan., to recover the purchase price of certain town lots situated in Woodlawn addition to the city of Wellington. The petition of the plaintiff below is as follows:

"The said plaintiff complains of said defendant, and avers: That said plaintiff is now, and for five years last past has been, a corporation, duly organized and existing under and by virtue of the laws of the state of Kansas. That on February 10, 1887, and prior thereto, the plaintiff was the owner in fee simple of the following described real estate, situated in Sumner county, in the state of Kansas, to wit, lots three (3) and four (4), in block twenty-two (22), in Woodlawn addition to the city of Wellington. That on said date said plaintiff and defendant each made, executed, and delivered to the other, in duplicate, an agreement in writing, whereby the said defendant agreed to buy of and from the plaintiff the above-described real estate, and to pay therefor the sum of two hundred and fifty dollars, as follows: Eighty-three and  $\frac{34}{100}$  dollars in cash on said date; \$83.33 on August 10, 1887; and \$83.33 on February 10, 1888; and to pay interest on said deferred payments at eight per cent. per annum from date until paid,—a copy of which said agreement, with all the indorsements thereon, is filed herewith, attached hereto, and made part hereof, as Exhibit A. And plaintiff avers that said defendant has failed, neglected, and refused, though requested, to pay either of said deferred payments, or any part thereof, and that said defendant is indebted to plaintiff on said agreement in the sum of one hundred sixty-six and  $\frac{66}{100}$  dollars, with interest thereon at eight per cent. per annum from February 10, 1887, all which is due and remains wholly unpaid. And plaintiff avers that it has performed and kept said contract on its part, and on July 19, 1890, it caused to be tendered to said defendant a deed as provided in said agreement, conveying to said defendant said premises, as in said agreement provided, and demanded payment of said two deferred payments, with interest as aforesaid, all of which was refused and declined by defendant. Wherefore plaintiff demands judgment against said defendant for one hundred and sixty-six and  $\frac{66}{100}$  dollars, with interest thereon at the rate of eight per cent. per annum from February 10, 1887, and for costs, and for all proper relief."

#### Exhibit A.

"Contract. The Woodlawn Town Company.

"This agreement, made this tenth day of February, in the year 1887, between the Woodlawn Town Company, of the first part, and John C. Richardson of Wellington, county of Sumner, state of Kansas, of the second part,

witnesseth: That in consideration of the stipulations herein contained, and the payments to be made as hereinafter specified, the first party hereby agrees to sell unto the second party lots Nos. three (3) and four (4), in block twenty-two (22), in Woodlawn addition to the city of Wellington, county of Sumner, and state of Kansas, as designated by the recorded map of said addition, for the sum of two hundred and fifty and no/100 dollars, with interest at the rate of eight per cent. Payment has been made and received of eighty-three and  $\frac{34}{100}$  dollars, and the remaining principal, with the annually accruing interest, shall be paid at the office of the first party, in two payments, at the times and in the manner following, that is to say:

	Day.	Month.	Year.	Principal.	Int.	Amt.	Recta.
1st Payment	10th	Aug.	1887	83.33	3.33	86.66	
2d Payment	10th	Feby.	1888	83.33	6.66	89.99	
3d Payment							

"And the said second party, in consideration of the premises, hereby agrees that he will make punctual payment of the above sums, as each of the same respectively becomes due, and that he will regularly and seasonably pay all such taxes and assessments as may hereafter be lawfully imposed on said premises. In case the second party, his legal representatives or assigns, shall pay the several sums of money aforesaid, punctually and at the times above limited, and shall strictly and literally perform all and singular the agreements and stipulations aforesaid, after their true tenor and intent, then the first party will cause to be made and executed unto the said second party, his heirs or assigns, upon request, at the office of the first party, and the surrender of this contract, a deed conveying said premises in fee simple, with the ordinary covenants of warranty as to incumbrances, except as to said lease existing against said premises at the date of this contract. And it is hereby agreed and covenanted by the parties hereto that time and punctuality are material and essential ingredients in this contract. And in case the second party shall fail to make the payments aforesaid, and each of them, punctually, and upon the strict terms and times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party, shall become utterly null and void, and all rights and interest thereby created or then existing, in favor of or derived from the second party, shall utterly cease and determine, and the right of possession, and all equitable and legal interests in the premises hereby contracted shall revert to and revest in said first party, without any declaration of forfeiture, or act

of re-entry, or any other act by said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully, and perfectly as if this contract had never been made. And said party of the first part shall have the right, immediately upon the failure of the party of the second part to comply with the stipulations of this contract, to enter upon the land aforesaid, and take immediate possession thereof, together with the improvements and appurtenances thereto belonging. And the said party of the second part covenants and agrees that he will surrender to the said party of the first part the said land and appurtenances without delay or hindrance, and no court shall relieve the party of the second part from a failure to comply strictly and literally with this contract. And it is further stipulated that no assignment of the premises shall be valid unless the same shall be indorsed hereon, and that no agreements or conditions or relation between the second party and his assignee, or other person acquiring title or interest from or through him, shall preclude the first party from the right to convey the premises to said second party or his assigns, on the surrender of this agreement, and the payment of the unpaid portion of the purchase money which may be due to the first party.

In witness of which, the Woodlawn Town Company has caused these presents, in duplicate, to be signed by the president of its board of directors and sealed with its common seal, and the second party has hereunto set his signature, on the day and year first above written.

"The Woodlawn Town Company,  
 "[Seal.] By A. H. Smith, President.  
 "John C. Richardson."

To this petition the defendant below filed a demurrer, setting forth that the petition of the plaintiff did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and the defendant elected to stand upon his demurrer. Judgment was rendered on the pleadings in favor of the plaintiff for the deferred payments under the contract. The defendant excepted, and brings the case here for review.

W. W. Schwinn, for plaintiff in error. A. E. Parker and L. Nebeker, for defendant in error.

JOHNSON, P. J. (after stating the facts). The defendant in error, as plaintiff below, commenced this suit to recover on a contract for the sale of lots 3 and 4, in block 20, in Woodlawn addition to the city of Wellington, Kan. The only question in the case turns upon the construction to be placed upon this contract. It is contended on the part of John C. Richardson, plaintiff in error, that, under the provisions of the written contract signed by him, he had the option to abandon

the purchase at any time, upon forfeiting all money paid by him thereon; that, when he refused to pay the contract price for the purchase of these lots, the contract became wholly void, and all the parties were released therefrom. In the case of *Bohart v. Investment Co.*, 49 Kan. 94, 30 Pac. 180; which was a suit upon a written contract, containing a provision similar to those now under consideration, it was there decided: "The provision of the contract making it null and void if Bohart made default in payment of his installments, or any installment, was for the benefit of the investment company. The company could have insisted on this provision, and had the contract annulled. It also had the right or option to declare a forfeiture for the nonpayment of the installments, or any installment; but it also could have waived that right. A waiver of the right to declare a forfeiture for nonpayment at a specified time is not a rescission of the contract. The investment company, as the vendor, is entitled to its money upon the contract, and the vendee to the lots therein described. *Barrett v. Dean*, 21 Iowa, 423; *Sigler v. Wick*, 45 Iowa, 630." In *Wilcoxson v. Stitt* (Cal.; 1884) 4 Pac. 629, it was held that "where, in an agreement for the sale of land, the parties stipulate that, 'in the event of the failure to comply with the terms of the agreement, the vendor shall be released from all obligations to convey, and the vendee shall forfeit all right thereto, and the agreement shall be void,' the meaning of such clause is that such agreement is void only at the election of the vendor, who can avoid it or enforce it at his option." In the case of *Chambers v. Anderson*, 51 Kan. 385, 32 Pac. 1098, the written contract contained a provision similar to that now under consideration, the only difference being that in that case it provided, "All rights and interest thereby created or then existing, in favor of or derived from the first party, shall utterly cease and determine"; under the contract sued on in this case the words are, "And all rights and interest thereby created or then existing, in favor of or derived from the second party, shall utterly cease and determine,"—the only difference in the two clauses being that in the case of *Chambers v. Anderson* occurs the words "first party," and in the case under consideration occurs the words "second party."

It is insisted that the case of *Chambers v. Anderson* would be decisive of this case, but for the use of the word "second," which changes the whole import, meaning, and force of the contract, and changes this provision from a provision for the benefit of the vendor into a provision for the benefit of the vendee, and in terms gives the vendee the right, at any time before final execution of the contract, to refuse any further performance. In order to get at the real intention of the parties to this contract, it is necessary to consider all parts of the contract together, and get the real meaning and purpose of the lan-

guage employed. The contract, after providing for the execution of the deed of warranty by the first party, reads: "And in case the second party shall fail to make the payments aforesaid, and each of them, punctually, and likewise to perform and complete all and each of the agreements and stipulations aforesaid, strictly and literally, without any failure or default, then this contract, so far as it may bind said party of the first part, shall become utterly null and void, and all rights and interests thereby created or then existing, in favor of or derived from the second party, shall utterly cease and determine." We think, by the language employed in this contract, that "the rights and interest derived from," would mean the rights or interest which had passed and been transferred by the sale of the land, rather than to the executory promise to pay the money. In the case of *Canfield v. Westcott*, 5 Cow. 270, which was an action of covenant, on articles of agreement under seal, to recover certain installments of the purchase money, the following clause in the articles came under consideration: "The said Daniel [the defendant] hereby agrees that should he fail in the performance of any part of the above covenants, that this contract shall become void and of no effect, and that said party of the second part [the testator] shall immediately re-enter and take possession of said premises without hindrance or molestation." In passing upon this clause in the agreement, the court says: "The provision that this agreement should be void was for the benefit of the vendor, on the vendee's default. The vendor might, therefore, consider the agreement void, at his own election, or affirm it, and bring his action on the covenant,"—and said that "this had been often so held in much stronger cases, and where the provision in the article was general and positive, in the words of both parties, that, if the vendee failed to perform, the contract shall be void." *Horton, C. J.*, delivering the opinion of the court in *Chambers v. Anderson*, supra, says: "Under the authorities it was the intention of all the parties to the written contract, when they inserted the clause permitting the contract to be null and void upon the default of Mary E. Chambers, to provide a penalty to insure the prompt performance of the contract by her. If the refusal of Mrs. Chambers to perform the terms of the contract prevented an action from being maintained thereon as against her, the agreement leaves everything in her own hands. It allows her to defeat or make the contract operative as may best subserve her interest, without any discretion on the part of the others. It makes it binding on the seller, but not on the buyer. But this is not the law. The provision in the contract permitting it to be regarded as null and void could only be taken advantage of at the election of the plaintiffs below, who can avoid it or enforce it at their option."

The forfeiture clause placed in this contract was wholly for the benefit of the Woodlawn Town Company, and it had the right to waive the same; and, when it executed the deed of conveyance of the town lots, and tendered it to the defendant, and demanded payment to the amount due on the contract, it waived the forfeiture clause, and was entitled to recover the money due under the contract, with the stipulated interest. The judgment of the district court is affirmed. All the judges concurring.

(5 Kan. App. 260)

GEORGE v. HUNTER.

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 4, 1897.)

COURT OF APPEALS—JURISDICTION.

The courts of appeals have no jurisdiction to review a judgment rendered in a civil action wherein the amount in controversy is less than \$100.

(Syllabus by the Court.)

Error from district court, Ellsworth county; W. G. Eastland, Judge.

Action by A. S. Hunter against H. S. George. Judgment for plaintiff, and defendant brings error. Dismissed.

N. Coover and C. J. Evans, for plaintiff in error. Lafferty & Sternberg, for defendant in error.

CLARK, J. This is an action of replevin, brought in the district court of Ellsworth county, by Hunter, to recover from George the "undivided two-thirds of six stacks of wheat," situated on a certain farm in said county. The property in controversy was duly delivered to the plaintiff under the writ of replevin, and possession retained by him. Thereafter the defendant answered by general denial, and also claimed a return of the property. The plaintiff had judgment, and the defendant, George, as plaintiff in error, brings the case here. Hunter was a tenant farmer, a judgment debtor, and the head of a family. George was a constable, and by virtue of an execution duly issued to him had levied upon this property. Hunter claimed that the property in controversy was exempt to him from execution, under subdivisions 6 and 7 of section 3 of the act relating to exemption (Gen. St. par. 2998). The evidence is uncontradicted that these six stacks contained but 400 bushels of wheat, and that Hunter's share thereof was 266⅔ bushels. The jury found, and the plaintiff in error virtually admits, that, under said subdivision 7 and the evidence adduced upon the trial, Hunter is entitled to retain 50 bushels of the wheat for food for himself and family for one year; and the only contention upon which George bases his proceedings in error is that the court erred in its ruling upon the admission of evidence offered tending to show that wheat is a suitable food for stock, and in instructing the jury with relation to their finding from such evidence. In other words,

George contends that Hunter was entitled to retain only 50 bushels of this wheat, while he should have been awarded the return of the remaining 216½ bushels, or have recovered a personal judgment against Hunter for the value thereof, which was only \$83.92. This amount is below the jurisdiction of this court, and precludes a review of the judgment. Code Civ. Proc. § 542a; *Stinson v. Cook*, 53 Kan. 179, 35 Pac. 1118; *Obert v. Banking Co.*, 54 Kan. 750, 39 Pac. 699. The petition in error will be dismissed. All the judges concurring.

(5 Kan. App. 890)

**RANDOLPH v. CAMPBELL et al.**

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 9, 1897.)

**FINDINGS—STIPULATION—EVIDENCE.**

1. Where the facts on which the judgment rests have been found at the time of the trial, but are not reduced to writing when judgment is rendered, they may thereafter be written out by the court, by agreement of the parties, and filed as of the date of the judgment.

2. Where a party relies on an alleged agreement of his adversary, that findings of fact may be written out and filed after the date of the judgment, it cannot be established by oral evidence, but must be shown by the production of a duly-recorded order of court, made pursuant to such agreement.

Error from district court, Cloud county; F. W. Sturges, Judge.

"Not to be officially reported."

Action by John F. Randolph against W. C. Campbell and the Northwestern Barb-Wire Company to enjoin the enforcement of an execution. From a judgment refusing the injunction, plaintiff brings error. Affirmed.

Theo. Laing, for plaintiff in error. Kennett, Peck & Matson, for defendants in error.

CLARK, J. But two questions are presented for our consideration by the record in this case. The first is as to whether the defendants in error are bound by the special findings of fact which were reduced to writing, and filed nearly one year after the decision and judgment were rendered. The other is as to whether the court's conclusions of law are warranted by such findings. Notwithstanding the journal entry which purports to recite the proceedings which were had in this case on February 2, 1893, makes no reference to an agreement or order that findings of fact and of law should thereafter be reduced to writing, the trial court, on January 2, 1894, heard a motion, filed on behalf of the plaintiff in error, that such findings be filed, and journal entry of proceedings and judgment entered as of February 2, 1893; and the court, upon hearing, found that, after the judgment had been rendered in the case, the parties agreed in open court, and it was ordered, that the court "should put the facts and law as so found in writing," etc., and accordingly proceeded to file eight specific findings of fact, covering ten typewritten pages, which included copies of

the judgment originally rendered against Wells and Randolph, and as subsequently modified, the order of sale, an opinion filed by the supreme court (28 Pac. 170) reviewing the modified judgment, the mandate issued by said court, the proceedings of the district court in pursuance thereof, and the execution the levy of which the plaintiff in error seeks to enjoin. Whether any evidence was introduced upon the hearing of the motion on January 22, 1894, with reference to any prior agreement or order that findings of fact and of law should be reduced to writing, or whether the ruling of the court upon such motion was based wholly upon the recollection of the court as to what had transpired upon the trial, nearly one year prior thereto, is not disclosed by the record before us. There can be no question but that, under the law, findings of fact upon which a judgment is rendered must be made prior to the rendition of the judgment; otherwise, they are of no avail. The judgment must rest upon the facts which, at the time of the trial, are found to exist. If these facts as so found by the court are not reduced to writing at the time the decision is made, and all parties to the action voluntarily agree that the same may thereafter be written out by the court, and filed as of the particular date when the decision was made, we see no objection thereto. But where a party relies upon an alleged agreement made by his adversary, that findings of fact may be written out and filed subsequent to the date of the rendition of the judgment, he should not be permitted to offer proof thereof in any other manner than by the production of a duly-recorded order of the court, made pursuant to such agreement. The court certainly had no power to determine this disputed question of fact without hearing evidence thereon; and, as above stated, we think the policy of the law would preclude the admission of oral testimony to show that such an agreement was, in fact, made.

Having reached this conclusion, it becomes unnecessary to decide as to whether the pretended findings of fact warrant the conclusions of law drawn therefrom, or support the judgment rendered. Still, we may be permitted to add that, after a careful examination of these pretended findings of fact, we cannot say that the plaintiff was entitled to an injunction. The court did not find all the facts, which are necessary to be considered in determining the question then before it. It is clear from an examination of the opinion filed by the supreme court, and which constitutes a part of the findings of fact, that, if the record then before that court correctly recited the modified judgment which was there sought to be reversed, the honorable commissioner who prepared the opinion failed to comprehend the facts as disclosed by such record. But it is also evident that the supreme court did not intend

to affirm the modified judgment, but, rather, to hold that as the plaintiff in that action had sought to hold Randolph on his assumption of the Wells mortgage, and as Randolph had conveyed the mortgaged premises to Nye, with covenants of general warranty, equity would require that, before resorting to a sale of the mortgaged premises, the plaintiff should be compelled to protect the other defendants, by first attempting, through the levy of an execution, to collect from Randolph the amount of the judgment against him, and, if successful, apply the same in satisfaction of the Wells mortgage, payment of which Randolph had assumed. The record shows that, at the sale, the property failed to bring sufficient to satisfy both mortgages; and, in order that interests of Nye should be fully protected, his grantor in the warranty deed should be required to pay the judgment of \$462.25, which, under the modified judgment, was declared a prior lien to that of the Nye judgment. Under these circumstances, it would not be equitable to allow the injunction. We cannot say that the court erred in its conclusions of law, and the judgment will be affirmed. All the judges concurring.

(5 Kan. App. 252)

**BANK OF GLASCO v. MARSHALL, Sheriff.**  
(Court of Appeals of Kansas, Northern Department, C. D. Jan. 4, 1897.)

**PLEADING—OBJECTIONS WAIVED.**

Where the defendant fails to demur to a petition, but answers, and at the trial objects to the introduction of evidence upon the ground that the petition fails to state facts sufficient to constitute a cause of action, such petition will be construed so as to uphold the plaintiff's cause of action, if possible.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by the Bank of Glasco against Edward Marshall, sheriff of Cloud county, Kan. Judgment for defendant, and plaintiff brings error. Reversed.

A. H. Ellis and F. T. Burnham, for plaintiff in error. W. H. Savary, A. L. Wilmoth, and L. J. Crans, for defendant in error.

**GILKESON, P. J.** The only question presented is, does the petition filed herein state facts sufficient to constitute a cause of action? This we must answer in the affirmative. It is well settled in this state that where a defendant does not demur to a petition, but answers, and at the trial objects to the introduction of evidence upon the ground that the petition fails to state facts sufficient to constitute a cause of action, the petition will be construed so as to uphold it, if possible. No demurrer was filed in this case, nor was any motion presented to have the petition made more definite and certain. "In the absence of a

demurrer and motion, the allegations of a petition will be construed liberally, and, unless there is a total omission to allege some material fact which is essential, a petition will be held good." *Railway Co. v. Stone*, 54 Kan. 95, 37 Pac. 1012; *Robbins v. Barton*, 50 Kan. 125, 31 Pac. 686; *State v. School Dist.*, 34 Kan. 237, 8 Pac. 208; *Blier v. Fretz*, 32 Kan. 338, 4 Pac. 284; *Grandstaff v. Brown*, 23 Kan. 178; *Polster v. Rucker*, 16 Kan. 116; *Moody v. Arthur*, Id. 426; *Barkley v. State*, 15 Kan. 107; *Mitchell v. Milhoan*, 11 Kan. 617; *Insurance Co. v. Barnes*, 2 Kan. App. 642, 42 Pac. 938. And from an examination of the petition in this case, we cannot say it is defective.

The other proposition urged in this case we do not think proper to decide at this time, it depending entirely upon what state of facts is shown to exist under the testimony in the case upon a trial thereof. The judgment will be reversed, and cause remanded for new trial. All the judges concurring.

(5 Kan. App. 260)

**THOS. KANE & CO. v. SCHOOL DIST. NO. 112 OF OSBORNE COUNTY.**

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 4, 1897.)

**SCHOOL DISTRICT — CONTRACTS — REVIEW ON APPEAL — LIMITATION.**

1. The officers of a school district, acting separately, and not as a district board, cannot make a contract that will be binding upon the school district.

2. Evidence examined, and held to sustain the judgment.

(Syllabus by the Court.)

Error from district court, Osborne county; Cyrus Heren, Judge.

Action by Thos. Kane & Co. against school district No. 112. Judgment for defendant. Plaintiff brings error. Affirmed.

J. K. Mitchell, for plaintiff in error. Robinson & McBride, for defendant in error.

**CLARK, J.** On October 25, 1886, a certain contract in writing was entered into between Thos. Kane & Co., who are therein referred to as "party of the first part," and E. R. Hahn, J. H. Murphy, and William R. Ralston, who are therein designated as "parties of the second part," by the terms of which Kane & Co. sold to Hahn, Murphy, and Ralston certain school furniture at the agreed price of \$100. The furniture mentioned in this contract was received by school district No. 112 of Osborne county some time in the year 1886, and on December 10th of that year W. R. Ralston, as clerk, and J. H. Murphy, as director, executed and delivered to Kane & Co. a warrant on the treasurer of said school district for \$100, payable on or before January 1, 1889, with interest at the rate of 8 per cent. per annum from date until paid. On March 1, 1889, a similar warrant was issued by Ralston and Murphy, as clerk and director,

respectively, on the treasurer of said school district, for \$117, with 8 per cent. interest, payable on or before March 1, 1890; and on July 1, 1890, one W. S. Mayfield and said Murphy, as clerk and director, respectively, executed a similar warrant on the treasurer of said school district for \$130.31, with 8 per cent. interest, payable on or before July 1, 1891. Kane & Co. not having received payment for said school furniture, brought this action against the school district. The amended petition contained four counts, the first of which recited the original contract for the purchase of the school furniture, and charged that the same was executed by the school district; that the goods had been delivered thereunder, but that the same had not been paid for; and that the district was indebted to the plaintiff, under that count, in the sum of \$100 and interest from October 10, 1886, at 8 per cent. In the remaining counts a recovery was sought upon the several warrants above mentioned, each count, however, specifying that the warrant therein sued on represented the original indebtedness in favor of Kane & Co. for the purchase of school furniture; that each was a renewal of the one previously maturing, and was executed in pursuance of an agreement to extend the time of payment of the indebtedness in favor of Kane & Co. The petition closed with a prayer for judgment for \$130.31, with interest thereon at 8 per cent. from July 1, 1890, the date of maturity of the warrant executed July 1, 1889, and set out in the fourth count. The defendant filed a duly-verified answer, containing a general denial of the allegations of the petition, and also specific denials of the execution by the school district of any of the warrants mentioned in the petition, or that it agreed to pay any sum to, or that it had had any dealings whatever with the plaintiff. The reply alleged that the school district had retained and used the furniture in the schoolhouse since soon after the date of the original contract, and had neither paid for nor offered to return the same; that it had ratified the acts of the school-district board and its officers in making the original purchase, and in the execution of the several warrants; and that it was therefore estopped from denying its liability to the plaintiff. A demurrer to the reply having been overruled, a trial was had before the court, a jury being waived. The court found that the several warrants were executed by the clerk and director, but without any authority therefor from either the district board or the school district; that no ratification of these unauthorized acts of the clerk and director had been shown; that the consideration for the warrants was the previous receipt of certain school furniture in the year 1886; and that the school district had retained and had not offered to surrender the same to the plaintiff; and that, as this action was not commenced until August 19, 1892, more than five years had elapsed since a cause of action would have accrued upon the original contract of purchase. Upon

these findings the court held that the plaintiff was not entitled to recover.

It appears to us that it is necessary to consider but one question in this case: Was the cause of action barred by the statute of limitations? The original contract was entered into between Kane & Co. and certain individuals who constituted the district board of school district No. 112. By the terms of this contract these individuals agreed that they would either pay the contract price for the furniture in cash on receipt of goods, or secure such payment by the delivery to Kane & Co. of a legal school warrant due January 1, 1889, bearing 8 per cent. interest. They received the furniture and delivered it to the school district in 1886. Neither the parties who purchased it nor the school district, which, at the commencement of this action, had had the use of it more than five years, had paid for it. There had been neither a partial payment of principal or interest nor a written promise on the part of the school district to pay the same; nor had there been "a written acknowledgment of an existing liability, debt, or claim" in favor of the plaintiff. Hence, under the statute, an action could not be maintained on the contract mentioned in the first count, even had the school district been originally liable for the contract price, or for the value of the property retained and used by it. The court, upon conflicting evidence, found that the district board had not authorized the issuance of any of these warrants, and that neither the board nor school district had ratified the action of the district officers in issuing the same. This court is bound by these findings, and the judgment must be affirmed. All the judges concurring.

(5 Kan. App. 326)

**SHOCKEY et al. v. AKEY.**

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 4, 1897.)

REVIEW ON APPEAL.

Where the issues of fact have been passed upon by the jury, and their special findings and general verdict are supported by the evidence, they will not be disturbed.

(Syllabus by the Court.)

Error from district court, Dickinson county; James Humphrey, Judge.

Action by E. A. Akey against Shockey & Co. Judgment for plaintiff. Defendants bring error. Affirmed.

John H. Mahan, for plaintiffs in error. J. P. Campbell and Stambaugh & Hurd, for defendant in error.

**GILKESON, P. J.** We have carefully examined the record in this case, and find no material error. The issues are purely of fact, and have been passed upon by the jury; and we are satisfied that the verdict is sustained by the evidence, and, under the rule so well established in this state, it will not be disturbed. The plaintiffs in error contend, however, that the court erred in

its instructions given and refused, but have failed to comply with the rules in setting out the instructions, or proof thereof, complained of. But an examination of them as a whole fails to disclose any error. On the contrary, we think they covered all the questions in the case, were in accord with the testimony, and fully and fairly presented the law of the case.

While it is true that some of the testimony admitted over the objection of the defendants, and now complained of, is close to the line, yet it is quite evident that the jury did not consider such testimony in arriving at their verdict, and we fail to see how the defendant was prejudiced thereby. The same verdict might have been rendered if all such testimony had been excluded. The judgment in this case will be affirmed. All the judges concurring.

(5 Kan. App. 263)

UNION PAC. RY. CO. v. BAKER.

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 11, 1897.)

JUDGMENT OF SISTER STATE—RES JUDICATA—GARNISHMENT—CONFLICT OF LAWS.

1. A judgment rendered by a court of another state, having jurisdiction of the parties and the subject-matter, may be pleaded as a bar to the further prosecution of an action for the same cause in this state, notwithstanding the latter action was pending prior to the rendition of such judgment.

2. When an employer has been duly garnished and held liable in another state, and has paid as garnishee a debt due a resident of this state, he may interpose such garnishment proceedings and payment in bar of the prosecution of another action for the same debt in this state, although by the laws of this state such debt is exempt from garnishment.

(Syllabus by the Court.)

Error from district court, Geary county; James Humphrey, Judge.

Action in justice court by M. S. Baker against the Union Pacific Railway Company for wages. There was a judgment for plaintiff, and on appeal to the district court he again recovered judgment, and defendant brings error. Reversed.

A. L. Williams, N. H. Loomis, and R. W. Blair, for plaintiff in error. Thos. Dever, for defendant in error.

GILKESON, P. J. In May, 1893, M. S. Baker, the defendant in error, was employed by the railway company, plaintiff in error, as a carpenter, and during said month performed the work required of him for 21 days at \$2.50 per day, and was entitled to receive from the company the sum of \$52.50. During said month, and at all subsequent times hereinafter mentioned, he was a resident of the state of Kansas, and a married man. On the 31st day of May, 1893, the plaintiff in error was served with garnishment summons, issued by F. L. Ferris, a justice of the peace of Sioux City, Woodbury county, state

of Iowa, in an action pending before said justice of the peace, in which one A. H. Willard was plaintiff, and the said defendant in error, M. S. Baker, was defendant. The plaintiff in error railway company answered as garnishee in that action, admitting an indebtedness of \$52.10; and on the 12th day of August, 1893, judgment was rendered in the above case against M. S. Baker for the sum of \$43.00, and costs, \$8.20, and also against the Union Pacific Railway Company as garnishee in the sum of \$52.10. This amount was by the railway company paid into the justice court. As soon as the company received notice of the pendency of this action against Baker, they notified him, and also of the service of the garnishment summons. After this action had been commenced in Iowa, and on the 3d day of July, 1893, M. S. Baker began an action against the railway company before J. R. Grant, a justice of the peace of Junction City township, Geary county, Kan., to recover of it the sum of \$52.50 for work and labor performed as carpenter, alleging in his bill of particulars, among other things, that the contract of employment between him and the railroad company, under which said work was performed, was entered into in the state of Kansas, and the work was done in the state of Kansas, and was to be paid for in the state of Kansas. On the 6th day of July, 1893, the railway company not appearing, the justice of the peace rendered judgment against it in the sum of \$52.68. On the 10th day of July, 1893, the railway company filed its appeal bond with the justice of the peace, and perfected its appeal; and on the 14th day of July, 1893, the transcript and papers belonging to said case were filed with the clerk of the district court of Geary county, Kan. On August 1, 1893, and during the session of the district court of said county, upon motion of the plaintiff, M. S. Baker, the defendant was required to file an answer, or bill of particulars, setting forth its defense, which was done on the 11th day of September, 1893; said answer setting up the garnishment proceedings and judgment in Iowa as a bar to the further prosecution of this action. Issues having been joined upon said answer, a trial thereof was had on October 30, 1893, by the court, a jury being waived, resulting in a judgment in favor of Baker and against the railway company for the amount of his claim.

The principal question involved in this case is as to the validity and effect of the judgment rendered by the Iowa justice of the peace, and the case has been appealed to this court (there being less than \$100 involved), for the reason that a question arises under section 1, art. 4, Const. U. S., which provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Some question has been raised as to the jurisdiction of the Iowa justice of the peace to ren-

der the judgment pleaded. While the record is not as full and clear upon this proposition as it might be, and while there may be some room for doubt whether the Iowa justice had jurisdiction of the railway company as garnishee, we think there is sufficient in the record to show *prima facie* that the necessary facts existed to give jurisdiction both of the defendant and of the garnishee.

It is further contended by counsel for the defendant in error that, as the Iowa judgment was not rendered until after the commencement of this action, it cannot be pleaded as a bar to the prosecution of this case. With this contention we cannot agree. If the proceedings in Iowa were valid, and an order or judgment was there made on the garnishee before the trial of this case in the district court of Geary county, we think it would be a bar to further prosecution of the case. Of course, the mere pendency of an action for the same cause of action in another state is not a bar to an action in this state; but, as we understand the rule, if a judgment is rendered in the other state, the judgment first rendered may be interposed as a bar to the further prosecution of another action. By the appeal taken from the judgment rendered by the justice of the peace of Geary county by the railroad company, the case was transferred to the district court for trial *de novo*, and stood there the same as if originally commenced in that court; nor is it tried there on the defense to the judgment of the justice, but on defenses to the cause of action. If valid, the Iowa judgment merged the cause of action, and must be a bar to a further prosecution of a case based on the original cause of action in this state. "Although a suit is not abated by reason of the pendency of another suit between the same parties and for the same cause of action in another of the United States, still a judgment rendered in one state by a court having jurisdiction of the suit will operate as a merger of the cause of action, and be a bar to the further prosecution of a suit in another state between the same parties upon the same claim. The defendant, a citizen of New Hampshire, was sued simultaneously by the plaintiffs both in New Hampshire and in Vermont upon the same cause of action. In each suit the property of the defendant in the state in which the action was brought was attached, but the attachment in New Hampshire was subject to several prior attachments of other creditors. The plaintiff obtained a judgment in the New Hampshire suit, which, however, had not been paid. Held, that the recovery of the judgment in New Hampshire was a bar to the further prosecution of the suit in this state." *McGilvray v. Avery*, 30 Vt. 538. "Parties having a judgment in another state, legally rendered by a court of common-law jurisdiction, cannot maintain an action in this state on the original debt or

cause of action. The effect of a common-law judgment is practically to destroy, so long as it exists, the grounds upon which it rests. The plaintiffs brought suit in the supreme court of the state of New York to recover a debt claimed to be due from the defendants, and afterwards brought suit in the circuit court of Essex county, in this state, against the defendants for the same cause of action, pending which last suit the plaintiffs obtained a judgment in the state of New York. This judgment operates as a merger of the original debt, and may be pleaded in bar of the suit brought in this state." *Barnes v. Gibbs*, 31 N. J. Law, 317. "The pendency of another suit for the same cause of action may be pleaded in abatement of a suit subsequently commenced, but the converse of the proposition does not hold true. The original or first suit cannot be abated by a plea that another action for the same cause was afterwards commenced. *Renner v. Marshall*, 1 Wheat. 215. But this doctrine does not overturn the plea. The defendant does not set up matter in abatement, but in bar of the action. He does not plead the pendency of another suit, but a judgment rendered. The plea does not go to the form of the remedy, but to the right of the plaintiff. It shows that the cause of action which the plaintiff once had is gone forever. I can see no good reason why the defendant should not be at liberty to set up this as well as any other bar to the further maintenance of the action which may have arisen since brought. It is true that he might have pleaded in abatement before the justice, but the omission to do so cannot be construed into a waiver of the right to set up matter in bar which had not then arisen. He has omitted no opportunity of pleading the trial and the judgment before the justice, and that judgment is none the less conclusive because the defendant might have got rid of the action in another way. If the plaintiff had recovered on the former trial, he would hardly think of maintaining this action. It would be giving him two judgments against the same party for one debt. But the question now is the same, in principle, as it would be if the plaintiff had recovered before the justice. The original cause of action is merged and gone, not because the one party or the other prevailed on the former trial, but because the right has been tried and adjudged one way or the other." *Nicholl v. Mason*, 21 Wend. 339. To the same effect are, *Rogers v. Odell*, 39 N. H. 457; *Baxley v. Linah*, 16 Pa. 241; *U. S. v. Dewey*, 6 Biss. 503, Fed. Cas. No. 14,956.

The other question involved, and the only one which gives this court jurisdiction to review the judgment, is as to the effect which should be given to the Iowa judgment. The law is well settled that the judgment of a justice of the peace is within the constitutional provision before re-



ferred to, and that, when such judgment is proven by competent evidence in an action pending in another state, the same faith and credit must be given to it as would be given by the courts of the state wherein it was rendered. We think, therefore, it necessarily follows that the question now before us must be considered in the same way as if the present action was pending in a court of Iowa, and the judgment of the justice of the peace which is set up in this case was therein pleaded as a bar to a second action. The record shows that the garnishee set up the fact in the proceedings before the Iowa justice that the money due Baker was exempt under the laws of the state of Kansas, of which he was a resident, and that it, without delay, gave notice to Baker of the pendency of said action and garnishment proceedings. The question, then, resolves itself into this: When a debtor has been garnished and compelled to pay a debt in another state, in accordance with the laws of such state, can he be called upon to again pay the same debt to his creditor in this state, by the laws of which such debt was exempt from legal process? In Iowa there was no exemption, and the rights of the defendant in that action, which he might have claimed under the exemption laws of Kansas, were disregarded. We do not see, on principle, why the defense made in this case should not be maintained. The company was compelled by due process of law to pay the debt for which this action was brought, and there is no reason or justice in requiring them to pay the same again. In accordance with the laws of another state, this debt has been attached and appropriated to the payment of the debts owing by this plaintiff there. This, in our opinion, should satisfy any liability of the defendant in this action; and this, we think, is sustained by authority. *Railway Co. v. Gough*, 35 Kan. 1, 10 Pac. 89; *Railroad Co. v. May*, 25 Ohio St. 347; *Allen v. Watt*, 79 Ill. 284; *Railroad Co. v. Crane*, 102 Ill. 249; *Mooney v. Railroad Co.*, 60 Iowa, 346, 14 N. W. 343; *Bradstreet v. Clark*, 65 Iowa, 670, 22 N. W. 919; *Garity v. Gligle*, 130 Mass. 186; *Baxley v. Linah*, 16 Pa. St. 241.

The judgment will be reversed, and case remanded for further proceedings in accordance with the views expressed herein. All the judges concurring.

(5 Kan. App. 506)

NEWELL, County Surveyor, et al. v.  
DANIELS et al.<sup>1</sup>

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 4, 1897.)

JURISDICTION OF COURT OF APPEALS—ACTION CONCERNING REAL ESTATE.

1. Where the record fails to disclose, and it is not otherwise shown, that the amount or val-

ue in controversy, exclusive of costs, exceeds \$100, this court has no jurisdiction of the action, and the certificate of the trial judge cannot be considered as establishing this fact.

2. To establish jurisdiction under the exceptions mentioned in paragraph 4642, Gen. St. 1889, if the amount is less than \$100, two things are necessary: (1) The case must belong to one of the excepted classes, and (2) the trial judge must so certify.

3. It is not every action concerning real estate that involves the title thereto.

(Syllabus by the Court.)

Error from district court, Norton county.

Action by Amariah Daniels and others against J. C. Newell and others. Judgment for plaintiffs. Defendants bring error. Dismissed.

J. R. Hamilton & Son and L. H. Wilder, for plaintiffs in error. L. H. Thompson and C. D. Jones, for defendants in error.

GILKESON, P. J. We have very carefully examined the record in this case for the express purpose of retaining jurisdiction thereof, if possible, but we cannot. Paragraph 4642, Gen. St. 1889, being section 542a, Code, provides: "No appeal or proceeding in error shall be had, or taken to the supreme court in any civil action, unless the amount, or value in controversy, exclusive of costs, shall exceed one hundred (\$100) dollars, except in cases involving the tax, or revenue laws, or the title to real estate, or an action for damages in which slander, libel, malicious prosecution, or false imprisonment is declared upon, or the constitution, laws, treaties, of the United States, and when the judge of the district or superior court trying the case involving less than one hundred (\$100) dollars shall certify to the supreme court that the case is one belonging to the excepted classes." Under this section we must hold that the amount or value in controversy must be ascertainable from the record, or be proven aliunde. In this case it is not ascertainable, nor has it been shown aliunde. The certificate of the trial judge cannot fix the amount in controversy, or establish the jurisdiction of this or the supreme court. Such certificate is without authority. The only certificate he can make is when it is less than \$100, and then that it is one of the excepted cases.

That brings us to the consideration of the other portion of the section, as to jurisdiction: "No appeal or proceeding in error shall be had or taken \* \* \* except in cases involving the tax, or revenue laws, or the title to real estate." These exceptions, we think, must be shown to exist by the record, the same as value or amount. The language of the section is "cases involving" these exceptions, and this view is strengthened by the other portion of the section: "And when the judge of the district or supreme court, trying the case involving less than one hundred dollars, shall certify to the supreme court that the case is one belonging to the excepted classes." Now, there are two things nec-

<sup>1</sup> Rehearing denied.

essary to bring an excepted case before this or the supreme court for review, viz.: (1) It shall involve one of the exceptions,—not that one of the exceptions might be involved; it must be involved; there must be something in the record to show. And (2) the trial judge must, in addition thereto, certify that it is involved; that is, that there was really an issue of that kind in the lower court. And we can very readily see very potent reasons for thus guarding the record. Then, under this section, both of these things must meet—both exist. One without the other is unavailing. It was not intended, when this statute was passed, to place the jurisdiction of the appellate courts at the disposal of the lower courts, which would be virtually doing so if their certificate was the only thing necessary. Suppose a trial court should make the required certificate in an action of debt, would it be for a moment contended that because this debt, when merged into judgment, might be made out of the real estate of the debtor, and thus deprive him of his title thereto, the case involved the title to real estate? And this is not putting it too strongly. It is not every action concerning real estate that involves the title thereto. An action to foreclose a mortgage affects—concerns—real estate, but the title thereto is not necessarily involved, nor is it as a rule. Nor is it shown by the record in the case at bar that the title to real estate is involved. Nor can we see how it can be. The action is to establish certain quarter section lines. Now, how does this affect or involve the title of the defendants in error, or any one else, to the quarter sections they own or claim to own. Each one of these parties owns certain quarter sections of land by description, viz. the northeast, northwest, southeast, or southwest quarter of a certain section, such a township and range. This land lies within certain boundaries, and contains a certain acreage. Now, where the lines are can make no difference to their title to their individual quarter; and that is all they claim. Within this parallelogram is the quarter section the party owns; the same amount of land. Unless the record discloses such circumstances that preclude this idea in the case at bar, they do not exist. The proceedings in error will therefore be dismissed.

(5 Kan. App. 493)

#### HALL v. FIRST NAT. BANK OF HAYS CITY.

(Court of Appeals of Kansas, Northern Department, W. D. Sept. 9, 1895.)

#### EXTENSION OF NOTE—RELEASE OF SURETY—TAKING NEW NOTE.

1. Mere indulgence given to the principal maker of a note for its payment does not release a surety. To have that effect, there must be a valid agreement extending the time for payment, without the surety's consent, and the time of the extension must be definitely fixed.

2. The mere taking of a new note, payable on demand, with additional security, for a debt evidenced by a prior note, also payable on demand, does not release a surety on such prior note, unless it appears to have been the intention of the parties that the second note should be accepted in payment of the first.

(Syllabus by the Court.)

Error from district court, Ellis county.

Action by the First National Bank of Hays City, Kan., against A. S. Hall. Judgment for plaintiff. Defendant brings error. Affirmed.

Chas. A. Hiller, for plaintiff in error. A. J. Bryant, for defendant in error.

GARVER, J. This was an action commenced February 18, 1893, before a justice of the peace, by the First National Bank of Hays City, Kan., against A. S. Hall and John Yunker, on a demand note for \$215.40, executed November 5, 1889. No answer was filed by the defendants, but on the trial in the district court Hall made defense by claiming that he signed the note as surety for Yunker, and that he was released from liability thereon because the time for payment had been extended by the bank without his consent. The case was tried by a jury, and a general verdict returned in favor of the plaintiff. Various matters were considered upon the trial, and are discussed at considerable length in the briefs of counsel, which we deem unimportant in the decision of this case. While the note in suit was drawn payable on demand, it seems to have been the general understanding of the parties thereto that no demand of payment would be made prior to August, 1890. On December 9, 1891, a note for the same debt was taken by the bank from Yunker and wife, secured by a chattel mortgage on personal property, some of which was property not included in the chattel mortgage given to secure the first note. There was no understanding or agreement that the last note was not just what it purported to be,—a note payable on demand. There was some evidence tending to show that the second note and mortgage were taken with the knowledge and consent of Hall; sufficient being shown, we think, in this respect, to maintain the verdict of the jury. But, apart from that, we think there was an entire failure of proof to establish the fact that there was any such extension of the time for the payment of this debt as would release the surety. When the second note was taken, the bank held against Yunker, as principal, and Hall, as surety, a note payable on demand. The new note was likewise payable on demand. The amount of the indebtedness of Yunker to the bank was not changed, nor was any change made in the terms of payment. The mere taking of additional security for a debt does not release the surety. Neither will the giving of time or indulgence have that effect, unless it is based on a contract which ties the creditor's hands, and

prevents him from enforcing payment for a definite time. To have that effect, there must not only be a valid agreement extending the time for payment, but the time of the extension must be definitely fixed. *U. S. v. Hodge*, 6 How. 281; *Miller v. Stem*, 2 Pa. St. 286; *Rucker v. Robinson*, 38 Mo. 154; *McGee v. Metcalf*, 12 Smedes & M. 535; *Gardner v. Watson*, 13 Ill. 352. Under the facts in this case there was nothing to prevent the bank from at any time commencing proceedings against Yunker to collect its debt on either note; nor was there anything suspending the right of Hall, as the security for the debt, to discharge the obligation, and to be subrogated to the rights of the bank. The rule under which a surety for a debt is released by the giving of time to the principal without the surety's consent is founded upon a supposed restriction of the rights of the surety by which he is presumed to be injured. The reason for the rule falling in this case, the rule itself should not be enforced. We think no reversible error appears in the record. The judgment will be affirmed.

CLARK, J., concurs. GILKESON, P. J., having been of counsel, did not sit.

(5 Kan. App. 271)

**DEMERS, Register of Deeds, et al. v. BOARD OF COM'RS OF CLOUD COUNTY.**

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 4, 1897.)

**REGISTER OF DEEDS—FEES—LIABILITY—REPORT—SALARY.**

1. The salary of the register of deeds of Cloud county is fixed, by the statute regulating the same, at \$1,800 per annum, and cannot exceed that amount.

2. Upon making his quarterly report to the board of county commissioners, they must charge him with the legal fee for each and every act performed, as shown therein, and the total amount thereof fixes his liability to the county.

3. The filing, or placing on file, of a paper by a public officer, may consist of only one, or be composed of several, acts; and where the statute provides for the payment of a fee for filing such paper that amount constitutes the full fee for performing all, each, and every act necessary to be done in order to file the same; and no other or different amount can be claimed or charged, nor can any fee be charged for doing anything in connection with said paper not required by law to be done.

4. The legal fee which may be charged by a register of deeds for filing a renewal affidavit to a chattel mortgage is five cents.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action by the board of county commissioners of Cloud county against Samuel Demers, register of deeds, and A. R. Maddox and M. Charbonneau, on an official bond. From a judgment for plaintiff, defendants bring error. Reversed.

L. J. Craus, for plaintiffs in error. A. L. Wilmoth, for defendant in error.

GILKESON, P. J. Two questions are involved in this case: (1) The interpretation of chapter 92, Laws 1893. (2) What is the legal fee of the register of deeds for filing an affidavit of renewal of a chattel mortgage?

Chapter 92, Laws 1893 ("An act regulating the fees and salaries of the county treasurer, county clerk, probate judge, clerk of the district court, and register of deeds of Cloud county, Kansas"), provides, as to the register of deeds, as follows:

"Sec. 6. That the register of deeds of Cloud county shall be allowed by the board of county commissioners, as full compensation for his services, the sum of eighteen hundred dollars per annum, said salary to be paid out of the county treasury in quarterly installments, upon the order of the board of county commissioners."

"Sec. 8. That the fees for the services now allowed, or hereafter to be allowed by law for the several officers herein named, shall be charged and collected by the proper officer, and when so charged and collected shall become the property of Cloud county, and on or before the tenth day of each month, for the preceding month, before the hour of four o'clock p. m., the money so collected by each officer, as fees, shall be turned over to the county treasurer by each officer, who shall take his receipt therefor in duplicate. One receipt to be kept by the officer or person paying the money, the other to be deposited forthwith in the office of the county clerk, who shall immediately charge the county treasurer therewith under the proper head, in the book kept for the purpose of charging the liabilities of the county treasurer to the county.

"Sec. 9. That at the last of March, June, September and December of each year, or waiting [within] ten days thereafter, each officer named in this act shall file his report in the office of the county clerk, which report shall show all the moneys collected by virtue of being such officer during the quarter just ended for which fees were chargeable by law. He shall be chargeable for the full legal fee to the county for all services performed by such officer, unless the same is remitted by the board of county commissioners at the time of filing his quarterly report. Each officer shall take and subscribe an oath to be attached hereto substantially as follows: 'I, —, of Cloud county, Kansas, do hereby solemnly swear that the foregoing exhibit shows all the money, or other things valuable coming into my hands for the quarter ending —, 18—, by virtue of being such officer, or for which fees were chargeable by law. So help me God.'"

The language of section 6 is very plain in so far as it relates to the amount of compensation of the officer for the performance of his official duties. He shall receive \$1,800 per annum—no more, no less—for all acts performed and services rendered by him as such officer; that is, if the sum total of all his acts or services during the year, if charged for separately, would amount to a sum in excess of, or fall

below, \$1,800, it does not affect the compensation he is to receive. It is fixed at \$1,800 regardless of the receipts of his office or other sources of his revenue. This is conceded by all parties to this action. But the contention is as to what becomes of the fees and moneys collected by him. To whom do they belong? For it will be noticed that sections 8 and 9 provide for "fees, moneys, or other things valuable," and clearly make a distinction between them. Section 8 provides "that the fees for the services now allowed or hereafter to be allowed by law \* \* \* shall be charged and collected, \* \* \* and when so charged and collected, shall become the property of Cloud county." Now, what is to be charged and collected? Fees allowed by law. If not recognized by law,—legal,—they are neither to be charged nor collected. When the fees allowed by law are charged and collected, they are the property of and belong to the county of Cloud. They must be charged and collected. The money so collected as fees shall be turned over to the county treasurer. We read it: "The money so collected as fees allowed by law shall be turned over to the county treasurer,"—not money extorted or dishonestly obtained. Surely the county is not asking that it be made particeps criminis. Section 9: "\* \* \* Shall file his report in the office of the county clerk, which report shall show all the moneys collected by virtue of being such officer, \* \* \* for which fees were chargeable by law." We read it that the report shall show all the moneys collected for services which were chargeable by law by him as register of deeds; that is, this report should show the sums he collected for the items, and each one of them, for which the law permits him to make a charge of any kind, without regard to the correctness of the charge. To illustrate: For some items he may not have charged and collected the full legal fee, through mistake, or the party from whom it was collectible may have been unable to pay it, and he gave the difference to them. For others, he may have, through mistake or otherwise, charged more than allowed by law. But his report must show these things. The total thereof will then be "all moneys collected during the quarter for which fees were chargeable by law." And this view is strengthened by the next provision of the same section: "He shall be chargeable for the full legal fee to the county for all services performed by such officer, unless the same be remitted by the board of county commissioners." This limits, qualifies, and explains what precedes it. He shall be charged with the "full legal fee"; that is, the total amount of the different items at their legal rate. In other words, if his report shows 1,500 items, and each, charged for separately, at the legal rate, would aggregate the sum of \$600, he would be charged with \$600, regardless of what he collected, "unless remitted by the board of county commissioners." Now, suppose his report shows that he only collected \$500 for these 1,500 items; then the county commissioners

have the power to remit the \$10 uncollected; and this is the only sense in which this remittance clause can be used. But, upon the other hand, let us assume that this report shows an excess,—that for these 1,500 items he has charged \$625. He in the same manner is charged with the full legal fee, viz. \$600. They cannot remit the \$25 excess, for the reason that, as they can charge only the full legal fee, they have nothing to remit; and it will certainly not be claimed that the board, by any process of remission or otherwise, can empower him to keep this amount,—legalize his unlawful act.

The charge against him is confined to the sum total of legal fees for the items specified in the report,—“the full legal fee,”—nothing more; but it may be less in the discretion of the board. And we are further convinced that this is the intent and meaning of the law when we examine the oath required by section 9: "\* \* \* Do solemnly swear that the foregoing exhibit shows all the money or other things valuable coming into my hands \* \* \* by virtue of being such officer, or for which fees were chargeable by law,"—clearly indicating that he must make a report of all the transactions of his office for the quarter without regard to what he is to be charged with. Suppose a deposit had been made with him to cover expected services; he should report this. But could it for a moment be contended that this should be charged up to him, and become the property of the county, regardless of the amount of work to be done, or whether it was done or not? We think not. The work might never be done. The party expecting the services might abandon the project, and demand his deposit back. Could the register say to him: "You must look to the county. The board of commissioners took it at such a quarterly statement." The plain wording of the statute forbids any such idea. The legal fees,—those allowed by law,—when charged and collected, shall become the property of the county; nothing else. And we can conceive of many reasons why this law should be so interpreted, and why the provisions thereof should be framed as they are. Among them, and perhaps the strongest, is that it affords to the public a protection against dishonest officers, by making public their official acts, and establishing evidence of that which before was scarcely susceptible of proof, viz. the collection of illegal fees. And another reason might be given. The county, having relieved the officer of the uncertainty of his compensation, is entitled to all of his official transactions.

This, then, brings us to the question of what is the legal fee for filing a renewal affidavit of a chattel mortgage. Paragraph 3905, Gen. St. 1889, provides, among other things: "Such affidavit shall be attached to and filed with the instrument, or copy on file to which it relates." Paragraph 3908, Gen. St. 1889: "The register of deeds shall

keep a book in which shall be entered a minute of all mortgages of personal property, and affidavits filed under this act. Such book shall be ruled off into separate columns, with heads as follows: 'Time of Reception,' 'Name of Mortgagor,' 'Name of Mortgagee,' 'Date of Instrument,' 'Amount Secured,' 'When Due,' 'Property Mortgaged,' and 'Remarks.' The proper entry shall be made under each of such heads. \* \* \*

The date of filing any affidavit, and the amount sworn to be due and unpaid, shall be entered under the head of 'Remarks.' An index to said book shall be kept in the manner as required for other records." Paragraph 3010, Gen. St. 1889, specifies the items of service for which fees may be charged by the register of deeds, and the amount of the fee. The affidavit, then, is to be attached to and filed with the chattel mortgage renewed thereby. Now, the statute nowhere provides for a fee for attaching this paper to the other instrument, but it does for filing, viz.: "For filing each paper requiring to be filed, .05." The word "file" is derived from the Latin "filum," which signifies "a thread"; and its present application is drawn from the ancient practice of placing papers on a thread, or wire, for the more safe keeping and ready turning to the same. The origin of the term indicates very clearly that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the string or wire. Accordingly, we find that filing a paper is now understood to consist in placing it in the proper official custody. On the part of the party charged with the duty of filing the paper, the officer's duty in filing it, or, strictly speaking, placing it on file, may consist of only one, or be composed of several, acts; and, under our statute, for the purpose of protecting the public rights, it consists of several, viz. the reception, the attaching, and the making of the proper entry in the book under the head of "Remarks." And there is as much propriety and authority of law for his charging for the attaching of the affidavit to the original mortgage, with pin, mucilage, or otherwise, as to charge for making the entry. But it is claimed that this entry comes under the head of "each entry on index." We think not. The law does not require it to be indexed, and the reason therefor is very apparent. The original instrument is indexed; the affidavit does not affect any new property; and, besides, the entry to be made is not on an index, as clearly shown by the last clause in paragraph 3908. But it is contended that the register must indorse on the back the date of reception. By implication from other sections of the statute, this may be true; but should he also charge for this? Public officers are frequently required to do certain acts for which they receive no pay, in order to carry into effect those acts for which they are paid, for the sake of public policy, as a consideration

for the privilege of charging for the others allowed by law. Instances of this could be given without number, but it is unnecessary.

We are clearly of the opinion that the only legal fee that can be charged by the register of deeds with reference to the filing of an affidavit of renewal of a chattel mortgage is five cents, and if he, by color of his office, unlawfully and willfully exacts or demands and receives more, the statute of this state provides for a punishment for him. But by what process of reasoning, or under what rule of law, equity, or morality, the county is entitled to any benefit from the unlawful act of its officer, we are unable to see. We agree with counsel for defendant in error that the officer (Demers) had no right to receive or retain the fees he did for renewal affidavits; but we cannot agree with him that he must pay over to any one else the proceeds of his illegal acts, and we have been unable to find any authority that so holds. Those cited by counsel do not. The propositions in those cases are entirely different from the case at bar, nor do they arise upon statutes in any manner similar to the one under consideration. The judgment in this case will be reversed, and cause remanded. All the judges concurring.

(5 Kan. A. 508)

BURTON et al. v. COCHRAN et al.

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 9, 1897.)

DEFECT OF PARTIES—WAIVER OF OBJECTIONS—CHattel Mortgage—Validity—Replevin—Judgment.

1. Any question as to the sufficiency of the parties plaintiff, or as to their legal capacity to sue, is waived, unless raised by demurrer or answer.

2. A chattel mortgage given upon 500 bushels of wheat in a granary containing 1,800 bushels, of the same grade and kind, is not void for uncertainty.

3. When an alternative judgment is rendered for the plaintiff in replevin, the value of the property adjudged to be paid in case a return cannot be had should not exceed the value alleged in the petition and affidavit in replevin.

(Syllabus by the Court.)

Error from district court, Rawlins county.

Action by T. W. Cochran and others against John M. Burton and others. Judgment for plaintiffs. Defendants bring error. Modified.

Dempster Scott, F. T. Burnham, and A. H. Ellis, for plaintiffs in error. Wilson & McWhealon, for defendants in error.

CLARK, J. This is an action of replevin, brought by the defendants in error to recover the possession of 500 bushels of wheat (the value of which was in the petition and affidavit of replevin, alleged to be \$200) and \$50 as damages for its detention. The property in controversy was taken into the possession of the officer under the writ, but was soon thereafter returned to the defendants

upon the execution by them of a redelivery bond. The plaintiffs below sue as trustees of the Citizens' State Bank of Blakeman, and in their petition they allege, among other things, that they are such trustees, and that said bank was a corporation organized under the laws of this state, and that prior to its dissolution by order of the district court at the November term, 1893, it was engaged in the banking business at Blakeman, Rawlins county; that on February 18, 1893, one Brittain executed and delivered to the bank his promissory note for \$240.30, payment of which he secured by a chattel mortgage on "500 bushels of red winter wheat in granary on S. E. ¼, Sec. 35—1—36, Rawlins county, Kansas"; that the chattel mortgage was, on February 22, 1893, duly filed for record; that the indebtedness evidenced by the note was past due and unpaid; that the defendants were in possession of the property covered by the chattel mortgage, and refused to deliver the same to the plaintiffs. The answer was a general denial. The question as to whether the petition stated a cause of action was, for the first time, raised by an objection to the introduction of any evidence which was overruled. After the evidence for the plaintiffs had been introduced, and a demurrer thereto overruled, counsel for the defendants stated their defense, after which the court sustained an objection to the introduction of any evidence by them. This was evidently done upon the theory that the statement of counsel amounted to an admission that their only defense was that, as they were in possession of the property at the commencement of the action, the plaintiffs could recover only by showing that they had a better right thereto than is evidenced by the bare possession of the defendants, and that the evidence already introduced failed to do this. We think that the statement referred to will bear such construction. After this ruling was made, the defendants did not offer to show by what right they held possession, or that the plaintiffs' mortgage was not in fact a valid and first lien on the property. The court found that the plaintiffs were entitled to the possession of the wheat, and that the value thereof was \$500, and rendered judgment in accordance therewith. A motion for a new trial was filed by the defendants, wherein it was claimed that the decision was not warranted by the evidence, was in excess of the amount claimed by the plaintiffs, and that errors of law occurred at the trial. This motion being overruled, the defendants have brought the case to this court.

It is insisted by the counsel for the plaintiffs in error that the petition fails to contain sufficient allegations to show that the directors of the State Bank of Blakeman are entitled to maintain this action in their names as trustees, and that the evidence fails to show that the bank had been legally dissolved. We think, however, that the right

to challenge the legal capacity of the plaintiff to maintain the action was waived by failure to specifically raise that question either by demurrer or answer. Code Civ. Proc. §§ 89, 91. The facts that the granary mentioned in the chattel mortgage contained about 1,800 bushels of wheat, that the 500 bushels mortgaged to the bank had not been definitely ascertained, and separated from the balance of the grain in the bin, would not, under the decisions of the supreme court, operate to render the mortgage void. *Piazek v. White*, 23 Kan. 621; *Kingman v. Holmquist*, 36 Kan. 735, 14 Pac. 168. Nor can we say that the proper affidavit of the renewal of that mortgage was not filed, as the record in the office of the register of deeds which was introduced in evidence, and which would show that fact, is not preserved in the record before us.

It is finally contended that, as the plaintiffs, in their petition and replevin affidavit, placed the value of the property in controversy at only \$200, the judgment for an amount in excess thereof, conditioned upon a failure to return the property to the plaintiffs, is erroneous. It appears from the record that the attention of both court and counsel was called to this discrepancy in the motion for a new trial, yet no application was made to the court for leave to amend the allegation of the petition so as to conform to the proof and finding as to the value of the property in controversy. We think the amount of plaintiffs' recovery should be limited to the value of the property as claimed by them in their petition. This will necessitate a modification of the judgment by reducing the amount to be paid in lieu of a return of the property to \$200. With this modification, the judgment will be affirmed.

(5 Kan. A. 264)

#### STATE v. LINKER.

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 4, 1897.)

#### CONTEMPT—JURY TRIAL—EVIDENCE.

1. A party charged with contempt for the violation of an injunction allowed in a civil proceeding to abate and enjoin a public nuisance is not of right entitled to a jury trial. *State v. Durein*, 27 Pac. 148, 46 Kan. 695.

2. The evidence examined, and held insufficient to warrant the finding that the defendant was guilty of the contempt charged.

(Syllabus by the Court.)

Appeal from district court, Lincoln county. Charles Linker was fined for contempt, and appeals. Reversed.

David Ritchie and Geo. D. Abel, for appellant. F. B. Dawes, F. H. Dunham, C. B. Daughters, and G. M. Weeks, for the State.

CLARK, J. This is an appeal by Charles Linker from an order of the district court of Lincoln county assessing against him a fine of \$50 for contempt of court, based upon an alleged violation of a temporary injunc-

tion, which, pursuant to the provisions of paragraph 2533, Gen. St. 1880, was issued at the commencement of an action brought by the state to abate and enjoin an alleged nuisance. The main contention of the appellant is that as said paragraph 2533 declares that all places where intoxicating liquors are sold or kept for sale in violation of law are common nuisances, and that, upon the judgment of a court having jurisdiction finding such place to be a nuisance under that paragraph, the sheriff or other proper officer should be directed to shut up and abate such place, and that the owner or keeper thereof, upon conviction, should be adjudged guilty of maintaining a common nuisance, and be punished by fine and imprisonment, the legislature had no authority to enact the further provision of that paragraph that such nuisance might be perpetually enjoined; thus, as he claims, purporting to authorize the issuance of an injunction against the commission of a criminal act; that if such power is vested in the legislature, in order to sustain the validity of that provision of the statute, the defendant, when charged with a violation of such an injunction, must, under the constitution, be accorded the right to have the questions as to his guilt in that behalf passed upon by a jury; and that a refusal to award a jury trial in such case amounts to a denial of a right guaranteed to him by the constitution of the state.

The paragraph under consideration, as originally enacted (Laws 1881, c. 128, § 13), did not purport to authorize the issuance of an injunction, but did declare all places where intoxicating liquors were illegally sold, or kept for illegal sale, to be common nuisances, and authorized proceedings to abate the same, and to punish the owner or keeper thereof. Under the law as it thus stood, an action was instituted by the county attorney in the name of the state for the purpose of perpetually enjoining the further continuance of an illegal liquor saloon. The trial court denied an injunction, and such ruling was sustained by the supreme court in *State v. Crawford*, 28 Kan. 726, where it was held that while, under that section, such a nuisance might be "shut up and abated," it could not, ordinarily, be perpetually enjoined by a court of equity; but it was also held that this want of power was not because the keeping of a saloon is a criminal offense, and punishable as such under the laws of this state, but because the statute afforded another complete and adequate remedy. In the opinion, Valentine, J., said: "We think the statutory remedy of abatement is ordinarily sufficient remedy for the suppression of illegal drinking saloons, and that it and the other remedies furnished by the statute are really the only remedies which should ordinarily be resorted to." And, further: "It must be remembered that the statute does not give the remedy of injunction to restrain illegal drinking saloons,

or to restrain public nuisances of any kind. The jurisdiction to grant injunctions in such cases is simply assumed by courts of equity where no other adequate remedy exists; hence, where the legislature, after making the thing illegal, and after creating it a nuisance, then gives some other adequate remedy therefor, courts of equity will not assume such jurisdiction, and will not furnish to litigants the extraordinary remedy of injunction,"—thus, as we think, fairly intimating that, had the statute authorized the issuance of an injunction in that proceeding, its validity would have been sustained. After that decision was rendered, this particular paragraph was amended by adding thereto the following provisions: "The attorney general, county attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required. Any person violating the terms of any injunction granted in such proceedings shall be punished for contempt by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days, nor more than six months, in the discretion of the court, or judge thereof." Laws 1885, c. 149, § 13. It will thus be seen that the very remedy which was attempted to be enforced in the *Crawford* Case, and which the supreme court there declared a court of equity would not ordinarily sanction, was by that amendment specifically authorized, and the statute as so amended was subsequently construed by our supreme court in the case of *State v. Durein*, 46 Kan. 695, 27 Pac. 148. In that case the state had obtained a final order of injunction against Durein, forever enjoining him from "using, or permitting to be used, a certain building in the city of Topeka, as a place where intoxicating liquors are sold, bartered, or given away, or kept for sale, barter, or gift, otherwise than by authority of law." More than five years thereafter, the defendant was charged with violating that injunction; and, upon a hearing being had, he was found guilty, and the penalty authorized by the amended paragraph 2533 was imposed. The validity of the statute was sustained, and it was held that "a party charged with contempt for the violation of an injunction is not of right entitled to a jury trial." In the opinion, Johnston, J., speaking for the court, said: "While the proceeding was of a criminal nature, it was really incident to, and one of the final steps in, the civil action of injunction. He was not entitled to a jury trial in the original proceeding, and neither could he demand a jury, as a matter of right, to try the charge that he had violated the injunction previously granted. The constitutional provision that 'the right of trial by jury shall be inviolate' has no application in

a summary proceeding of this character. This guaranty does not extend beyond the cases where such right existed at common law; and the right to punish for contempt without the intervention of a jury was a well-established rule of the common law." The only material difference between the Durein Case and the one at bar is that Durein violated a perpetual injunction which had been granted after a final hearing, while Linker was found guilty of violating a temporary injunction, which, as authorized by the statute, was issued at the commencement of the action. The principle involved in each determination is the same. If Durein was not entitled to a jury trial upon a charge of violating a perpetual injunction, we can conceive of no logical reasoning that could be advanced in support of the theory that the court erred in holding that Linker was not entitled to a trial by jury upon the question as to whether he had violated a temporary injunction. The constitutionality of the section of the statute now under consideration was before the supreme court of the United States in the case of *Kansas v. Ziebold*, 123 U. S. 623, 8 Sup. Ct. 273; and it was there held that the equity power therein conferred to abate a public nuisance, without a trial by jury, is in harmony with settled principles of equity jurisprudence; and in the opinion of the court, written by Mr. Justice Harlan, the following language is used: "We are unable to perceive anything in these regulations inconsistent with the constitutional guaranties of liberty and property."

Another objection to the validity of the order complained of is that the evidence did not warrant the finding of the court that Linker had violated the temporary injunction. After that writ had been granted and served, Linker continued in business in the building mentioned and described in the petition, and there sold and kept for sale, as a beverage, certain liquors, which were delivered to him in beer cases. There was not a scintilla of evidence introduced tending to show that any intoxicating liquors were sold after the temporary injunction was allowed, nor was there any evidence tending to show that Linker kept any intoxicating liquor at such place for sale, or permitted any persons to resort there for the purpose of drinking intoxicating liquors as a beverage after that date. On September 12th, some 60 days after the main proceeding was instituted, Linker was charged in the police court of Lincoln Center with violating an ordinance of said city, which prohibited the illegal sale of intoxicating liquor, or the keeping of such liquor for illegal sale; and, at the time of his arrest under that prosecution, there were in the building heretofore mentioned nearly three cases of liquor, the bulk of which was American hop ale (which the evidence clearly shows was not intoxicating, and which the court so found), but the liquor in, at least, three of the bottles was beer. Some of the American hop ale so found was in a refrigerator, some in a water bucket, on ice,

while three bottles were found "behind the counter away next to the window." In some of the otherwise "empty cases" were found 11 unlabeled bottles. One of these beer cases was labeled "Pabst Brewing Company," and was marked "Clover," and from it the marshal secured two or three bottles. Three of these eleven bottles were opened, and found to contain Pabst beer. Incompetent evidence was also introduced which tended to show that, at the time the prosecution was commenced in the police court, Linker had in his place of business a government liquor license, and that prior thereto certain beer cases, which had been shipped to Lincoln Center by express to the address of "T. Clover," had been delivered to Linker; that certain alterations in the brands burned into these cases had been made by some one, presumably the shipper, prior to their delivery at Lincoln Center by the express company, but after the date of the commencement of the injunction proceedings; and that Linker had, in the building described in the petition, sold American hop ale to be drunk on the premises as a beverage; but, aside from the testimony above mentioned, there was no evidence tending to show any violation of the temporary injunction. Linker had a legal right to sell, and to keep in said building for sale, as a beverage, American hop ale, as, under the evidence and the findings of the court, such liquor was not intoxicating. He also had the right, if he so desired, to keep beer in said building, provided he did not keep the same for an illegal purpose. We think there was a total failure to show that he was guilty of constructive contempt of court.

In view of the conclusion which we have reached, and which necessarily compels a reversal of the judgment, there remains no necessity for passing upon the contention of the appellant that no authority was vested in the court to impose a fine of \$50 for violation of the temporary injunction, as the statute under which this proceeding was instituted and carried on fixes the minimum penalty for such violation at a fine of \$100 and imprisonment in the county jail for 30 days. The court held that "the legislature attempted to usurp the functions of the court in saying what shall be the penalty for contempt, and so much of that paragraph which, after denominating the place where intoxicating liquors are kept to be drunk on the premises to be a nuisance, attempts to fix the penalty upon proceedings for contempt, is unconstitutional and void; but \* \* \* that this court has a right to punish for a contempt of its order, regardless and without the aid of that portion of the section prescribing what the penalty shall be." It might also be suggested that as, at the time the ruling and judgment here complained of were made, the defendant was apparently satisfied therewith as he interposed no objection thereto, and as the punishment pronounced by the court is less than that authorized by the statute, and as until vacated, it is binding upon the plaintiff and a satisfaction thereof by the defendant



would relieve him from further liability to the state by reason of the acts complained of, the substantial rights of the defendant were not prejudiced by the action of the court in imposing a less punishment than authorized by the statute. But, as the finding that the defendant was guilty of violating the temporary injunction is not sustained by the evidence, it follows that the judgment must be reversed. All the judges concurring.

(5 Kan. App. 495)

**POWELL v. FINN.**

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 4, 1897.)

**TAXATION—RIGHTS OF HOLDER OF TAX DEED.**

The holder of a tax deed, being defeated in an action against him, because of irregularities in the tax proceedings, has a right to recover from the successful claimant the full amount of all taxes paid on such land, with interest and costs as allowed by law, which, when found by the court to have been paid, should be adjudged a lien upon the land.

(Syllabus by the Court.)

Error from district court, Graham county.

Action by S. T. Powell against G. S. Finn. From a judgment, plaintiff brings error. Affirmed.

S. N. Hawkes, for plaintiff in error. Harwl & Prewitt, for defendant in error.

**GILKESON, P. J.** The questions raised by the plaintiff in error in his brief are very numerous. Most of them, however, are of practice, and as to these latter we will say that the court erred in setting aside any part or portion of the decision and judgment first rendered in this case, as they were not properly presented, under the requirements of the Code, and, if they had been, were clearly out of time; but we do not think that the plaintiff below was prejudiced thereby, as the error did not affect the final judgment rendered, which could and should have been rendered even if the court had refused to set aside any of the proceedings, and, besides, some of the gross irregularities occurring upon the trial of this case were assented to, or, at least, submitted to, without exceptions being taken at the time. The question of the statute of limitations was not raised in the court below. The tax deed was attacked for irregularities, and the court held it void. The plaintiff obtained all he asked, and cannot complain.

The next proposition presented is: "It was error for the court to allow defendant a lien for any taxes." This contention cannot be sustained. We think this case falls within the spirit and letter of paragraph 6996, Gen. St. 1889, as amended by section 6, Laws 1903, and, under this paragraph, the court should have adjudicated the claim for taxes; and the record shows that it was adjudicated by consent, at least. Issue was

joined thereon, and hearing had, without objection; and, having so done, it was proper, under the testimony, to allow the amount thereof, and it became a lien upon the premises. We think this view is fully sustained by our supreme court, in *Russell v. Hudson*, 28 Kan. 99; *Coonradt v. Myers*, 31 Kan. 30, 2 Pac. 858; *Belz v. Bird*, 31 Kan. 139, 1 Pac. 246; *Bird v. Belz*, 33 Kan. 391, 6 Pac. 627; *Jackson v. Challiss*, 41 Kan. 247, 21 Pac. 87. The judgment of the court below will be affirmed.

(5 Kan. App. 515)

**STATE v. REYNOLDS.**

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 10, 1896.)

**INTOXICATING LIQUORS—UNLAWFUL SALE—INSTRUCTIONS.**

1. A compound of several ingredients, or a mixture of liquors, is an intoxicating liquor, within the meaning of the prohibitory liquor law, when such compound or mixture may be taken in sufficient quantity to produce intoxication, and when it is reasonable to presume that it may be used as a beverage, and as a substitute for the ordinary drinks.

2. Under an information charging an unlawful sale of intoxicating liquor, evidence should not be admitted to show other unlawful sales, which were not in the mind of the prosecuting witness when the information was filed; nor should sales other than that relied upon for conviction be considered merely for the purpose of making weight against the defendant.

3. An instruction, although correct as an abstract proposition, is properly refused by the court when it is not within the issues being tried.

(Syllabus by the Court.)

Error from district court, Rooks county.

Elmer L. Reynolds was convicted of selling liquors, and brings error. Reversed.

J. R. Brobst, for plaintiff in error. M. C. Reville and S. N. Hawkes, for defendant in error.

**GARVER, J.** This was an action in which the defendant was charged in three counts with the unlawful selling of intoxicating liquors, and was found guilty upon the second count. For a conviction upon this count the state elected to rely upon a certain sale of liquor made by the defendant as testified to by the complaining witness Gatfield. The record in this case is voluminous, and the rulings of the court complained of are numerous. But, with a few exceptions, the assignments of error are without merit. The evidence shows that the defendant was a druggist, and the proprietor of a drug store in the city of Stockton. Upon the trial he admitted the sale upon which the state elected to rely for a conviction under the second count, but claimed that the article sold was a mixture of six ounces of whisky and two ounces of tincture of ginger; that it was sold for use as a medicine, and could not be reasonably used as an intoxicating beverage. The issue upon this count was, upon the trial, prac-

tically narrowed down to the one question: Was this an intoxicating liquor, and the mixture of such a character that the defendant is presumed to have known that it was reasonably liable to be used as an intoxicating beverage, and therefore within the prohibition of the statute? It is well settled that it is not every liquid that contains intoxicating ingredients, and that is capable of being used so as to produce intoxication, which can be classed as an intoxicating liquor, within the meaning of the statute. Where the liquid is a compound of several ingredients, or a mixture of liquors, it must be a compound or mixture which may be taken in sufficient quantities to produce intoxication, and which it is reasonable to presume may be used as a beverage, and as a substitute for the ordinary drinks. *Intoxicating Liquor Cases*, 25 Kan. 524. And in any case where the sale of such compound or mixture is charged as a violation of the prohibitory law, it is a question of fact for the jury, under the evidence, whether such sale is within or without the statute. In this case this was, upon the evidence, a close question. A number of expert witnesses testified upon each side,—the testimony of one class tending to prove that the mixture could reasonably be used only as a medicine, and not as a beverage; the other class testifying that it was an intoxicating liquor, which could be used in such quantities, as a beverage, as to produce intoxication. We think, under the circumstances of the case, undue importance was given to the fact that the mixture contained a large percentage of alcohol, and was intoxicating. This being a fact not in dispute, the attention of the jury should have been directed more to the use which might reasonably be made of such liquor, and not so much to an exceptional use. Upon this point, after the jury had retired to deliberate upon their verdict, as an additional instruction given at the request of the jury the court said: "If you find the liquor sold upon the prescription of Dr. Keigh was compounded of six ounces of whisky and two of tincture of ginger, then you are to say, under the evidence, whether or not it was an intoxicating liquor." We think the court, in the same connection, should have qualified this instruction by stating that the jury must also find whether it could fairly be presumed that such liquor might be used as a beverage. As, in the general charge, the law was properly given, and these qualifications made, this of itself would not justify a reversal of the judgment, though it may have had a tendency to confuse the jury.

Evidence was admitted, over the objection of the defendant, tending to show other unlawful sales of intoxicating liquors by him, previous to the sale alleged in this case. The offer of this evidence was accompanied by a statement of counsel for the state that the sales which it was proposed to prove were not in the mind of the prosecuting witness at the

time the information was filed, and were independent thereof. So far as the record discloses, neither the prosecuting witness nor the county attorney had any knowledge or notice of such sales. The court also instructed the jury that they might take into consideration any proof of the keeping of intoxicating liquors on the premises of the defendant for use as a beverage, in passing on the question whether or not the defendant had such liquors there at the time he was charged with making the sales relied upon; and that they might also take into consideration the proof of other unlawful sales to Gatfield, to which he testified, in corroboration of his evidence, offered to prove the offense relied on by the state. This was error. The evidence should have been confined to the issues joined between the state and the defendant, and only such evidence admitted as tended to prove the specific offenses charged. Evidence of other offenses should not be injected into a case for the sole purpose of carrying weight against the defendant. *State v. Marshall*, 2 Kan. App. 792, 44 Pac. 49; *State v. Hughes*, 3 Kan. App. 95, 45 Pac. 94; *State v. Nield*, 4 Kan. App. 626, 45 Pac. 623. The evidence properly admitted to prove the second count of the information leaves the guilt of the defendant not free from reasonable doubt. Admitting this evidence of other unlawful sales, and permitting the jury thus to take it into consideration, may have had a controlling influence in securing the verdict.

Complaint is also made because the court permitted the jurors, or some of them, to smell and taste the liquor which it was claimed the defendant sold to Gatfield. This was error. *State v. Lindgrove*, 1 Kan. App. 51, 41 Pac. 688. But, as the court afterwards directed the jury to disregard any information which they thus obtained, this, of itself, would not justify a reversal of the judgment.

As there was no evidence tending to show that the article sold was tincture of ginger, the court very properly refused to instruct the jury, as the defendant requested, that tincture of ginger is not, by itself, an intoxicating liquor, within the meaning of the statute. There was no such issue before the jury.

Counsel for the state object to a review of this case, because of defects in the record. The clerk of the district court certifies to a full and correct transcript of the record in the case, including the bill of exceptions. This record may be open to technical objection, because of some apparent omissions, but we think everything is substantially before us, and that the defendant is entitled to the review of the case which we make. The technical objections made to the transcript are of matters which could be readily supplied, and can in no way affect the merits of the several questions which we have considered. The judgment will be reversed, and the case remanded for a new trial.

(5 Kan. App. 512)

**LLOYD v. FIRST NAT. BANK OF  
RUSSELL, KAN.**(Court of Appeals of Kansas, Northern Department,  
W. D. Jan. 10, 1897.)**ASSIGNMENT OF CAUSE OF ACTION—SET-OFF—RE-  
VIEW ON APPEAL.**

1. A cause of action for usurious interest paid to a national bank on a note given for a loan of money is not assignable.

2. Although a claim for usurious interest against a national bank and the note held by the bank on which such interest was paid cannot be set off one against the other, yet, when the claim for usury has been reduced to judgment, one judgment may be set off against the other, notwithstanding an attempted assignment of a portion of the claim for usury previous to the rendering of the judgment thereon.

3. When the decision of a trial court is correct, it will not be reversed, although insufficient reasons are assigned therefor.

(Syllabus by the Court.)

Error from district court, Russell county.

Action by the First National Bank of Russell, Kan., against Henry E. Shafer and Ira E. Lloyd. Judgment for plaintiff, and defendant Lloyd brings error. Affirmed.

Ira E. Lloyd, for plaintiff in error. H. L. Pestana, for defendant in error.

GILKESON, P. J. On October 17, 1889, Henry E. Shafer obtained judgment in the district court of Russell county against the First National Bank of Russell, Kan., for \$1,249.40 debt and \$17.40 costs, which judgment drew interest at the rate of 7 per cent. per annum. The cause of action upon which said judgment was rendered was for the recovery of usurious interest charged and received by the said bank upon loans made to the said Shafer, and by him paid, in violation of section 5198, Rev. St. U. S. In this action the plaintiff in error, Ira E. Lloyd, appeared, and acted and was the attorney of said Shafer. The First National Bank instituted proceedings in error in the supreme court of the state of Kansas to reverse said judgment, which was pending in said supreme court until November, 1893, when the bank caused the same to be dismissed. The said Ira E. Lloyd continued to be the attorney for said Shafer in said action during its pendency in the supreme court. On the 20th day of June, A. D. 1890, the First National Bank of Russell, Kan., obtained a judgment against the said Henry E. Shafer and one John C. Youngman for and upon their joint note in the sum of \$1,603.86 debt and \$21.15 costs, and this judgment drew interest at the rate of 10 per cent. per annum. The defendants in this action, Shafer and Youngman, instituted proceedings in error in the supreme court of the state of Kansas to reverse the same, and in June, 1894, judgment was rendered by the said supreme court modifying said judgment by reducing the rate of interest from 10 per cent. to 6 per cent., and in November, 1894, in accordance with the man-

date of the supreme court, the district court of Russell county modified its judgment. On the 9th day of November, 1893, this action was commenced in the district court of Russell county, Kan., by the First National Bank against Henry E. Shafer and Ira E. Lloyd, to have one of said judgments offset against the other, and for a judgment against said Shafer for any balance that might be due the bank from him; and upon December 22, 1894, the court rendered judgment herein in favor of the plaintiff and against the defendants, Lloyd and Shafer, as prayed for in the petition. At the commencement of this action the said Henry E. Shafer and John C. Youngman were insolvent, and have continued to be so until the present time, and neither of the judgments sought to be set off have been paid in whole or in part. The court made special findings of fact as follows: "First. It is by the court found that the matters stipulated as facts in this case are true as stipulated. Second. It is found by the court that in the action and suit of H. E. Shafer against the First National Bank, upon his allegations of usurious interest against the said First National Bank there was an agreement between the said H. E. Shafer and Ira E. Lloyd, before judgment was obtained in said case, that the said Ira E. Lloyd should receive as a fee for his services in said case the sum of \$500. Third. It is found by the court from the evidence in this case that there was an oral assignment by the said H. E. Shafer to said Ira E. Lloyd, before judgment, of an interest and ownership in the claim of said H. E. Shafer against the First National Bank to the extent of \$500." And conclusions of law, to wit: "That plaintiff's cause of action and defendants' cause of action, upon which respective judgments were rendered, were each founded upon contract; and that the respective causes of action arose in this state, and judgments were rendered in this state. That the cause of action by plaintiff upon which plaintiff's judgment was rendered is and was a proper counterclaim and set-off against the defendants' cause of action. Judgment of the court that the defendants' judgment be set off and applied in payment, so far as the same in amount applies to the payment of plaintiff's judgment; and that the court finds that the right of set-off in the bank is paramount to the claim of Ira E. Lloyd."

Can the claim of Shafer against the bank of usurious interest be set off? This question has been answered by our supreme court in the negative. *Fraker v. Cullum*, 24 Kan. 679. Mr. Justice Brewer, delivering the opinion of the court, says: "This depends upon the nature of the cause of action, for unless it is one arising upon contract it cannot, under our statute, be made a matter of set-off. The cause of action is clearly not founded upon express contract.

The bank never promised to pay Fraker double the usurious interest it had received from him. The only express contract was the other way, and that contract had been performed. Is it founded upon an implied contract? The authorities say not. *Hade v. McVay*, 31 Ohio St. 231; *Lucas v. Bank*, 78 Pa. St. 228; *Wiley v. Starbuck*, 44 Ind. 298. The section creates a forfeiture, and, in case the party wronged has actually parted with his money, allows him to recover double damages. Usury, says the statute, forfeits all interest. That is the penalty for the forbidden act. It is in the nature of punishment for an infraction of the law. If no interest has been paid, but only contracted to be paid, that is the only effect of the statute. It thus far nullifies the contract, and forbids recovery of such interest. But, if it has been paid, the party may recover it back, and as much more. The forfeiture is not avoided by the fact that the contract has been performed; but, as though performance had increased the wrong, the damages are doubled. The cause of action is really one to enforce a forfeiture, but a forfeiture implies no contract. \* \* \* It cannot be justly said that an action to enforce a forfeiture or recover a penalty is one founded upon contract, no matter who is the party chiefly benefited by the recovery." And it is admitted by the defendant in error that Shafer's causes of action against the bank were not causes of action arising upon contract, and for this reason contends that it was not assignable. This has been answered in our comments upon the right of set-off. And as we have there held that the causes of action did not arise upon contract, we are compelled to answer this, under the decisions of the supreme court of this state, in the negative. "At common law no chose in action was negotiable, or even assignable. In equity every chose in action, except a tort, was assignable; but it was assignable subject to all equities that might be set up against it. Under the Kansas statute every chose in action is assignable except a tort, the same as in equity." *McCrum v. Corby*, 11 Kan. 465; *Railway Co. v. Brehm*, 54 Kan. 751, 39 Pac. 690. It will therefore be seen that the second conclusion of law made by the trial court is erroneous as to the foundation of the defendants' cause of action, and the reason assigned for allowing the counterclaim or set-off. While we hold that the claim for usury was not assignable, yet, as soon as it was reduced to a judgment, the nature of the claim was changed. The judgment partook of a different nature from a bare, naked, open claim, and could be used as a set-off. But, as the decision is correct, it should not be disturbed if a wrong reason is assigned. This disposes of all the questions in this case. The judgment of the trial court will be affirmed.

(5 Kan. App. 498)

# HEATON et ux. v. NORTON COUNTY STATE BANK.

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 4, 1897.)

JURISDICTION ON APPEAL—DEED BY DURESS—REVIEW—NOTARY AS WITNESS.

1. When the record does not affirmatively show the amount or value of the subject-matter in controversy, evidence aliunde the record is admissible to establish that fact.

2. When the execution, by the wife, of a deed of conveyance of the family homestead is obtained by threats of the arrest and imprisonment of her husband, such deed will be held invalid and void on the ground of undue influence, even though the threatened arrest and imprisonment is for an offense of which the husband is guilty. The unlawful use of criminal process, or the threatened unlawful use of criminal proceeding, is itself unlawful, and no advantage so obtained will be sustained by the courts.

3. When offers of evidence and the rulings of the court thereon are made, without specific objection, upon the theory that the issues being tried are applicable alike to all the defendants, an appellate court will review the rulings of the trial court upon the same theory, and will not regard technical objections, for the first time made on appeal, that as to one defendant in default the rulings were correct.

4. An officer who certifies to the fact that the grantors in a deed personally appeared before him and acknowledged the execution thereof is a competent witness to testify to the circumstances surrounding such execution and acknowledgment, notwithstanding the testimony may tend to show that the execution of the deed was obtained by duress or undue influence.

(Syllabus by the Court.)

Error from district court, Norton county; A. C. T. Griger, Judge.

Action by the Norton County State Bank against Morgan Heaton and Mattie J. Heaton. Judgment for plaintiff. Defendants bring error. Reversed.

L. H. Wilder and C. Angerine, for plaintiffs in error. L. H. Thompson, G. H. Horton, and A. N. Sullivan, for defendant in error.

GILKESON, P. J. On the 16th day of January, 1895, the defendant in error, as plaintiff, commenced its action against the Heatons, as defendants, before a justice of the peace of Norton county, for the possession of certain real estate in the town of Norton, Norton county, Kan., alleging ownership thereof by the plaintiff, and the unlawful and forcible detention of the same by the defendants. This action was by the justice of the peace certified to the district court of Norton county for trial, and afterwards, and in said court, the Norton County State Bank filed what is termed its "amended petition," alleging title in itself by virtue of a certain warranty deed made, executed, and delivered by the defendants, Morgan Heaton and Mattie J. Heaton, to the plaintiff bank, the acknowledgment and recording of said deed, and attaching a copy thereof as an exhibit, and a cause of action for \$200 damages caused by the wrongful and un-

lawful possession of said real estate by the defendants. To this petition Mattie J. Heaton answered, denying each and every allegation in said amended petition, except such as are specifically admitted. Second. Admitting the deed referred to in plaintiff's petition was by her executed and delivered without any consideration. Third. That Mattie J. Heaton and Morgan Heaton are husband and wife, and have been for more than 15 years; that they are the absolute and unqualified owners of the property in controversy, and have been for many years; that the property is occupied by them, with their family, as a homestead, and was so occupied for many years prior to the action, and they now have possession thereof, and are entitled to the peaceable possession of the same as a homestead; that the deed in controversy was executed and delivered by her to the plaintiff while she was under coercion, intimidation, and duress, and undue influence practiced, caused, and brought about by the plaintiff and its representatives acting under the authority of plaintiff and for and on its behalf; that her husband, the defendant Morgan Heaton, at the time of the execution and delivery of the deed was, and for many years prior thereto had been, an officer and managing agent of the plaintiff; that the plaintiff and its representatives acting for the plaintiff and on its behalf prepared such deed without consulting her, and without her knowledge, and came to her home after midnight, and, with the intention to cheat and defraud her out of her homestead, wrongfully and fraudulently and unlawfully represented to her that her said husband had sold and disposed of the property of the plaintiff, and appropriated the proceeds thereof to his own use, and that he had stolen and embezzled the funds of the plaintiff, and with such intention so represented and threatened that, unless she immediately executed and delivered such deed, such plaintiff and its representatives would immediately cause her husband to be arrested and imprisoned on the charge of embezzlement and larceny; that such plaintiff and its representatives had heretofore made such charges against and to her said husband, and had threatened her said husband with such arrest and imprisonment; that she at the time was informed of such representations, threats, and charges; that then and there believing that the plaintiff and its representatives would immediately cause the arrest and imprisonment of her said husband unless she executed and delivered said deed to plaintiff, and being put a fear by such threat of arrest and imprisonment of her said husband, and to prevent such arrest and imprisonment, and for no other purpose or consideration whatever, she delivered said deed to plaintiff at the time it was presented; that all the acts by her done and performed at such time were caused and brought about solely and only

by such threat of arrest and imprisonment, and while she was under the influence of and controlled by such threats, and that the execution and delivery of such deed was not her voluntary act and deed, and that such threats of arrest and imprisonment were by the plaintiff and its representatives made to her, and to her husband with the intention on the part of the plaintiff and its representatives to cheat and defraud her out of her said homestead, and were made and communicated and repeated and caused to be made, communicated, and repeated to her for the purpose of intimidating her and putting her in fear, and coercing and compelling her to so execute and deliver such deed, and do and perform all other acts by her done and performed at such time; and that by reason of such acts on the part of the plaintiff and its representatives she was cheated and defrauded out of her homestead, and coerced and intimidated and put in fear, and compelled to so execute and deliver such deed to the plaintiff, and to do and perform all other acts by her done and performed at such time; that she never consented, either jointly with her husband or otherwise, to the execution and delivery of such deed, or to the conveyance of her said husband; and that such deed is void, and that of all the facts in her answer set out the plaintiff and its representatives have at all times had full knowledge. Plaintiff's reply is that it denies generally and specifically each and every material allegation contained in said reply, save and except such admissions therein made relative to the allegations contained in plaintiff's petition. Case tried to the court without a jury. Court found the issues in favor of the plaintiff, that at the time of the commencement of this action the plaintiff was the owner of, and entitled to the possession of, the real estate described in the petition, and that the plaintiff is entitled to recover from the defendants the sum of \$180 damages for the withholding the possession of said property; and judgment rendered in accordance therewith.

The jurisdiction of this court to hear and determine this action is again challenged by the defendant in error upon the ground that the amount or value of the property in controversy exceeds the sum of \$2,000. This question was raised in this court by motion to certify the action to the supreme court of the state, which, upon hearing, was denied. We are satisfied with the ruling made upon that motion at that time. The defendant in error, contending then, as it does now, that the consideration mentioned in the deed and the deed being pleaded, establishes the amount in controversy. We think not. The only object in setting out or referring to the deed in this case is for the purpose of showing title. It was introduced in evidence for this purpose only. There is not an allegation in this petition that refers to the value of the

property, and the fact that the title under which they claim is set up by the deed has no other effect; and how the consideration mentioned in the deed, executed long prior to the commencement of the action, can of itself establish the value of the property in controversy, we cannot understand. And if the consideration of this deed had been natural love and affection, or the sum of one dollar and other valuable considerations, we do not think that the learned counsel for defendant in error would for a moment contend that such consideration established the jurisdiction of this court.

But the vital question in this case is that of duress. In other words, do threats of lawful arrest constitute duress? This we must answer in the affirmative. While it has been held that threats of imprisonment, to constitute duress, must be unlawful imprisonment, we think the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener, who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered with reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crimes. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of the laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way. In such a case there is no reason why one should be bound by a contract obtained by force, which, in reality, is not his, but another's. *Morse v. Woodworth*, 155 Mass. 232, 27 N. E. 1010, 29 N. E. 525; *Hargreaves v. Korcek* (Neb.) 62 N. W. 1086. In the case of *Bane v. Detrick*, 52 Ill. 27, the court said: "The mortgage was void for another reason,—it was executed through a perversion and abuse of criminal process. It is against public policy that process should thus be used, and no court will allow the results flowing from it to be enjoyed by him who so uses it." The supreme court of California, in passing upon this question of duress, when the plaintiff had procured warrant to be issued by a justice of the peace for the arrest of the defendant for the purpose of coercing the defendant to pay certain sums of money and sign contracts for the payment of money to plaintiff upon the claim by plaintiff that defendant had embezzled large sums of money from the Milwaukee Furniture Company, of which defendant had been acting as treasurer, cites *Bane v. Detrick*, supra, and adds: "Under that kind of menace which consists of an injury to the character of a person, it is entirely immaterial whether such person

is guilty or innocent of the crime to be charged. *Morrill v. Nightingale* (Cal.) 28 Pac. 1068. In *Hackett v. King*, 6 Allen, 58, it was held: "That though a person was arrested under a legal warrant, and by a proper officer, yet if one of the objects of the arrest was to extort money, or enforce the settlement of a civil claim, such arrest is false imprisonment by all who have directly or indirectly procured the same, or participated therein for any such purpose; and a release and conveyance of property obtained by means of such arrest is void." In *Taylor v. Jaques*, 106 Mass. 294, the court says: "If he had embezzled their funds, they had a right to have him prosecuted; if he owed them a debt, they had a right to accept security for it; but they would have no right to make use of a criminal process for the collection of a debt. An arrest, even upon a legal warrant and upon a criminal charge, to compel the payment of a mere debt, would be a misuse of legal process; and the threat of such an arrest may constitute unlawful arrest." "It is well settled that where there is an arrest for improper purposes without a just cause, or where there is an arrest for a just cause, but without lawful authority, for unlawful purposes, it may be construed a duress." "It will thus be seen that an imprisonment for an unlawful purpose will constitute duress, and, such being the fact, a threat of arrest and imprisonment, made for unlawful purposes, will constitute menace." *Richardson v. Duncan*, 3 N. H. 511; *Morrill v. Nightingale* (Cal.) supra. And the supreme court of this state has said: "An arrest by a legal warrant, on a criminal charge, to compel the satisfaction of a mere private demand, is a misuse of process, and fraud upon the law, and an illegal arrest as respects the party who knowingly and purposely perverts the machinery in that way. And papers obtained under the pressure of such a proceeding by the party promoting it are at least voidable as against him, at the election of the party thus constrained to make them,"—citing *Selber v. Price*, 26 Mich. 522; *Thompson v. Niggley*, 53 Kan. 664, 35 Pac. 290.

The facts set out in the pleadings in this case are that this deed was obtained to satisfy an alleged indebtedness between the bank and Morgan Heaton, accompanied with the threat that, if Mattie J. Heaton did not execute it, her husband would be arrested and imprisoned. Such a proceeding is a threatened abuse of criminal process, and impedes the due course of public justice. One of the objects (indirect, however) of the giving of this deed was to relieve the defendant Morgan Heaton from responsibility for a violation of the law (if he were guilty of the charges alleged, and we have assumed for the purposes of this decision that he was; yet it is not shown). Is this not expressly forbidden by paragraph 2296, Gen. St. 1889? We think so. We cannot better

express our views upon this than by quoting the language of the court in *Eadie v. Slimmon*, 26 N. Y. 15: "Either the accusation which the defendant brought against *Eadie* was entirely unfounded, or he was seeking to compromise [compound] a criminal offense. If he knew that a crime had been committed by *Eadie*, he had no right to compromise it in this way, and the securities obtained on such compromise were received as a consideration for compromising a felony, and for that reason were invalid, else the whole of his assertions and threats on the subject were a gross imposture." It is true, this defense is not raised. But answer to that is, in the language of Chief Justice Ryan in *Wight v. Rindskopf*, 43 Wis. 348: "If the objection be not made by the party charged, it is the duty of the court to make it on its own behalf. Courts owe it to public justice, and to their own integrity, to refuse to become parties to contracts essentially violating morality or public policy by entertaining actions upon them. It is judicial duty always to bar a suitor upon such a contract out of court, whenever and however the character of the contract is made to appear."

It is urged that the court below did not err in excluding certain testimony, for the reason that the offers were made—apparently made—on behalf of both defendants, and that Morgan Heaton, one of the defendants, was in default by failing to answer; and to the assignment of error in this court for the same reason. We cannot sustain this contention as to the excluding of testimony. The trial seems to have been had upon the theory that both defendants were interested alike in the action; nor does it appear that this point was raised in the trial court, and, if it had been, we think it is not tenable, and the evidence should not be excluded for such reason. As to the assignments of error in this court, we cannot agree with defendant in error. The evidence in the lower court and the assignment in this, we think, should be treated and considered, even though Morgan Heaton was in default, as if they had been specially made for Mrs. Heaton. We think the court erred in the rejection of testimony in this case of the facts and circumstances leading up to and surrounding the execution of this deed. All of this testimony was proper, and should have been admitted. Should we concede that the notary could not be permitted to deny a fact which he has expressly testified to, this would not preclude him from testifying to the circumstances with reference to which he was offered; and he is certainly a competent witness to show all that occurred at the time he was taking the acknowledgment, and we are at a loss to understand how any of it contradicts anything in his certificate, or that which he is required to certify to by statute. He is not required to certify to any of the transaction concerning the instrument, or the contents thereof; only that the party duly acknowl-

edged the execution thereof; not that her act was voluntary or otherwise; and "a certificate of acknowledgment is only prima facie evidence of the execution of the deed." *Wilkins v. Moore*, 20 Kan. 538. And the execution of a deed can be proven, even though the deed has never been acknowledged. Paragraphs 1121-1123, Gen. St. 1889. And the supreme court of this state has held, "Where the execution of a deed is proven, it is then immaterial whether the deed was acknowledged or not." *Hell v. Redden*, 45 Kan. 562, 26 Pac. 2. The judgment in this case will be reversed, and cause remanded for new trial.

(5 Cal. Unrep. 575)

MALONE v. JOHNSON. (S. F. 577.)

(Supreme Court of California. Jan. 23, 1897.)

PLEADINGS — AMENDMENT — CHANGING CAUSE OF ACTION — PLEDGE — VALIDITY.

1. A complaint alleged that on April 1, 1891, defendant gave his note to plaintiff, and to secure payment thereof delivered a stock certificate which he had assigned to plaintiff on March 31, 1887. The prayer was for sale of the stock to apply on the over-due note, and for a personal judgment for any deficiency. An amended complaint alleged that on March 31, 1887, defendant gave his note to plaintiff, and delivered said certificate as security, and that on April 1, 1891, a new note was given in place of the old one, and the certificate redelivered to plaintiff as security for the new note. The prayer was the same, except that plaintiff waived judgment for deficiency. *Held*, that the amendment did not set up a different cause of action.

2. A pledge of corporate stock by indorsement and delivery of the certificate is valid as between the parties.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; James E. Murphy, Judge.

Action by John Malone against James K. Johnson. A demurrer to the amended complaint was sustained, and plaintiff appeals. Reversed.

L. F. Cooper and Sawyer & Burnett, for appellant. A. J. Bledsoe, for respondent.

BRITT, C. In this case judgment final for defendant was rendered on demurrer to an amended complaint. To support the judgment on appeal respondent relies on the plea of the statute of limitations (section 337, Code Civ. Proc.) contained in the demurrer. March 30, 1896, plaintiff filed his original complaint, alleging that on April 1, 1891, defendant executed his promissory note in plaintiff's favor for the sum of \$2,405, payable 12 months after date, and to secure such payment delivered to plaintiff a certificate of shares of stock in a certain corporation, which certificate had been previously, to wit, on March 31, 1887, assigned to plaintiff by defendant; and that the note remains unpaid. The prayer was for sale of the stock, application of the proceeds to payment of the debt, personal judgment for any deficiency, etc. In the amended complaint,

filed April 20, 1896, it was shown that on March 31, 1887, defendant made his promissory note to plaintiff for the sum of \$1,615.36, payable in one year, and as security for payment thereof then delivered to plaintiff the aforesaid stock certificate duly indorsed by defendant; that at the same time (March 31, 1887) an instrument in writing was executed by the parties stating the terms of the hypothecation of the stock; that such note was not paid, and on April 1, 1891, the principal and interest thereof amounted to \$2,390.73. That defendant then owed plaintiff a further sum of \$14.27, and in consideration thereof, and of the surrender of the overdue note, he executed a new note for the aggregate of said debts, \$2,405; "that the said defendant, James K. Johnson, to secure payment of said last-mentioned promissory note, \* \* \* did, on said 1st day of April, 1891, redeliver to said plaintiff, John Malone, said certificate of stock, \* \* \* and did then and there agree with plaintiff that he, plaintiff, should hold the same in the same manner and effect to secure the payment of the last-described promissory note of \$2,405, as he had held the same to secure payment of the first-described promissory note of \$1,615.36." Nonpayment of the new note was then stated, and the prayer was similar to that of the original complaint, except that plaintiff waived judgment for deficiency.

Respondent argues that the amended complaint, filed more than four years after maturity of the note of April 1, 1891, alleged a cause of action different from that set up in the original pleading, and hence does not have relation to the time of filing such original so as to save the bar of the statute. The pleader seems to have deemed it prudent to state in his amended complaint the antecedents of the debt evidenced by the new note and the transaction by which it was secured. This was not an attempt to state a different cause of action. The contract of April 1, 1891, which superseded that of March 31, 1887, was the ground of the claim made against defendant in both complaints. *Anderson v. Mayers*, 50 Cal. 525. It is further claimed that an extension of the lien on the stock could only be effected by another written agreement for that purpose; that none is alleged, and hence, as we understand the inference which respondent seeks to enforce, the right to proceed against the security is lost by lapse of time. But it appears that the certificate, already indorsed by defendant, was redelivered to plaintiff with the new note as security for its payment. As between the parties, nothing more was essential to a valid pledge of the stock. A second manual delivery was unnecessary indeed to perpetuate the lien if plaintiff still held possession of the certificate at the time the new note was executed. *Bank v. Ginty*, 108 Cal. 148, 153, 41 Pac. 38; *Brown v. Warren*, 43 N. H. 430. See *Spreckels v. Bank* (Cal.) 45 Pac. 329, 331. The judgment should

be reversed, and the court below directed to overrule the demurrer to the amended complaint.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below is directed to overrule the demurrer to the amended complaint.

(5 Cal. Unrep. 578)

MEEKER v. SHUSTER et al. (S. F. 374.)  
(Supreme Court of California. Jan. 23, 1897.)

EJECTMENT—MORTGAGE IN FORM A DEED.

A grantee of a deed absolute on its face cannot maintain ejectment thereon, where his grantor merely held the title as security for a debt which the grantee paid, and at the same time executed a bond to the original mortgagor in which he agreed to convey if the amount expended by him was repaid, with interest, by a specified time, since the instrument was a mortgage.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county; S. K. Dougherty, Judge.

Ejectment by M. C. Meeker against Sarah E. Shuster and others. From a judgment in favor of defendants, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Thos. Rutledge, for appellant. C. S. Farquar and T. J. Butts, for respondents.

HAYNES, C. This is an action of ejectment brought by the plaintiff to recover possession of certain lands in Sonoma county of which, it is alleged, he is the owner in fee and entitled to possession. Judgment was entered for the defendants upon the findings, and plaintiff appeals therefrom and from an order denying his motion for a new trial.

John Shuster, the husband of Sarah E., and father of the other defendants (James E. and Jacob F. Shuster), died seised of the demanded premises in July, 1883. On June 1, 1879, said John Shuster executed to Aaron Barnes his promissory note for \$5,482.89, with interest, and a mortgage upon said premises to secure the same. On September 29, 1883, the claim of said Barnes upon said note and mortgage was allowed by the administrator of the estate of said John Shuster in the sum of \$7,282.40. Said lands were inventoried at \$8,000, and the personal property at \$961.50, and a sale of said lands was ordered by the court to pay the debts of the estate. The defendants, the widow and two of the sons, desired to purchase the land, and applied to Barnes, the mortgagee, for assistance, and he consented to aid them in making the purchase. By arrangement with her said sons, the widow bid in the property at \$11,000, each of the defendants putting in the amount of their several interests, and



received to the administrator therefor, and Barnes also received for the amount of his mortgage claim, and made some other advances; and the administrator, with the assent of the sons who were interested in the purchase, conveyed the land to the widow, who, with her said sons, was then, and ever since has been, in possession. Said conveyance was made December 3, 1883, and on the same day the widow conveyed the same land to said Barnes by a deed absolute on its face, and at the same time Barnes executed to the defendants a bond, whereby he agreed to convey to them the same lands on or before December 3, 1893, upon payment of \$11,000, with interest at the rate of 9 per centum per annum, the taxes on said premises to be paid equally by the first and second parties until one-half of the principal sum and interest should be paid, and after that the whole of the taxes were to be paid by the widow and her sons. On October 5, 1892, pursuant to an arrangement between the plaintiff and the defendants in this action,—the character and purpose of which is the principal question presented on this appeal,—Meeker paid to Barnes the amount then due him from the defendants, the said bond executed by Barnes was canceled, and Barnes executed and delivered to Meeker a grant, bargain, and sale deed for the said premises, and Meeker executed to the defendants a bond by which he agreed to convey the same premises to the defendants, upon payment, on or before October 5, 1902, of the sum of \$8,440, Meeker to pay all taxes, and the defendants to pay interest at the rate of 8 per centum per annum, payable semiannually, and if not so paid to be compounded. It was further agreed that Meeker would "accept payments in part or in full on this bond at any time before maturity, and to make deed when the full amount is paid." This action was commenced May 28, 1894, and was preceded by a demand that defendants remove from the premises and deliver possession to plaintiff's agent. The evidence shows that defendants were in arrears in the payment of interest, but no reference is made to that fact, either in the demand for possession, or in the complaint, which is in the usual form in ejectment, alleging that the plaintiff is seised in fee and entitled to possession. The complaint was not verified, and the answer is a general denial.

The court found, from evidence entirely satisfactory to us, that the transaction between Barnes and the defendants was a loan, for which the deed was taken as a security; that the amount mentioned in the bond given by the plaintiff was the amount then due from the defendants to Barnes; that said sum was loaned by the plaintiff to the defendants to enable them to cancel their indebtedness to Barnes; that plaintiff, at the time said instrument was executed by Barnes to him, and which purported to be an absolute conveyance, knew the character of

the interest Barnes had in said land; that the instrument executed by Barnes to him was not intended to pass the title to him; and that plaintiff is not the owner or entitled to the possession of the demanded premises. The findings are very full and minute, several of them being of probative facts merely, but the ultimate facts are also fully found. Many of the specifications of alleged insufficiency of the evidence go to the findings of probative facts relating to the settlement of the estate of John Shuster, deceased, the amounts due Barnes, and other facts of like character; but, concerning these, it need only be said that the amount due Barnes from the defendants was mutually agreed upon and paid, and that sum constitutes the basis of the transaction between plaintiff and defendants which is involved in this action, and the sole question is whether the plaintiff bought and paid for the land, and acquired the title thereto, and then sold it to defendants, or whether the amount he paid Barnes was a loan to defendants, and the deed and bond in effect a mortgage to secure it.

That the deed to Barnes was given and received as a security for money loaned is beyond question. His advancements, including the amount due on the mortgage given him by John Shuster in his lifetime, were for the express purpose of enabling the defendants to purchase the land in question. He testified that he took the deed, instead of a mortgage, for the reason that he supposed the taxes would be less upon the land than upon the mortgage, and that he would be saved the expense of a foreclosure in case he was not repaid; and, in reply to the following question put by the court, namely, "When you entered into this transaction with the Shusters, did you think you were buying the land, or did you think you were loaning money?" he said, "Well, I thought I was loaning money." Touching the transaction with the plaintiff, Mrs. Shuster and her son Jacob testified to a conversation with the plaintiff some five or six months prior to the execution of the deed from Barnes, and the plaintiff, in rebuttal, testified that in that conversation Mrs. Shuster asked him to buy the property, and he replied that he "didn't want the property"; that Mrs. Shuster wanted to give a mortgage, and in reply to that proposition we quote the following from his testimony: "I told her I didn't want to take a mortgage; that if they failed to pay the interest I had to foreclose; that it was more than the property was worth. Then Mrs. Shuster said she would take the deed from Mr. Barnes, and deed to me, and I would give her a bond to purchase the property. I told them that was nothing but a mortgage, or the same thing as a mortgage." The witness then proceeded to explain the matter of taxes, and continued as follows: "I then explained to all present that, if they were to take the deed from Mr. Barnes, the title

would be vested in them. Then they would deed to me, and I would give them a bond. The supreme court had said that it was a mortgage. I then asked the question how much money they required. They talked the matter over pro and con, and they thought they needed about \$8,440." The plaintiff further testified: "The papers were signed, and we said we would go to the bank, and I would pay Mr. Barnes. We then all went to the recorder's office, and the Shusters and Barnes canceled the bond. I then filed my deed for record and the Shusters filed the bond for record. As we came out Jacob Shuster made the statement that Hitchcock had said he would give them \$12,000 for the place any day. I remarked: 'Well, you ought to get \$13,000 or \$14,000 for the property.' I did not say they ought to sell for less than that."

From the testimony of the plaintiff it is perfectly clear that the transaction between him and the defendants was a loan upon security, and not a purchase by the plaintiff. He had refused to buy. The money paid by plaintiff was the precise amount due from defendants to Barnes. He informed defendants that the deed and bond was a mortgage, and had so been held by the supreme court, the difference being that the taxes would be less upon the land than upon the mortgage, and that a foreclosure would not be necessary. As to the facts involved, and the purpose of the transaction, there can be no question. That plaintiff was mistaken as to the legal effect does not change the rights of the parties. That a deed, absolute upon its face, when given as security for a debt, or for money loaned, is a mortgage, and not a transfer of the legal title, is too well settled in this state to require citation of authorities. It was a loan of \$8,440 payable in 10 years, with the privilege of payment of the whole or any part of it, at any time before maturity, with interest at the rate specified, to be paid semi-annually, or to be compounded. But, if the transaction amounted to a sale to the plaintiff and a resale to the defendants, this action could not be sustained, since there was no provision in the bond that it should be forfeited for the nonpayment of interest, and no part of the purchase money was due.

We are referred by appellant to *Mahoney v. Bostwick*, 96 Cal. 58, 30 Pac. 1020, *Penney v. Simmons*, 99 Cal. 382, 33 Pac. 1121, and many other cases, to the proposition that "the testimony must be so clear and convincing that both parties intended it as a mortgage as to leave in the mind of the trial court no doubt as to the intention of the parties; otherwise, the writing should prevail." In the first of the cases above cited it was said: "But whether the evidence is of such character and strength as to produce conviction is a question for the trial court to determine." And this is repeated in almost the same words in the second of said cases. But in this case, if we were required to be satis-

fied; from a review of the evidence, that the court below rightly determined the character of the transaction before we could affirm the judgment, we could not hesitate to affirm it. Section 2924 of the Civil Code provides: "Every transfer of an interest in property other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in case of personal property it is accompanied by actual change of possession, in which case it is deemed a pledge." See, also, *Montgomery v. Spect*, 55 Cal. 352. If the transfer created a trust, as contended by appellant, it would not aid him, since in that case the terms of the trust were evidenced by the bond, and the trustee of the title could not claim the possession until the bond should be forfeited or canceled by the defendants. It was not a trust, however, in the sense of the statute, but a mortgage. The findings are justified by the evidence, and the conclusions of law were correctly drawn therefrom. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(115 Cal. 584)

SMITH et al. v. SAN FRANCISCO & N. P. RY. CO. et al. (S. F. 563, 599.)

(Supreme Court of California. Jan. 15, 1897.)

CORPORATIONS—VOTING STOCK—AGREEMENT—  
VALIDITY.

1. Under Civ. Code, § 307, providing that every stockholder shall have the right to vote the number of shares standing in his name, "as provided in section 312"; and section 312, providing that, to entitle a person to vote, he must be "a bona fide stockholder, having stock in his own name on the stock books at least ten days prior to the election,"—one is not entitled to vote stock in which he has never had any interest, but which is registered in his name for the purpose of enabling the real owner to avoid statutory liabilities; he not being a bona fide stockholder. Beatty, C. J., dissenting.

2. A written agreement between purchasers of stock in a corporation that they will for five years "retain the power to vote the shares in one body, and that the vote which shall be cast by said shares shall be determined by ballot between them or their survivors," is a proxy authorizing the vote of all the stock to be cast in accordance with the determination of the majority of the parties thereto.

3. It is sufficient consideration for an agreement between purchasers of stock to have it voted in one block for five years, the vote to be determined by ballot between the parties, that in their agreement among themselves to purchase they had stipulated for such a voting agreement; and it is immaterial that the voting agreement was not executed till after their bid for the stock was made, it having been executed before they had completed the purchase and become the owners by paying the purchase money; and it is likewise immaterial that a certificate for part of the stock was issued to each party.

4. An agreement between purchasers of stock in a corporation, that "to keep control of the corporation from passing to persons other than themselves," the shares, for five years, be voted in one block, the vote to be determined by ballot between them, does not contravene public policy. Beatty, C. J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Smith and others against the San Francisco & North Pacific Railway Company and others. Judgment for plaintiffs. Defendants appeal. Reversed.

W. S. Goodfellow, Jesse W. Lillenthal, and Garrett McEnerney, for appellants. Page, McCutchen & Eells, for respondents.

HARRISON, J. At the election for directors of the San Francisco & North Pacific Railway Company, which was had at the annual meeting of the stockholders held February 25, 1896, the votes offered by Peter Gundecker, G. E. Wagner, and Sidney V. Smith, in whose names certain shares of stock stood on the books of the corporation, were rejected, and at the close of the election the chairman of the meeting announced that Antoine Borel, A. W. Foster, Andrew Markham, P. N. Lillenthal, George A. Newhall, James B. Stetson, and John L. Howard had been duly elected directors of said corporation for the year then next ensuing. The votes of Gundecker and Wagner were rejected upon the ground that they were not bona fide stockholders in the corporation, and the vote of Smith was rejected upon the ground that by virtue of a certain agreement between him and two other stockholders—Foster and Markham—the stock of the three had been pooled for the term of five years, to be voted as a unit, and was cast in pursuance of that agreement. If the votes thus rejected had been received, the election would have resulted in the choice of Smith as one of the directors instead of Lillenthal. The present action was brought under section 315 of the Civil Code, for the purpose of having it declared that Smith instead of Lillenthal was elected a director at said election. The superior court found that Gundecker and Wagner were bona fide stockholders, and that their vote should have been received, and that the agreement by Smith with the other stockholders did not preclude him from the right to vote the stock standing in his own name as he might choose, and that the vote by the other stockholders for his stock was unauthorized and his own vote should have been received. Judgment was thereupon rendered that Lillenthal had not been chosen as a director, and was not entitled to exercise the office, and that at the said election Smith was chosen one of the directors and was entitled to be so recognized. A motion for a new trial on behalf of the defendants was denied, and from both the judgment and the order denying the new trial appeals have been taken.

1. The Gundecker and Wagner Stock. At the time of the election, and for more than 10 days prior thereto, there were standing upon the books of the corporation 4,200 shares of stock in the name of Peter Gundecker and 4,485 shares in the name of G. E. Wagner, and they were represented at the election by Antoine Borel, to whom they had given their proxy. When their votes were tendered by Borel, a protest was made against receiving them, upon the ground that neither of them was or had been a bona fide stockholder of the corporation, and thereupon the protest was sustained, and the votes rejected. In support of the action of the chairman in rejecting these votes it is alleged in the answer herein that neither Gundecker nor Wagner ever held or owned any shares of stock of the corporation, or was ever a bona fide stockholder therein; that the true owner of said shares was the firm of Ladenburg, Thalman & Co., of New York. At the hearing before the court an affidavit for a continuance was presented for the purpose of enabling the defendants to take the depositions of certain witnesses in New York, including Gundecker and Wagner, to establish this issue, and it was admitted by the plaintiffs that if the witnesses were present they would testify to the matters set forth in the affidavit, reserving, however, their objections to its materiality. The matters thus set forth in the affidavit are that at the time Gundecker and Wagner gave their proxies to Borel they were neither of them holders or owners of any stock in the defendant railway company, and had never held or owned any stock in said company; and that at the time the shares were transferred to their names they belonged to the firm of Ladenburg, Thalman & Co., who caused said shares to be so transferred to the names of Gundecker and Wagner as dummies, so as to avoid for said Ladenburg, Thalman & Co. the liability of a stockholder for the debts of said defendant railroad company. When the defendants offered this admission of the plaintiffs in evidence, the court excluded it upon the objection of the plaintiffs that it was immaterial. For the purpose of determining the present appeal, it must be assumed that, if the witnesses had testified in accordance with the admission of the plaintiffs, the court would have found the facts in accordance with their testimony, so that the real question to be determined is whether, if such were the facts, the votes of Gundecker and Wagner should have been received, and this depends upon a proper construction of the provision in section 312 of the Civil Code, requiring every voter at an election for directors in a corporation to be "a bona fide stockholder having stock in his own name on the stock books of the corporation, at least ten days prior to the election."

The act in relation to corporations passed at the first session of the legislature of this state (St. 1850, p. 347) made different provi-

sions for different kinds of corporations, and also different requirements on the part of the stockholders for the election of directors. The provision generally made in this respect was that the directors should be elected by the stockholders, and that "each stockholder shall be entitled to as many votes as he owns shares of stock in the company." Sections 35, 105, 124, 187. The chapter relating to railroad companies provided (section 59) that the stockholder must have owned his stock for 30 days next preceding the election in order to entitle him to vote; and that "no stockholder shall vote at any such election upon any stock except such as he shall have owned for such thirty days"; and the chapter relating to bridge companies provided (section 159) that the stockholder could vote only upon such stock as he had "owned absolutely, or as executor, administrator or guardian, for thirty days previous to such election." The act authorizing the incorporation of mining and manufacturing companies, passed in 1853 (St. 1853, p. 87), provided (section 5) that "each stockholder, either in person or by proxy, shall be entitled to as many votes as he owns shares of stock"; and further provided (section 11): "Whenever any stock is held by any person as executor, administrator, guardian or trustee, he shall represent such stock at all meetings of the company, and may vote accordingly as a stockholder." The statute relating to the incorporation of railroad companies was revised and re-enacted in 1861 (St. 1861, p. 607), and section 5 of that act provided that directors should be elected "by a majority of the votes of the stockholders being present in person or by written proxy; and every stockholder being so present, either in person or by proxy, at any election for directors shall be entitled to give one vote for every share of stock which he may have owned for ten days next preceding such election; but no stockholder shall vote at any such election upon any stock, except such as he shall have owned for ten days." In none of these statutes was it provided that the stock owned by the stockholder should stand in his name upon the books of the corporation.

At the adoption of the Civil Code in 1872 the legislature sought to bring into a single system, applicable to all corporations, so far as practicable, the entire method of corporate organization and management, and, having provided that directors should be chosen annually by the stockholders, provided in section 307 that every stockholder should have the right to vote in person or by proxy the number of shares standing in his name, "as provided in section 312." It is provided in section 312 that to entitle a person to vote he must be "a bona fide stockholder, having stock in his own name on the stock books of the corporation at least ten days prior to the election." It is thus made a requisite of the right to vote that the voter

shall not only be registered as a stockholder, but that he shall have been so registered for at least 10 days prior to the election, and that he shall also be a bona fide stockholder at the time of the election. The provision in section 313 that the shares of stock of an estate of a minor or insane person may be "represented"—that is, voted—by his guardian, and of a deceased person by his executor or administrator, indicates that these officers would be entitled to vote the stock without having it transferred to their own name. See *re Election of Directors of Cape May & Delaware Bay Nav. Co.*, 51 N. J. Law, 78, 16 Atl. 191. These provisions are substantially those previously existing in reference to railroad corporations, although there is added thereto the requirement that the stock must stand in the name of the voter; and, while the requirement of section 159 of the act of 1850, that the stockholder must have owned the stock "absolutely" in order to entitle him to vote, is not preserved, it is now required that in all cases he must, at the time of the election, be a bona fide stockholder. The legislature having included this as a requirement, it must be assumed that something was intended thereby in addition to what was previously made a qualification for voting, and it is the duty of courts to ascertain this intention, and construe the words accordingly. Under the previous statutory provisions in this state it had been decided in *People v. Hill*, 16 Cal. 113, that the surviving partner of one in whose name stock belonging to the partnership was registered upon the books of the corporation had the right to represent and vote the stock at an election of officers, and that the administrator of the partner in whose name the stock was registered did not have such right; saying that "the real owner of stock should be entitled to represent it at the meetings of the corporation, and the mere fact that he does not appear as owner upon the books of the company should not exclude him from the privilege of doing so." In that decision the court pointed out the distinction between the statutes of this state and of those states in which the transfer books were made the exclusive evidence of the right to vote; and it is reasonable to suppose that the provision that the voter must have stock standing in his own name was made in view of that decision.

As early as 1825 the legislature of New York provided by statute that the transfer books of an incorporated company should be the evidence of who were the stockholders of the company, and should determine the right of any claimant to vote at an election. This statute has remained in force in that state, and has been followed in other states by similar statutes, or, in the absence of any statute on the subject, by accepting the decisions thereunder as authority for determining the same question. See *Downing v. Potts*, 23 N. J. Law, 75; *Hopplin v.*

Buffum, 9 R. I. 513; State v. Ferris, 42 Conn. 560. Under this statute it was held that a registered stockholder had the right to vote at an election of officers, even though he held the stock as trustee for others without any beneficial interest therein (Ex parte Barker, 6 Wend. 509), or though his stock had been hypothecated for its full value (Ex parte Willcocks, 7 Cow. 402); and when the stock belonging to a bank was registered in the name of its cashier, who held it merely in trust, and who had been superseded by another in that office, it was held that the vote of the registered stockholder should be received in preference to the vote tendered by his successor (Ex parte Mohawk & H. R. Co., 19 Wend. 135). It was, however, held in Ex parte Holmes, 5 Cow. 426, that where stock belonging to the corporation itself was registered in the name of an individual he would not have the right to vote it, for the reason that, since it was the property of the corporation, it could not be voted at all. See, also, Brewster v. Hartley, 37 Cal. 15. It may be assumed that at the adoption of the Civil Code in 1872 the legislature was aware of the provisions of the statutes of New York, and of the decisions thereunder, and those of similar import in other states, to the effect that the one who is registered as a stockholder was entitled to vote, even though at the time of voting he had no interest in the stock; and the insertion of the words "bona fide" as an element of his qualification, in addition to the other requirements of the section, was doubtless made in view of such decisions.

Under a statute requiring him to be the owner, it has been held sufficient that he be registered as the owner, and that the corporation could not inquire into the character of his ownership; but when he is required to be a "bona fide stockholder" the nature of the title under which he holds the stock is open to inquiry. It will be observed that the requirement is not that he shall be a bona fide "owner" of the stock, but that he shall be a bona fide stockholder. The provision in section 298, Civ. Code, that the owners of stock are called "stockholders," does not need or admit of the construction that only those are stockholders who are owners of stock. This section does not purport to be a definition of the term "stockholder," or to limit its extent, as would have been the case if it had said that stockholders are those who own the shares of stock in a corporation, but is consistent with holding that others may be stockholders than merely those who are the owners of the stock, and for the purpose of avoiding such construction section 312 requires the voter at an election to be a bona fide stockholder. One may be a bona fide stockholder without being the owner of the stock. He may have caused himself to be registered as a stockholder in the utmost good faith, both towards the corporation and also towards his fellow

stockholders, and yet he may not be the owner of the stock. The owner of the stock may have pledged it as security for his indebtedness, and the creditor may have caused it to be transferred to his own name upon the books of the corporation without changing its ownership. Civ. Code, § 2888; Hawley v. Brumagim, 33 Cal. 394. It may be placed in the name of one as trustee to hold under an express trust, without any interest in the stock, but for the sole purpose of applying the income or disposing of the proceeds of its sale according to the terms of the trust. It may be the property of an estate, and transferred into the name of the executor. In all such cases the transfer would be in good faith, and the person in whose name it was registered would be a bona fide stockholder. In re Argus Printing Co., 1 N. D. 434, 48 N. W. 347. The provisions of section 322, Civ. Code, by which the liabilities of pledgees and trustees in whose names stock is registered are limited to that section, imply that such limitation does not exist in other relations which these persons sustain to the corporation, and corroborates the proposition that they are not to be precluded from voting at an election. Section 312 provides that "at all elections or votes had for any purpose there must be a majority of the subscribed capital stock represented, either in person or by proxy in writing." But, if stock that is registered in the name of a pledgee, or of a trustee, or of an executor, cannot be voted, it might not infrequently happen that a majority of the stock would not be represented at an election. This section received a construction in Stewart v. Mining Co., 54 Cal. 149, and it was there held that one in whose name stock was registered upon the books of the corporation, but who had no interest therein, and was not the owner of any stock in the corporation, had no right to vote the stock; that he was neither the proxy nor the representative of the owners of the stock, nor a member of the corporation; and was, therefore, not a bona fide stockholder. The construction then given by the court to this section has never been modified, and must be regarded as a controlling authority in the present case. The case of People v. Robinson, 64 Cal. 373, 1 Pac. 156, involved only the construction of the act of 1853. It will be observed that in that case one of the considerations stated in the opinion upon which the decision was made was that it did not appear that the right of the registered stockholder to vote as he did was challenged, or that his vendee attempted or claimed the right to cast the vote. That case, moreover, was not an action under section 315, but was in the nature of a quo warranto to oust the defendants from the offices of trustees.

It may not be easy, nor is it requisite under the facts in this case, to formulate a definition of a bona fide stockholder which

shall cover all cases, or to draw a line of exclusion by which the right to vote shall be determined; but we are very clear that one in whose name stock has been registered upon the books of the corporation, but who has never had any interest in the stock, and is only a dummy for the real owner, and when the object of such registration was for the admitted purpose of enabling the real owner to avoid certain statutory liabilities, whether such purpose would be effectual or not, is not a bona fide stockholder, within the meaning of this section, and should not be allowed to vote at an election.

2. The Smith Stock. The exclusion of the vote tendered by Smith upon the stock standing in his name was by reason of the following facts: In February, 1893, the estate of James M. Donahue, deceased, was the owner of 42,000 shares, or thereabouts, of the capital stock of the defendant railway company, which the superior court of Marin county had ordered to be sold in the course of the administration of his estate. Prior to the sale, an agreement was entered into between Smith, Foster, and Markham for the purchase of this stock as an entirety, upon the representations of Smith that upon acquiring the shares an agreement would be made by them whereby, in order to secure the control of the management and business policy of the railway company, and for its prudent and economical management in the interest of all of its stockholders, the said 42,000 shares should for the term of five years thereafter be voted as a unit in the election of directors of said railway company. In pursuance of this agreement, Smith and Foster, on the 24th of February, made their joint bid for the shares, offering to purchase them as an entirety for the sum of \$800,000 and upwards, and by order of court their bid was accepted, and on March 23d the sale was completed, and the price paid. After the making of the bid, and before the consummation of the purchase and completion of the sale, Smith prepared the agreement for the voting of the shares as a unit that had been contemplated by the parties to the purchase; and on the 22d of March the same was executed in triplicate between Smith, Markham, and Foster. By this instrument, after reciting therein that the parties thereto had purchased the 42,000 shares of stock, and had agreed to retain the power of voting the stock for five years, "so as to keep the control of the corporation from passing to persons other than themselves," it was "mutually agreed between said Foster, Markham, and Smith that they will, during said period, retain the power to vote said shares in one body; and that the vote which shall be cast by said shares, whether for directors or for any other purpose, shall be determined by ballot between them or their survivors." It was in the contemplation of the parties to the agreement that they might

sell or otherwise dispose of some of the shares, and accordingly they made provision in this instrument for retaining the right to vote the stock so sold by them, and annexed thereto the form of an agreement to be taken by them from their vendees. This form or draft recited the purchase of the 42,000 shares by Foster, Smith, and Markham, and that "for the purpose of keeping control of said stock in the interest of themselves and of all persons who shall buy any portion of the stock from them," they have agreed that for the period of five years "they shall vote the said stock in one block" at all elections for officers. The purchase of the stock by Foster, Smith, and Markham was completed, and the price therefor paid on the 23d of March, and 12,336 shares of the stock were transferred on the books to each of them; 5,000 shares being left in the name of the Mercantile Trust Company, subject to some prior trust. Prior to the day for the election in 1896, a conference was called to be held between Foster, Smith, and Markham, upon proper notice therefor, to determine by ballot how the vote of the shares should be cast at the next annual meeting for directors, and in accordance with said notice said conference was held, at which Foster and Markham were present, and upon a ballot had thereto it was determined that said shares should be voted for Foster, Markham, Newhall, and Lilienthal as directors. The foregoing matters are alleged in the answers of the defendants, and at the trial the defendants sought to introduce in evidence the agreement of March 22d, and offered to prove in connection therewith the matters set forth in their answer relative thereto; but upon the objection by the plaintiffs to this offer, "on the ground that said agreement, was not a proxy, and did not provide that any of the parties thereto should vote the stock belonging to the other, and that it was revoked before the election, and was invalid as against public policy," the evidence was excluded; the court saying: "I will assume, for the purpose of my ruling, that it was a valid agreement, but that it was not an agreement which gave any authority to any other person to cast the vote of Mr. Smith." As we have said with reference to the Gundecker and Wagner stock, for the purpose of this appeal it is to be assumed that the evidence offered by the defendants would sustain the allegations of their answer, and the sufficiency of these averments to authorize the exclusion of the vote by Smith is to be determined. It was shown at the trial that at the meeting of the stockholders held on February 25th, Smith tendered a vote for the shares standing in his name, and at the same time Foster presented the vote of the same stock by himself and Markham in behalf of Smith. Mutual protests against the votes were made by different stockholders, and the vote cast by Foster and Mark-

ham was received and counted, and that cast by Smith was rejected. Smith also testified that, after receiving the notice for the conference to determine the ballot to be cast, he informed Foster and Markham that he did not recognize the validity or legality of the agreement, and that he withdrew from the same, and would not be bound by anything which they might do thereunder. That the instrument of March 22d constitutes an agreement that the 42,000 shares are to be voted "in one body," and that the parties thereto agreed that "they" would vote the stock "in one block," is stated therein in express terms. By this instrument they also "mutually agreed" that "the vote" to be cast by said shares should be determined by ballot "between them" or their survivors. To "determine by ballot" is to ascertain the result of balloting upon a proposition by those entitled to cast the ballots; and the "vote"—that is, the voting paper or ticket to be cast for the officers, which the parties agreed should be thus determined—is to be the same for the entire 42,000 shares. That by virtue of this agreement an authority was given by each of the parties to the others to determine "the vote" to be cast by the 42,000 shares of stock is too clear for argument. When they mutually agreed that they would "determine" between them the vote which "shall be cast" for directors, they declared by necessary implication that such vote should be cast in accordance with the results of that ballot, and that, if either of them should fail to cast the vote as should be determined by the ballot, the vote so determined might be cast by the others. If we should hold that this instrument is to be construed as not giving authority to the majority of the parties thereto to cast the vote of the entire 42,000 shares of stock, as might be determined upon such ballot, we should be compelled to hold that the instrument was prepared in disregard of the agreement between the parties, and of the purpose for which it was to be executed. If there is any ambiguity in the language used for the expression of that agreement, it is to be construed so as to carry the agreement into effect, rather than to defeat its operation. No particular form of words is requisite to constitute a proxy. *Mor. Priv. Corp.* § 486. Like any other agency, the instrument by which it is created may be informal; but if, in order to give effect to its language in view of the purpose for which it is executed, it is necessary to construe the instrument as creating an agency, such construction will be given. The instrument executed between the parties must, therefore, be held to be a proxy, and to authorize the vote of the 42,000 shares of stock to be cast in accordance with the determination of the majority of the parties thereto; and, if it was made upon a consideration sufficient to bind the parties to its enforcement, it

must be regarded as still operative. One of the inducements for the purchase of the stock, and under which the parties entered into the agreement, was that the shares should be voted in one body, and held for five years as a unit. It is immaterial that the voting agreement was not reduced to writing and executed until after the bid had been made for the stock. It was so executed before the parties thereto had completed the purchase, and become the owners of the stock by paying the purchase price. Nor is the validity of the agreement or the effect of its terms different by reason of different certificates having been issued in the names of the several parties to the transaction, rather than in the name of one of them. The agreement between them was with reference to the 42,000 shares of stock, and that it should be voted as a unit, and the purpose of the agreement was the economical management of the road, and to prevent irresponsible persons from getting control. It was within the power of the parties to contract in reference to this property as fully as with regard to any other property. They were at liberty to make as a condition of their purchase that its management should be held by either of them, or by a majority of the three, and the terms of the agreement for such purchase could not be repudiated by either after the purchase had been made. It may be assumed that neither of the parties would have entered into the transaction or agreed upon the purchase of the stock except upon these conditions, and it must be held that each contributed his money to the purchase of the stock upon the promise made to him by the others. There was thus a sufficient consideration for the agreement granting the right to vote the stock. It was in the nature of a power coupled with an interest, and, being given for a valuable consideration, could not be revoked at the pleasure of either. *Hey v. Dolphin*, 92 Hun, 230, 36 N. Y. Supp. 627.

Although the court, in excluding this evidence, assumed that the instrument was valid, counsel for respondents have presented an argument in support of their further objection thereto that the instrument is invalid by reason of being against public policy; and it therefore becomes necessary to consider this objection, inasmuch as the action of the court, rather than its reason for so acting, is to be reviewed; for, if the instrument is invalid, the refusal of the court to allow any effect to be gained from its exercise was proper. "Public policy" is a term of vague and uncertain meaning, which it pertains to the lawmaking power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule



of law. Sir George Jessel, as master of the rolls, said in *Besant v. Wood*, 12 Ch. Div. 605, that public policy is "to a great extent a matter of individual opinion, because what one man or one judge might think against public policy another might think altogether excellent public policy." And in another case (*Registering Co. v. Sampson*, L. R. 19 Eq. 465) the same jurist said: "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice." It is not in violation of any rule or principle of law for stockholders who own a majority of the stock in a corporation to cause its affairs to be managed in such way as they may think best calculated to further the ends of the corporation, and for this purpose to appoint one or more proxies, who shall vote in such a way as will carry out their plan. Nor is it against public policy for two or more stockholders to agree upon a course of corporate action, or upon the officers whom they will elect; and they may do this either by themselves or through their proxies, or they may unite in the appointment of a single proxy to effect their purpose. Any plan of procedure they may agree upon implies a previous comparison of views, and there is nothing illegal in an agreement to be bound by the will of the majority as to the means by which the result shall be reached. If they are in accord as to the ultimate purpose, it is but reasonable that the will of the majority should prevail as to the mode by which it may be accomplished. It would not be an illegal agreement if articles of partnership should provide that stock in a corporation owned by the partnership, though standing in the individual names of the partners, should be voted by one of its members; and it is no more against public policy for such an agreement to be entered into between stockholders whose interests in the stock are separate than where their interests are joint. Viewed from considerations of public policy merely, it is immaterial whether such an agreement is made by the members of an existing partnership, which owns the shares, or in pursuance of an agreement by two or more persons to form a partnership for their purchase, or to purchase them for their joint account, or as one of the terms of an agreement for their purchase by persons who contemplate no relation to each other, other than that of owning stock in the same corporation. Such agreement would in any case be outside of the corporation, and disconnected with the interest of every other stockholder, and in either case the same rules would control. Whether such an agreement is illegal, so that any action or vote under it can be set aside, or is of such a character that it will not be

enforced, will depend upon the object with which it is made, or the acts that are done under it, and will be governed by other rules of law. Mr. Beach, in his treatise on Corporations, says (section 304): "The owners of shares may enter into agreements as between themselves to elect the officers of the company, and to manage its affairs as they or a majority of them shall determine; and it is held that agreements of that character are not illegal, nor void, as against public policy; for, as was said by the court in a leading case, their interests are identical with the interests of the minority of shareholders." The authority thus referred to is *Faulds v. Yates*, 57 Ill. 416. In that case *Faulds* was the owner of a majority of the shares of stock in a corporation, and entered into an agreement with the defendants in the nature of a partnership for the working of a mine, and for the purchase by the defendants from him of two-thirds of his stock. It was provided in the agreement between them that they would elect the directors of the company; that they would determine among themselves as to the officers and management of the company; and that, if they could not agree, they would ballot among themselves for the directors and officers, and that the majority should rule, and their vote be cast as a unit, so as to control the election. Upon an attempt to enforce this agreement, it was contended that those parts of it were invalid, for the reason that they were in conflict with the interests of the other stockholders. The court, however, sustained the agreement, using the following language: "There was nothing unlawful in it. There was nothing which necessarily affected the rights and interests of the minority. Three persons, owning a majority of the stock, had the unquestioned right to combine, and thus secure the board of directors and the management of the property. If one man owned a majority of the stock, he surely had the right to select the agents for its honest management." In *Hey v. Dolphin*, 92 Hun, 230, 36 N. Y. Supp. 627, the parties were jointly interested in certain shares of stock which had been issued to them in a single certificate, and it was agreed between them that the stock should not be sold, or in any manner disposed of, or the certificates surrendered, for a period of 10 years, without their joint consent in writing, but should remain as first issued, "for the purpose of enabling the said parties of the first part to prevent the control and management of the company from passing over to persons who might be less qualified or less disposed to make the business of the said company a success and its stock valuable." By the same agreement *Dolphin* was appointed a proxy to vote the whole of said shares at all elections, and the proxy was made irrevocable for 10 years, unless sooner revoked by joint consent. In an action brought for the purpose of having the agreement declared void, and that there be



issued to the plaintiff certificates for one-half of the shares, the court held that the agreement was not void, or against public policy, saying: "The object and purpose of the arrangement, as stated in the contract, is not of itself vicious, but rather the contrary. This is not a case where, as in some of the cases cited by the respondent, there is a combination of stockholders for the special benefit of some party, or where the power to cast the vote is in a party having no beneficial interest. The arrangement purported to be for the benefit of all the stockholders, and the attorney was one of the parties beneficially interested. It will hardly be claimed that a majority of stockholders may not combine to control an election of directors." See, also, *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506; *Brown v. Steamship Co.*, 5 Blatchf. 525, Fed. Cas. No. 2,025.

In cases of "voting trusts," where the owners of stock transfer the shares to trustees with authority to vote at elections according to the direction of a majority of those holding trust certificates, and the only consideration for such transfer and agreement is the mutual promises of the several stockholders, it has been held that any stockholder may revoke his agreement, and withdraw his stock at will; and it is also held that stockholders who become such after an agreement of this nature is entered into are not bound by its terms, but will hold their shares freed from the limitations of the agreement. *Fisher v. Bush*, 35 Hun, 641; *Woodruff v. Railroad Co.*, 30 Fed. 91; *Brown v. Steamship Co.*, 5 Blatchf. 525, Fed. Cas. No. 2,025. In *Moses v. Scott*, 8 Ala. 608, 4 South. 742, certain stockholders had formed a voting trust, and placed their stock in the hands of four trustees, with power to vote the stock as a unit at all meetings as three of them should think best, or, if they failed to agree, as three-fourths of the stock represented should determine, and had agreed not to sell their stock so pooled for three years. There was no consideration for this agreement other than the mutual promise of the several stockholders, and, while the court refused to enforce the agreement concerning the sale, upon the ground that it was in restraint of the free alienation of property, it said: "We cannot say there is anything per se illegal in an agreement entered into by and between certain stockholders in a joint-stock company by which they promise to vote together as a unit in all matters pertaining to the government of the corporation. Each member has the clear right to cast his ballot as he pleases, wisely or unwisely, and no other stockholder can control his conduct or gain-say his discretion, and it can make no difference if several stockholders uniformly vote together, or so vote in obedience to a prior agreement that they will do so. The vote, when cast, is but the expressed wish of the

stockholder, or, at least, must be so regarded, and no other stockholder can be supposed to be injured thereby. To hold otherwise would greatly abridge the voter's right to cast his ballot as he pleased."

The agreement in question cannot be regarded as illegal by reason of being in restraint of trade. The rule invalidating contracts in restraint of trade does not include every contract of an individual by which his right to dispose of his property is limited or restrained. Section 1673, Civ. Code, makes void every contract by which one is restrained from "exercising a lawful profession, trade, or business," except in certain instances. But this is far different from a contract limiting his right to dispose of a particular piece of property except upon certain conditions. As the owner of property has the right to withhold it from sale, he can also, at the time of its sale, impose conditions upon its use without violating any rule of public policy; and there is nothing inconsistent with public policy for two or more persons who contemplate purchasing certain property to agree with each other, as a condition of the purchase, that neither will dispose of his share within a limited period, or for less than a fixed sum, or except upon certain limitations. They have the same right to contract with reference to the terms under which they will hold or dispose of the property after it shall have been purchased, as they have to agree upon any other terms upon which the purchase shall be made; and they no more violate a rule of public policy in making such agreement a consideration of their purchase than would two or more partners, who should purchase property for partnership purposes, and agree that it should not be disposed of unless their vendee would assent to certain conditions regarding its use. These terms enter into and form a part of the consideration for the agreement to purchase, and are as binding and enforceable as any other terms of the agreement. *Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335; *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57; *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981. The contract in *Fisher v. Bush*, 35 Hun, 641, was held to be invalid for want of any other consideration than the mutual promise of the parties; but it was said in that case: "If these parties and their associates were the promoters of this corporation, then, doubtless, they could have entered into a valid agreement regulating a sale of the same, and requiring the owners to hold them from market for a reasonable and definite period of time, and thus forbidding a sale by either of his interests to one against whom his associates might have a reasonable objection. *Moffatt v. Farquhar*, 7 Ch. Div. 591; reported in 23 Moak, Eng. R. 731. A stipulation of that character

would not be illegal, as against public policy, as it would be simply a provision, assented to by all, that the newcomer into the business transaction should be with the approval of the other joint owners."

Neither is it illegal or against public policy to separate the voting power of the stock from its ownership. The statute authorizes the stockholder to vote by proxy, and it was held in *People's Home Sav. Bank v. Superior Court of City and County of San Francisco*, 104 Cal. 649; 38 Pac. 452, that a by-law restricting the selection of proxies to stockholders was invalid, that the statute placed no limitation upon the right of selection, and that a stockholder may appoint as his proxy one who is an entire stranger to the corporation. The right to appear by proxy implies, of itself, that the voting power may be separated from the ownership of the stock; and, unless the authority of the proxy is limited by the terms of his appointment, he is necessarily required to use his own discretion in any vote that he gives. Being the agent of the stockholder, he is required to exercise this discretion in behalf of his principal; but he is at liberty to use his own discretion as to the means by which his principal's interest will be best subserved. The cases in which it has been said that the stockholder could not divest himself of the voting power of his stock, and that it should not be separated from the ownership of the stock, were cases which involved either the sufficiency of the agreement by which the voting power was transferred, or the validity of the purpose for which the power was to be exercised. The proxy must exercise a discretion of the same nature as that which the stockholder is authorized to exercise, and an authority to do otherwise would be invalid; but the authority to exercise a discretion differs from an authority to perform a particular act. Under an appointment without words of limitation, the proxy may act against the interests of the stockholder, or even against the interests of the corporation, and the corporation, as well as the stockholder, will be bound by his act as fully as if the stockholder had acted in person; while, if the authority had been directed in terms to that act, it might have been invalid. The distinction is that between an unlawful exercise of a lawful power and the attempt to authorize the exercise of an unlawful power.

The question has been presented in cases of voting trusts, but an examination of these cases will show that the question has arisen either when the authority was expressly given to carry out some illegal purpose, or when, having been given without any consideration, though purporting to be for a definite term, subsequent owners of the stock have sought to revoke it before the expiration of the term. *Shepaug Voting-Trust Cases*, 60 Conn. 553, 24 Atl. 32, sometimes reported

under the name of *Bostwick v. Chapman*; *White v. Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75. We have been cited to no instance where the purpose of a proxy given upon a sufficient consideration was lawful, and the person by whom the proxy was created continued to be the owner of the stock, in which the agreement has been held invalid. The stockholder cannot separate the voting power from his stock by selling his right to vote for a consideration personal to himself alone, any more than he could agree, for the same consideration, to cast the vote himself; and an agreement with others to appoint a proxy upon the same considerations would be equally invalid. In *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847, an agreement by the purchaser of stock to give to other stockholders his irrevocable proxy, for the purpose of securing and maintaining the control of the company, was held invalid, for the reason that it was one of the terms of the agreement that the directors to be elected under its provisions should employ the one giving the proxy at a fixed salary during its existence. Such an agreement was held to operate as an inducement to elect directors who would not act disinterestedly for the benefit of all of the stockholders, but rather to promote the interest of the parties to the agreement alone, and was therefore void, as being against public policy. The court, however, said: "This conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy with the view to promote the best interests of all the stockholders." It was upon this principle that the agreements in *Guernsey v. Cook*, 120 Mass. 501, and *Fennessy v. Ross*, 5 App. Div. 342, 39 N. Y. Supp. 323, were held invalid. The same principle was declared in *Gage v. Fisher* (N. D.) 65 N. W. 809. In *Railroad Co. v. Nicholas*, 98 Ala. 92, 12 South. 723, the court held that there was nothing illegal or contrary to public policy in separating the voting power of the stock from its ownership, saying: "Where a proxy is duly constituted, and the power of the appointment is without limitation, the vote cast by the proxy binds the stockholder, whether exercised in behalf of his interest or not, to the same extent as if the vote had been cast by the stockholder in person. The invalidity of acts of this character by a proxy, rightly understood, is not made to rest upon the ground that there has been a separation of the voting power from the stockholders, but because of the unlawful purpose for which the proxy was appointed, or the unlawful end attempted to be effected by the exercise of the voting power."

From the foregoing considerations it follows that the superior court erred in finding that Gundecker and Wagner were bona fide stockholders in the defendant railway company, and also in refusing to receive in evidence the instrument of March 22d, and the

evidence offered by the defendants in connection therewith, for the purpose of sustaining the averments of their answer. The judgment and order denying a new trial are reversed.

We concur: VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

(Jan. 16, 1897.)

BEATTY, C. J. I dissent from the judgment, and from the conclusions of the court on both of the principal points decided. The contract between Smith, Markham, and Foster was, in my opinion, void, as against the policy of the law giving to the holders of a majority of the stock of a corporation the right of control. Its sole purpose and object was to give to a minority of the stockholders the power to control the affairs of the corporation against the will of the majority, and that object is secured by means of this judgment. There is not time at my command to go over the decisions, but I am satisfied that the weight of authority is against the validity of any contract by which the sole owner of stock parts irrevocably with the right to vote it, with the effect of putting a minority in control of the corporation. As to the power of the chairman of a stockholders' meeting to refuse the vote of a registered stockholder upon the ground that he is not the bona fide owner of the stock standing in his name, I deny that it exists. As I construe sections 307 and 312 of the Civil Code, the registered stockholder must be allowed to vote; and if there is a claim that he is not the real owner of the stock which he has voted, that claim must be asserted, and the remedy sought, in the proceeding defined in section 315. To hold otherwise is to invest the chairman of the meeting with a power capable of the grossest abuse, and in its nature purely arbitrary; for there is neither time nor means of trying the question of ownership at the meeting. Nor is there any necessity for investing the chairman or the members present with any such power. The real owner of stock can always have it properly transferred and registered, and the failure to do so is his own fault. Or, if a case may sometimes arise in which the right of the owner to have the stock transferred on the books is delayed or impeded, he may enjoin the apparent owner from voting it. In other words, he has his remedy in his own hands in most cases, and in the rare instances in which it is otherwise the courts will afford him a remedy. But there is no adequate remedy for the registered stockholder whose vote is excluded merely because the chairman of a stockholders' meeting may choose, without notice, without pleading, and without evidence, to sustain an objection of some other stockholder that he is not really the owner of stock which appears to be his. In this case, however, the objection was made by parties who themselves had no claim to the stock of-

ferred to be voted. It had been legally issued and regularly transferred by the owner to the persons in whose name it stood on the books, and the objection was that they were dummies, to whom it had been transferred for the purpose of avoiding the stockholders' liability to creditors, etc. This was not, in my opinion, a valid objection to the right of the holders of the stock to vote it. The owners had a right to put it in the hands of trustees, and their motive for so doing was not open to inquiry for the purpose of this election. Creditors of the corporation could not be deprived of their action against the real owners by the transfer, nor could the corporation be deprived of its right to collect assessments; but only the creditors and the corporation could question the transaction, and they only in a proper proceeding for the enforcement of their rights.

(115 Cal. 611)

FOSTER et al. v. SMITH et al. (S. F. 572.)  
(Supreme Court of California. Jan. 15, 1897.)

APPEAL—DISMISSAL.

Appeal from an order denying an injunction pendente lite will be dismissed, the action being to enjoin the voting of stock at a certain election, and that election having already been held.

In bank. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by Foster and others to enjoin Smith and others. From an order denying an injunction pendente lite, plaintiffs appeal. Dismissed.

W. S. Goodfellow and Jesse W. Lillenthal, for appellants. Page, McCutchen & Eells, for respondents.

HARRISON, J. The annual meeting of stockholders for the election of directors of the San Francisco & North Pacific Railway Company was called to be held on the 21st day of January, 1896. On the 16th of January the plaintiffs herein filed their complaint in the superior court of Marin county against the defendants, in which they prayed for an injunction restraining the defendant Smith from casting any vote for directors at said annual meeting upon certain shares of stock, except in accordance with the result of a ballot previously had under the terms of a certain written agreement between him and the plaintiffs, Foster and Markham; and that the defendant railway company and its officers be enjoined from receiving any vote from Smith, except in accordance with said ballot,—the agreement being the same which was considered in the case of Smith v. Railway Co. (S. F. 568 and 599; just decided) 47 Pac. 582. Upon the filing of the complaint the judge of the superior court, on the application of the plaintiffs therefor, made an order directing the defendants to show cause before him on the 18th of January why an injunction as prayed for should

not issue pendente lite, and restraining them in the meantime, and until the determination of said order, to show cause, and the further order of the court, from the acts sought to be prevented by the injunction. The hearing of the matter was continued from time to time until February 3d, when it was presented upon affidavits filed on behalf of the respective parties, and on the 20th of February the court made its order denying the application for the injunction pendente lite, and dissolving the restraining order. The present appeal is from this order.

The appeal has been argued in connection with the case of *Smith v. Railway Co.*, supra, from which it appears that, after the order herein appealed from was made, the election of directors by the railway company was had February 23, 1896, and that the present appeal was not taken until the 16th of April. It thus appears that the parties to the litigation have no rights which can be affected by a reversal of the order, and that the correctness of the order has become merely an abstract question. The injunction sought by the action was limited to the election then about to be held; and an injunction pendente lite, as well as the restraining order given, would have no greater extent than was sought in the action itself. If the parties should obtain a final judgment in the action upon the other issues presented in the complaint, the superior court would not grant an injunction as a part of the relief, for the facts set forth as the grounds for the injunction sought would not then exist. If the order should be reversed, the superior court would have no function to perform in consequence of such reversal. To re-establish the restraining order, or to issue an injunction pendente lite, would be a vain and frivolous act. Any opinion that we might give upon the merits of the plaintiffs' application to the superior court would not, therefore, be followed by any action on the part of that court, and would not have any binding authority, or constitute an adjudication of the rights of the parties. *People v. Common Council of City of Troy*, 82 N. Y. 575; *In re Manning*, 139 N. Y. 446, 34 N. E. 931. It was said in the case last cited, upon a similar question: "The demands of actual, practical litigation are too pressing to permit the examination or discussion of academic questions such as this case in its present situation presents." The appeal should therefore be dismissed, and it is so ordered.

We concur: VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

BEATTY, C. J. As the dismissal of the appeal has the same effect as an affirmance of the order appealed from, I do not dissent from the order of dismissal, but, in my opinion, the order denying the injunction should be affirmed.

(5 Cal. Unrep. 569)

**BARRETT v. SUPERIOR COURT OF PLACER COUNTY. (S. F. 539.)**

(Supreme Court of California. Jan. 18, 1897.)

REVIEW—ADMINISTRATRIX—REVOCATION OF LETTERS—NOTICE—OUSTER.

1. Under Code Civ. Proc. § 1395, which provides that, if sufficient security is not given within the time fixed, the right of an administrator to the administration shall cease, etc., where an administratrix fails to comply with the order, and obtains no further time, she is not entitled to notice of an order revoking her letters after the limitation has expired.

2. Where there has been a failure to comply with an order for an administratrix to give additional security, an order "that the right of the administratrix to the administration of this estate cease" cuts off her powers, and ousts her from office.

Department 1. Application by Maggie G. Barrett against the superior court of Placer county (J. E. Prewett, judge), for a bill of review. Writ discharged.

George B. Merrill, for petitioner. Benjamin P. Tabor, for respondent.

GAROUTTE, J. This is an application for a writ of review, asking the court to annul an order made by the superior court of Placer county in the month of May, 1896, appointing one Mitchell administrator of the estate of Joseph Byrn, deceased. It is claimed that such order was beyond the jurisdiction of the court.

Petitioner, Maggie Barrett, was the administratrix of the estate of said deceased. Upon the 15th day of June, 1895, the judge of said court issued a citation to her and the sureties upon her bond, ordering them to appear before him upon a certain named day and be examined as to their property and its value. This hearing resulted in the court making an order, upon July 1, 1895, that the administratrix furnish additional security in a certain named amount within the next five succeeding days. This additional security was not furnished to the judge within the time fixed, but a new bond was presented to the judge for approval some seven days thereafter, and approval thereof was refused. Upon July 9th, at the hour of 10 a. m., said superior court made the following order, which was duly entered in its minutes, in the matter of the estate of Joseph Byrn, deceased: "That the right of the administratrix to the administration of this estate cease." Thereafter, upon the same day, at 2 p. m., the court made the following order, which was entered in the minutes: "That her powers as such administratrix be, and the same are hereby, suspended, and her letters as such revoked, until the further hearing upon the question of her permanent removal, now pending, to be heard on September 12, 1895."

Petitioner sustains her application for the writ upon the ground that her letters of administration had not been revoked when her successor was appointed, and, in fact, never have been revoked, and hence such appoint-

ment was without the court's jurisdiction. Some of the orders of the superior court made in this case have already been before us upon a writ of review (see *Barrett v. Superior Court*, 43 Pac. 519), and it was there, at least incidentally, held that a failure to comply with the order of the court requiring the giving of additional security resulted, ipso facto, in a revocation of her letters. This court said: "Section 1395 does not require any order to be served upon the administratrix, but declares that the mere failure to give the security within the time fixed by the judge's order shall, of itself, without any further action on the part of the court, cause the right of the administrator to the administration to cease." The section declares: "If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who elects to give a sufficient bond, must be appointed to the administration." This language is clear, explicit and positive, and we are not at all prepared to say that the construction given it in the former opinion of the court is not the correct one.

Conceding the letters of the administratrix were not revoked by operation of law, then we have the order of 10 a. m., July 9th, that the right of the administratrix to the administration of this estate cease. If her powers and rights as administratrix did not, ipso facto, cease upon her failure to file the bond within the time required, then this order of the court cut off those powers and rights, and completely ousted her from office. The validity of this order is attacked upon the ground that it was made without notice. But no notice is required by the statute, and no notice was necessary. Both the court and the administratrix knew all the facts. There was no evidence to take. The administratrix was required to file additional security within five days. When she failed to comply with the order, and obtained no further time in which to comply with it, either one of two results necessarily followed; that is, by operation of law she was no longer administratrix of the estate, or, if an order of the court was necessary to revoke her letters, then they were revoked, for such an order was made. With either construction of the statute, her position is equally unfortunate. It is evident that the order was intended to revoke her letters. There was no other reason for making it. It meant this, or it meant nothing. It was broad enough to cover the ground. It was not required to be in any particular form, and was sufficient to serve every purpose intended.

The order made at 2 p. m. upon July 9th becomes immaterial, and the consideration of it unnecessary in view of the construction given the order of 10 a. m. If petitioner was removed from office by an order made at 10 a. m., and her letters revoked, an order made some hours later served no effective purpose, unless

it could be construed as setting aside the earlier order. It does not purport to do so. This could hardly be its construction by implication; and, in the absence of express and direct language indicating such intention on the part of the court, we could not so hold. We find no such clear intention in the order. It is recited in the record that the later order was made by mistake and inadvertence. Whatever may be the true reason is immaterial, and the order of 10 a. m. must stand. The administratrix having been ousted from office, and her letters revoked, the court did not exceed its jurisdiction in appointing her successor. For the foregoing reasons, the writ is discharged.

We concur: VAN FLEET, J.; HARRISON, J.

(115 Cal. 613)

LAVER et al. v. HOTALING. (S. F. 502.)  
(Supreme Court of California. Jan. 19, 1897.)

ACTION FOR SERVICES—CUSTOMARY CHARGES—  
EVIDENCE.

On the trial of an action by an architect on a quantum meruit, plaintiff's evidence of the customary charges of architects for similar services is not made incompetent by defendant's showing that the customary charges made by architects originated in and conform to a rule established by an association of architects. *McFarland, J.*, dissenting.

In bank. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Augustus Laver and others against A. P. Hotaling on a quantum meruit. From an order granting a new trial to defendant, plaintiffs appeal. Reversed.

Robert Harrison and Michael Mullany, for appellants. A. P. Van Duzer and Walter H. Levy, for respondent.

BEATTY, C. J. Plaintiffs are co-partners in the practice of their profession as architects. They sued in this action to recover the alleged reasonable value of services performed, it is claimed, at defendant's request, in the preparation of drawings, plans, and specifications for a building defendant had in mind to erect. After verdict and judgment in plaintiffs' favor, the court granted a new trial, on the sole ground, specified in its order, that it erred at the trial "in permitting the introduction of evidence of a rule of compensation of architects, established by architects' institutes or associations." The plaintiffs appeal from the order granting a new trial, and contend that, if any evidence of a rule of compensation established by architects' institutes or associations was admitted, it was not introduced or offered by them. A careful examination of the record convinces us that this contention is well founded. In order to prove the value of their services the plaintiffs introduced evidence of the customary charges of architects for similar services. This evidence was, of course, entirely competent, just as the current market

price is evidence of the value of goods sold. On cross-examination of plaintiffs' witnesses, and on the direct examination of his own witnesses, defendant brought out the fact that the customary rates of charges made by architects originated in and conforms to a rule established by an association of architects. But the fact that the customary rate of charges originated in a rule which, as such, was not binding upon the defendant, did not render evidence of the actual custom incompetent. If the usual and regular wages of a mechanic are three dollars per day, does such customary rate become any less competent evidence of the value of his services when it is shown to have been first prescribed by a rule of his union? Certainly not. The rule, it is true, is not binding, as a rule, upon those who have not made it a part of their contract, and no one is held to have made it a part of his contract unless charged with knowledge of it. But, however ignorant an employer may be, of the customary rate of compensation, such customary rate is evidence of value in any suit by his employé upon a quantum meruit. The superior court did not err, therefore, in admitting the evidence offered by the plaintiffs, or in refusing to strike it out after the defendant had proved the rule of architects, and certainly the defendant was not entitled to a new trial because of the testimony offered by him. The instruction of the court to the jury with reference to this testimony may have been misleading, but it was not excepted to at the time, nor was it specified as a ground of the motion for a new trial, and can lend no support to the order. Other grounds were specified in support of the motion, but none of them are relied upon in the argument of counsel, and we cannot see that they possess any merit. The order granting a new trial is reversed.

We concur: VAN FLEET, J.; TEMPLE, J.; HARRISON, J.; HENSHAW, J.

I dissent. McFARLAND, J.

(5 Cal. Unrep. 572)

PEOPLE ex rel. WIRT v. BUDD. (S. F. 775.)

(Supreme Court of California. Jan. 19, 1897.)

MANDAMUS — PARTIES — APPOINTMENT OF POLICE COMMISSIONERS.

A citizen is not "beneficially interested" (Code Civ. Proc. § 1086) in the appointment of police commissioners for the city and county of San Francisco, so as to entitle him to sue, without permission of the attorney general, for a writ of mandate to compel the governor to make such appointment.

In bank. Petition, on the relation of N. S. Wirt, against James H. Budd, for a writ of mandate. Dismissed.

N. S. Wirt, for relator. Davis Louderback, for police commissioners. W. F. Fitzgerald, Atty. Gen., and D. H. Anderson, Deputy Atty. Gen., for defendant.

PER CURIAM. This is an application, on notice, for a peremptory writ of mandate to the governor of California to appoint two police commissioners for the city and county of San Francisco. The attorney general moves to dismiss the proceeding, upon the ground that the relator has received no authority to sue in the name of the people of the state, and that he is not himself a party beneficially interested (Code Civ. Proc. § 1086), in any sense that distinguishes him from other citizens of the state. The grounds of the motion are conceded, and the motion must be granted. *Linden v. Supervisors*, 45 Cal. 6; *Ashe v. Supervisors*, 71 Cal. 236, 16 Pac. 783; *Colnon v. Orr*, 71 Cal. 43, 11 Pac. 814; *Marini v. Graham*, 67 Cal. 130, 7 Pac. 442. Proceeding dismissed.

(115 Cal. 617)

WILLIAMS v. BORGWARDT. (L. A. 335.)

(Supreme Court of California. Jan. 20, 1897.)

APPEAL—SUPERSEDEAS BOND.

Leave to file a stay bond in the supreme court will not be granted where the only excuse of appellant for failure of the sureties on his original stay bond to justify was that they were out of the county on the day set for justification, without a showing that they were notified to appear for justification, or that their absence was without appellant's consent, or that an attempt was made to secure other sureties.

In bank. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by C. S. Williams against H. L. Borgwardt, Jr. There was a judgment for defendant, and plaintiff appeals. Application to file a stay bond. Denied.

D. H. Whittemore, for appellant. E. Rousseau, for respondent.

PER CURIAM. This is an application for leave to file a stay bond in this court under the rule of practice established in *Hill v. Finnigan*, 54 Cal. 493. Since the decision of that case the inherent power of this court to make an order to operate as a superseas, upon condition that a good bond shall be filed here, has not been questioned, and frequently such orders have been made. But they have not been made, and they ought not to be made, in the absence of any excuse for the failure to give the undertaking or to justify the sureties in the manner and at the time prescribed and intended by the statute. In this case an undertaking was filed in due time, the sureties were objected to, and notice given that they would justify on a day named. The respondent attended at the time and place named in the notice of justification, but the appellant and the sureties failed to attend. The only excuse offered for such failure is that the sureties, being absent from the county, were unable to attend. It is not shown that they were notified or requested to attend, or that they were absent without the consent of the appellant, or that any effort was made to se-

cure their attendance or to procure other sureties. In short, there is nothing to show either accident, surprise, inadvertence, or excusable neglect, and for this court to extend the relief asked would be equivalent to making a rule that the appellant may always neglect to follow the procedure prescribed by the statute, secure that upon his mere request this court will issue its supersedeas upon the filing of a bond to be approved by us. We do not think such practice should be sanctioned or encouraged. It would necessarily involve greater expense and inconvenience to respondents, and would seriously encroach upon the time of this court. Application denied.

(5 Cal. Unrep. 573)

**LEET et al. v. BOARD OF SUP'RS OF KERN COUNTY. (L. A. 202.)**

(Supreme Court of California. Jan. 22, 1897.)

**APPEAL—WHEN LIES—DISMISSAL.**

1. Where a board of supervisors refuses a liquor license, and, after a peremptory writ of mandate, approves the bond filed by the applicants, and orders the license to issue, it cannot appeal from the judgment of mandate.

2. An appeal by supervisors from a judgment of mandate requiring it to issue a liquor license, when the hearing is after the license has expired, will be dismissed.

Commissioners' decision. Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Petition by Leet & Lang, co-partners, for a writ of mandate to the board of supervisors of Kern county, requiring them to grant petitioners a license to retail liquors. From a judgment of mandate, and from an order denying a new trial, the board appeal. Dismissed.

Alvin Fay, for appellants. Laird & Packard and J. W. Mahon, for respondents.

**SEARLS, C.** The appellants constitute the board of supervisors in and for the county of Kern, state of California. Ordinance No. 52, adopted by the board of supervisors of the county of Kern, provides for the issuance of license to sell at retail spirituous, malt, or fermented liquors or wines. The ordinance provides the mode of application, time of hearing the application, etc., and then provides as follows: "The board of supervisors shall deny the said application for license, and refuse license to be issued thereunder, if on such hearing it shall appear to the satisfaction of the board, either that applicant for such license is an unfit and not a proper person to have or to hold such license, or that such application is not made in good faith, or that the statements made in such application are untrue, or that there is any other sufficient reason for such refusal, whether shown by protest on file, location of saloon or otherwise. Leet & Lang, co-partners, filed their application for a license to retail liquors, etc., on block 231, in the town of Bakersfield, county of Kern, accompanied

by the recommendation of a majority of the owners of lots in said block 231, as by the ordinance required. A hearing of the application was had, and testimony pro and con received, whereupon the board finally refused to grant the license. Thereupon applicants procured from the superior court an alternative writ of mandate, which, after answer by the appellants here, and upon a hearing, was on the 22d day of October, 1895, made peremptory. A copy of the peremptory writ was served upon the supervisors, and, as is shown by the record, they on the same day, to wit, October 22, 1895, approved the bond filed by applicants, and ordered the license to issue. This appeared on the hearing of the motion for a new trial subsequently made, and may have been the reason for a denial of that motion. Under these circumstances, we recommend that the appeal herein be dismissed, for two reasons:

1. As was said in *San Diego School Dist. of San Diego Co. v. Board of Sup'rs of San Diego Co.*, 97 Cal. 438, 32 Pac. 517, which was in all essentials similar to this: "The defendant voluntarily complied with the mandate of the court, and the judgment was thereupon satisfied, and its force exhausted. After it had thus been satisfied, there was nothing in the judgment which the court had rendered of which the defendant could complain, or about which it could say that it was aggrieved." A reversal of the judgment here would not have the effect to annul the license, "nor did the appellants, by compliance with the judgment, lose any property rights of which restitution could be made in case of reversal."

2. As the license issued October 22, 1895, more than one year since, we may well suppose that it has served its purpose, and that all rights thereunder have ceased to exist. *Foster v. Smith* (S. F. 572; Jan. 15, 1897) 47 Pac. 591, dismissing an appeal under similar circumstances, and citing *People v. Common Council of Troy*, 82 N. Y. 575, and *In re Manning*, 139 N. Y. 446, 34 N. E. 931; the court quoting from the last-mentioned case as follows: "The demands of actual, practical litigation are too pressing to permit the examination or discussion of academic questions, such as this case, in its present situation, presents."

We concur: **HAYNES, C.; BELCHER, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion, the appeal herein is dismissed.

(115 Cal. 626)

**FIRST NAT. BANK OF SAN DIEGO v. NASON. (L. A. 141.)**

(Supreme Court of California. Jan. 22, 1897.)  
**DISMISSAL—WANT OF PROSECUTION—DISCRETION OF COURT.**

1. The power of the superior court to dismiss an action for want of prosecution is dis-

retionary, and its exercise is only reviewable for a patent abuse of such discretion.

2. Where summons was not issued for nearly a year after the filing of the complaint, and not served for nearly another year, though defendant was a resident of the county, and after issue joined the case stood for a year and a half without any effort to bring it to trial, a judgment dismissing the action for want of prosecution will not be reversed, because defendant had threatened to take advantage of the insolvency laws if judgment was obtained.

Commissioners' decision. Department 1.

Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by the First National Bank of San Diego against Arthur G. Nason. From a judgment dismissing the action for want of prosecution, plaintiff appeals. Affirmed.

Trippett & Neale, for appellant. Cassius Carter and Withington & Carter, for respondent.

SEARLS, C. This is an appeal by the plaintiff from a judgment of dismissal of its action for want of prosecution. The action was brought May 28, 1892, to recover \$3,500 and interest on a promissory note made by defendant April 3, 1888, payable 60 days after date. Summons issued April 20, 1893, and was served January 4, 1894. Defendant filed his answer February 7, 1894, which, if true, constituted a defense to the action. August 7, 1895, defendant moved to dismiss the action, and the motion was granted August 16, 1895.

From the foregoing statement it appears that at the date of dismissal the action had been pending over three years. The bill of exceptions, in addition to the above, shows, on the part of defendant, that for two years next before the motion to dismiss he had resided in the city of San Diego, and as a supervisor of the county of San Diego had occupied an office in the superior court building. On the part of plaintiff the bill of exceptions shows that the reason plaintiff had not prosecuted its action was that defendant had threatened to go into insolvency, under the laws of this state, if plaintiff pushed its action to judgment against him, in which event it would get nothing; and hence it delayed in the hope of finally realizing something on its claim.

1. The power of the superior court to dismiss an action for want of prosecution has been too often asserted and too uniformly upheld to call for discussion. *Kubli v. Haw-kett*, 89 Cal. 638, 27 Pac. 57; *Saville v. Frisbie*, 70 Cal. 87, 11 Pac. 502; *Chipman v. Hibberd*, 47 Cal. 638; *Simmons v. Keller*, 50 Cal. 38; *Kreiss v. Hotelling*, 99 Cal. 383, 33 Pac. 1125; *Murray v. Gleeson*, 100 Cal. 511, 35 Pac. 88; *Grigsby v. Napa County*, 36 Cal. 585; *Pickett v. Hastings*, 39 Cal. 105. There are many other cases to like effect, but these are sufficient.

2. The exercise of this power must, in the very nature of things, be left to the discretion of the nisi prius court, subject only to reversal for a patent abuse of such discretion. Each particular case presents its own peculiar

features, and no ironclad rule can justly be devised applicable alike to all.

3. Where the delay has been had at the instance or request of the defendant, the court will properly refuse to dismiss. *Cowell v. Stuart*, 69 Cal. 525. We fail to discern in the cause disclosed by the bill of exceptions any valid reason for the delay on the part of plaintiff to prosecute its action. The threat of defendant to take advantage of the insolvent laws was but evidence of a disposition to do what the law permitted, provided he was insolvent, and, as it was not coupled with any request for delay or promise of payment in the event of such delay, we are at a loss to see any valid excuse for postponement on the part of plaintiff in prosecuting its action. The delay of nearly a year to take out a summons after filing the complaint, the delay of nearly another year to serve the summons, with the defendant ever present, and the delay of a year and a half after issue joined, in a simple action upon a promissory note, may well have led the court below to believe that plaintiff was seeking the judicial arm of the law, not to secure prompt justice, but as a means to some ulterior purpose. We find no abuse of discretion in the action of the court below, and recommend that the judgment be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(115 Cal. 629)

Ex parte SEUBE. (Cr. 190.)

(Supreme Court of California. Jan. 22, 1897.)

INTOXICATING LIQUORS—LICENSE—ORDINANCE—VALIDITY—CONSTRUCTION.

1. A section of an ordinance providing that "every person who sells \* \* \* liquors \* \* \* must obtain a license," is not void as imposing a license tax on each sale, and not on the business of selling, it appearing from the entire ordinance that the intent was to impose the tax on the business of selling. *Merced County v. Helm*, 86 Pac. 399, 102 Cal. 159, distinguished.

2. In construing a section of an ordinance it must be read in connection with the other sections.

In bank. Petition by B. Seube for a writ of habeas corpus to obtain his release from the custody of E. W. Jones, sheriff, who held him by virtue of a commitment issued by a justice of the peace. Writ denied.

W. G. Dyar and B. F. Howard, for petitioner. E. W. Jones, in pro. per.

BEATTY, C. J. The petitioner was convicted and sentenced to pay a fine, with the alternative of imprisonment, upon a charge of carrying on the business of selling liquors without a license, contrary to the provisions of an ordinance of Colusa county. He claims that his imprisonment is unlawful, because the ordinance is void, and he bases



this contention upon the decision in the case of Merced County v. Helm, 102 Cal. 159, 36 Pac. 399, in which it was held that an ordinance in some respects similar to the Colusa county ordinance was in excess of the powers of the board of supervisors, because it attempted to impose a license tax upon each single sale, and not upon the business of selling. I have always considered that the rule of construction applied in that case went to the extreme verge of strictness, and the court has been disposed to limit, rather than extend, its application, as appears from the manner in which the case of *Ex parte Mansfield* was distinguished in 106 Cal. 400, 39 Pac. 775. In this case the language of the ordinance differs from that of the ordinance construed in *Merced County v. Helm*, and clearly supports a construction which brings it within the conceded power of the board of supervisors "to license for the purposes of regulation and revenue all and every kind of business not prohibited by law and carried on in such county." St. 1891, p. 306. The first, fourth and fifteenth sections of the ordinance read as follows:

"(1) That for the purpose of regulating certain businesses and occupations in the county of Colusa, and for the purpose of raising revenue for county purposes, a license tax shall be, and the same is hereby, imposed upon persons, occupations and businesses carried on in said county of Colusa, state of California, in the following manner and for the following sums or rates, to wit."

"(4) Every person who sells spirituous, malt or fermented liquors or wines, in quantities less than one quart, must obtain a license, and pay therefor one hundred dollars per year."

"(15) Every person who commences or carries on any business or calling, for the transaction or carrying on of which a license is required by this ordinance, without first procuring a license as prescribed herein, is guilty of a misdemeanor."

The claim of petitioner is that section 4 must be read by itself, and without reference to the other sections and parts of the ordinance, and that, so read, it is fatally affected by the vice found in the Merced county ordinance; that is to say, that it attempts to impose the license tax upon every single act of selling. But we know of no rule of statutory construction which requires us to take one section of the ordinance by itself and give it a construction at variance with other sections. On the contrary, the rule is to look at the whole ordinance, and to give each section a construction which will make the whole consistent and operative according to the apparent intent of the framers. But, even if we were to look to section 4 alone, the petitioner could claim nothing from the doctrine stated by Lord Cairns in *Partington v. Attorney General*, L. R. 4 H. L. 122, as quoted in *Merced County v. Helm*: "The principle of all fiscal legislation is that, if the

person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an 'equitable construction,' certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." If the letter of the ordinance embraces all who sell, it certainly embraces all who make a business of selling; and petitioner cannot claim that the acts charged in the complaint upon which he was convicted do not come within the letter of the ordinance. The only point he can urge is that the whole ordinance is void because it imposes, or attempts to impose, a license tax upon every single sale. Speaking for myself, I should say that if the ordinance, looking exclusively to section 4, necessarily bore that construction, it would only be void *pro tanto*. But this point need not be decided, because it is perfectly clear from all the provisions of the ordinance that the intention of its framers was to impose the tax only upon the business of selling. It is only those who carry on the business who incur the penalty, and it was for carrying on the business that the petitioner was arrested and prosecuted. The prisoner is remanded.

We concur: HENSHAW, J.; TEMPLE, J.; VAN FLEET, J.

McFARLAND, J. I concur in the judgment.

(115 Cal. 622)

MARSHALL et al. v. LUIZ et al. (S. F. 434.)

(Supreme Court of California. Jan. 22, 1897.)  
RIGHTS OF TENANT UNDER LEASE—LIEN OF LANDLORD—CHATTEL MORTGAGE ON CROP.

Under a lease of a farm for a year, containing also an agreement for the furnishing by the lessor to the lessee of cows for dairying purposes, such agreement "in no wise, however, to affect the foregoing lease of real property," the lessee became entitled, under Civ. Code, § 819, to "take the annual products of the soil"; and a provision of the lease that the tenant should not remove any hay or grain from the farm for sale did not give the landlord any lien thereon which he could enforce as against a mortgagee of the tenant without notice of such provision, who took possession of the crop after its severance from the land.

Commissioners' decision. Department 1. Appeal from superior court, Marin county; F. M. Angelotti, Judge.

Action by James Marshall and others against Frank Luiz and others to enjoin the sale of property under a chattel mortgage. Judgment for defendants, from which, and from an order dissolving a temporary injunction granted, plaintiff appeal. Affirmed.

Hepburn Wilkins, for appellants. Jas. W. Cochrane, for respondents.

**BRITT, C.** By the terms of a written lease the plaintiffs in this action let to defendant Luiz for the term of one year beginning September 1, 1894, a tract of farming and grazing land at the rental of \$2,880, payable one-half on said September 1 and the remainder on April 15, 1895. Among the covenants of the lease, for breach of which the lessors might re-enter, the lessee agreed that nothing should be sold from the land or removed therefrom except dairy products and calves and hogs raised on the place, "and that no hay, grain, or other product of the soil is to or shall be sold or carried off from said land while this lease remains in force"; that the lessee might keep on the premises seven horses, also certain cows of the lessors, to be presently mentioned, but except these should take no live stock to feed or pasture there; and should plow about 100 acres, and no more, "being the field usually cultivated for hay, and to be used for that purpose." It was stipulated that during the term the lessors would furnish to the lessee for the purpose of dairying on said land 160 cows, then on the same, which he agreed to properly care for; the use of the cows "in no wise, however, to affect the foregoing lease of the real property, but the whole of the rental mentioned and reserved being for said real property; and \* \* \* the parties of the first part shall have in the premises all such legal rights and remedies as pertain to leasing real property, and as though herein no mention of personal property was made." The lease concluded as follows: "If at the expiration of this lease, and upon the fulfillment of all the conditions herein mentioned, the party of the second part shall have any hay left in the barn, he shall be paid the sum of \$6 per ton for said hay." Said second party, the tenant, paid on account of rent the sum of \$700 only, and is insolvent. In May, 1895, he executed a chattel mortgage of the growing crop of oat hay planted by him on the premises to defendant Freitas. The court found that Freitas took the mortgage for value and without notice of the provisions of the lease. In July following, the mortgagee obtained a judgment against Luiz for the foreclosure of said mortgage and sale of the crop, which had then been harvested for hay, and thereunder the defendant Harrison, as sheriff of the county, seized the hay, and was about to sell the same, when the lessors commenced the present action to enjoin such sale and the removal of the hay from the premises. On final hearing the relief demanded was denied, and an injunction issued ad interim was dissolved. It is the view of plaintiffs, as stated by counsel, that the lease "is a contract for the purpose of carrying on the dairy business. \* \* \* The landlord practically reserves the crops to himself, and

such reserved crops remain the property of the owners of the land, and cannot be disposed of by the tenant or become liable for his debts."

We are unable to agree that the lease constituted merely a contract for the purpose of carrying on the business of dairying, or that this object should be considered controlling of those provisions which create the conventional relation of landlord and tenant between the parties. They were at too much pains to specify in the instrument the independence of the contract for dairying, and that for the lease of real property, to permit of such construction. Luiz was a tenant for years, having as such an estate in the land, and consequent right to the annual products of the soil, unless this right was withheld from him by some provision of the lease. Civ. Code, § 819. We find no language in the instrument apt for that purpose. It contains no engagement that the hay shall be fed to plaintiffs' cows; or applied in any manner to the use of plaintiffs; except that, if the tenant "shall have any hay left in the barn," he shall be paid therefor,—a contract of future sale on a contingency, which conferred no title on the lessors. True, the tenant had obligated himself not to sell or remove the hay from the premises, and his infraction of this promise—admitting, as we may, that the mortgage, inducing a sale and removal, was in contravention thereof—may have been morally and legally wrong; but it was a wrong for which redress was to be sought by re-entry or appropriate action for damages. *McCombs v. Becker*, 3 Hun, 342; *Colville v. Miles*, 127 N. Y. 159, 27 N. E. 809. Certainly, it seems to us, the lessors have no lien upon or other interest in the hay itself which equity ought to enforce against a third person whose claims thereon were acquired in ignorance of the lessors' pretensions. *More v. Ord*, 15 Cal. 204; *Hitchcock v. Hassett*, 71 Cal. 331, 12 Pac. 228; *Society v. Purvis*, 112 Cal. 236, 241, 44 Pac. 561. The judgment and order appealed from should be affirmed.

We concur: **BELCHER, C.; SEARLS, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

**PETERS v. BOWMAN.** (S. F. 203.)  
(Supreme Court of California. Jan. 19, 1897.)

In bank. Petition for rehearing. Denied.  
For original opinion, see 47 Pac. 113.

**BEATTY, C. J.** A rehearing of this cause is denied, but the statement contained in the department opinion to the effect that no similar case had been cited in which damages were allowed requires correction. The case

of *City of Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, was noted on the margin of appellant's brief, but escaped attention. There are circumstances which distinguish that case from this, particularly with respect to the culpability of the defendant; but the similarity is sufficient to justify counsel in his claim that his position is supported by a case in point. I can only say that the reasoning of the opinion in that case has failed to convince me, and that the decision stands alone and without other support than may be found in the turntable cases, from which the supreme court of Illinois was unable to distinguish it. I think, however, that there is a distinction which relieves us of the necessity of extending an exceptionally harsh rule of liability to such a case. A turntable is not only a danger specially created by the act of the owner but it is a danger of a different kind to those which exist in the order of nature. A pond, although artificially created, is in no wise different from those natural ponds and streams, which exist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. A turntable can be rendered absolutely safe, without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot upon which a pond is situated would answer the purpose; and therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed. But ponds are always useful, and often necessary, and where they do not exist naturally must be created, in order to store water for stock and domestic purposes, irrigation, etc. Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then upon the same principle must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches, and falls out. But this, we imagine, is an absurdity, for which no one would contend, and it proves that the rule of the Turntable Cases does not rest upon a principle so broad and of such rigid application as counsel supposes. The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing; and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect

to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the number-pile cases, and others of a similar character.

But the owner of a thing dangerous and attractive to children is not always culpable, and therefore is not always liable for an injury to a child drawn into danger by the attraction. It is necessary to discriminate between the cases in which culpability does and does not exist. In the Illinois case cited by counsel the city of Pekin was held to have been culpable in excavating a deep pit within the city limits, which afterwards filled up with water. It might be granted that that case was well decided, and the principle of the Turntable Cases properly applied, without holding that this defendant is similarly liable. There the existence of a pond in a thickly-peopled quarter was due to the act of the party charged. Here, the existence of the pond was due to the exercise by the city of San Francisco of a power and authority which the defendant could not lawfully resist. By the act of the city, and without any fault on his part, his lot was converted into a pond. He might, it is true, have filled it up; but he was no more bound to do so than if it had been a natural pond, because it was in no respect more of a nuisance than it would have been if it had been there before the city was laid out. The facts being undisputed, it is the province and the duty of the court to decide, as matter of law, whether a defendant has been guilty of culpable negligence, and I think that it would be most unjust to hold that in this case the defendant has omitted any duty that he owed to the child of plaintiff. The case of *Malloy v. Society* (Cal.) 21 Pac. 525, which is also much relied upon by counsel, was altogether different in its circumstances, and the culpable negligence of the defendant was clear and evident. Rehearing denied.

(5 Cal. Unrep. 583;

PALMER v. BURNHAM. (S. F. 475.)<sup>1</sup>

(Supreme Court of California. Jan. 23, 1897.)

MUNICIPAL CORPORATIONS—CONTRACT FOR STREET WORK—FIXING TIME FOR COMPLETION.

Under St. 1885, p. 151, § 6, which authorizes a superintendent of streets to enter into a written contract for grading or other street work, and requires him to fix the time for the commencement and for the completion of the work under all contracts, a fixing of the time for the commencement of work under a contract at "within 15 days from the date thereof," and for its completion at 180 days "thereafter," makes the time for the completion dependent on the time of actual commencement, and is not such a compliance with the statute as entitles the contractor to enforce assessments for the work.

<sup>1</sup> Rehearing granted

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by C. T. H. Palmer, as assignee of C. A. Warren, against Helen M. Burnham and others, to enforce a lien for an assessment for street work under a contract for grading in the city of Oakland. Judgment for defendant on demurrer to the complaint, and plaintiff appeals. Affirmed.

C. T. H. Palmer, in pro. per. J. C. Bates, for respondent.

SEARLS, C. Action to recover by C. T. H. Palmer, as assignee of C. A. Warren, contractor, upon a street assessment, and to enforce a lien therefor for grading Broadway, a public street in the city of Oakland. A demurrer was interposed by the defendants to the amended complaint of the plaintiff, which was sustained by the court, and, plaintiff having failed and declined to amend, final judgment went for the defendants. Plaintiff appeals from the judgment, and the cause comes up on the judgment roll.

The only questions presented relate to the sufficiency of the amended complaint. The resolution of intention to grade "to the official subgrade for macadamizing," etc., Broadway, from the northern line of Fourteenth street to the northern boundary line of the city of Oakland, was adopted March 18, 1889, and such proceedings were thereafter had that the work was completed prior to June 24, 1890. The improvement was therefore performed under "An act to provide for work upon streets, lanes," etc., approved March 18, 1885 (St. 1885, p. 147), and the act amendatory thereof, approved March 14, 1889 (St. 1889, p. 157). The contract under which the grading was performed was dated August 2, 1889, and the pleader, after averring that the superintendent of streets entered into the same with C. A. Warren, the contractor, continues and avers that he (the superintendent) "fixed the time for beginning said work to be within fifteen days from the date thereof, and the time for completing said work to be within one hundred and eighty days thereafter." It is also alleged that the work was commenced August 16, 1889, and "under direction of said council, by its resolutions Nos. 14,667, 14,853, and 15,062, said superintendent of streets enlarged and extended the time of completing said work, viz. February 4, A. D. 1890, by ninety days, and April 22, 1890, by forty days, and June 17, 1890, by thirty days." It is further averred that the work was completed according to the "terms of the contract with its said extensions of time."

Section 6 of the act of 1885 (St. 1885, p. 151) confers power upon the superintendent of streets to enter into written contracts of the character herein involved, and provides that "he shall fix the time for the commencement, which shall not be more than fifteen days from the date of the contract, and for the

completion of the work under all contracts entered into by him, \* \* \* and he may extend the time so fixed from time to time, under direction of the city council." It has been repeatedly held by this court that all extensions of time for the completion of contracts for street work must be made before the period fixed therein for its completion, or within the periods to which it has been previously extended. *Beveridge v. Livingstone*, 54 Cal. 56, 57; *Fanning v. Schammel*, 68 Cal. 429, 9 Pac. 427; *Dougherty v. Coffin*, 69 Cal. 454, 10 Pac. 672; *Raisch v. San Francisco*, 80 Cal. 1, 22 Pac. 22; *McVerry v. Boyd*, 89 Cal. 304, 28 Pac. 885; *Brock v. Luning*, 89 Cal. 316, 26 Pac. 972; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52; *Heft v. Payne*, 97 Cal. 108, 31 Pac. 844. If the 180 days fixed in the contract are to be reckoned from August 2, 1889, the date of the contract, then the time expired January 29, 1890; and, as it could not be thereafter extended, the attempt to do so on the 4th of February, 1890, was a vain act under the foregoing authorities, and could not galvanize the contract into new life.

Appellant's contention is that the expression in the pleading, that "the time for completing said work to be within one hundred and eighty days thereafter," must be construed to mean 180 days from the date of its commencement, which, as before stated, was August 16, 1889, and from which time 180 days would extend beyond the date of the first extension. *People v. Los Angeles Electric Ry. Co.*, 91 Cal. 341, 27 Pac. 673, is relied upon in support of this construction. This construction, however, leaves the contract subject to another grave objection, in that it leaves the time of the completion of the contract indefinite. The statute requires the superintendent of streets to fix the time for the commencement and for the completion of the work. This authority is conferred upon and is to be exercised by him, and, until it is done, the contract, as has been said, is inchoate or remains in abeyance. To fix the running of a precise period of time from the happening of an uncertain event is to leave it indefinite. It is not left to the contractor to fix the time within which his contract may be completed, yet in the present case, as he had 15 days after the date of the contract within which to commence the work, he might, under the theory of appellant, determine within 15 days when it should be completed. It seems to have been the intention of the lawmakers to require record evidence of the various steps taken in consummating street improvements, to the end that parties interested may have certain knowledge as to the regularity of proceedings whereby their property is incumbered by the liens created thereby. To say that the validity of a given improvement is to be determined by the time at which the work thereon is commenced, when such work is within certain limits optional with the contractor, and for the determination of which only oral proof can be had, is to leave the validity of such proceedings

open to doubt and uncertainty, and must, we think, lead to unhappy results. It is sufficient to say that where the statute, as here, requires the superintendent of streets to fix the time for the completion of the work, he must do so by such designation as will render it certain or capable of being made certain by computation, and that to establish, as the initial point from which the time is to run, an event which is uncertain, and to a certain extent in the volition of another, renders the time uncertain and void under the statute. These views render the consideration of the other points raised on the demurrer unnecessary. We recommend that the judgment be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(115 Cal. 619)

BROWN v. ROUSE et al. (S. F. 773.)

(Supreme Court of California. Jan. 21, 1897.)

APPEAL—BOND—JUSTIFICATION OF SURETIES—NOTICE—SERVICE BY MAIL.

1. Under Code Civ. Proc. § 948, providing that, on exception to the sureties on a stay bond, "unless they or other sureties justify" within a certain time, the judgment appealed from shall be no longer stayed, appellant may, at the time fixed for the justification, file a new bond with different sureties.

2. Under Code Civ. Proc. § 948, requiring appellant to justify his sureties within 20 days after exceptions thereto, on five days' notice, his failure to justify at the time specified in the notice does not prevent his giving a second notice and justifying other sureties within the 20 days.

3. Code Civ. Proc. § 1013, providing that, when service is by mail, and a right may be exercised or an act is to be done by the adverse party, the time within which such right may be exercised or act done is extended one day for every 25 miles distance between the place of deposit and the place of address, does not apply to notice of the justification of sureties on an appellant's stay bond, as respondent in such case has merely the right to be present at the justification, and is not required to exercise any right or do any act.

In bank. Action by Adam Brown against Charlotte D. Rouse and others. There was a judgment for plaintiff, and defendants appeal. Application for supersedeas. Granted.

John H. Durst, for appellants. W. C. Kennedy, for respondent.

BEATTY, C. J. This is a motion for supersedeas, based upon the following facts: The defendants appealed from a money judgment, and in due time filed a stay bond in sufficient amount and proper form. On November 24, 1896, plaintiff excepted to the sufficiency of the sureties, and defendants gave notice that they would justify before the county clerk on December 4th, at 11 o'clock a. m. At that day and hour the plaintiff attended before the clerk, but neither the defendant nor her sureties appeared.

On the same day, December 4, 1896, the defendant's attorney, who resided and had his office in San Francisco, mailed to plaintiff's attorney at San José, where he resided and had his office, another notice to the effect that the sureties would justify before the county clerk of Santa Clara county—the county in which the action had been tried—on the 10th day of December, 1896, at 11 o'clock a. m. At that day and hour the defendant's attorney appeared at the clerk's office and tendered a new bond, with other sureties, who duly justified before the clerk, and he thereupon approved and filed said bond. The plaintiff's attorney, deeming the second notice of justification of the sureties unwarranted and insufficient, declined to appear before the clerk on the 10th day of December, and afterwards moved the superior court to order execution to issue, notwithstanding the approval by the clerk of the bond filed on that day. The motion for execution was granted by the court, and the question to be decided here is whether the appellant is entitled to a writ of supersedeas.

The respondent, in resisting her application, urges three reasons for holding that the county clerk exceeded his authority in approving the bond filed on December 10th. In the first place, he says the notice was to the effect that the sureties on the original bond would justify, and the appellant had no right, in view of that notice, to file a new bond with different sureties. We think, however, that the right to do so is conferred in express terms by the statute. Code Civ. Proc. § 948. In the next place, the respondent contends that, according to the decision in *Hill v. Flinnigan*, 54 Cal. 494, the appellant, by failing to produce her sureties for justification on December 4th, in pursuance of her first notice, thereby forfeited her right to justify them, or other sureties, at any other time. But the case of *Hill v. Flinnigan* did not involve any such question, and it was not decided upon any principle or proposition which justifies the claim made by counsel. It was said, in effect, in the opinion in that case, that the statute contemplates but one proceeding in the trial court to stay execution, and that to allow others after failure of the first might enable the appellant, by a series of pretended efforts to justify, to unreasonably delay the prevailing party in the enforcement of his rights. But the "one proceeding" contemplated by the statute, and referred to in that opinion, is the proceeding in which the appellant is allowed all of 20 days after exception to the sufficiency of his sureties to justify them, or others in their place. When that 20 days has elapsed without justification then the proceeding is at an end, and the right to a stay is lost so far as the trial court is concerned. But if the sureties fail to appear in pursuance of one notice, and there is sufficient time left of the 20 days allowed for justification to produce the same

or other sureties, upon 5 days' notice, the appellant may give a new notice, as was done in this case, and the respondent must attend or the sureties will be well justified in his absence. Lastly, the respondent contends that the notice of the 4th of December did not give him the time to which he was entitled. It was mailed in San Francisco and directed to San José, which is 50 miles distant, and therefore he contends that he was entitled, under section 1013 of the Code of Civil Procedure, to 7 days' notice, because he says the law gave him 5 days after the service of the notice to exercise the right of appearing and cross-examining the sureties, and, therefore, he was entitled to 2 days additional time for every 25 miles between San Francisco and San José. But in this case the law does not give the respondent the right to appear and cross-examine within any certain number of days. It requires him to appear at the time specified in the notice, and he is entitled to only 5 days' notice. Section 1013 applies to such provisions and rules as those which require an answer within 10 days after notice of demurrer overruled, or service of notice of motion for new trial within 10 days after notice of filing of decision. It applies, in other words, according to its terms, where some act must be done or right exercised within a certain number of days after service, and not to the right to be present at a proceeding of which a prescribed notice must be given.

For these reasons, we think, the stay bond tendered by appellant on December 10th was properly approved by the clerk, and that the order for execution to issue was improperly granted. Let a writ of supersedeas issue as prayed.

We concur: HARRISON, J.; VAN FLEET, J.; MCFARLAND, J.

(117 Cal. 577)

**HIBERNIA SAVINGS & LOAN SOC. v.  
LEWIS et al. (S. F. 309.)**

(Supreme Court of California. Jan. 23, 1897.)

WRIT OF ASSISTANCE—PURCHASER PENDENTE LITE  
—NOTICE—JUDGMENT—COLLATERAL ATTACK.

1. A writ of assistance running to the mortgagor, or a purchaser from him pendente lite with notice, is the proper remedy to place in possession the mortgagee, who has purchased at the foreclosure sale.

2. On foreclosure, the mortgagor's attorney filed an answer for his client, alleging that, after the commencement of the suit, the parties had agreed that the default mentioned in the complaint should be waived, and foreclosure postponed, such answer being sworn to by the attorney, who stated that the "affiant knows that the facts set forth in the above answer are true." Held sufficient to show that the attorney had actual notice of the pendency of the suit when he purchased the premises from the mortgagor between the date of said agreement and the filing of the answer.

3. On writ of assistance against a purchaser from the mortgagor pendente lite, defendant cannot attack the judgment of foreclosure, valid on its face, on the ground that, when the

mortgagor appeared and submitted to the jurisdiction of the court, he mistakenly supposed the summons was valid.

Commissioners' decision. Department 1. Appeal from superior court of city and county of San Francisco; A. A. Sanderson, Judge.

Action by the Hibernia Savings & Loan Society against Anna A. Lewis and others, in which there was a decree for plaintiff. From an order granting a writ of assistance against defendant J. D. Boyer, he appeals. Affirmed.

J. D. Boyer, in pro. per. Tobin & Tobin, for respondent.

SEARLS, C. Two appeals were taken in this case,—one from an order refusing to vacate the judgment, and the other from an order granting a writ of assistance. Upon motion of counsel for respondent the appeal from the order refusing to vacate the judgment was dismissed. 111 Cal. 519, 44 Pac. 175. It follows that the only questions for consideration are those involved in the appeal from the order granting the writ of assistance.

The action was brought December 1, 1892, to foreclose a mortgage, executed May 26, 1891, by Anna A. Lewis and William F. Lewis (who are husband and wife), upon a city lot, situate at the southeasterly corner of Jackson and Baker streets, San Francisco, to secure the joint and several promissory note of the mortgagors, bearing even date with the mortgage for \$7,000, and payable one year after date, with interest, etc. The mortgage was duly recorded at the date of its execution. The Santa Cruz Rock Pavement Company and sundry other parties were made defendants, as subsequent lienholders; but, as they are not involved in this appeal, they need not be further mentioned. Summons was duly served upon Anna A. Lewis, and she made default. Defendant William F. Lewis was served with summons March 1, 1894, in Sonoma county, and appeared, and in March, 1894, filed a demurrer to the complaint, which was overruled, whereupon, and on April 11, 1894, he filed an answer in the case. On May 31, 1894, on motion of defendant William F. Lewis, he was permitted to withdraw his answer. A decree of foreclosure was entered in due form December 5, 1894, under which the mortgaged property was duly sold, the plaintiff (respondent here) becoming the purchaser, and, no redemption having been had, a deed was in due time executed, exhibited to appellant, who was in possession, and possession demanded from him, which was refused, and thereafter, on application of plaintiff, and after a hearing and opposition by appellant, the writ issued. The appellant, J. D. Boyer, was in possession of the property under a deed of conveyance executed by the mortgagors, Anna A. and William F. Lewis, May 4, 1893, and duly recorded at the date thereof.

As will be seen from the foregoing statement, appellant purchased the mortgaged premises during the pendency of the action to foreclose. A writ of assistance is the proper remedy to place the mortgagee who has purchased under a foreclosure sale in possession under his deed. It runs against the mortgagor and all persons who have purchased the fee under him pendente lite with notice. *Freem. Ex'ns*, § 37d; *Wiltse, Foreclosures*, § 593; *Montgomery v. Tutt*, 11 Cal. 191; *Frisbie v. Fogarty*, 34 Cal. 11; *Skinner v. Beatty*, 16 Cal. 156; *Montgomery v. Middlemiss*, 21 Cal. 103; *Sichler v. Look*, 93 Cal. 600, 29 Pac. 220; *Newmark v. Chapman*, 53 Cal. 559.

Appellant contends that he is not bound by the decree, for the want of notice, either constructive or actual, of the pendency of the action. Respondent avers, in his brief, that a lis pendens was recorded December 1, 1892, in Liber 40 of Lis Pendens, at page 50. We find no proof of this fact in the record, and cannot assume it to be correct. We think, however, the court was fully justified in holding, as it must have done, that appellant had actual notice of the pendency of the action. The facts as disclosed by the record on this point are: (1) That the appellant, who was the purchaser from the mortgagors, appeared in this action as the attorney for William F. Lewis, and filed a demurrer to the complaint, and upon its being overruled, on the 11th of April, 1894, filed an answer for said Lewis to the complaint. (2) Said answer set out that, after the commencement of the action (some 13 days after December 1, 1892, as the affidavit shows), plaintiff and defendant entered into an agreement whereby it was stipulated that the time for payment should be extended, and the default mentioned in the complaint should be waived, in consideration of which Anna A. Lewis paid to plaintiff \$200, etc. This answer was sworn to by the appellant here, as attorney for the defendant, who says in his affidavit "that the affiant knows the facts set forth in the above answer are true." If he knew those allegations to be true, he must have then known of the pendency of the action, as the sole object of that agreement was to postpone the pending foreclosure. The object of notice to a purchaser pending the action is to give him an opportunity of being substituted as a party thereto under section 385, Code Civ. Proc., and thus to conserve his rights, or he may permit the action to continue in the name of his grantor, but in either event he is equally bound by the judgment with his grantor.

Appellant further contends that neither he nor his grantor, William F. Lewis, are bound by the judgment, for the reason that the latter was served with an alias summons, which issued more than one year after the original summons. Section 408, Code Civ. Proc., which provides for an alias summons, contains the proviso "that no such alias sum-

mons shall be issued after the expiration of one year from the date of the filing of the complaint." The complaint having been filed December 1, 1892, and the alias summons not having issued until February 14, 1894, was not in time. But under section 416, Code Civ. Proc., "the voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint on him." When defendant William F. Lewis appeared, demurred to the complaint, and filed an answer thereto, the court acquired jurisdiction of his person thereby, and whether there was or was not a valid summons or any summons in the case was of no moment. It is true that appellant made a showing of mistake in answering, and that he supposed the summons was valid when he appeared in the case, etc. This was proper in his motion to set aside the judgment, which motion, it seems, was denied and an appeal taken from the order. But that appeal was dismissed. In the present appeal the judgment, being fair on its face, and one which on the judgment roll the court had authority to render, cannot be collaterally attacked for mere voidable error which can only be reached by appeal from the judgment or proceedings aimed at its existence subsequent to the rendition thereof. "It is a doctrine of law, too long established to require the citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding on every other court." *Peck v. Jenness*, 7 How. 624. The order appealed from should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(115 Cal. 632)

JACKSON v. PUGET SOUND LUMBER CO et al. (S. F. 774.)

(Supreme Court of California. Jan. 22, 1897.)

BILL OF EXCEPTIONS — FILING — CERTIFICATE OF ALLOWANCE.

Under Code Civ. Proc. § 650, directing that the bill of exceptions be filed after it is signed by the judge or referee, with his certificate that it is allowed, the filing thereof by the referee after settlement and allowance by him as to the proceedings before him does not deprive the judge of authority to settle and allow it as to matters which took place in court, or the appellant of the right, on timely request, to have him do so.

In bank. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Action by Alexander Jackson against the Puget Sound Lumber Company and others. Plaintiff had judgment, and defendants appeal. Plaintiff moves to dismiss. Denied.

L. L. Cory and Geo. E. Church, for appellants. Wiley J. Tinnin, for respondent.

**BEATTY, C. J.** This is a motion to dismiss an appeal from the judgment upon the ground of failure to file the transcript within 40 days after the appeal was perfected. The motion is resisted upon the ground that there is an unsettled bill of exceptions in the case, awaiting the action of the trial judge. It appears that in the superior court the cause was referred to a court commissioner to take an account and report findings, etc. Upon the filing of his report, and after various proceedings in court, a judgment was rendered in favor of the plaintiff in October, 1895, from which the defendant has appealed. In due time after judgment the defendant served upon the plaintiff a draft of his proposed bill of exceptions, which included a statement of the testimony taken, and other proceedings had before the referee, as well as the proceedings in court subsequent to the filing of the referee's report. Amendments to this proposed bill were suggested by the plaintiff, relating exclusively to the proceedings before the referee, and the draft and the amendment were sent to the referee for settlement. He allowed certain of the proposed amendments, whereupon the bill was engrossed by defendant, and its allowance certified by the referee. There is some conflict in the evidence as to what next occurred, but the most positive and certain testimony is to the effect that the referee, without notice to the defendant, filed the bill, as settled by him, without presenting it to the superior judge for settlement and allowance as to the matters which took place in court. When this was discovered by appellant (and he made the discovery while printing his transcript, and before the time to file it had elapsed), he requested the judge to add his certificate of allowance to the bill, and, until that should be done, suspended the work of printing. The judge took this application under advisement, and finally, after the expiration of 40 days from the filing of the bill of exceptions, declined to certify it, upon the sole ground that the filing of the bill in the clerk's office left him without the right or authority to take further action. In this, we think, the trial judge erred. The defendant had done all that the law required him to do, and was entitled to have his bill of exceptions certified, for otherwise it could not avail him in this court. The statute, it is true, directs that the bill shall be filed after it is signed by the judge or referee, with his certificate that it is allowed. Code Civ. Proc. § 650. But it is not to be concluded from this provision that if the settled and engrossed bill of exceptions happens to be filed with the clerk, by inadvertence of the judge or referee, or even of the party seeking its allowance, before it has been properly certified, the right to a proper certificate is forever lost. On the contrary, it ought to be considered that such filing was premature and unauthorized, and, if a timely request is

made for the certificate of allowance, it should be granted, and the bill refiled. There is nothing in the statute which conflicts with this most reasonable conclusion, nor is anything to the contrary decided in *Keller v. Lewis*, 56 Cal. 469, or *Adams v. Dohrmann*, 63 Cal. 419. The latter case, indeed, is not authority for anything, because a rehearing was ordered by the court in bank, and only set aside because it proved to have been granted one day too late. We think the trial judge should settle and allow the bill of exceptions according to the facts, notwithstanding the premature filing of it, and that the motion to dismiss the appeal should be denied. It is so ordered.

We concur: **HENSHAW, J.**; **HARRISON, J.**; **McFARLAND, J.**

(15 Utah, 126)

**WYETH HARDWARE & MANUFACTURING CO. v. JAMES-SPENCER-BATEMAN CO. et al.**

(Supreme Court of Utah. Jan. 12, 1897.)

**CONSTITUTIONAL LAW—CORPORATIONS—INSOLVENCY—PREFERENCES—TRUST-FUND DOCTRINE—DISSOLUTION.**

1. Whether sections 7, 10, 18, article 12, Const., or either of them, is applicable to a corporation which was organized before the constitution went into effect, is not decided; but, if they are applicable, neither one of them affects the power of an insolvent corporation to make preferences among its creditors. *Held* likewise as to sections 2-4, 6-9, c. 87, *Sess. Laws 1896*. Nor does section 3330, *Comp. Laws 1888*, affect the power of a corporation to prefer creditors.

2. There are no express statutory provisions in this state affecting preferences by corporations.

3. An insolvent debtor, at common law, may assign a part or the whole of his property for the benefit of his creditors, and may prefer one creditor or class of creditors over others equally meritorious, provided the transaction be bona fide; and this rule is in force in this state, there being no statutory provisions to the contrary.

4. A corporation is an artificial person, acting in an individual capacity; and in this state, in the absence of insolvent laws and statutory restrictions, it has the same power to prefer creditors, who are not its officers or agents, by deed of assignment or otherwise, as a private debtor has, so long as its assets have not been taken into possession by a court of equity, in a proper proceeding, at the instance of a proper party.

5. A corporation in this state has the absolute dominion over and *jus disponendi* of its corporate property, and a person may deal with it, respecting such property, the same as with an individual owner, and without any greater danger of being held to have received property into his possession burdened with a direct trust or lien.

6. In this state, the assets of an insolvent corporation do not constitute a trust fund to be equally and ratably distributed among its creditors, but they do constitute such a fund in the sense that they cannot be appropriated for any purpose foreign to its legitimate business, or distributed among its officers or stockholders, until all its debts are paid.

7. The rule of the common law which permits insolvent debtors, whether individuals or corporations, to prefer creditors, is impregnable



in this state, and cannot be overthrown, except by legislative enactment.

8. The mere transfer, by deed of assignment, of the corporate property of a corporation to a trustee, for the purpose of paying its debts, does not per se work a dissolution of the corporation. (Syllabus by the Court.)

Appeal from district court, Salt Lake county; M. L. Ritchie, Judge.

Action by the Wyeth Hardware & Manufacturing Company against the James-Spencer-Bateman Company and another to set aside a deed of assignment. From a judgment of dismissal, plaintiff appeals. Affirmed.

N. W. Sonnedecker, for appellant. Young & Moyle, for respondents.

**BARTCH, J.** It appears from the complaint in this case that on the 27th day of June, 1896, the defendant James-Spencer-Bateman Company, by its board of directors regularly assembled, declared itself insolvent, and unable to further carry on the business for which it was incorporated, and by deed of assignment transferred all of its property, both real and personal, to the defendant George H. Horne, as assignee, in trust, for the purpose of paying the claims of its creditors. In the deed of assignment the claims of certain creditors are preferred over that of the plaintiff and those of other creditors, and required to be paid in the order of preference indicated. The deed also provides that, in case any balance shall remain in the hands of the assignee after all claims shall have been paid, then such balance shall be paid to the assignor. It is alleged that the assets of the concern amount to over \$18,800, and that the liabilities exceed the assets by about \$15,000. The prayer is that a receiver be appointed; that the deed of assignment be set aside; that the assets of the defendant corporation be declared a trust fund for the payment of the creditors, including the plaintiff's claim, and costs; and that such relief be granted as may be just and equitable. To the complaint the defendants interposed separate demurrers, on the grounds that there is a misjoinder of parties defendant, that several causes of action have been improperly united, and that the complaint does not state a cause of action. The demurrers were sustained, and, the plaintiff electing to stand by its complaint, the court entered judgment of dismissal, and for costs. From this judgment the plaintiff appealed.

The important question presented is whether an insolvent corporation in this state has power, in the disposition of its corporate property, to prefer, by deed of assignment, one creditor or class of creditors over other creditors whose claims are equally meritorious. The contention of appellant is that, under the laws of this state, when a corporation has become insolvent, and ceased to pursue the business for which it was incorporated, all its assets constitute a trust fund, to be

equally and ratably distributed among all its creditors, and that a deed of assignment, in which it prefers some of its creditors over others, and conveys all its property to a trustee for the purpose of paying its creditors in the order of preference, is fraudulent and void. To sustain this position considerable stress is placed on the constitution and laws of the state, and the provisions referred to will be considered, because, if there is any constitutional or statutory provision which prohibits a corporation from making preferences among its creditors, then the contention of appellant must be sustained. A corporation is a mere creature of law, and has such powers only as are expressly granted by the state, or as are necessary to carry into effect the powers expressly granted. 2 Kent, Comm. 298. It therefore has no power to do any act foreign to the law of its creation.

The provisions of the constitution which it is claimed affect the question under consideration are contained in article 12, section 7 of which reads: "No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor, or grantor or grantee contracted or incurred in operation, use or enjoyment of such franchise or any of its privileges." This section simply prohibits a corporation from leasing or alienating its franchise, so as to relieve the franchise or property from the liabilities of the lessor or grantor or grantee; but it does not prohibit any corporation from conveying its corporate property to a trustee for the purpose of subjecting it to such liabilities, and the defendant company, by conveying its corporate property expressly for the purpose of subjecting it to liabilities of the grantor, committed no act in contravention of this provision of the constitution. Section 10 reads: "No corporation shall engage in any business other than that expressly authorized in its charter, or articles of incorporation." This limits the business of every corporation to that authorized by the law of its creation, but the section contains no restrictions as to the mode of discharging liabilities which may be created in the conduct of the business which the corporation may lawfully transact. Section 18, the remaining one to which reference is made, merely provides for an individual liability of the stockholders of every corporation and joint-stock association for banking purposes, but contains no provisions relating to the manner in which a corporation should pay the claims of its creditors. Whether or not these provisions of the constitution are applicable to a corporation like the one at bar, which was organized long before the constitution became the organic law of this state, it is not necessary, nor is it our purpose, to decide in this case; but, if it were conceded that they were applicable, it would be difficult to perceive in what respect they could affect the power of a cor

poration to make preferences among its creditors, if such power exists independent of the constitution.

The statutory provisions, with one exception, which are invoked in behalf of the appellant, may be found in chapter 87, Sess. Laws 1896. Section 2 provides how a corporation may be organized, and what shall be stated in the agreement of the incorporators, which they must enter into, and also prescribes how the agreement shall be executed. Section 3 provides when and with what officer the agreement shall be deposited for record after its execution. Section 4 refers to the qualification of officers, and prescribes that, before entering upon their duties, they must make oath "that they will discharge the duties of such office to the best of their judgment, and that they will not do nor consent to the doing of any matter or thing relating to the business of the corporation with intent to defraud any stockholder or creditor, or the public." The oath here required is pertinent and entirely proper, whether the corporation has power to prefer creditors or not. Under either theory of the law, fraud will vitiate the acts of officers. Section 6, among other things, refers to the powers of a corporation, and provides that it "shall have power to make contracts, to sue and be sued, to have a seal, which it may alter at its pleasure, to buy, use and sell, or dispose of personal property, to buy, use, sell or dispose of all such real estate as may be necessary for its general business and such as shall be necessary for the collection of its debts, or judgments, or decrees in its favor." A fair interpretation of this section gives a corporation the same right of disposition of its corporate property as an individual has to dispose of his property. And such interpretation is in harmony with the provisions of the entire act, of which this section forms a part, as an examination will show; for nowhere is there manifest any intention on the part of the legislature to abridge the *jus disponendi* as to corporations. In the construction of statutes the intent of the legislature must prevail, and such intent may be gleaned from the context. Section 7, referred to, provides how the capital stock of a corporation may be increased or diminished, how its name may be altered and the number of its officers changed, and how corporations may consolidate. It has no bearing whatever on the question at issue. Section 8 provides a method for the dissolution of a corporation, and section 9, the remaining section under the act of 1896 referred to by counsel for the appellant, provides that, after dissolution, the corporate powers shall continue for certain purposes, specified. Whether or not these several provisions of the act of 1896 apply to corporations organized under the laws of the late territory of Utah, it is not necessary to decide in this case, because at the time of the organization of the defendant corporation

the statutes contained substantially the same provisions, and because a careful scrutiny fails to reveal any prohibitory or restrictive provision, respecting preferential assignments by corporations, in any of the statutes in force then or now. Counsel for the appellant has also referred to section 3330, Comp. Laws 1888, which, among other things, provides that a receiver may be appointed, by the court in which an action is pending or has passed to judgment, "in the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights." This authorizes the appointment of a receiver when an action is pending or has passed to judgment; and, doubtless, after proceedings in equity have been instituted for such purposes, and the corporate property of a corporation has become subjected to the control of a court of equity, the corporation has no longer any power to make an assignment of such property. But such is not the case here. There is no contention that chancery proceedings had been instituted when the assignment in this case was made.

It is clear, beyond reasonable controversy, that neither the organic nor the statutory laws of this state prohibit an insolvent corporation from preferring one creditor over another by deed of assignment. Nor is there any express constitutional or statutory grant of such power in this state. In the absence of such prohibition and grant, it becomes necessary to determine whether or not such power exists by referring to the law as stated by text writers and declared by judicial decision. The question under consideration has frequently arisen in courts with the result of some conflict of authorities, and that the law places artificial and natural persons on the same footing, in regard to assignments for the benefit of creditors, has been denied in numerous cases. That a solvent debtor, whether an individual or a corporation, can make an assignment of his or its property for the payment of his or its debts, has never been denied, either in England or in this country. Indeed, it would be impossible to predicate fraud on such an assignment, because this would be to deny a debtor the right to do what the law enjoins upon him as a duty,—the right to pay his just debts. In the performance of an act which the law and justice require to be done, no question of fraud can arise, and hence such an act cannot become the subject of controversy in a court of justice. It is only in cases where the debtor has become insolvent, and unable to pay all his debts, that a court of equity may be resorted to for the purpose of determining whether or not fraud has been perpetrated upon any of the creditors, by deed of assignment or otherwise; and, in a case of this character, there is at this day no doubt that, if the debtor be a private person, he may make an assignment of all

his property and prefer creditors. Such is the rule at common law; and, in all cases not affected by insolvent or bankrupt laws, or by statutory restrictions, the debtor may make such preferences as he pleases, provided the transaction be bona fide. While the existence of the rule has been deplored, and its policy doubted by some eminent jurists, still it has become so firmly established in our system of jurisprudence that it cannot now be overthrown by judicial decision. Chancellor Kent said: "As we have no bankrupt system, the right of the insolvent to select one creditor, and to exclude another, is applied to every case, and the consequences of such partial payments are extensively felt and deeply deplored. Creditors out of view, and who reside abroad or at a distance, are usually neglected. This checks confidence in dealing, and hurts the credit and character of the country. These partial assignments are, no doubt, founded, in certain cases, upon meritorious considerations; yet the temptation leads strongly to abuse, and to the indulgence of improper motives." *Riggs v. Murray*, 2 Johns. Ch. 565.

The justness of these criticisms of the rule, made by that eminent jurist, can hardly be controverted; for, while there are doubtless cases where preferences are meritorious, and are called for by considerations of gratitude and benevolence, there are also cases, as experience has shown, where the preferences have been given to creditors who lent but a delusive credit, under a well-grounded confidence that, in case of failure, they would have perfect indemnity in priority of payment. It frequently happens that the preferred creditor is the one who has been the means of decaying the real business creditor, who, in honest confidence, parted with his money and property, and of making him the victim. Sometimes, in order to prevent a disturbance, the influential creditor may be preferred, while the absent, or poor, or the one who has not the means or inclination to engage in litigation, is left without any protection, and with no possibility of recovering what is justly due him. While, however, the rule is susceptible of abuse, and capable of being used as an instrument to perpetrate fraud, and while its policy may be questioned, still its legality cannot be doubted. The rule is absolute and impregnable, except by legislative enactment. In the absence of statutory restrictions, an insolvent individual debtor may assign all his property for the payment of the claims of one creditor or class of creditors, to the exclusion of all others, and the principle upon which he makes distribution is immaterial, provided the whole of his property be assigned for the payment of his just liabilities, and the assignment be not made for the purpose of placing his property beyond the reach of his creditors, or for the benefit of the insolvent himself. If the assignment be made for the sole purpose of the payment of the just debts of the assignor,

neither law nor equity will inquire what motives or reasons actuated preferences; but, if the assignor departs from an unequivocal devotion of his property to the payment of his debts, the assignment will be viewed with distrust. Whether the right to prefer was originally sustained in part upon the supposition that, in most cases, proper and just grounds for preference did exist, and ought to be duly regarded by the debtor, or whether the rule was founded on the absolute dominion and ownership which every person has over his property, is not now necessary to inquire, because the right exists. Mr. Justice Sutherland, in *Grover v. Wakeman*, 11 Wend. 187, said: "It is now too late to agitate the question whether those assignments, either partial or general, are sustained by considerations of true wisdom and policy. Reflecting men have differed upon that subject, but the better opinion seems to be that, in the absence of a general bankrupt system, the interests of a commercial community require that they should be sustained." This doctrine having become a part of our system of laws, all that the courts are now required to do is to see that these assignments fairly appropriate all of the insolvent's property, or that portion which he assigns, to the payment of his just debts. Such is the settled law as to assignments, both in England and in this country, except where affected by insolvent or bankrupt laws; and, in order that a creditor may succeed in having such an assignment declared void, he must not only show that it hinders and delays creditors in the collection of their claims, but he must also show, by proper averment and proof, that it is fraudulent. *Small v. Oudley*, 2 P. Wms. 427; *Pickstock v. Lyster*, 3 Maule & S. 371, 16 Rev. Eng. Rep. 300; *Halsey v. Fairbanks*, 4 Mason, 206, Fed. Cas. No. 5,964; *Cock v. Goodfellow*, 10 Mod. 489; *Meux v. Howell*, 4 East, 1; *Murray v. Riggs*, 15 Johns. 571; *Mackie v. Cairns*, 5 Cow. 547; *McMenomy v. Ferrers*, 3 Johns. 71; *Hatch v. Smith*, 5 Mass. 42; *Ljvingston v. Bell*, 3 Watts, 198; *Hower v. Geesaman*, 17 Serg. & R. 251; *Hastings v. Baldwin*, 17 Mass. 551; *Brashear v. West*, 7 Pet. 608; *Gould v. Railway Co.*, 52 Fed. 680.

A private person thus having the right, at common law, to assign all his property for the payment of his debts, and to prefer one or more creditors over others, it becomes important to inquire into the nature and powers of corporations, to ascertain whether or not they have the same right. A corporation is defined by Bouvier as "a body, consisting of one or more natural persons, established by law, usually for some specific purpose, and continued by a succession of members." It is an aggregation of individuals, so united by operation of law as to form but one person,—artificial, invisible, intangible, it is true, but nevertheless a distinct entity, and endowed with the power of succession. It possesses the property of legal immortality, and this

constitutes its principal utility, because its existence may thereby be prolonged beyond the term of a natural life, and its rights and immunities preserved, which otherwise, upon the death of an individual, would become lost and extinct. As one person, those composing the corporation have but one will, and this is collected by the sense of a majority of the individuals. This will, so collected, directs and controls as absolutely as does the will of a private person. The individual is a person endowed with attributes through the Creator of all things. A corporation is a person with attributes conferred upon it by law. Sir William Blackstone, in his Commentaries on the Laws of England (1 Bl. Comm. 123), says: "Persons, also, are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us. Artificial are such as are created by human laws for the purposes of society and government, which are called 'corporations' or 'bodies politic.'" The natural person has such powers and rights as are conferred upon him by nature, except as restricted by human laws for the good of society. The artificial person, or corporation, has such powers and rights as are conferred upon it by the law of its creation, and such as are incidental and necessary to its corporate existence. Both the natural and artificial personages act in an individual capacity. Among the most important attributes of a natural person are his absolute dominion over his property and his right of disposition, and the same may be said of a corporation aggregate as to its corporate property. It has the right to contract and be contracted with, to sue and be sued, to implead and be impleaded, the same as a natural person; and it has the right to do all other acts in regard to its property that a natural person may do in regard to his. 1 Bl. Comm. 475. Through its agents it can purchase and alienate property, as provided by its charter, for the purposes and objects of its creation; and a person can deal with it, respecting its corporate property, the same as with an individual owner, and without any more danger of being held to have received property into his possession burdened with a direct trust or lien. Being, then, a creature of statute, and having conferred upon it its individuality by law, which has endowed it with a legal existence, independent of that of all its members, and having the same dominion over its property, with the same right of disposition as a private person has over his, it would seem, upon principle, that a corporation would have the same right to dispose of its corporate property by deed of assignment as a private person has to dispose of his by such deed. It is true that a corporation must transact all its business through agents, while an individual may transact his through agents or not, as he pleases; but this difference affects no right or title in property. The title of the corporation to its property is as

absolute as that of an individual is to his, and as to its individuality a corporation stands on an equal footing with an individual. Why, then, in the absence of bankrupt and insolvent laws, deny to a corporation the equal benefit of the rule of the common law respecting insolvent debtors? Where the same individuality and the same dominion over property exists, there, upon principle, the same right of disposition ought to exist. The reason of the rule applies with as much force in the one case as in the other. Nor has such reason, whether sound or not, ceased to exist; for it is just the same now as it was from time immemorial, and therefore the principle, "*Cessante ratione legis, cessat et lex ipsa*," does not apply. But, if it did, it would apply in the case of a corporation with no greater force than in that of an individual debtor. So the fact that the rule is subject to abuse, and may become an instrument of fraud, is no more potent in the one case than in the other. Likewise as to the reasons which may be urged against the soundness of the rule. While a corporation can only act through its agents or officers, who act in a fiduciary capacity respecting its property which they hold in their hands, and are liable for fraud in respect to it, and sometimes for mere mismanagement, still the corporation is simply a debtor, as between itself and its creditors, and it holds its property subject to a lien in favor of the latter, or in trust, in no other sense than does an individual debtor. This is, doubtless, the general rule, and there appears to be nothing in the case at bar which makes it an exception thereto. There was no preference given to any of the officers or agents of the corporation. It is simply an assignment of all of the debtor's property for the payment of just debts. This being so, neither the insolvency of the defendant corporation nor the execution of the deed of assignment with preferences had the effect of charging the property of the insolvent corporation with a direct trust in favor of the appellant, or of giving a simple contract creditor like the appellant a lien thereon.

The doctrine that an insolvent corporation may make an assignment of all its property for the purpose of paying its just debts, and prefer one creditor or class of creditors over others, the same as it might do if it were a natural, instead of an artificial, person, when none of its officers or agents are preferred, must, in the absence of charter and statutory provision to the contrary, be regarded as the settled law of this country, and, like the rule in the case of an individual debtor, has been so thoroughly incorporated in our system of jurisprudence that it cannot be overthrown, except by legislative enactment. It appears that the earliest case in which this question was raised in this country was that of *Catlin v. Bank*, 6 Conn. 233, where it was decided in the affirmative, in 1826, by the supreme court of errors of

Connecticut. In that case the right to prefer had been exercised by the bank in favor of a particular creditor, and it was attempted to establish a distinction between the creditor of an insolvent corporation and that of an individual respecting the right of alienation in general, and it was contended that when a corporation became insolvent its officers or agents became trustees for the creditors, and that the creditors were entitled to be paid out of the trust fund equally and ratably. These propositions were overruled, the court maintaining that no distinction respecting the general power of disposition of their property existed between a corporation and an individual. Mr. Chief Justice Hosmer, delivering the opinion of the court, said: "Where no legal lien has been obtained, it is a reasonable supposition that the relation of creditor and debtor must in all cases infer the same consequences, and that where the same mischief exists there is the same law. The cases of an individual and of a corporation in the matter under discussion, it appears to me, are not merely analogous, but identical; and I discern no reason for the slightest difference between them. There exists no doubt that there have been many instances of actually insolvent corporations where certain creditors have been preferred to others; and the perfect silence, until now, on the subject of this fancied diversity, is powerful to show what has been the universal opinion." The same doctrine was also sanctioned, in 1834, by the court of appeals of Maryland (*State v. President, etc., of Bank of Maryland*, 6 Gill & J. 205), where it was held that an individual debtor in failing circumstances might prefer one creditor over another by a transfer of his property made in good faith, and that a corporation might do the same. Mr. Chief Justice Buchanan, speaking for the court, observes: "No satisfactory reason has been advanced, and none is perceived, why a corporation in failing circumstances, unless restrained by some express provision in the charter of incorporation, which is not the case here, may not assign its property to trustees, for the benefit of either preferred creditors or of all its creditors equally, as well as an individual in insolvent circumstances; the same relation of debtor and creditor subsisting in one case as in the other." So, in Pennsylvania, in 1843, it was expressly held by the supreme court of that state, in *Dana v. Bank*, 5 Watts & S. 223, that a bank or other corporation had the power to make an assignment for the benefit of preferred creditors. Mr. Justice Kennedy, delivering the opinion of the court, said: "In this case, although there are some restrictions placed on the bank by the act establishing it, yet it cannot be pretended, or, at most, cannot be shown, that the bank, or its president and directors, are either expressly or impliedly restrained from giving, directly or indirectly, preferences to some of its creditors over others; and, not

being restrained in this respect by this or any other act, it must be deemed to have the same power to make a distinction between its creditors, and to give preferences to some of them over others, that any natural person has."

This doctrine has since been maintained by the decided weight of judicial decisions, but few cases comparatively having denied to insolvent corporations the same right to prefer which an insolvent individual has. Generally corporations have been held to have the same dominion over corporate property, the same interest therein, and the same right of disposition thereof, as an individual has concerning his property. In *Graham v. Railroad Co.*, 102 U. S. 148, Mr. Justice Bradley, delivering the opinion of the court, said: "It is contended, however, by the appellant, that a corporation debtor does not stand on the same footing as an individual debtor; that, while the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that, if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken. We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but in law it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same; its interest is the same; its possession is the same." In *Gould v. Railway Co.*, 52 Fed. 680, it is said: "A good many courts have from time to time inveighed against the rule of the common law which allows a debtor to make preferences among his creditors, but the rule is too firmly imbedded in our system of jurisprudence to be overthrown by judicial decision, and it can no more be overthrown by the courts in its application to corporations than to individuals." The supreme court of Illinois, in *Reichwald v. Hotel Co.*, 106 Ill. 439, speaking through Mr. Justice Sheldon, observes: "An individual may turn out part or the whole of his property in payment of his debts, and in so doing may prefer creditors. We do not see why this corporation might not do the same, and that through the action of its board of directors." So, in *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514, it was said: "Both reason and authority establish the proposition that a corporation may sell and transfer its property, and may prefer its creditors, unless such conduct is prohibited by law." In *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 90 Mich. 345, 51 N. W. 512, the

same doctrine is maintained by Mr. Justice Montgomery, who, in the course of an opinion concurred in by the other justices, says: "The rule in this state has, we think, been established, since the case of *Town v. Bank*, 2 Doug. (Mich.) 530, that a corporation may, in the absence of legislative restriction, deal with its property precisely as an individual may, and may prefer one creditor over another, and hence that the assets do not become a trust fund, for pro rata distribution among all its creditors, until such time as steps are taken under the winding-up act." 2 Kent, Comm. 281, 315, and note g; Burrill, Assignm. (6th Ed.) § 45; 2 Cook, Stock, Stockh. & Corp. Law, § 601; 2 Mor. Priv. Corp. § 802; Ang. & A. Corp. pp. 155, 156; *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127; *Steel Co. v. O'Donnell*, 156 Ill. 624, 41 N. E. 185; *Ahl v. Rhoads*, 84 Pa. St. 319; *Coats v. Donnell*, 94 N. Y. 168; *Sargent v. Webster*, 13 Metc. (Mass.) 497; *Pairpoint Manuf'g Co. v. Philadelphia Optical & Watch Co.*, 161 Pa. St. 17, 28 Atl. 1003; *Smith v. Skeary*, 47 Conn. 47; *Ex parte Conway*, 4 Ark. 302; *Warner v. Mower*, 11 Vt. 385; *Dabney, Morgan & Co. v. Bank of State of South Carolina*, 3 S. C. 124; *Pyles v. Furniture Co. (W. Va.)* 2 S. E. 909; *Hopkins v. Turnpike Co.*, 4 Humph. 403; *Rollins v. Carriage Co. (Iowa)* 45 N. W. 1037; *Blalock v. Manufacturing Co. (N. C.)* 14 S. E. 501; *Ringo v. Biscoe*, 13 Ark. 563; *Arthur v. Bank*, 9 Smedes & M. 394; *Allis v. Jones*, 45 Fed. 148; *Schroeder v. Mason*, 25 Mo. App. 190; *Haxtum v. Bishop*, 3 Wend. 13; *Bank v. Whittle*, 78 Va. 737; *People v. President, etc., of College of California*, 38 Cal. 166; *Breene v. Bank*, 11 Colo. 97, 17 Pac. 289; *Lyons-Thomas Hardware Co. v. Perry Stove Manuf'g Co. (Tex. Sup.)* 22 Lawy. Rep. Ann. 802, note; s. c. 24 S. W. 16; *Lippincott v. Carriage Co.*, 25 Fed. 577; *Conover v. Hull (Wash.)* 45 Am. St. Rep. 826, note; s. c. 39 Pac. 166; *Pyles v. Furniture Co.*, 30 W. Va. 123, 2 S. E. 909; *Paper Co. v. Robbins*, 151 Ill. 588, 38 N. E. 153; *Revere v. Copper Co.*, 15 Pick. 351.

Counsel for the appellant, however, insists that, when a corporation has become insolvent, and ceased to carry on its business, its property and assets constitute a trust fund for the equal benefit of all its corporate creditors, and that the directors become trustees for all the creditors, and hence have no power to make preferences among them. It is true that courts of high character have made the general statement that the assets of an insolvent corporation constitute a trust fund for the benefit of its creditors, and in a few of the states the courts have based their decisions upon these general statements, and reasoned thence that managers or directors of an insolvent corporation had no power to dispose of the corporate property by deed of assignment with preferences, or otherwise than for the equal benefit of all the creditors by a pro rata distribution among them. We

are not aware, however, that any of the courts, using the general statement above referred to, have ever declared that the assets of an insolvent corporation must be held and treated as a fund in trust for the equal benefit of all its creditors, or that it must be distributed *pari passu*. The leading case in which the language referred to was used is said to be *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944, where Mr. Justice Story stated it in these words: "The charters of our bank make the capital stock a trust fund for the payment of all the debts of the corporation. The bill holders and other creditors have the first claims upon it, and the stockholders have no rights until all the other creditors are satisfied." Other eminent jurists have occasionally used similar language, but this does not necessarily import that the assets of a corporation constitute a trust fund which requires distribution equally and ratably among the creditors. From the general character of the language, it is apprehended that it might be satisfied by an appropriation of all the assets to certain just and honest claims, even though others equally meritorious would remain unprovided for. On principle, this doctrine ought to apply with equal force to an insolvent partnership or an individual; for, strictly speaking, a corporation holds its assets in trust for its creditors in no other sense than does a partnership or an individual debtor. If either one of them undertakes to defraud creditors, by withdrawing its or his assets from their reach, the law affords a proper remedy to frustrate such dishonest purpose. In any such case, however, each creditor is at liberty, by superior diligence, to receive payment in full for his claim, or to create a lien in his favor to the extent thereof, regardless of whether there will be any assets remaining to satisfy the claims of other creditors; and this can only be so because no direct trust or specific lien previously existed in favor of either him or them, for, if a direct trust existed immediately upon insolvency, which burdened the assets with a lien in favor of all the creditors alike, then legal proceedings to create the same would be useless. Doubtless, the assets of a corporation constitute, in a certain sense, a trust fund for the payment of its debts, in the sense that they cannot be appropriated for any purpose foreign to its legitimate business, or distributed among its officers or stockholders, until all its debts are paid. This implies that creditors have an equitable right which may be enforced, when the assets have been taken into possession by a court of equity in a proper proceeding, at the instance of a proper party. Until such proceeding it is difficult to see how the assets can be burdened with a specific lien or direct trust, except in case of a valid judgment or record lien created by the parties. And such is, substantially, the limitation which the "trust-fund doctrine" has

received by the supreme court of the United States. In *Fogg v. Blair*, 133 U. S. 534, 10 Sup. Ct. 338, Mr. Justice Field, speaking for the court, says: "We do not question the general doctrine, invoked by the appellant, that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence. The cases of *Curran v. State of Arkansas*, 15 How. 304, 307, and *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944, give no countenance to anything of the kind." So, in *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, Mr. Justice Brewer, delivering the opinion of the court, after discussing the trust-fund theory as applied to corporations, said: "The same idea of equitable lien and trust exists to some extent in the case of partnership property. Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that, in equity, the partnership creditors have a right to payment out of those funds in preference to individual creditors, as well as superior to any claims of the partners themselves; and the partnership property is therefore sometimes said, not inaptly, to be held in trust for the partnership creditors, or that they have an equitable lien on such property. Yet all that is meant by such expressions is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of a proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien or a direct trust. A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien." *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739; *Railway Co. v. Ham*, 114 U. S. 594, 5 Sup. Ct. 1081; *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354; *Graham v. Railroad Co.*, 102 U. S. 148; *Richardson's Ex'r v. Green*, 133 U. S. 30, 10 Sup. Ct. 280.

The case of *Purifier Co. v. McGroarty*, 136 U. S. 237, 10 Sup. Ct. 1017, cited by counsel for the appellant to sustain its contention that a corporation has no power to prefer creditors, does not express the views of the supreme court of the United States on that subject. It merely follows the decision of the supreme court of Ohio in *Rouse v. Bank*, 46 Ohio St. 493, 22 N. E. 293, as to the rights

of the creditors of corporations existing and carrying on business within that state. Referring to that case, Mr. Justice Gray, who delivered the opinion of the court, said: "That decision, it is true, proceeded in part upon a theory that the property of an insolvent corporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence." Under the Ohio statutes all assignments, made by a person, partnership, or corporation, in trust to a trustee, in contemplation of insolvency, with the intent to prefer one or more creditors, inured "to the equal benefit of all creditors in proportion to the amount of their respective claims." Rev. St. Ohio 1880, §§ 6335, 6343. Under these statutes the supreme court of the United States held with the supreme court of Ohio. The reasoning of the latter court, while based in part on the constitution and laws of that state, is such, however, as to compel the inference that the decision was fairly made on the doctrine that any preference by an insolvent corporation which has ceased to transact business is unlawful. So, in the case of *Lyons-Thomas Hardware Co. v. Perry Stove Manuf'g Co.*, 86 Tex. 145, 24 S. W. 16. While, in the decision, considerable reliance was placed upon the statutes of that state, still the argument of the court, which resulted in the denial of the right of giving preference by an insolvent corporation, induces the conviction that such denial would have followed had the statute, which, in the opinion of the court, applied to the case, and strengthened their argument against such preferences, never existed. Whether or not the reasoning of these cases is sound, they cannot be regarded as of much weight in this state, where the question is not affected by statute. Likewise, in Wisconsin, the statutes are entirely different from ours, and therefore the cases cited from that state are entitled to but little weight in determining the question in this state.

Our attention is also directed to the case of *Robins v. Embry*, 1 Smedes & M. Ch. 207. That case was decided by the superior court of chancery of Mississippi in 1843, and the doctrine that an insolvent corporation may prefer creditors was vigorously assailed by Chancellor Buckner, who, in one of the ablest, if not the ablest, opinion which has yet been written against the right to prefer by a corporation, combated the views of Mr. Chief Justice Hosmer in *Catlin v. Bank*, above cited, and held it to be deducible from principle, adjudged cases, and legal analogy that the assets of a corporate bank constitute a trust fund primarily for the equal benefit of its creditors, and that it is not competent to defeat the right of equality by an assignment with preferences. The chancellor also held that the rule which permitted an individual debtor to prefer creditors was founded on his absolute dominion over his proper-



ty, and his unrestricted right of disposition, which, he contended, a corporation did not possess. These views, however, were afterwards overruled, in the case of *Arthur v. Bank*, supra, by the high court of errors and appeals, and the doctrine settled in that state that a corporation may prefer one creditor over another. The Washington cases appear to sustain appellant's contention that an insolvent corporation, even in the absence of statutory provision on the subject, cannot prefer creditors, and that its assets are a trust fund for the equal benefit of its creditors; but they are so manifestly against the weight of authority that we must decline to follow them. Other cases in other states have denied preferences when made for the benefit of officers or agents of the corporation, to give them, by reason of their positions, an advantage over creditors, and where, by statutory enactment, preferences were prohibited; but such cases cannot be considered as authority in this case, where the assignment was made under no such objection or prohibition. With these cases must be classed that of the *Noble Mercantile Co. v. Mt. Pleasant Equitable Co-operative Inst.*, 12 Utah, 213, 42 Pac. 869, where the court properly held that the directors of an insolvent corporation, which had abandoned the objects for which it was created, could not prefer themselves, by voluntary deed of assignment, over other creditors, whose claims were equally meritorious. While the same question here discussed was there argued by counsel, the court expressly declined to pass upon it, because it was not necessary to a decision in that case. Such cases are not in point here.

Upon careful examination of adjudged cases, as well as upon principle and analogy, and in the absence of insolvent laws and statutory restrictions, we feel ourselves bound to hold that a corporation, in this state, has the same power to prefer creditors, by deed of assignment or otherwise, as a private debtor has, so long as its assets have not been taken into possession by a court of equity, in a proper proceeding, at the instance of a proper party. The rule in the case of a corporation, the same as in that of an individual, is impregnable, except by legislative enactment. This also appears to be in harmony with the English rule, for there the power of a corporation to prefer creditors seems to be fully established, except as restricted by statute. In *re Wincham Ship Building, Boiler & Salt Co.*, 9 Ch. Div. 322; *Willmott v. Celluloid Co.*, 34 Ch. Div. 147. While we are not disposed to enlarge the rule so as to include cases not strictly within its terms, yet where it is applicable, as in the case at bar, it must be regarded and upheld as a law of this state no longer open to question. Whether, if we were free from the authority of judicial decisions, we would entertain different views from those herein expressed, is now a matter of no concern. It

is but for us to declare what is the law, and, if such law is not in consonance with reason and justice, it is within the power of the legislature to make it so. A court ought not, for light reasons, to assume to declare that not to be the law which has been accepted and treated as the law, by courts as well as the populace, for a long period of time,—not even though such court may feel impelled to inveigh against the rule as not founded in the soundest reason and policy. Especially is this so when such law has become the rule of practice in the business world, and when the business interests of the state have grown up under it.

The contention of the appellant that the assignment dissolved the corporation is not tenable. The law is well settled that a mere transfer of the corporate property of a corporation to a trustee, for the purpose of paying its debts, does not per se work a dissolution, and there is nothing in the deed of assignment in this case which would produce such a result. *Manufactory v. Langdon*, 24 Pick. 49; *Town v. Bank*, 2 Doug. 530; *Bruffett v. Railroad Co.*, 25 Ill. 310; *Pyles v. Furniture Co. (W. Va.)* 2 S. E. 909, 921; *Reichwald v. Hotel Co.*, 106 Ill. 439; *Buell v. Buckingham*, 16 Iowa, 284.

We do not deem it necessary to discuss any other question presented in this case. The judgment of the court below is affirmed.

MINER, J., concurs. ZANE, C. J., concurs in the affirmance of the judgment appealed from, but not in all the propositions of law held in the opinion.

(15 Utah, 77)

Ex parte HAYS.

(Supreme Court of Utah. Jan. 15, 1897.)

HABEAS CORPUS—JURISDICTION—CRIMINAL LAW—JUDGMENT—VALIDITY.

1. Where a prisoner convicted of the crime of murder is in the custody of the proper officer, who detains him under a warrant, fair and regular on its face, issued after conviction and judgment by a court of record, which had jurisdiction of the person and subject-matter, he will not be discharged on habeas corpus.

2. In a criminal case, where the district court has jurisdiction of the person and cause, its judgment is binding on all the world, until reversed in a regular way by appeal. A fortiori is this so after the judgment has been affirmed by the supreme court. Such a judgment is final, and pronounces the law of the case; and the supreme court will not, upon habeas corpus, look beyond it, and review the proceedings upon which the judgment was pronounced.

3. A prisoner's detention under a judgment, the commitment being regular on its face, cannot be unlawful unless the judgment is an absolute nullity, and irregularities and mere errors in proceedings will not render it an absolute nullity, although they may render it voidable; and, when voidable only, it is conclusively presumed to be valid until reversed, and it cannot be reversed by habeas corpus.

4. Where a case has been tried in a district court, and the judgment rendered at the trial has been affirmed by the supreme court, such trial and judgment will be presumed to be legal,



and cannot be questioned upon habeas corpus for anything except a want of jurisdiction, shown upon the face of the record or proceedings, as ruled upon in the supreme court.

(Syllabus by the Court.)

Application by Harry Hays for a writ of habeas corpus. Denied.

Powers, Straup & Lippman, for petitioner. A. C. Bishop, Atty. Gen., and F. B. Stephens, for respondent.

**BARTCH, J.** The petitioner in this case on the 1st day of April, 1896, was convicted of the crime of murder in the first degree, and thereafter judgment of death by hanging was pronounced against him; and since then he has been in the custody of the sheriff of Utah county, who justifies his detention of the petitioner by virtue of the death warrant and commitment issued to him by the district court of said county. The warrant and commitment, a copy of which is attached to the petition, appear to be regular and in proper form. He complains that the sentence or judgment by virtue of which he is in confinement is void, because, as he maintains, his trial was not conducted in pursuance of law, and that, therefore, his detention is illegal. The contention of the petitioner is that the jurors who sat in the trial of the case were not drawn pursuant to any valid law of the state; that the act under which they were drawn to serve as jurors was unconstitutional, and was repealed by a later law, which took effect prior to the commencement of the trial; and that as jurors who sat in the trial of the case were summoned under the repealed law, and as the trial was conducted under the later law, an error which is fatal to the judgment and sentence was committed. This case was appealed to this court, but none of these points were presented in that appeal, and the judgment was affirmed. 46 Pac. 752.

The important and decisive question, which confronts us at the outset, is, can this court, in a collateral proceeding by habeas corpus, look beyond the judgment, and determine questions which arose during the trial of the case, and which, if they had been presented in the record on appeal, might have resulted in a reversal of the judgment? We think not. The warrant appears fair and regular on its face, and that the district court in which the case was tried had jurisdiction of the person and subject-matter is not, and cannot be successfully, questioned. This being so, and that court being a court of record, its judgment is binding upon all the world until reversed in a regular way by appeal. A fortiori is this so after the judgment has been affirmed by this court. Such a judgment is final, and pronounces the law of the case. With what propriety, then, can this court, by means of habeas corpus, substantially reverse a judgment which the law has placed beyond our control? The prisoner's detention under the judgment, the com-

mitment being regular on its face, cannot be unlawful unless that judgment is absolutely null and void; and it cannot be null and void, when the court had general jurisdiction of the person and subject-matter, even though it may have erred in its proceedings during the trial. Irregularities and mere errors in proceedings will not render a judgment an absolute nullity, although they may render it voidable, and when voidable only it is conclusively presumed to be valid until reversed, and it cannot be reversed by habeas corpus, because habeas corpus does not authorize the exercise of appellate jurisdiction; and "no inquiry," says Chancellor Kent, "is to be made into the legality of any process, judgment, or decree, \* \* \* where the party is detained under the final decree or judgment of a competent court." 2 Kent, Comm. 30. The district court being a court of general jurisdiction, the offense charged against the prisoner was cognizable in that court, and it was competent to inflict the punishment provided by law for the offense of which the prisoner was convicted; and its judgment, not being reversed, has all the obligation which the judgment of any tribunal can have.

If the judgment be voidable only, and hence obligatory, because not reversed, we cannot look beyond it on habeas corpus. If it be absolutely void, the officer who detains the prisoner and obeys the judgment is guilty of false imprisonment. Would counsel for the prisoner in this case undertake to maintain the position that the officer is guilty of false imprisonment? Clearly, the detention is authorized by the judgment and warrant, and the imprisonment is not illegal. "The habeas corpus is undoubtedly an immediate remedy for every illegal imprisonment. But no imprisonment is illegal where the process is a justification of the officer; and process, whether by writ or warrant, is legal whenever it is not defective in the frame of it, and has issued, in the ordinary course of justice, from a court or magistrate having jurisdiction of the subject-matter, though there have been error in the proceedings previous to the issuing of it." Com. v. Lecky, 1 Watts, 66. In *Ex parte Watkins*, 3 Pet. 193, the petitioner was imprisoned by virtue of a judgment of a circuit court of the United States. The motion to discharge was founded on the allegation that the indictment charged no offense for which the prisoner was punishable in that court, and that, consequently, the proceedings were coram non iudice, and totally void. A copy of the indictment was annexed to the petition. The supreme court of the United States declined to look into the indictment to ascertain whether the circuit court had misconstrued the law, maintaining that they had no power to look beyond the judgment in that case upon habeas corpus. Mr. Chief Justice Marshall, in the course of his opinion, said: "An imprisonment under a judg-

ment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous." In the case of *In re Callicot*, 8 Blatchf. 89, Fed. Cas. No. 2,323, the petitioner alleged that he was imprisoned under a sentence of the circuit court of the United States, and charged that his imprisonment was illegal, "for the reason that the law under which such sentence was imposed had been changed and repealed before said sentence was passed." The court refused to examine the question thus presented, and denied the motion for the writ. So, in *Ex parte Parks*, 93 U. S. 18, Mr. Justice Bradley, delivering the opinion of the court, said: "When a person is convict or in execution by legal process issued by a court of competent jurisdiction, no relief can be had. Of course, a superior court will interfere if the inferior court had exceeded its jurisdiction, or was not competent to act." So, in *Ex parte Winston*, 9 Nev. 71, the court, by Mr. Justice Hawley, said: "On a habeas corpus the judgment of an inferior court cannot be disregarded. We can only look at the record to see whether a judgment exists, and have no power to say whether it is right or wrong. It is conclusively presumed to be right until reversed; and, when the imprisonment is under process valid on its face, it will be deemed prima facie legal, and, if the petitioner fails to show a want of jurisdiction in the magistrate or court whence it emanated, his body must be remanded to custody." 2 Kent, Comm. pp. 29, 30; Church, Hab. Corp. § 363; Hurd, Hab. Corp. § 333; *Ex parte Gibson*, 31 Cal. 619; *Passmore Williamson's Case*, 26 Pa. St. 9; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Schwartz*, 2 Tex. App. 74; *Ex parte Twohig*, 13 Nev. 302; *Com. v. Lecky*, 26 Am. Dec. 37, 40; 9 Am. & Eng. Enc. Law, 224.

If, in the case at bar, the jurors were not selected and summoned in pursuance of law, and the petitioner was not satisfied with those drawn, he was not without a remedy; for he could have interposed his objections by a challenge to the panel, as provided by statute. Comp. Laws Utah 1888, §§ 5004, 5009. The district court was competent to determine whether or not the jurors had been erroneously selected. That court had undoubted power to determine all the questions of which the petitioner now complains, and if its determination as to any one of them was erroneous, or if it failed to rule on any one of them when it ought to have done so, the petitioner had an opportunity to bring the matter up in his record on appeal. If he failed to bring up his whole case, it is his own misfortune. He cannot be allowed to bring up part of it, and, after this court has affirmed the judgment, have the balance considered upon habeas corpus. Where a case has been tried in a district court, and the judgment rendered at the

trial has been affirmed by the supreme court, such trial and judgment will be presumed to be legal, and cannot be questioned upon habeas corpus for anything except a want of jurisdiction, shown upon the face of the record or proceedings, as ruled upon in this court. *Daniels v. Towers*, 79 Ga. 785, 7 S. E. 120.

We are of the opinion that the officer in this case lawfully detained the prisoner in custody. Having reached this conclusion, it is unnecessary to determine whether or not the act in question is unconstitutional, or was repealed. The writ is denied, and the prisoner is remanded.

ZANE, C. J., and MINER, J., concur.

(30 Or. 250)

FIRST NAT. BANK OF PORTLAND v.  
LINN COUNTY NAT. BANK.

(Supreme Court of Oregon. Jan. 18, 1897.)

BANK RECEIVERS—DECLARATIONS—PRESENTMENT  
OF CHECK—PRESUMPTIONS.

1. Even if a receiver of a national bank is its agent, so that his admissions may be used against it, his declarations as to receipt by it of a draft prior to his appointment, and of which he had no personal knowledge, are not admissible to charge it with negligence in reference thereto.

2. In support of a judgment, an instrument alleged to be a sight draft, drawn by an individual on a bank, will be presumed to be an ordinary bank check.

3. The holder's laches in presenting a check for payment will not discharge the drawer if he had no funds in the bank applicable to its payment.

4. All the evidence not being shown by the record, it cannot be held that the verdict was not supported thereby.

Appeal from circuit court, Linn county; George H. Burnett, Judge.

Action by the First National Bank of Portland against the Linn County National Bank. Judgment for defendant. Plaintiff appeals. Affirmed.

J. N. Teal, for appellant. J. K. Weatherford, for respondent.

BEAN, J. This is an action to recover for a loss suffered by the plaintiff on account of an alleged negligent omission of duty on the part of the defendant. The substance of the complaint is that on the 16th day of June, 1893, the plaintiff bank forwarded by mail to the defendant bank, its regular agent and correspondent at Albany, Or., for collection and payment, a sight draft for \$1,000, drawn by one J. L. Cowan on the defendant bank in favor of Fleischer, Mayer & Co., and by them indorsed to the plaintiff for deposit on account; that the draft was received by the defendant on the day it was mailed, but it did not collect or pay the same, and negligently failed to notify the plaintiff of its noncollection or nonpayment, and no action was taken thereon until the 24th of June, when the defendant, having in the meantime closed its doors, and passed into the hands

of a national bank examiner, such examiner, at the request of the plaintiff, presented the draft for payment, which, being refused, the draft was duly protested; that in the regular course of business notice of its nonpayment could and ought to have been communicated by the defendant to the plaintiff on June 17th, and that then and thereafter until the 19th Cowan was possessed of ample property out of which plaintiff could have enforced payment thereof if it had been notified that the same had not been paid; but that on the last-named date he became, and has ever since been, utterly insolvent, and the plaintiff has wholly lost the sum of money for which the draft was drawn, to its damage in the sum of \$1,000. The defendant denies the imputed negligence, and sets up in its answer that the draft was not received by it until the 24th of June, and was immediately protested for nonpayment, and plaintiff duly notified, and this presents the controlling question in the case. The trial resulting in favor of defendant, plaintiff appeals.

As already suggested, the important, and indeed the only, question of fact in issue on the trial was the date of the receipt of the draft by the defendant bank. As evidence tending to support the issue on its part, the plaintiff offered a letter written by the receiver of the defendant bank to the plaintiff's attorneys on July 28, 1893, in which it is stated that the draft in question was taken out of the post office at Albany "by Examiner Jennings on his arrival, June 21st, and not received by the bank before suspension." The court refused to admit the letter in evidence, and this ruling is assigned as error. The contention for the plaintiff, as we understand it, is that the receiver of a national bank is the statutory agent of the bank, and that his admissions are competent evidence against the association. Conceding—but without deciding—this to be the law, the letter in question was clearly incompetent. It is at most but the narrative of a past event, and does not appear to have been made by the receiver as a part of some transaction then pending within the scope of his authority. Whenever what an agent did is admissible in evidence against his principal, it is competent to prove what he said about the act while doing it, because his declarations or statements, made at the time, are part of the *res gestæ*. It is for this reason that they are admissible at all. As stated by Mr. Story, the rule is "that, where the acts of an agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting a part of the *res gestæ*." 1 Story, Ag. 134. The agent is the representative of the principal in the transaction of business embraced within his agency. Whatever, therefore, he lawfully does in the transaction of that business, is the act of his principal;

and his declarations respecting the subject-matter, if made at the same time and forming a part of the transaction, will also bind him. But when the right of the agent to act in a particular matter has ceased, or the declarations do not accompany the act, or are concerning a matter not within the scope of the agent's authority, the principal cannot be affected by them in any way. 1 Greenl. Ev. § 113; Mechem, Ag. 115; Anderson v. Railroad Co., 54 N. Y. 334; La Rue v. Elevator Co. (S. D.) 54 N. W. 806. Within this principle the declarations of the receiver offered in evidence were clearly incompetent. They were not only made more than a month after the alleged receipt of the draft, but were in reference to a matter of which the receiver did not claim to have any personal knowledge, and which evidently happened prior to his appointment. So it seems to us that under no view of this case was the letter admissible in evidence to charge the defendant with negligence.

It is also claimed that the court erred in charging the jury that negligence of the defendant bank in not making due presentment of the draft would not discharge the drawer from liability if he had no funds in the bank applicable to its payment. The form of the draft in question nowhere appears in the record, and therefore it must be assumed, in favor of the judgment of the court below, that it was an ordinary bank check drawn by Cowan upon the defendant bank, and, considering it as such, there was no error in the instruction.

The holder's laches in presenting a check for payment constitutes no defense in an action against the drawer unless he is damaged by the delay, and then only to the extent of his loss. A check purports to be made upon a deposit to meet it, and presupposes funds of the drawer in the hands of the drawee. But, if the drawer has no such funds at the time of drawing his check, or subsequently withdraws them, he commits a fraud upon the payee, and can suffer no loss or damage from the holder's delay in respect to presentment or notice. In such case he is liable, and cannot insist upon a formal demand or notice of nonpayment. 3 Rand. Com. Paper, §§ 1106, 1347; 2 Daniel, Neg. Inst. §§ 1587, 1596.

And, finally, it is claimed that the court erred in overruling plaintiff's motion for a new trial. Its counsel frankly concedes, however, that the ruling of the trial court on a motion for a new trial based on the insufficiency of the evidence, or some other question of fact, is not assignable error on appeal, but he seeks to make a distinction between the case stated and one where the motion is based upon the ground that the verdict is against law. He contends that from the undisputed facts and the instructions of the court in the case at bar the plaintiff was entitled to a verdict, and that the only remedy for the correction of the er-

ror of the jury was by motion for a new trial. But the facts on which his argument is based do not appear of record. The bill of exceptions does not contain, or purport to contain, all the evidence given on the trial, nor all the instructions of the court, and therefore we could not determine, even if the question was otherwise properly here, whether the verdict was against law or not. The pleadings present an issue of fact upon which defendant's liability admittedly depends, and, this issue having been determined by the jury in favor of the defendant, we are bound to assume, in the absence of an affirmative showing to the contrary, that the verdict was supported by the testimony. Finding no reversible error in the record, the judgment of the court below is affirmed.

(30 Or. 280)

MITCHELL et al. v. HOLMAN et al.

(Supreme Court of Oregon. Jan. 18, 1897.)

EQUITY — JURISDICTION — REFORMATION OF CONTRACTS—MISTAKE—CORPORATION—SALE OF STOCK.

1. Equity will entertain a suit to compel the allowance of a set-off against a judgment obtained by the indorsee of a note, where, at the time the judgment was obtained, the maker had no knowledge that the note had been indorsed as collateral merely for an amount less than the note, and the payee is insolvent.

2. Equity will not reform a contract on the ground of mistake unless the party asking reformation shows clearly, not only that the alleged mistake exists, but that it was mutual, and was not caused by his negligence.

3. Evidence that the contract in issue was intentionally drawn by the plaintiff in the form in which it was finally executed, and was submitted to the defendant, who retained it several days for examination, and then executed it without objection, will not warrant a reformation of the contract on the ground of mistake, in that a certain condition was omitted therefrom.

4. Defendant and others, holding a controlling interest in a corporation of which defendant was manager, sold their stock to plaintiff, who effected a reorganization. Defendant collected a claim which had become due and payable to the company before the sale of the stock. *Held*, that defendant was liable to the company for the amount so collected, less such portion as was applied to pay legal claims against the company.

Appeal from circuit court, Marion county; H. H. Hewitt, Judge.

Suit by S. Z. Mitchell and others against Thomas Holman and others. From a decree for defendants, plaintiffs appeal. Modified.

O. F. Paxton and G. G. Bingham, for appellants. H. J. Bigger and Tilmon Ford, for respondents.

BEAN, J. This suit arises out of the following facts: On February 24, 1893, the defendant Bush recovered judgment against the plaintiffs for the sum of \$24,566.50 on a promissory note, of date August 31, 1892, executed by them to the defendant Holman, and by him indorsed and transferred to Bush, before maturity, as collateral security for

about \$16,000. Prior to the commencement of this suit, the plaintiffs paid Mr. Bush \$22,379.97 on the judgment, and, as an offset to the balance of \$2,938, tendered a receipt in full for a claim of that amount which they held against the defendant Holman, and demanded satisfaction of the judgment, which being refused, they brought this suit for the purpose of offsetting the amount due them from Holman against the balance of the Bush judgment. The amount paid Mr. Bush being sufficient to pay and discharge his demand against Holman, it is admitted that he has no interest in the balance due on the judgment, except as trustee for his co-defendant, and hence this controversy is between the plaintiffs and Holman. As a ground for equitable jurisdiction, it is averred that, at the time the action on the note was brought by Mr. Bush, and up to the trial, plaintiffs supposed and believed that he owned the note in his own right, and so had no opportunity, if otherwise permissible, to plead the amount due them from Holman as a set-off in such action, and that, at the time of the commencement of this suit, Holman was practically insolvent. These allegations are sufficiently supported by the testimony for the purposes of this case. The evidence shows that plaintiffs had no knowledge of the character or nature of Mr. Bush's interest in the note until it was developed on the trial, and that, when this suit was commenced, Holman was very largely indebted, and his property incumbered to such an extent as to render it highly inequitable and unjust for him to enforce the judgment under the circumstances of the case. We shall, therefore, without further reference to this branch of the case, proceed to a consideration of the merits.

On the 15th of April, 1893, a corporation, known as the Oregon Electric Light Company, of which Holman was the manager, was, and for a long time prior thereto had been, supplying certain of the state buildings at Salem with electric light, under a contract with the state, for the stipulated and agreed compensation of \$5,000 per annum, payable quarterly, and at that time there was due and unpaid thereon the sum of \$2,708.33. The capital stock of the corporation was divided into 500 shares of \$100 each, of which the defendant Holman owned 220 shares, D. P. Thompson 220, and J. Loewenberg 60. On the day named, the defendant Holman and Thompson sold and assigned, for a good and valuable consideration, all their stock to the plaintiffs, Mitchell, Anson, and Paxton, and one E. P. McCornack, and delivered to them all of the corporate records and property. On the 17th of the same month a meeting of the stockholders was held, all the stockholders of the company being present either in person or by proxy, at which new directors were elected, who immediately qualified, and assumed control of the corporation, and elected a new set of corporate officers. On

May 5, 1893, after he had parted with all his stock, and therefore ceased to be an officer of the corporation, and without any authority from it whatever, Holman, representing himself to be still the manager of the corporation, collected from the state the amount due the company on the lighting contract, and used a part thereof in payment of the operating expenses of the corporation during the time it was being earned, and retained the remainder. On the 12th of August, 1893, the Oregon Electric Light Company duly sold and assigned its claim against Holman, for the money so collected by him, to the plaintiffs in this suit, and they are now the owners and holders thereof, and seek to set off the amount of such claim against the judgment in favor of Bush, but which in fact belongs to Holman.

If these were all the facts in the case, there could be no question as to who should prevail in this suit. The money collected by Holman was due the corporation, and not the stockholders, and when he sold and assigned all his stock he ceased to be an officer of the corporation, or any longer interested therein, and had no more right to this money than he had to the plant or other property of the company. The corporation is an entity separate and distinct from its stockholders, and the change of the latter could in no way affect its rights. But Holman, to overcome the force of this position, alleges as a defense that the stock of himself and Thompson was sold to Mitchell, Anson, Paxton, and McCornack under and in pursuance of an option contained in a contract between himself, as the representative of all the stockholders of the corporation, and Anson and McCornack, made on January 26, 1893, and that, as a part of such contract, he and his associates reserved the right to collect from the state any money due the corporation under the lighting contract referred to, at the time the option to purchase the stock should be exercised by Anson and McCornack. This contract is in writing, and contains no such stipulation or agreement; but Holman avers that it was omitted therefrom by a mutual mistake of the parties, and this is the only defense set up in the answer, and the controlling question in this case.

Upon this issue the burden of proof is with him, and he must show, by clear and satisfactory evidence, not only that there is a mistake in the written agreement, but that such mistake was mutual, or shared in by all the parties, and that it did not occur through his own negligence. *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *Epstein v. Insurance Co.*, 21 Or. 179, 27 Pac. 1045; *Kleinsorge v. Rohse*, 25 Or. 51, 34 Pac. 874. And this he has wholly failed to do. The written contract was prepared by the plaintiff Anson, and the undisputed evidence shows that he intentionally drew it in the precise form in which it was executed, and that no words were omitted which he intended

should be inserted, and that no words were included which he intended should be omitted. In short, there is not a particle of evidence in the entire record to show that the written contract is not just as Anson and McCornack intended it should be, and they both testify that it correctly expresses the terms of the agreement as actually made. It thus appears that, if there is a mistake in the contract at all, it is a mistake of Holman alone; and, while a mistake of one party to an agreement may in some instances be ground for the rescission of the contract, or afford a sufficient reason for a refusal by a court to enforce specific performance thereof, it clearly will furnish no ground for reforming it. And this for the paramount reason that, if the written contract should be reformed on proof of the mistake of one of the parties alone, great injustice might be done to the other, by imposing upon him the consequences of a contract to which he had never assented, and which he may have been unwilling to make in the first instance. But, besides this, the undisputed evidence shows that, after Anson drew the contract, he submitted it to Holman for examination, who retained it for a couple of days for that purpose, and then signed it without objection, although it contains no reference to or mention of the amount due the corporation from the state of Oregon. This, alone, would probably be a sufficient bar to the relief sought on the ground of negligence.

But it is claimed, and the court below found, that the deferred payment from the state was not in the minds of the parties at the time the contract was made, or during any negotiations pertaining thereto, and for that reason the written contract ought to be modified so as to exclude such claim against the state from its operation. Considering this to be true, it affords no ground at this time for the reformation of the contract actually made, or for relief from the legal consequences thereof. If the parties did not make the contract they intended, or if the legal operation of the one made is different from what they expected, it might, perhaps, have been a sufficient ground for a refusal on the part of Holman to perform, but it affords no defense to this suit. The contract as made has been fully executed, and a court cannot now relieve either party from the legal consequences thereof. 15 Am. & Eng. Enc. Law, 631. So that, on this record, we do not see any grounds upon which the defendant can be relieved from the consequences of his contract, although it seems probable he did not suppose that the legal effect of the sale and transfer of his stock in the corporation would deprive him of the right to collect the money due from the state at that time. Such, however, is the effect, and the court cannot relieve against a mere mistake of that kind. *Archer v. Lumber Co.*, 24 Or. 341, 33 Pac. 526. But it appears

from the record that he paid \$1,222 of the debts of the corporation from the money so collected by him, and for this sum he is equitably entitled to a credit.

The doctrine that an officer of a corporation acquires no legal claim against it for services performed in the discharge of his official duties, unless a compensation therefor was fixed by resolution or by-law of the corporation prior to the performance of the services, has no application to the questions raised in this case. The services performed by Holman, and for which he was accustomed to receive compensation at the rate of \$100 per month, did not pertain to the duties devolving upon him as director and president of the corporation; and hence, under the rule announced in *Wood v. Manufacturing Co.*, 23 Or. 20, 23 Pac. 848, he is entitled to compensation upon a quantum meruit, and it is not questioned but what the services were reasonably worth the sum charged therefor. It follows, therefore, that the decree of the court below must be modified; that plaintiffs be allowed a credit on the judgment against them in favor of Bush for the sum of \$1,486.33, with interest thereon at the rate of 8 per cent. per annum from the 5th day of May, 1893; and that, upon the payment of the balance due thereon, the defendants satisfy the judgment. Neither party to recover costs.

(30 Or. 228)

**BARGER v. TAYLOR et al.<sup>1</sup>**

(Supreme Court of Oregon. Jan. 18, 1897.)

**APPEAL—PARTIES—USURY—PROOF—AGENCY.**

1. The rendition of a judgment in favor of the state for the original sum loaned, on proof that the contract of loan sued on is usurious (*Hill's Ann. Laws*, § 3589), does not make the state a party to the action, so as to require notice of appeal to be served on it. 42 Pac. 615, reaffirmed.

2. Evidence that the lender's agent, in making the loan, exacted a bonus from the borrower, which would have rendered the loan usurious if exacted by the lender, and that the lender had, in other loans to the borrower, himself exacted a bonus, and that the borrower, while acting as agent for the lender in making the loans, exacted a bonus, which he divided with the lender, does not show that the bonus was exacted by the agent with the authority of the lender, or that the lender derived any benefit therefrom, so as to render the loan usurious.

3. The fact that the agent of the lender exacts a bonus from the borrower, which, if exacted by the lender, would make the loan usurious, does not, when without the authority of the lender, and without his deriving any benefit therefrom, make the loan usurious.

Appeal from circuit court, Wasco county; W. L. Bradshaw, Judge.

Action by John Barger against O. D. Taylor and others. From the judgment against him, plaintiff appeals. Reversed.

For opinion on motion to dismiss, see 42 Pac. 615.

E. B. Dufur, for appellant. A. S. Bennett, for respondents.

WOLVERTON, J. Plaintiff seeks the foreclosure of two certain mortgages by separate causes of suit. The defendant interposed a plea of payments not credited as a partial defense to the first cause, and usury as to the second. The court below sustained the defendant's contention, and its decree is for plaintiff upon the first for a small balance due, and in favor of the state and against the defendants upon the second. Plaintiff appeals from the whole decree, but without making the state a party, or serving it with notice; and defendants challenge the regularity of such appeal by a motion to dismiss. The main case presents largely questions of fact. The motion to dismiss was considered, and an opinion rendered touching it, some time ago, and as to that phase of the case the present consideration is upon a rehearing, but not so as it respects the merits. On the former hearing it was held that the state was not an adverse party in the sense that requires it to be served with a notice of appeal from a judgment in its favor made and entered upon a usurious contract. We are now constrained to adhere to that opinion, after a careful re-examination of the reasoning upon which it is based. It would seem that the state is not required to intervene in the first instance, and thereby become a party to the suit or action as a condition to the rendition of judgment in its favor. Section 3589 of *Hill's Annotated Laws of Oregon* provides that: "If it shall be ascertained in any suit brought on any contract that a rate of interest has been contracted for greater than is authorized \* \* \* the court in which such suit is prosecuted shall render judgment for the amount of the original sum loaned or the debt contracted, without interest, against the defendant and in favor of the state of Oregon, for the use of the common school fund of said county, and against the plaintiff for the costs of suit, whether such suit be contested or not." The judgment is the sequence of a litigation entirely between other parties, and is dependent upon the nature of the contract sued upon. The defendant may plead the usury, and pray a forfeiture, and the state bides the result of the contest, or the court may, without contest, if usury appears, forfeit the sum loaned or the debt contracted. So that, in so far as the state is concerned, its interests are fully conserved without its becoming a party to the litigation, and is in no sense a necessary, indispensable, or adverse party. Now, if prior to the rendition of judgment in its favor it is not a party in that sense, it is difficult to see how the judgment alone makes it such a party for the purposes of subsequent contest in the same litigation. This is a court of review, and its functions are to revise the proceedings of the lower courts, and it is sufficient that we be placed

<sup>1</sup> Rehearing denied.

in like position as regards parties as they were, in order that we may correct, if need be, their judgments and decrees. So that it would seem, if the state is not a necessary nor adversary party below, neither is it here for the purposes of the appeal, which is but a continuation of the litigation instituted and tried out in that court. Its interests will be as well conserved here without its formal presence as there. It was stated, *arguendo*, that so soon as the judgment is entered the state would have the right to have an execution issue, and that, unless it is notified of an appeal, it could never know when the case had gone to a higher court, and hence might use the execution as though the judgment in the lower court were final. This result could hardly follow. As the state is dependent for its judgment upon the result of a litigation between other parties, it is believed it would be dependent for its execution upon whether the judgment has been suspended by an appeal taken by one or more of such parties, and that it could only have an execution under like conditions as one of the parties to the action; that is to say, it must abide the course of the litigation, and take notice of its condition at all times, as it is entirely dependent for its rights upon the final judgment. But, however this may be, the question here is whether this court can obtain jurisdiction of the cause without the state being served with the notice, and this depends upon the question whether it is a party to the action, or becomes such by the entry of a judgment in its favor. For reasons already stated in this and the former opinion, we think it is not a party in the sense that requires it to be served with a notice of appeal, and hence this court may acquire jurisdiction to hear the cause without such service.

We come now to the merits, and the remaining questions are mainly of fact. As it pertains to the first cause of suit, the issue is direct whether defendant should have some additional credits not accorded him by plaintiff. We think his claim to these credits is not supported by the testimony, and they should not be allowed. The amount due plaintiff upon the note for \$1,277, set out in his first cause of suit, is \$400, with interest at 10 per cent. per annum from October 12, 1893. The question arising upon the second cause is whether the note of \$1,000 sued on is tainted with usury. The testimony directly bearing upon the transaction is meager. The note is made payable to "Geo. W. Rowland, Agent," and the mortgage executed to secure its payment is to "Geo. W. Rowland, Agt. of." The money loaned belonged to one C. W. Deitzel, who drew his check on French & Co., bankers, for the full amount of \$1,000, in favor of Rowland. This check is indorsed by Rowland, showing that he received the money. Deitzel testifies that the note was delivered to him soon after its execution, and should have been indorsed

by Rowland, but by an oversight was omitted until he had traded it to Barger, the plaintiff herein, when it was indorsed as follows: "Pay to John Barger, without recourse. Geo. W. Rowland." This tends to show that Rowland was the agent of Deitzel in making the loan. The latter evidently knew the loan was about to be consummated, as he consulted the defendant about the security. As touching the transaction, the defendant testifies as follows: "Q. What was the real consideration that you received for the execution of the \$1,000 note sued on in this proceeding? A. It was \$950, less some expenses of a mortgage, or recording, or something of that kind. Q. Was that all the money that you received for the execution of the note? A. Yes, sir." This is, in effect and substance, all the testimony having direct relation to the contract or understanding of the parties touching the loan. There is some other testimony tending to show that defendant had on previous occasions borrowed money from Deitzel; that he at times exacted bonuses or sums of money from him in excess of the lawful rate of interest; that at one time the defendant was acting as the agent of Deitzel in loaning his money, and that it was his custom to exact a bonus from the borrower, and divide it with Deitzel. But these negotiations involved transactions other than the obligation sued on here. By statutory intentment, a contract is to be deemed usurious when an unlawful rate of interest has been contracted for, either directly or indirectly, or when any gift or donation of money or property or other valuable thing has been made to the lender or creditor, or any person for him, either directly or indirectly, either by the borrower or debtor, or any person for him, the design of which is to obtain for money loaned, or for debts due or to become due, a greater rate of interest than is allowed by law. Section 3589, *supra*. The enactment is explicit and comprehensive, and was intended, no doubt, to cover every scheme or device by which the lender may obtain for money loaned or for debts due or to become due more than the lawful rate of interest, and ought to be enforced whenever a case is brought within the compass of its provisions. It is penal in its nature, and works a forfeiture of the original sum loaned. However much the law may abhor a forfeiture where it results in a benefit solely to an individual, it is upheld and sustained as a penalty to the state for the infraction of law, but proof of the transaction which involves and incurs the penalty should be clear and satisfactory, and its establishment should not be left to vague inference or mere probabilities or conjecture. It has been so held in this state in a case wherein it was sought to establish usury under the present enactment. *Poppleton v. Nelson*, 12 Or. 349, 7 Pac. 492. It may be taken as established that Rowland retained \$50 of the \$1,000 for which the de-

fendant executed his note, and that defendant only obtained \$950 therefor. Further than this, it does not appear for what purpose Rowland was permitted to withhold the sum named, whether as compensation for his services in procuring the loan in the capacity of a broker, or as agent for Deitzel, or whether Deitzel was to receive the money so retained by Rowland, or any part thereof. It is not clear, nor can it be satisfactorily inferred, that because Deitzel had on prior occasions made usurious loans, or that the defendant had at one time acted as his agent in consummating such loans, this money, or any part of it, was paid to him by Rowland. It is but a conjecture to say that it was retained for his benefit, and there is no cogent or convincing testimony of the fact if it was so retained. But, even if it be conceded that Rowland was the agent of Deitzel, we can only assume, without proof to the contrary, that the agency comprehended the doing of a lawful business, and the consummation of lawful transactions; and, as it respects a business or transaction which operates as an infraction of law, the law will presume that the principal did not direct nor assent thereto, and that such transaction was without the scope of the agent's authority given or conferred. The principle is applied to alleged usurious transactions consummated by an agent. In *Gokey v. Knapp*, 44 Iowa, 35, it is said: "An authority to loan money at a legal rate of interest does not include by implication the authority to loan it at an illegal rate. An authority to violate the law will never be presumed." This language is quoted with approval in *Call v. Palmer*, 116 U. S. 102, 6 Sup. Ct. 301. It is said in *Van Wyck v. Watters*, 81 N. Y. 352: "The fact that an agent, intrusted with money of his principal to invest, exacts a bonus for himself, without the knowledge or assent of his principal, as a condition to making a loan, does not establish usury. The principal is not liable for such an unauthorized act of the agent, in the absence of proof that he received a portion of the bonus, or in some form reaped a benefit or advantage from the same." So it is held in *Cox v. Insurance Co.*, 113 Ill. 385: "The fact that an agent, without the authority, consent, or knowledge of his principal, upon loaning the money of the latter, exacts from the borrower a sum in excess of lawful interest, does not make the loan usurious." The doctrine is maintained by many other authorities, and we are constrained to adopt it in the present case. See *Estevez v. Purdy*, 66 N. Y. 446; *Phillips v. McKellar*, 92 N. Y. 34; *Ammerman v. Ross*, 51 N. W. 6, 84 Iowa, 359; *Vahlberg v. Keaton*, 51 Ark. 534, 11 S. W. 878; *Bell v. Day*, 32 N. Y. 165; *Condit v. Baldwin*, 21 N. Y. 219; *Nichols v. Osborn*, 41 N. J. Eq. 92, 3 Atl. 155; *Brigham v. Myers*, 51 Iowa, 397, 1 N. W. 613; *Rogers v. Buckingham*, 33 Conn. 81. It would follow from these authorities that it was not only necessary for the defendant to

show that Rowland was the agent of Deitzel, and as such took and received from him the \$50 as a consideration for making or causing to be made the loan in question, but that the act was authorized by Deitzel, or was done with his knowledge or assent, or was in some manner ratified by him. See *Greenfield v. Monaghan* (Iowa) 52 N. W. 193, a case much in point. In this latter respect the proof utterly fails, and so we conclude the plea of usury is not sustained, and the plaintiff is entitled to recover upon the second cause of suit the sum of \$1,000, with 10 per cent. interest from the date of the note. He is also entitled, under the pleadings and evidence, to an attorney's fee of \$140. Let a decree be entered for plaintiff in accordance with this opinion, and for the costs of suit.

#### WESTOVER v. DOBSON et al.

(Supreme Court of Kansas. Jan. 8, 1897.)

##### APPEAL—PARTIES—DISMISSAL.

On appeal from a judgment against a partnership, a partner is a necessary party, though he defaulted; and, if not properly made a party, the appeal will be dismissed as to all.

Error from district court, Franklin county; A. W. Benson, Judge.

Action by Adam Dobson against W. A. Westover and another. There was a judgment for plaintiff, and defendant Westover brings error. Dismissed.

Wm. H. Clark, for plaintiff in error. C. A. Smart and W. S. Jenks, for defendants in error.

PER CURIAM. On February 20, 1893, Adam Dobson commenced an action of replevin against W. A. Westover and Charles S. Wolsey, partners as W. A. Westover & Co., for a stock of goods. W. A. Westover alone answered for himself, and not in behalf of the firm. A trial before the court resulted in a general finding and judgment in favor of the plaintiff below on January 9, 1893. The journal entry of the judgment recites that neither C. S. Wolsey nor the firm of W. A. Westover & Co. appeared, either by pleadings or counsel, and the judgment was rendered against W. A. Westover & Co. Westover brought the case here, attaching to his petition in error against Dobson and Wolsey a case-made which was not served on Wolsey. On motion of Wolsey the case was dismissed as to him December 7, 1895. On the hearing of the case on the merits, we are met by the motion of Adam Dobson to dismiss as to him. The petition in error recites and prays for the reversal of a judgment "against W. A. Westover and C. S. Wolsey, partners as W. A. Westover & Co." The judgment being joint against Westover and Wolsey, it would seem, *prima facie*, that Wolsey should join in the petition in error; but, if his consent could not be obtained, then he might have been properly



made a defendant, the reason being stated in the petition in error. Code Civ. Proc. § 37. The petition in error is defective in not stating the reason for making Wolsey a defendant. But, passing by this defect, we must hold that Wolsey was not only a proper, but a necessary, party to a final determination of the proceeding in error; and, as he was not properly brought into, and was therefore dismissed out of, this court, we can proceed no further against Dobson, and the case must be dismissed as to him also. *Norton v. Wood*, 55 Kan. 559, 40 Pac. 911, and cases cited; *Hyde Park Inv. Co. v. First Nat. Bank*, 56 Kan. 49, 42 Pac. 321. Ordered accordingly.

(57 Kan. 655)

**SUPREME LODGE OF ORDER OF SELECT FRIENDS v. CAREY**, Clerk of District Court, et al.

(Supreme Court of Kansas. Jan. 8, 1897.)

**ENJOINING JUDGMENT—BOND ON APPEAL.**

In case of the refusal of the clerk of the district court to approve an undertaking given to stay the enforcement of a valid judgment until a review of the proceedings can be had in an appellate court, the appropriate remedy is an application to the court of which he is an officer, and which has supervision over him, to compel the performance of his duty. When adequate relief may be had by that procedure, an action in another court to enjoin the enforcement of such judgment cannot be maintained.

(Syllabus by the Court.)

Error from district court, Bourbon county; J. S. West, Judge.

Action by the Supreme Lodge of the Order of Select Friends against Joe Carey, clerk of the district court, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. L. Denison and L. C. Boyle, for plaintiff in error. Oscar Foust & Son, for defendants in error.

**JOHNSTON, J.** This was an action to enjoin the enforcement of the judgment rendered by the district court of Anderson county in favor of Charles Raymond and against the Supreme Lodge of the Order of Select Friends, which judgment has just been affirmed. 47 Pac. 533. After the rendition of the judgment, a case was made for and filed in the supreme court with a view of obtaining a reversal. In order to supersede the judgment and stay its enforcement until a review could be had, an undertaking was tendered by the supreme lodge to the clerk of the district court of Anderson county, but he declined to approve it. An execution was issued, and placed in the hands of the sheriff of Bourbon county, which he was about to levy, when the supreme lodge brought this action in the district court of Bourbon county, alleging that the undertaking was valid and sufficient; that it was wrongfully refused by the clerk; that Raymond was insolvent; and, if the col-

lection of the judgment is enforced, and it is subsequently reversed and set aside, the supreme lodge would suffer great and irreparable loss. The district court sustained a demurrer to the petition, and gave judgment for defendants.

The petition was demurrable. It is not claimed that the judgment is void, nor is any reason shown for resorting to this extraordinary remedy in a court other than the one wherein the judgment was rendered. The remedy is not appropriate. If the district clerk capriciously or wrongfully refused to approve a proper undertaking, the plaintiff should have proceeded against him in the court of which he was clerk. Adequate relief could have been had there by employing ordinary methods of procedure. The clerk is an officer of the district court, which is charged with the duty of regulating the proceedings of its own officers. In *State v. Breese*, 15 Kan. 123, it was held that an application to compel the performance by an officer of the district court of a duty devolving upon him by virtue of his office should ordinarily be made in the first instance to that court. It was said that harmony will be promoted by having all the proceedings controlled by one tribunal, and that the district court "is better acquainted with its officers, and can more fully appreciate the reasons for their action, and more justly measure the punishment to be awarded in case of disobedience." We think the district court ruled correctly, and its judgment will therefore be affirmed. All the justices concurring.

(5 Kan. App. 623)

**PAWTUCKET MUT. FIRE INS. CO. v. LANDERS** et al.

(Court of Appeals of Kansas, Southern Department, C. D. Jan. 5, 1897.)

**MORTGAGE—DEFAULT IN PAYMENT—INTEREST—FORECLOSURE SALE—RETROACTIVE STATUTE.**

1. In a promissory note executed July 1, 1885, and secured by mortgage on real estate, due five years from the date thereof, with interest at 7 per cent. per annum, payable semiannually, with semiannual coupons attached, and containing a provision that the note is to draw interest from date at the rate of 12 per cent. per annum if either principal or interest remains unpaid 10 days after due, and where the makers thereof, on the 1st day of June, 1891, paid one-half of the principal and all interest due to that date, and failed to pay the residue thereof, held, that when default is made in the payment of the principal and interest for more than 10 days after the maturity, and for more than 10 days after the time to which the interest is paid, the holder is entitled to recover the amount due as principal and 12 per cent. interest thereon from the 1st day of June, 1891.

2. Chapter 109, Laws 1893, concerning the sale and redemption of real estate, has no retroactive operation, and therefore does not apply to mortgage contracts existing at and before its passage. If the legislature intended the act to apply to such contracts, it violates section 10 of article 1 of the constitution of the United States. *Watkins v. Glenn*, 40 Pac. 316, 55 Kan. 417.

(Syllabus by the Court.)

Error from district court, Harper county; G. W. McKay, Judge.

Action by the Pawtucket Mutual Fire Insurance Company against George R. Landers and Mary Landers. Judgment for plaintiff, and it brings error. Modified.

Beardsley, Gregory & Flannelly, for plaintiff in error. Houston & McCulloch, for defendants in error.

JOHNSON, P. J. The Pawtucket Mutual Fire Insurance Company commenced this action in the district court of Harper county, Kan., against George R. Landers and Mary Landers, on a promissory note, and to foreclose a mortgage on land in said county, given to secure the payment of said promissory note. The note was executed by defendants below on the 1st day of July, 1885, to Jarvis, Conklin & Co., and by the terms of said note the makers agreed to pay to the order of Jarvis, Conklin & Co. the sum of \$4,000 on July 1, 1890, with interest at 7 per cent. per annum, payable semiannually, interest and principal payable at the office of Jarvis, Conklin & Co., in Kansas City, Mo. The promissory note provides that it shall draw interest at 12 per cent. from date if either principal or interest remains unpaid 10 days after due. Before the maturity of the note, it was sold and transferred by Jarvis, Conklin & Co. to plaintiff below, and duly indorsed in writing on the back thereof. The makers of the note made default in the payment of said note when the same fell due, July 1, 1890. On the 1st day of June, 1891, defendants below paid \$2,000 on the principal of the note, and all interest due thereon up to that date. The plaintiff below prayed judgment for \$2,000, with interest at 12 per cent. per annum from June 1, 1891, and asks for the foreclosure of the mortgage and a sale of the mortgaged property, without appraisal. George R. Landers and Mary Landers appeared to the action, and filed answer, denying all the allegations of the petition, except the execution of the note and mortgage, and allege that on June 1, 1891, they paid \$2,000 and all interest to that date; and that Jarvis, Conklin & Co. agreed with them to grant an extension of time for, at least, one year to pay the balance of the principal and interest, and that the year had not expired when the suit was brought; and that there was nothing due on the note; and ask that the action be dismissed. Plaintiff below filed a reply, containing a general denial of all new matter in the answer. The case was tried before the court, and resulted in a finding and judgment for the plaintiff below for the sum of \$2,000 as principal on the note, and interest at 7 per cent. per annum from June 1, 1891, and a decree of foreclosure of the mortgage, and for a sale of the mortgaged property, and that the defendants have 18 months after the sale of the mortgaged premises in which to redeem the same. The plaintiff objected to so much

of the judgment as fixed the rate of interest on the note at 7 per cent. per annum, and so much of the decree of foreclosure as gave the defendants 18 months after sale to redeem the mortgaged premises, and filed motion for new trial as to the judgment of the court fixing the rate of interest at 7 per cent. per annum, and so much of the decree as gave the defendants 18 months after sale to redeem the mortgaged premises. The motion was overruled, and plaintiff excepted. Plaintiff then filed motion to modify the judgment so as to give it interest at 12 per cent. per annum on the principal of the note from June 1, 1891, and to strike out of the decree that clause that gave the defendants 18 months after sale in which to redeem the mortgaged property, which motion was overruled, and plaintiff excepted, and brings the case to this court for review.

There are two reasons urged by plaintiff in error for a reversal of this judgment: (1) That the court erred in computing the interest on the amount due on the note at 7 per cent. per annum from June 1, 1891, instead of 12 per cent., in accordance with the terms of this note. (2) The court erred in decreeing that the mortgagors should be allowed 18 months from the sale of the mortgaged premises in which to redeem the same.

The note reads: "July 1st, 1885. Five years after date, for value received, we promise to pay to the order of Jarvis, Conklin & Co. four thousand gold dollars, lawful money of the United States, with interest thereon at the rate of seven per cent. per annum, payable semiannually on the first days of January and July in each year, according to the tenor of ten interest notes of even date herewith, and hereto attached, both principal and interest payable at the office of Jarvis, Conklin & Co., Kansas City, Missouri, with New York exchange. This note is to draw interest from date at the rate of twelve per cent. per annum, if either principal or interest remain unpaid ten days after due. At the option of the legal holder, after any of said interest notes remain due and unpaid ten days, the whole of the principal and interest may be declared immediately due and payable. This note is given for an actual loan of the above amount, and is secured by a mortgage of even date herewith, which is a first lien on the property therein described. Appraisal waived. George R. Landers. Mary Landers."

The court erred in computing interest on the amount due upon the note at 7 per cent. from June 1, 1891. The interest should have been allowed at 12 per cent. from June 1, 1891, as the note provided for interest at 12 per cent. from date if not paid within 10 days after maturity. All interest due on the note having been paid up to June 1, 1891, interest at 12 per cent. per annum should have been allowed from the date to which the interest had been paid. The note and mortgage were executed on the 1st day of July, 1885, and

the redemption law of 1893 was not applicable to this case. The whole question as to whether chapter 109 of the Laws of 1893, relating to the sale and redemption of real estate, was intended by the legislature to operate retrospectively, so as to apply to mortgage contracts existing at and before its passage, was ably and fully decided by the supreme court of this state in an opinion written by Horton, C. J., in case of *Watkins v. Glenn*, 55 Kan. 417, 40 Pac. 316, where it is said: "In view of these expressions of this court, delivered by such eminent and palmtaking jurists as Brewer and Valentine, and considering that section 1 of chapter 109 provides for deeds to issue at once on sales of real estate not subject to redemption, and for certificates to issue on sales subject to redemption, we think the legislature did not intend that the provisions of the act of 1893 should apply to mortgage contracts existing at the date of its passage. No statute, however positive in its terms, is to be construed as designated to interfere with existing contracts, rights, or actions, or suits, and especially vested rights, unless the intention that it should so operate is expressly declared. And courts will apply new statutes only to future cases, unless there is something in the very nature of the case, or in the language of the new provision, which shows that they were intended to have a retroactive operation. *Potter*, Dwar. St. 75; *Id.* 162, 163, note. *Sedgwick*, in his work on the Construction of Statutes and Constitutions (2d Ed.), after stating that retrospective or retroactive statutes, independently of certain exceptions, are within the scope of the legislative authority, yet says that 'such laws,' as a general rule, are objectionable, and the judiciary will give all laws a prospective operation only unless their language is so clear as not to be susceptible of any other construction.' Page 173. Again, he says: 'The courts refuse to give statutes a retroactive construction unless the intention is so clear and positive as by no possibility to admit of any other construction.' Page 166. If the legislature intended the act to be retrospective in its operation, so as to apply to prior mortgages, the following decisions of the supreme court of the United States, and the reasons given therein, are conclusive that the act is unconstitutional and void as to such contracts: *Ogden v. Saunders*, 12 Wheat. 213, 327; *Green v. Biddle*, 8 Wheat. 1-107; *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; *Gantly's Lessee v. Ewing*, 3 How. 716; *Ex parte Christy*, *Id.* 328; *Clark v. Reyburn*, 8 Wall. 322; *Walker v. Whitehead*, 16 Wall. 314; *Howard v. Bugbee*, 24 How. 461; *Bank v. Sharp*, 6 How. 301; *Gunn v. Barry*, 15 Wall. 610; *Brine v. Insurance Co.*, 96 U. S. 627, 637; *Memphis v. U. S.*, 97 U. S. 293; *Kring v. Missouri*, 107 U. S. 233, 2 Sup. Ct. 443; *Butz v. City of Muscatine*, 8 Wall. 575; *Mobile v. Watson*, 116 U. S. 305, 6 Sup. Ct. 398; *Cur-*

*ran v. State*, 15 How. 319; *Louisiana v. New Orleans*, 102 U. S. 206; *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190; *Edwards v. Kearzey*, 96 U. S. 595."

It is therefore ordered that this case be remanded to the district court of Harper county, with direction that said judgment be so modified as to compute interest on \$2,000 at the rate of 12 per cent. per annum from the 1st day of June, 1891, to the rendition of the judgment, and that said judgment draw 12 per cent. per annum from the date of its rendition, and that the clause in the decree of foreclosure of the mortgage giving the defendants 18 months to redeem the mortgaged premises after sale be stricken out, and the defendants pay the costs in this court. All the judges concurring.

(5 Kan. App. 473)

### UNION PAC. RY. CO. v. MILLS.<sup>1</sup>

(Court of Appeals of Kansas, Northern Department, W. D. Jan. 4, 1897.)

#### ERRONEOUS INSTRUCTIONS—EFFECT.

Instructions should be applicable to the case and the facts proven. It is a right of a party to have his case submitted to the consideration of a jury under proper instructions; and, where incorrect instructions are shown to have been given, this court will not undertake to say that they did not operate to the injury of the party against whom they were given, unless such fact is made clearly to appear.

(Syllabus by the Court.)

Error from district court, Trego county.

Action by H. S. Mills against the Union Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. S. Williams, N. H. Loomis, and R. W. Blair, for plaintiff in error. Lee Monroe, and Lilly, Day & Monroe, for defendant in error.

GILKESON, J. The negligence alleged in the petition is as follows: "That on the 27th day of March, 1892, the said defendant, while running one of its trains on the aforesaid road in Trego county, managed its said train carelessly and negligently, and failed to employ suitable means to prevent the escape of fire from its engine which was running said train, and also permitted dead and dry grass and other combustible material to remain on its right of way near its railroad track; so that, by reason of its carelessness and negligence, as aforesaid, fire escaped from its said engine, and set fire to the dry grass and other material on or near its right of way; and, by reason of a continuous body of dry grass and other material, such fire was, on March 28, 1892, communicated to the aforesaid premises." It was stipulated on the trial, among other things: "For the purpose of the trial of this case, \* \* \* on the 27th day of March, 1892, between two and three o'clock in the afternoon, west-

<sup>1</sup> Rehearing denied.

bound train on the track of the defendant company known as "Train No. 11, Engine No. 620," started a fire in some dry grass on the right of way of the defendant company, at a point in said county of Trego, about two miles east of the town of Ogallah, by emitting sparks from the smokestack of said engine. That the fire spread northerly about one-half to three-quarters of a mile, setting fire to two hay stacks, and burning north of them some 100 feet. That at this place all the fire was extinguished, except such as remained in the hay stacks, about 6 p. m. that evening, by the section foreman and others. The next day, March 28th, the fire left in the hay stacks by reason of the wind escaped therefrom; and that it is this fire, last mentioned, which caused the damage for which this action is brought. That the premises injured are from eight to nine miles from the place where the fire of March 27th originated; and that this intervening space was covered, at the time the first started, with dry buffalo grass." Thirty-five special findings were returned by the jury, showing "that the original fire of March 27th started by sparks from the smokestack of engine No. 620"; "that said engine was equipped with a standard diamond stack; and that said stack is the best in use"; "the engineer was careful and competent, and the defendant's section hands and farmers put out the fire after it had burned beyond the hay stacks, except in the hay stacks, which they considered entirely safe to leave as it was, there being no danger of its starting up again"; that the fire in the hay stacks was left by the parties in an unsafe and dangerous condition, and "its escape a result that might reasonably have been anticipated by a prudent man; the engine was not equipped with the necessary appliances to prevent the escape of sparks from the smokestack; was defective in the netting"; netting not in good condition; and that "the negligence of the defendant in causing the fire of March 27th was in not plowing and burning a fire guard. \* \* \* Under the petition, the plaintiff could only recover for injuries resulting from a fire caused by defendant, either "in carelessly and negligently managing the train to which engine No. 620 was attached at the time and place of fire from its engine"; "permitting dead and dry grass and other combustible material to remain on its right of way."

The first proposition is entirely out of this case, under the evidence and the findings of the jury. The testimony shows, and the jury found, that the engineer was competent and careful, and while it is true they make the following findings: "Ques. 15. Did he not handle the engine in a careful and proper manner at the time the fire occurred? Ans. Don't know,"—yet they explain this in question 16: "If you find that the engine was not properly handled, then state in what the improper handling consisted. Ans. Did not

claim in question 15 that the engine was improperly handled."

As to the second proposition, the testimony shows that the engine was furnished with proper and approved appliances. This is uncontradicted, and the jury so found, but they also found that the appliances were not in good order, viz. the netting in the smokestack. Query: "Does the allegation of the petition of not being properly supplied include not being in good order?" But, be this as it may, the jury also found that the negligence in setting out the original fire of March 27, 1892, consisted in not plowing and burning fire guards, viz.: "Ques. 17. Was the defendant guilty of negligence in causing the fire on Sunday, March 27th? Ans. Yes. Ques. 18. If you answer the above question in the affirmative, then state fully in what the negligence consisted? Ans. In not plowing and burning fire guards." If these findings be true,—and we must take them to be so,—then what difference can it make as to the appliances or their condition? The answer to this is that, taking both together, the defect in the netting allowed the sparks to escape, and it was not by "plowing and burning fire guards" that the fire was caused. But does this make the condition of the netting an act of negligence? We think not. Its condition might have been purely the result of an accident, and this finding is not within the issues of the case. There is no allegation that can be construed to embrace it.

And this brings us to the consideration of the third proposition. Upon this, we think, there is a total failure of proof. The only testimony that is claimed to show or prove this allegation is that there was some grass growing on the right of way. This of itself is not negligence. *Railway Co. v. Butts*, 7 Kan. 308. And there is certainly a very material difference between permitting grass to grow and permitting dead and dry grass and other combustible material to remain on its right of way. And, if we take the next allegation of the petition, the fire was communicated to the plaintiff's premises "by reason of a continuous body of dry grass and other material." The defendant company is not charged with any fault for the existence of this "continuous body of dry grass," etc. It might be inferred, but we have no right to infer, particularly against the specific allegations of the pleadings. This construction of the pleadings is upheld by the decisions of the supreme court and this court. *Railway Co. v. Fudge*, 39 Kan. 543, 18 Pac. 720; *Telle v. Railway Co.*, 50 Kan. 455, 31 Pac. 1076; *Railway Co. v. Griffith*, 54 Kan. 428, 38 Pac. 478; *Clark v. Railroad Co.*, 48 Kan. 654, 656, 662, 29 Pac. 1138; *Railroad Co. v. Ayers*, 56 Kan. 176, 42 Pac. 722; *Railway Co. v. Bell*, 1 Kan. App. 71, 41 Pac. 200; *Railway Co. v. Motzner*, 2 Kan. App. 342, 43 Pac. 785.

But it is contended by the plaintiff in error that certain instructions given and re-

fused are erroneous. We agree with counsel particularly with respect to those given. The eighth instruction is as follows: "Now, if you find that the original fire was negligently set out, as I have explained to you, then when the company got that fire under control, or their section men there got that fire under control, it was their duty to see that the fire was out; and it would make no difference that it might have waited until the next day, and been carried by a high wind from these stacks onto the high prairie; the defendant in that event would still be liable. That would be because the originals setting out of the fire was negligently caused; that is, I say if you find that it originated negligently. Of course, on the other hand, if you find that it was not negligently done, and that it was a mere accident, and could not be avoided, and that the company was neither negligent in the construction of their engines, or in the employing of skillful workmen, or in keeping their right of way free from grass and combustible material, and that the fire was accidental, or that the company could not avoid it by a careful and proper management of their trains, then and in that case they would not be liable unless they got it under control, failed to use reasonable diligence and care in taking care of it. In other words, if the fire did not originally escape through the negligence of the company, and afterwards the company got it under control through their employés, they were only required to use such care as reasonable men would do under the circumstances; and if they did that, and the fire escaped to the man's premises, the company could not be held liable." The thirteenth instruction is as follows: "Defendant is not liable for the loss of plaintiff's property unless the loss was such a probable and natural consequence of leaving the premises in the condition in which they were left in the evening that a reasonable person could have foreseen that such would be the result. After the fire started, defendant was only bound to do what a reasonably prudent person would do under the circumstances to control or extinguish the fire; and if it did that, and left the premises in such condition on the evening of March 27th as would leave an ordinarily prudent person to believe that there was no danger of any outbreak, then it had performed its whole duty, and your verdict must be for the defendant. This instruction is applicable only in case the fire did not negligently start in the first place. And if you believe that it was not negligently started, and that they got it under control, and then permitted it to escape from them, I say this instruction will be applicable." These instructions, we think, are erroneous, as not stating the law correctly, and are confusing, not confined to the issues of the case. They virtually tell the jury that the railroad company is liable for a purely accidental fire, which they fail to extinguish, after attempting to do so. In

other words, a party may become liable for an accident on account of his inability to control it. We do not think this is sound. Admitting that it was the duty of the section hands to put out this fire, if it came to their knowledge (but that is a common duty owed by all the citizens of that locality, regardless of its origin), and even admitting that the section men were under special obligations to so act, would it change the rule, and make the company liable for an accidental fire on account of the physical inability of its employés to control it? But it is contended they attempted to do so, and the court instructed that, having so attempted, "they must use reasonable diligence and care in taking care of it, and, if they failed to do so, the company is liable, without regard to the origin." True, and herein, we think, the court erred. It might just as properly be charged that Cowden, Richards, and Rogers, and the others who were attempting to extinguish this fire were liable, because they failed to use reasonable diligence in taking care of it. The company is not charged in this action with negligence in not properly handling a fire after they had it under control. The negligence charged is in originally setting out the fire, and, as we have said, is not within the issues in this case.

The evidence in this case is very unsatisfactory upon many propositions, particularly as to the value of the property, and the amount or items destroyed, and it might also be said that the court erred in other instructions, or, rather, in not giving instructions that should have been given; and we are forced to the conclusion, after an examination of the record, that the special findings of the jury were made with very little regard to the testimony. The judgment will therefore be reversed, and a new trial awarded.

(5 Kan. App. 484)

# UNION PAC. RY. CO. v. LEPPARD.

(Court of Appeals of Kansas, Northern Department, W. D. June 18, 1895.)

## NEGLIGENCE—QUESTION FOR JURY.

Whether negligence in a particular case is shown is ordinarily a question for the jury; but when the facts are undisputed, or are definitely found by the jury, and only one conclusion can be drawn therefrom, it becomes a question for the court.

(Syllabus by the Court.)

Error from district court, Russell county.

Action by Richard Leppard against the Union Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. L. Williams, N. H. Loomis, and R. W. Blair, for plaintiff in error. Geo. W. Holland, for defendant in error.

GILKESON, P. J. Defendant in error, Richard Leppard, as plaintiff, brought this action to recover damages sustained by him

from a fire alleged to have been negligently set out by defendant. The allegations of negligence in the petition are: "On the 12th day of March, 1893, the said defendant, while running one of its trains on its road in Russell county, managed its train carelessly and negligently, and failed to employ suitable means to prevent the escape of fire from the engine that was used in running the train, the same being a freight train going west, on or about the afternoon of the date aforesaid; and the defendant carelessly and negligently permitted dead and dry grass and other combustible material to collect and remain on the right of way and land of said defendant, and also dead and dry grass and other combustible material to remain and collect near the track of the road of the said defendant; so that, by reason of the carelessness and negligence hereinbefore set forth, fire escaped from the engine of said company used in running the train aforesaid, and set fire to the dry and dead and other combustible material on the right of way and other lands of the said company; and, by means of a continuous body of dry grass and other combustible material, the fire was communicated without any fault of the plaintiff, to the premises of the plaintiff, and then and there burned and destroyed," etc. Upon the trial, the jury returned 29 special findings upon different propositions. Those returned by them as to the condition of the engine and escape of the fire and the management of the train are as follows: "Q. 1. Was not Frank Schuyler the engineer in charge of engine 712, attached to train No. 11, on March 12, 1893? Ans. Yes. Q. 2. Was not Chas. Petrie fireman on that train? Ans. Yes. Q. 3. Was not Mr. Schuyler a careful and competent engineer? Ans. Yes. Q. 4. Was not Mr. Petrie a careful and competent fireman? Ans. Yes. Q. 5. Were not Mr. Schuyler and Mr. Petrie both performing their respective duties properly when the train passed between mile posts 250 and 251? Ans. For the want of sufficient evidence, we can't say. Q. 6. If you find either of them was not properly performing his duty at that time, state which it was, and in what manner he failed to do his duty properly. Ans. Answer of question 5 answers this question. Q. 7. Did the fire which damaged plaintiff's property start from an engine belonging to defendants? Ans. Yes. Q. 8. If you answer the last question in the affirmative, then state the number of the engine from which the fire started. Ans. 712. Q. 9. Was not engine 712 furnished with well-known, improved, and reasonable safe appliances to prevent the escape of fire or sparks? Ans. Yes. Q. 10. Were not all of said appliances in good order and proper position on March 12, 1893? Ans. For want of sufficient evidence, we can't say. Q. 10½. Is it possible to construct and equip a locomotive so as to entirely prevent the escape of sparks and fire, and furnish draft sufficient for the engine to do its work, when it is care-

fully and properly operated? Ans. No. Q. 11. Was it not found by the inspector at such time to be in good and safe repair? Ans. Yes." They also found in reference to the wind, and where the fire started, and the fire guard of the defendants, as follows: "Q. 13. Was there not an unusually high wind blowing from the south or southwest at the time the fire started? Ans. No. Q. 14. Did not the fire start about 140 feet north of the track, and between mile posts 250 and 251? Ans. Yes. Q. 15. Had not the defendant burned a strip about 140 feet wide for a fire guard along the north side of the track, between mile posts 250 and 251, and along the south side of the Smith stubble field, prior to March 12, 1893? Ans. Yes. Q. 16. Did not the fire start on the north side of the fire guard? Ans. Yes. Q. 17. Would not such a fire guard as defendant had on the north side of its track be sufficient, under usual ordinary circumstances, to prevent fire being communicated from passing engines to combustible matter on the outside of the fire guard? Ans. No. Q. 18. Was not the land where the fire started in cultivation? Ans. Yes. Q. 19. Had not the land where the fire started been under cultivation since 1880 or 1881, and, if it had not been, state for how many years it had been under cultivation. Ans. It was, but not continuously. Q. 20. Had not Chas. Smith plowed two furrows along the south side of the Smith stubble field at the time the fire guard had been burned by section foreman? Ans. Yes. Q. 21. Had the defendant been in possession or exercised any control over the land included in the Smith stubble field since said field had been in cultivation? Ans. Yes." And also found as to the condition of the buildings: "Q. 22. Had the buildings which the plaintiff claims were destroyed by fire been unoccupied since the spring of 1892, and, if not for that length of time, state how long they had been vacant. Ans. Yes."

The petition in this case does not allege generally that the injuries complained of were committed by the defendant "in the operation of its railroad," but it limits it to negligence caused by the defendant either in managing the train, or by failure to employ suitable means to prevent this escape of fire from the engine, or permitting dead and dry grass and other combustible material to remain on its right of way near its track, and on its land. It is true that there is an allegation in the petition that, "by means of a continuous body of dry grass and other combustible material, the fire was communicated, without any fault of the plaintiff, to the premises of the plaintiff." But this does not help the plaintiff. The defendant is not charged with any fault of its existence. *Railway Co. v. Mills* (just decided) 47 Pac. 623, and authorities there cited. We have conceded that the petition is sufficient to authorize a recovery on proof of the negligent keeping of the right of way, and permitting the accumulation there-

on of combustible material (which concession we seriously doubt the correctness of); but do not the special findings and evidence in this case defeat the plaintiff's claims? Whether negligence in a particular case is shown is ordinarily a question for the jury; but when the facts are undisputed, or are definitely found by the jury, and only one conclusion can be drawn therefrom, it becomes a question for the court. *Railway Co. v. Pointer*, 14 Kan. 37; *Dewald v. Railway Co.*, 44 Kan. 586, 24 Pac. 1101; *Railway Co. v. Buck*, 3 Kan. App. 674, 44 Pac. 904.

There is nothing in the pleadings or the evidence to indicate whether the fire was purely accidental, or caused by the negligence of the defendants, either in the management of the train, want of suitable means to prevent the escape of fire, use of defective engine, or its appliances. The jury found that the fire started from an engine belonging to the defendant, and that it was engine No. 712; but why or how it escaped they fail to state, and there is not a particle of testimony to show. The evidence is uncontradicted that the engineer and fireman were careful and competent (and the jury so found), and were doing their duties properly when the train passed the point where the fire originated. It is true, the jury found that they are unable to state as to the latter, for want of testimony upon this point, but this finding is unwarranted. There was testimony upon this point, and it was uncontradicted. The testimony shows that the engine No. 712 was furnished with the most approved appliances to prevent the escape of fire or sparks; that it was found to be in good order when inspected on its arrival at Ellis, March 14th; that it is impossible to construct and equip a locomotive so as to entirely prevent the escape of sparks and fire, and furnish draft sufficient for it to do its work, even though carefully handled; and the jury so found. The jury found that they are unable to state whether the appliances were in good order and proper position at the time the fire started; yet all the testimony on this proposition is uncontradicted, and, for aught that appears on the record, the jury must have rendered their general verdict solely on the ground of the defendant's negligence in the care of its right of way. But this theory is not sustained by the findings or the evidence. They show that the fire originated 140 feet north from the track, and the company had prepared a fire guard that width on the north side; that the fire originated on land in cultivation, in the possession of one Smith, not on the fire guard; that Smith had plowed two furrows south of this cultivated land. Can it be said with any justice that a railroad company can be chargeable with negligence in the management of its right of way, any more than a private individual, when it has guarded against danger from the accidental escape of fire. We think not. Nor is there any testimony showing that there was any

combustible material on this 140-foot fire guard, or anywhere near the tract, which was ever burned by this fire. There is testimony as to some tall grass, weeds, foxtail, etc., in a little draw; but whether it was on the right of way, or how far from the track, is not shown. But it is argued that the jury found that this fire guard was not sufficient under ordinary circumstances. Our answer to this is that there is no testimony to base this finding upon. We might add here that they also found that there was not an unusually high wind on the day of the fire, when every witness who testified as to the wind characterized it as unusually high, terribly high wind, etc.

Many errors are assigned as to the admission of testimony and refusal to strike out, and we think most of them are substantial, and we think the objection should have been sustained as to the following: Witness Anspaugh, as to description of buildings on the land, given from measurements of foundations long after the fire. This testimony was incompetent for all purposes, and was certainly prejudicial to the defendant. Witness Raincamp, upon the same subject, Witness Kauffman, as to the value of his labor in plastering one of the buildings, and how much it cost him to build the granary at the time it was built, and the value of the lumber in the house when he built it. And we might add here that most of the testimony with reference to the condition of these buildings is incompetent. There is no testimony to show their condition immediately previous to the fire, but it shows (and the jury so found) that they had been vacant and unoccupied since the spring of 1892, and this case was tried in November, 1894. No witness testified that they had seen the buildings at any time within seven weeks prior to the fire, and their estimates of value thereof were founded by a majority of the witnesses upon an inspection of the ruins, and their estimates were for the cost of entirely new buildings. The admission of the contract between the Union Pacific Railway Company and Charles A. Smith was incompetent for any purpose. The refusal to allow the defendant to show by witness Raincamp what the buildings were composed of, and by witness Kauffman the same thing, certainly was competent as to the damages sustained. Other damages urged by the defendant should have been sustained, to wit: The rejection of testimony of witness Petrie as to the operation of an engine with finer netting, and whether the engineer did anything that tended to increase the amount of sparks from the smokestack or ash pan; and the rejection of testimony of Easterbrook as to the adoption of improved appliances. But, under the findings of this case, the rejection of this testimony was not prejudicial to the defendant, and we mention these to avoid a repetition thereof in the retrial of this case.

We also think that the court erred in its instructions, particularly in the following: "No. 20. There is some testimony tending to show that the defendant railway company owned the land upon what is known as the 'Smith Land,' four hundred feet immediately north of the defendant's railroad, at the point where the fire occurred. You are instructed that there is no evidence offered, aside from this evidence, as to what is the scope and extent of the right of way at this point." There is not a particle of testimony in this case warranting this instruction. Even if the contract had been competent to prove a right of way, it certainly would not have proven that it was 400 feet on the north or south side of the track. The contract merely shows that the company reserved a strip of land in the quarter section therein described, 400 feet wide, to be used for the right of way or other railroad purposes, where the railroad was located in said quarter section. If the fact that the railroad owns a certain amount of land on each side of its track is to be taken as the criterion for the width that they are required to keep clear of weeds and combustibles, then we must hold that where the track runs through the center of a section, as it frequently does, that is owned entirely by the company, they must keep one-half mile on each side of its track clear on his section, and less on adjoining sections. Such a contention has no foundation either in law or reason, as stated by Garver, J., in *Railway Co. v. Buck*, 3 Kan. App. 675, 44 Pac. 805: "Railway companies are limited, barring exceptional cases, by the laws of this state, to a right of way 50 feet on each side of the center of the track. In such cases the burning or removal of combustible materials to the extent of the right of way would certainly be all that could be required; and the fact that sparks accidentally escaping from passing engines fell beyond the right of way, setting fire in dry grass on adjoining premises, would not make the company liable. Railway companies have no right to enter upon the lands of adjoining owners for the purpose of making fire guards. There is no express statutory requirement as to the condition in which a right of way must be kept, rules upon the subject being merely the outgrowth of judicial decisions. But, when it is held to be negligence to permit combustible materials to accumulate on the right of way in such manner as to endanger adjoining property, it seems reasonable that the required care be limited to the width recognized by statute as sufficient for the operation of a railroad. Otherwise, a court might find itself in the anomalous situation of holding that there was no negligence when combustible materials were removed from a right of way 100 feet wide through one tract of land, and that there was negligence when a like space was cleared upon an adjoining

tract, through which the right of way happened to be of greater width."

In view of the special findings of the court in admitting, rejecting, and refusing to strike out testimony, and its instructions herein particularly pointed out, we can reach no other conclusion than that another jury should pass upon the matters of fact in controversy between the parties. The judgment will therefore be reversed, and cause remanded for new trial

(5 Kan. App. 890)

NIAGARA INS. CO. OF NEW YORK v.  
KNAPP.

(Court of Appeals of Kansas, Northern Department, C. D. Jan. 4, 1897.)

APPEAL—REVIEW—DEMURRER TO EVIDENCE—INSTRUCTIONS.

1. When the court making an order as to the amendment of pleadings, has passed upon its scope and extent, and the order is not preserved in the record, we cannot say that it erred in the construction placed upon it.

2. A demurrer to the evidence should not be sustained where there is some proper evidence to establish every material allegation of the petition.

3. Where a party to an action asks a large number of special instructions to be given to the jury, and they are refused, but the court, in its general instructions, embraces all the points of law arising upon the pleadings and evidence, and embodies therein all the matters of law contained in the special instructions asked for, so far as they are applicable to the case, no error is thereby committed, as the court is not bound to repeat its charge in the form of special instructions, or to give special instructions in the exact language asked for.

(Syllabus by the Court.)

Error from district court, Washington county; F. W. Sturges, Judge.

Action by John Knapp against the Niagara Insurance Company of New York. Judgment for plaintiff. Defendant brings error. Affirmed.

H. M. Jackson, for plaintiff in error. J. G. Lowe and Chas. Smith, for defendant in error.

GILKESON, P. J. On January 11, 1892, the defendant in error, John Knapp, was the owner of a certain building in the town of Haddam, Kan., and a nursery stock stored in the basement of said building. On that day he took out a policy of insurance from the plaintiff in error company for the sum of \$500 on the building and \$600 on the nursery stock. There was some difficulty about the rate of premium to be paid for this policy, which was afterwards adjusted, and the policy completed, and about four days afterwards, to wit, on the 22d day of January, 1892, this building and nursery stock were destroyed by fire, and to recover for the damages sustained, Knapp brought this suit.

The allegations of the amended petition necessary to be noticed to understand this case are as follows: "Plaintiff further states: That he has complied with and performed all the conditions of said policy, or contract of in-



surance, to be by him performed, fully and well. That defendant has denied any liability under said contract of insurance, and has refused to pay the plaintiff the said sum of \$1,100, as agreed to do. (a) That the same was done at Haddam, Washington county, Kansas, on or about the 6th day of February, 1892, by one L. S. McMillan, who now is, and was at that time, the supervising agent and adjuster for defendant for the state of Kansas, with full power and authority in the premises. That plaintiff is unable to state the exact language used by the said agent of defendant, as the same was not reduced to writing, but says that the substance of the same was that defendant was not liable upon the contract of insurance, for the reason that the loss sustained was not covered by the policy of insurance. That plaintiff had caused the said insured property to be burned and destroyed by fire for the purpose of recovering of defendant the amount of said insurance, and then offered to compromise the same with plaintiff to avoid a lawsuit by giving him an amount much less than the amount of his damage and loss, and at the time and all times denied specifically that the defendant was in any way liable by said contract of insurance, in any sum or amount whatsoever. (b) That said defendant, by and through its adjuster, L. C. McMillan, did, on the 6th day of February, 1892, at Haddam, Kansas, deny that it owed to plaintiff anything whatever on said policy. That said insurance company waived the making of the written sworn statement and proof of loss provided for in said policy of insurance, by sending its agent and adjuster to the place where said fire occurred on the 6th day of February, 1892, and within a few days from the fire, and before the expiration of thirty days from the fire, for the purpose of adjusting and settling the loss; and that said adjuster then fully investigated all the facts and matters to which proof of loss were required by the terms of the policy to be made, examined the assured, his books, and did all things required by the policy to be done to make proof of loss, and took a memoranda thereof for the use of the defendant; and, further, said defendant further waived the making of proofs of loss as required by said policy by retaining the proofs of loss sent to it by plaintiff without objection, or demand, or suggestion of amendment until after the expiration of thirty days from the date of the fire, although said proofs were filed with it in ample time for it to object and demand that the same be made formal and correct, but retained said proofs of loss until after the expiration of the said thirty days, and then notified plaintiff that he had not complied with the terms and conditions of the policy as to making proofs of loss; that it would insist upon its legal rights not to pay the amount of said policy for that reason." The defendant filed its motion to make more definite and certain in the matters and respects following, to wit: Where it is alleged

that defendant had denied any liability under said contract of insurance, to allege and state with definiteness and certainty. When it is claimed the defendant denied any liability under such contract. Where such claim was made. How made, whether orally or written. If written, to attach copy thereof to petition; if orally, to state the substance of what was said, or the acts done, which are claimed to amount to a denial of liability. By whom such claim was made, for the following reasons: Because the defendant cannot anticipate the claim made and relied upon. The defendant, being a corporation, transacts its business through and by numerous agents, without knowing the name or character of the agent who it is claimed made the denial of liability, cannot prepare to meet the same. The statement is a conclusion of law. The allegations of the petition are so indefinite and uncertain, the precise nature of the charge and claim of plaintiff is not apparent. This motion was sustained, and the paragraph (a) was written therein as an amendment. The defendant then filed its motion to strike out the amendment for several reasons, and particularly strike out the following words thereof: "And at the time and at all times denied specifically that the defendant was in any way liable on said contract of insurance in any sum or amount whatever," because this clause is not in accordance with the order of the court made upon the former motion to make definite and certain, and because the same is indefinite and uncertain as the original petition. The answer filed admits: That it is an insurance company organized and doing business as alleged in the petition; that the plaintiff is a resident of the county of Washington, Kan.; that the fire occurred in said county; the execution of the insurance policy, the consideration for it, the time it was to run, and the amount of insurance; and that the buildings and personal property described in the policy were destroyed by fire on the 23d day of January, 1892. "(2) That defendant denies each and every statement, averment, and allegation in said petition contained, not therein expressly admitted. (3) This defendant especially denies that the plaintiff has complied with and performed all of the conditions of said policy or contract of insurance to be by him done and performed, and denies that the value of the property amounted to the sum of \$1,700, and denies that the plaintiff was by said fire damaged to that extent."

The instructions of the court are as follows: "(1) This action is brought by the plaintiff, John Knapp, to recover of the defendant insurance company the sum of \$1,100, with interest from April 24, 1892, claimed to be due from the defendant on account of a certain policy or contract of insurance, whereby it is claimed that said defendant insured certain property of the plaintiff against loss or damage by fire, as follows: \$500 on a one-story frame building on lot 5, block 17,

in Taylor's addition to Haddam, in this county, occupied as a ware and packing house for nursery stock; also \$600 on a nursery stock in said building and the cellar thereunder. This policy or contract was issued January 11, 1892, for one year, and the property insured thereby is claimed by plaintiff to have been totally destroyed by fire on the 22d day of January, 1892. Plaintiff further claims to have complied with and performed all the conditions of the policy or contract to be performed by him, or if in any instance he had not strictly so done, it is because the defendant, by its adjuster and general agent, waived the performance thereof by his acts and conduct, by, February 6, 1892, denying all liability of the company on said policy. (2) Defendant, by its answer, admits that it is a corporation duly organized and authorized to do business in this state; that it issued its policy to the plaintiff, and that the building and property in the basement thereof was destroyed by fire at the time alleged, to wit, January 22, 1892. Defendant, however, denies that the property destroyed was of the value claimed by the plaintiff, and that the plaintiff has been damaged to the extent he claims; and, even if he has, defendant insists that it is not liable therefor, for the reason that, as defendant claims, the plaintiff has not complied with and performed all the conditions of the policy or contract on his part, nor has the defendant waived compliance therewith. (3) Before plaintiff can recover, he must show that all the conditions of the policy to be performed by him, as stated in the policy, have been performed, or that the defendant has waived the performance thereof. (4) Said contract or policy provides that, in case of loss thereunder, plaintiff shall immediately give notice that there has been a loss, and within thirty days after loss make proof thereof; that is, make a statement of the loss to the company at its office in New York, within that time, signed and sworn to by plaintiff, stating such knowledge or information as plaintiff has been able to obtain as to the time, origin, and circumstances of the fire; also the nature of the title and interest of the plaintiff and all others in the property described in said policy, all incumbrances on said property, the cash value thereof, the amount of loss or damage, all other insurance, giving copies of the written parts of additional policies, any changes in the title, use, occupation, location, or possession or exposure of said property that may have occurred since the issuing of the policy, how, by whom, and for what purpose the building described, and the different parts thereof, were occupied at the time of the fire. If the plaintiff, however, had no knowledge as to origin and circumstances of the fire, and there was no incumbrance or additional insurance on the property, and there had been no change in the title, use, occupation, location, or exposure, plaintiff would not be required to state them. Plaintiff, however,

should in the statement state his title and interest, as well as that of others, in the property, the cash value thereof, the loss or damage, how and by whom and for what purpose occupied, and the time of the fire, if known. The object of this statement or proof of loss is to inform the company concerning these matters. As this is for the company's benefit, the company may, of course, waive it. In this case, as said above, the plaintiff claims that the defendant did waive this statement by the acts and conversation of the defendant's agent McMillan with plaintiff at Haddam on February 6, 1892. A waiver is such acts or conduct on the part of the defendant or its adjuster and agent as are calculated to deceive the plaintiff, or induce him to believe that proofs of loss would be unnecessary or of no avail. A waiver need not be proven by express language, but may be inferred or presumed from the acts and conduct of the parties. Therefore, if the defendant, by its agent, did anything which induced plaintiff to believe that proofs of loss would be of no avail, such conduct would amount to a waiver, and plaintiff would be relieved from making proofs of loss, or correcting any made, and be entitled to recover as though he had made and forwarded proper proof as required by the policy. If the adjuster went to the place of the loss before the time for making proof of loss had expired, and fully investigated the loss for the purpose of ascertaining how much, if anything, defendant was liable for, and did fully investigate the matters with reference to which proofs of loss were required by the terms of the policy, this would be a circumstance proper to be considered by you in considering the question as to whether the defendant had waived the conditions of the policy as to making proofs of loss. (5) Plaintiff also claims that the defendant waived proof of loss in this: that at the time above mentioned—February 6th—the agent denied any and all liability to the plaintiff on account of said policy, while the defendant insists that it did not deny all liability, but only denied that plaintiff had sustained as large damage as plaintiff claimed, and informed plaintiff that it could not determine as to whether defendant was liable without further proof and inquiry. If you find the fact to be as plaintiff claims,—that is, at the time and place mentioned, the defendant's agent and adjuster denied all liability on account of the policy, and refused absolutely to pay anything thereon under any circumstances,—this would obviate the necessity of proofs of loss, and be a waiver of the same. If, however, he did not deny all liability, but simply insisted that plaintiff's loss was not as large as he claimed, and as to whether defendant was or was not liable would depend upon circumstances as shown by further examination, this would not be a waiver of proof of loss. (6) Necessity for full and complete proof of loss may also be obviated or waived

when plaintiff, although he makes or attempts to make proof of loss, makes insufficient or defective proofs, and when defendant, having received the same within the time provided by the policy, refused to pay, or denies its liability, unless it denies it specially upon the defects in the proof. The plaintiff in this case made and forwarded to the company at New York what he claimed he supposed was proper proof of loss, which, however, were not in strict compliance with the terms of the policy. If, however, the defendant made out and forwarded what he supposed was proof of loss, sworn to and signed by himself, and the same was received by the company in time for it to object within thirty days from the date of the fire, and to notify the plaintiff within said thirty days wherein the said proofs were defective and insufficient, and the defendant did not do so, but retained said proofs of loss, and made no objection thereto until after the expiration of the thirty days, the jury would be justified in finding that the defendant waived the making of further proofs of loss. Or, if the defendant company, by its adjuster or other agents, after the expiration of the thirty days within which plaintiff could make proof under the provisions of the policy and not before, called plaintiff's attention to the defects in his proof filed with the company, retained them, and gave the plaintiff to understand that he had, by failure to file complete and acceptable proofs within the time required by the policy, forfeited his rights thereunder, and that the company would take advantage thereof, and would not consider further or amended proofs,—but would resist payment on the ground of such defects and failure to file proper proofs within the prescribed time, the plaintiff would thereby be excused from making or filing additional proof, and such conduct would stop the defendant to deny that proper proofs of loss to complain that no corrected proof had been filed with it. (7) The policy sued upon in this case fixes the rights of all the parties, and before the plaintiff can recover he must have complied with and performed all the conditions of said policy, or the same must have been waived; and, unless the plaintiff had proven by a preponderance of the evidence such performance or waiver, the plaintiff cannot recover. (8) If, however, you find from the evidence that there has been a performance or waiver,—that is, that proofs of loss have been made or waived,—then, as the policy and loss are admitted, the question for you to determine would be the amount of that loss; and in determining this you should take into consideration all the evidence and all the facts and circumstances shown thereby, and also use the knowledge and experience you possess in common with the generality of mankind. What the plaintiff should recover, if anything, is the actual value of the property at the time of the loss, not exceed-

ing, of course, the amount for which insured; and in considering the value of the building consider its location, its age, its wear, and tear, if any, whether by reason of removal or otherwise; and the value of the stock would be what it would sell for to those wishing to buy that kind of property in the manner that the defendant was selling it, less the cost of selling."

The special findings of the jury submitted by plaintiff are as follows: "(1) Did the general adjuster of the defendant deny the liability of the company to pay the loss? Ans. Yes. (2) Did the general adjuster visit the plaintiff on the 6th day of February, 1892, and make an examination of the ruins, and of the books of plaintiff; interrogate plaintiff as to the value of the property destroyed, as to the time, origin, and circumstances of the fire, as to the nature of plaintiff's and others' title and interest in the property, of all incumbrances thereon, and the cash value thereof, the amount of loss or damages, what other insurance, if any, on the property, as to whether there had been any change in the title, use, occupation, location, possession, or exposure of said property after the issuing of the policy; how, by whom, and for what purpose the building was occupied at the time of the fire? Ans. Yes. (3) If your answer to the second question is 'Yes,' then did the adjuster, after such examination, offer to adjust the loss at any sum, and, if 'Yes,' what? Ans. No." "(5) Was the loss by fire a total or a partial loss? Ans. A total loss. (6) When did plaintiff make, or attempt to make, proofs of loss to the defendant? Ans. February 9, 1892. (7) When did the defendant receive the proofs of loss? Ans. February 16, 1892. (8) Did defendant notify plaintiff within thirty days from date of fire that it objected to, or that the proofs of loss were defective and incomplete? Ans. No. (9) Did defendant ever at any time demand further proofs of loss from plaintiff? Ans. No. (10) Did plaintiff have any knowledge or information as to the origin of the fire? Ans. No. (11) Was there any change in the title, interest, incumbrances, or use, occupancy, location, possession, or exposure of the property insured between the date of the policy, January 11, 1892, and the date of the fire, January 22, 1892? Ans. No. (12) Was there any insurance on the property at the time of the fire, other than the insurance in question, effected by defendant? Ans. No. (13) Did the adjuster, by his acts or conduct, induce plaintiff to believe that proofs of loss, if made, would be of no avail? Ans. Yes. (14) What was the value of the building burned at the time of the fire, exclusive of the cellar or foundation walls? Ans. \$500. (15) What was the value of the cellar or foundation walls at the date of the fire? Ans. \$81. (16) Did defendant company retain plaintiff's proof of loss without objection or suggestion of amendment until after the expiration of the thirty days

within which plaintiff was required by the terms of the policy to make his proofs of loss? Ans. Yes."

Special findings of the jury to questions submitted by the defendant: "(1) Did plaintiff, within thirty days after the fire, render to the defendant company, at its office in New York, a particular statement of the loss claimed to have been sustained by the plaintiff, signed and sworn to by him, stating such knowledge or information as he (the plaintiff) had been able to obtain as to the time, origin, circumstances of the fire, and the exact nature of the title and interest of the assured and all others in the property described in the policy of insurance sued upon, all incumbrances upon such property, and the cash value of such property, the amount of loss or damage, and all other insurance, whether valid or not, covering all of said property, and a copy of the written parts of all policies, with a statement of any change in the title, use, occupation, location, possession, or exposure of said property insured, and for what purpose the building described, and the several parts thereof, were occupied at the time of the fire? Ans. No." "(4) Was a sworn statement sent by the plaintiff to the defendant at its New York office on or about February 9, 1892? Ans. Yes. (5) If you answer question 4 'Yes,' then state if such sworn statement signed by the plaintiff was in the following words: 'Haddam, Kansas, February 9th, 1892. I, John Knapp, do solemnly swear that the hereunto attached invoice is a correct copy as taken from time book No. 5, as made by me when packing said trees in my cellar, on lot twenty-five (25), block seventeen (17), in Taylor's addition to Haddam City. [Signed] John Knapp.' Ans. Yes. (6) If you answer question 4 'Yes,' then state if the invoice attached to said affidavit was a list of trees and nursery stock, giving the number of each kind, and the value thereof, which value, as stated therein, aggregated \$1,701.28, less 25 per cent. net, \$1,275.96. Ans. Yes. (7) If you answer question number 4 'Yes,' then state if the same was sworn to and subscribed to before S. Peabody, justice of the peace. Ans. Yes. (8) If you answer number 4 'Yes,' then state whether said affidavit was received at said New York office on February 16, 1892. Ans. Yes. (9) If you answer question number 8 'Yes,' then state whether said affidavit was received and forwarded by L. S. McMillan on February 16, 1892. Ans. Yes. (10) If you answer number 8 'Yes,' then state if said L. S. McMillan was at that time a supervising agent and adjuster representing the defendant company in the state of Kansas, having in his charge as such adjuster the settlement of plaintiff's loss. Ans. Yes. (11) If you answer number 8 'Yes,' then state if on February 23, 1892, said L. S. McMillan wrote to plaintiff about said affidavit, and on February 24, 1892, sent the same by registered letter to plaintiff at Haddam, Kansas.

Ans. Yes. (12) If you answer number 11 'Yes,' then state if said plaintiff receipted for said letter on February 29, 1892. Ans. Yes. (13) If you answer number 11, 'Yes,' then state if said L. S. McMillan, in said letter, wrote plaintiff that if said affidavit was intended as proofs of loss it could not be accepted as such, and refer the plaintiff particularly to paragraphs 1, 2, and 3, under section 6, of said policy, headed 'Proceedings in Case of Loss.' Ans. Yes. (14) If you answer number 12, 'Yes,' then state if said L. S. McMillan in said letter stated to the plaintiff that the company did not at that time admit nor deny liability, nor waive any of the terms, conditions, or agreements of the policy, and reserved all legal rights and defenses thereunder. Ans. Yes. (15) Was said McMillan located and did he have his office and place of business at Kansas City, Missouri, during the month of February, 1892? Ans. Yes. (16) Was said McMillan absent from Kansas City, Missouri, from the evening of February 17, 1892, until the morning of February 23, 1892, in the city of St. Louis, Mo., engaged in the settlement of a loss by fire to the State University of Missouri, and so engaged for and on the business of the department company? Ans. Yes. (17) Were the objections in the letter of Mr. McMillan to the affidavit of plaintiff mentioned in questions 4 and 13 sent by said McMillan in a reasonable time after the affidavit of plaintiff was sent to defendant company at its office in New York? Ans. No. (18) If you answer number 17 'No,' then state in what respect the time of sending such letter of objections was unreasonable. Ans. For the reason that the New York office did not send direct to plaintiff. (19) Did the plaintiff neglect or fail to take any action necessary for his protection on account of the delay of the company or Mr. McMillan in sending the objections contained in the letter of February 23, 1892? Ans. Yes. (20) If you answer 19 'Yes,' then state fully what action plaintiff neglected or failed to take on account of such delay. Ans. By not making a full and particular statement. (21) Did plaintiff send to defendant, or to any officer or agent of defendant, any other statements, signed and sworn to, than the affidavit mentioned in question 5? Ans. No." "(23) Did L. S. McMillan, defendant's adjuster, at Haddam, Kansas, on or about February 6, 1892, deny the liability of the defendant by then and there stating, in substance, that defendant was not liable upon the contract of insurance, for the reason that the loss sustained was not covered by the policy of insurance; that plaintiff had caused the said insured property to be burned and destroyed by fire for the purpose of recovering of defendant the amount of said insurance? Ans. Yes, with the exception that the loss sustained was covered by the policy of insurance. (24) Did any person representing defendant, other than the said L. S. McMil-

lan, ever talk with or write to plaintiff about the liability of the company for said claimed loss? If 'Yes,' state who, and when. Ans. Yes; Blackwelder and Tansel, Haddam, Kansas, on or about June 7, 1892. (25) Was said L. S. McMillan the only agent of the defendant with whom the plaintiff conversed about the loss, who was authorized to adjust said loss, or bind the company in relation thereto? Ans. Yes. (26) If you answer 25 'No,' state the names of the other agent or agents of the company with whom plaintiff conversed about that matter, and who was authorized to adjust said loss, or so bind the company, and state when and where conversations were had with such other persons about such matters. Ans. There was no other. (27) Did said L. S. McMillan and plaintiff have any conversation about said loss other than at Haddam, Kansas, on February 6, 1892? Ans. No." "(29) If you answer 27 'No' then state whether said L. S. McMillan, by anything said by him in the conversation at Haddam, or done by him at that time, intended to waive or excuse the plaintiff from making proofs of loss under the policy. Ans. Yes. (30) If you answer 27 'No,' then state if, from anything said or done by said L. S. McMillan at Haddam on February 6, 1892, the plaintiff understood that he was not required to make proofs of loss. Ans. No. (31) Did the plaintiff understand from anything said or done by said McMillan at Haddam, February 6, 1892, that the making of proofs of loss was waived? Ans. No. (32) Was the plaintiff misled or hindered in the matter of making proofs of loss by anything said or done by said McMillan at Haddam on February 6, 1892? Ans. No." "(34) Did plaintiff, on February 9, 1892, make the affidavit mentioned in question 5, and send it to the New York office of the company, because he understood it was required of him by the policy? Ans. Yes. (35) Did plaintiff, on February 9, 1892, understand that he was not required to make proofs of loss? Ans. No. (36) Did plaintiff, on February 9, 1892, forward the affidavit mentioned in question 5, because he understood it was necessary for his protection? Ans. Yes."

The errors assigned are as follows: (1) Overruling motion to strike out part of amended petition; (2) admitting incompetent evidence, and refusing to instruct the jury to disregard; (3) overruling demurrer to evidence; (4) refusing to give instructions asked; (5) giving improper instructions; (6) overruling motion of defendant for judgment on finding; (7) refusing a new trial. We will take these in the order presented.

1. Overruling motion to strike out part of amended petition. This is founded solely upon the reason that the part objected to did not conform to the order of the court. The court making the order has passed upon this question, and certainly understood the scope and extent of the order made,

which is not in the record, and we can only infer what it was from the motion; and we think it conforms to it, and the defendant obtained all it asked, and just as it asked it; and it would, indeed, be presumptuous for us to correct the court in this respect, when to do so we would be compelled to say that the court intended by its order to require the plaintiff to do more by amendment than the defendant requested. And besides, amendments are in the discretion of the court, and, unless a clear abuse thereof is shown, they will not be disturbed.

2. Admitting incompetent evidence: (a) Answer of plaintiff to question as to conversation with defendant's adjuster had on February 6, 1892: "Q. State what that conversation was, as near as you can recollect. Ans. Well, he talked the matter over quite abusive, and talked in that way that I had set it afire, and like that." We cannot agree with defendant that this is a conclusion. It is not an opinion, or an attempt to give an opinion, as to whether the company waived proof of loss or not. While it is not full by any means, it is an attempt to give the substance of a conversation according to the witness' recollection. The record of this man's testimony (the plaintiff) shows him to be a man of very limited education, if not illiterate; and it is not to be expected he would be able to detail a conversation, or to express himself in the language of a scholar, and we think it is sufficiently responsive to the question. (b) The cross-examination of the adjuster, McMillan, as to the purpose and custom of using the expression, "We neither admit nor deny liability at this time." We can only say, in the language of the attorney for defendant in error, it is difficult to understand how the insurance company can be prejudiced by giving the court (and jury) its precise purpose in using this expression. Who is better qualified to explain it than the man who used it? And we think the company should be allowed to give its own interpretation of its letters to its policy holders; and how it can be prejudiced thereby is beyond our ken. (c) As to the explanation of what induced the adjuster to make the offer of \$750, particularly as he testified that "he was not in the habit of making such offers unless circumstances justified it."

3. Overruling the demurrer to plaintiff's evidence. A demurrer to the evidence should not be sustained where there is some proper evidence to establish every material allegation of the petition. *Hagan v. Association*, 2 Kan. App. 711, 43 Pac. 1138. And where there is sufficient proof before a jury to make out a prima facie case, it is not in error to overrule a demurrer to the evidence. We think there was evidence sufficient to justify the court in sending this case to the jury.

4. Refusing to give instructions asked. Instruction No. 3: This was given by the court

in its No. 3 and No. 7, and much more correctly, under the issues in this case, than asked by defendant. Instruction No. 4: The first paragraph of this is a mere statement of evidence, shown by the contract, and was substantially incorporated in court's No. 4. The second paragraph ignores the question of waiver, and tells that they should find for the defendant, if formal proof has not been made. Instruction No. 5 is more fully and correctly given in the court's No. 5. Instruction No. 6 is more fully, fairly, and correctly given in court's No. 7. Instruction No. 8 singles out certain alleged facts, and it assumes certain facts to exist that are in dispute. This is covered by court's No. 8, and properly instructs the jury as to their duty. Instruction No. 10 is covered by court's Nos. 3, 4, and 7. Instruction No. 11 is not proper. It assumes that the absence of the adjuster would of itself excuse the delay in advising Knapp of the defects in his proof. We cannot admit that this is true. How his absence alone could affect plaintiff's rights, we are unable to understand, any more than the mere fact that Knapp was absent at the time, and for thirty days thereafter, would relieve him from making the proof. The question of waiver is a question of fact, and facts that would justify the presumption of waiver in one case, might not in another; and to add to this the company is charged with the contents of its policies, and should be required to act accordingly, and we think that all that was necessary to be given upon this proposition is given by the court in No. 4. Instruction No. 12 assumes certain facts to exist as facts upon which there is no testimony, and cites authorities therein to sustain it which is clearly improper. Instruction 13 is much more strongly given in defendant's favor in court's No. 5, and we cannot see how the defendant was prejudiced by its refusal. Instruction 14 assumes the existence of facts that are controverted, and were proper subjects of consideration for the jury. Instruction 15 is too narrow. It limits the jury in its deliberation to certain language used denying liability, and virtually directs the jury to find for the defendant. It was the province of the jury to find upon the testimony what was or was not proved.

5. Giving improper instructions. We think the instructions of the court, when considered as a whole, are full, fair, and correctly state the law of the case. They state the general proposition that the plaintiff must prove either a compliance with the terms of the contract of insurance or a waiver on the part of the company. And what constitutes a performance by the plaintiff, and what a waiver on the part of the company.

6. The claim of the plaintiff is as to the waiver and the defendant's denial thereof with reference to the acts and declarations of the adjuster, which, if proven, as claimed by plaintiff, would constitute a specific, definite waiver, and how a waiver may be ef-

fected under different circumstances, such as were testified to in this action, and the force and effect of the policy as to the rights of the parties thereunder, and what the plaintiff should receive in the event of his recovery, and how they should arrive at this.

7. Motion for judgment on the findings of the jury should have been sustained.

8. Error in refusing a new trial.

These we will consider together, being based upon the claim that, while the jury make the necessary findings to sustain the general verdict and the judgment, yet there are findings inconsistent therewith, and which destroy the effect thereof. If the findings can be reconciled upon any reasonable theory, it is the duty of the court to do so, and uphold the judgment.

A careful examination of the findings, with the evidence in this case, leads us to the conclusion that they are not inconsistent. The manner in which they are framed (those claimed to be inconsistent) is such that the jury naturally inferred that their answers must be with reference to a specific matter of waiver, and they so answer them, and while these answers are sustained by the testimony, yet they do not conflict with, negative, or contradict those upon the general proposition of waiver, and both can be true, and be in perfect harmony, and we think they are. The judgment in this case will be affirmed. All the judges concurring.

(19 Mont. 113)

HUSTON v. NUSS et al.

(Supreme Court of Montana. Jan. 18, 1897.)

#### FINDINGS—REVIEW.

The finding of a jury on conflicting evidence as to fraudulent representations will not be disturbed.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action to foreclose a mortgage. Defendants (appellants here) admit the execution of the note and mortgage pleaded, but allege fraud and misrepresentation, by means of which they were induced to execute the same. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

W. I. Lippencott, for appellants. Chas. O'Donnell, for respondent.

HUNT, J. The appellants argue that the evidence was insufficient to justify the verdict of the jury. The question of fact which arose on the trial was as to the agreement between the mortgagor and mortgagees at the time of the execution of the mortgage. The defendants contended that the \$1,000 borrowed was to be delivered by plaintiff (respondent) to one Kinney and another to engage in a turkey-selling venture in Butte, and that said Kinney and his associate would repay plaintiff from the moneys or profits received from the business venture; but that,

after the note and mortgage were executed, the plaintiff, instead of delivering the \$1,000 to Kinney and his associate, Carter, entered into the business himself, and used the money therein, and failed to turn the same over to Kinney and Carter, as agreed. The plaintiff explained this on rebuttal by testifying that the defendants executed the mortgage and note upon the understanding that the plaintiff was to order the turkeys, and to have them come in his name, and that, when the \$1,000 was realized, he was then to transfer the business to Kinney and Carter; that all this was done at defendants' express request, and in order that the moneys realized from the sale of the turkeys should be properly applied to reimburse plaintiff; and that this agreement was carried out by plaintiff's ordering the turkeys in his name, but that the net sales realized amounted to only \$518.42, which was applied on the note. The jury found that there was no fraud or misrepresentation on plaintiff's part. They were fully justified in doing so under the evidence, and we shall not disturb their verdict.

The only other error relied on is the alleged failure to properly apply the money received to the payment of the note. This point is not well taken, as there is evidence to prove that the plaintiff did apply the net receipts of the sales of the turkeys upon the note, but that they were insufficient to wholly pay the same. The judgment and order must be affirmed.

PEMBERTON, C. J., and BUCK, J., concur.

(19 Mont. 87)

### MORSE v. CALLANTINE.

(Supreme Court of Montana. Jan. 18, 1897.)

#### OPENING DEFAULT — APPEAL BOND — WAIVER OF OBJECTIONS.

1. A default judgment against one of two defendants should be opened, he having believed, and had a right to believe, that counsel had been employed by his co-defendant to attend to the case for both defendants to the end of the litigation; and plaintiff having, on the filing of an answer by the other defendant containing an absolute defense for both defendants, dismissed the action as to him, and taken judgment against the one in default; and defendant in default having, as soon as he learned that counsel employed in the case had withdrawn, as far as he was concerned, taken immediate steps to have the default set aside, tendering with his motion an answer pleading the facts set up in his co-defendant's answer.

2. The point that, there being three appeals, — one from the judgment, one from an order refusing to open default, and one from refusal to modify, — the one appeal bond filed is insufficient to give jurisdiction, is not properly presented, not being raised by motion to dismiss, but in the printed brief and in the oral argument.

Appeal from district court, Gallatin county; F. K. Armstrong, Judge.

Action by Ebenezer Morse against Felix Callantine. Plaintiff had judgment by default, and defendant appeals. Reversed.

The plaintiff in this case brought this action against defendants Stillman Huling and Felix Callantine, alleging in his complaint that in March, 1893, he was the owner and in possession of 520 acres of land described in the complaint, and that on the 16th day of March, 1893, he sold said land to the defendant Huling, reserving unto himself the right to use and lease, free of charge, about 20 acres of said tract of land, which was then used as an orchard, and for the raising of small fruit, and which he was to have, under said lease, for a period of three years from April 1, 1893. It is further alleged that the deed from the plaintiff to Huling contained the contract of the lease of said 20 acres of land. The complaint alleges that the plaintiff immediately after the execution of the deed entered into the possession of the 20 acres of land mentioned, and continued to be and remained in possession thereof at all times, and until on or about the 1st day of June, 1894; that in November, 1893, the defendant Huling sold and conveyed the tract of land, including the 20-acre orchard, to the defendant Felix Callantine, who, when he purchased the tract of land and took his deed therefor, had full knowledge of the rights of the plaintiff in the 20 acres, and of his possession thereof, and that he took his deed subject to the right of the plaintiff to the possession of the 20-acre orchard; that on or about — day of May, 1894, defendants, and each and both of them, forcibly, and with arms, and threats of bodily injury, and without any cause whatever therefor, drove the plaintiff from said tract of land, and forbade and refused to allow the plaintiff to use and enjoy said tract of land, as by said contract and deed he was entitled to use and enjoy it, and that at all times since then, and now, the defendants, and each of them, refused to allow the plaintiff to enter upon said land, or any part thereof; that the said 20-acre tract of land was planted in small fruit and plants, garden and nursery stock, including various kinds of fruit trees and plants, then owned and raised by the plaintiff for sale; that the fair, reasonable, and rental value for the profit and use of said land during the years 1894 and 1895 was \$1,000 per year. The complaint further alleges that the plaintiff had upon said 20 acres a large amount of personal property, which is itemized in an exhibit attached to the complaint, of the value of \$230, which the complaint alleges the defendants, and each and both of them, took and converted to their own use and benefit, without the consent of the plaintiff. The plaintiff asked judgment against the defendants, and each of them, for \$2,230, being the rental value of said 20 acres of land for two years and the value of the personal property alleged to have been converted by the defendants. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause



of action, that it was indefinite and uncertain, and that there was a misjoinder of parties defendant and a misjoinder of causes of action. This demurrer was overruled by the court. Thereafter the defendant Huling filed his answer, and denied that the plaintiff continued in possession of the 20-acre tract of land until June 1, 1894, and alleged that he voluntarily quit the possession of the same on November 19, 1893, pursuant to an agreement with said Huling. The answer denied that plaintiff took possession of the 20-acre tract under the contract or deed above mentioned, but averred that on March 27, 1893, Huling executed a written lease to plaintiff for the said 20-acre tract, pursuant to the terms of the contract originally entered into between the plaintiff and defendant Huling, and under which lease plaintiff entered into possession of the said 20 acres of land, and under which he remained in possession until the 3d day of May, 1893, when, for a valuable consideration, he sold, assigned, and transferred to the defendant Huling all his interest in the 20-acre tract of land, and surrendered the lease to said Huling. The answer denied that when the conveyance of the land was made to the defendant Callantine plaintiff had any interest whatever in the 20-acre tract, or that Callantine took the deed subject to any right of the plaintiff, or that the plaintiff ever had any right therein after May 3, 1893, the date on which it is alleged plaintiff sold his lease to the defendant Huling; denied that either of the defendants, at the times mentioned in the complaint, forcibly, or with threats of bodily injury, or at all, drove the plaintiff from the land, but alleged that he voluntarily left the land after the surrender to Huling of the lease for a valuable consideration. The answer affirmatively alleges that on the 8th day of April, 1893, in a suit pending in the district court in and for Gallatin county, wherein J. D. McCammon was plaintiff and this plaintiff was defendant, a judgment was duly entered in favor of said McCammon and against this plaintiff, Morse, and that on April 15, 1893, an execution was issued, which, in default of sufficient personal property to satisfy the same being found, was duly levied upon the right, title, and interest of said plaintiff, Morse, in and to the said 20 acres of land, the same having been previously attached by the sheriff of said county; and, after being advertised for sale, the sheriff, on June 1, 1893, sold all the right, title, and interest and claim of the said plaintiff, Morse, in and to the said land to said McCammon for \$226.72; that no redemption from this sale was made by plaintiff, Morse; that McCammon assigned his certificate of sale to the defendant Huling, who, at the expiration of six months for redemption, to wit, on August 1, 1894, received from the sheriff a deed for the land, which deed conveyed to him all the right, title, and interest of plaintiff, Morse, therein; and that

the said plaintiff, since April 8, 1893, had no interest whatever in said land, and that the defendant Callantine owned the same free from any right, interest, or claim or right of possession of said plaintiff, Morse, under any lease or agreement or contract whatever. The answer also pleads a misjoinder of parties and a misjoinder of action. It denies the conversion of the personal property mentioned in the complaint, as well as the value thereof, and alleges that on the 21st day of December, 1893, there was a full settlement of all the claims which plaintiff had against the defendants on account of the alleged conversion of the said personal property made between the plaintiff and the defendant Huling; and that a suit which was then pending between the plaintiff, Morse, and defendant Huling for damages for the conversion of said property in the district court of Gallatin county was dismissed as settled. On the 18th day of March, 1895, defendant Huling moved the court for judgment on the pleadings, on account of plaintiff's failing to file a replication to the answer, which motion was denied, the court giving to the plaintiff three days in which to reply. On March 20, 1895, the plaintiff, instead of filing his replication to the answer of defendant Huling, dismissed the action as to said defendant without prejudice, and took judgment by default against the defendant Callantine, who had not answered, in the sum of \$1,033.75.

On April 5, 1895, the defendant Callantine, the appellant in this cause, filed his motion in the district court to be relieved from the judgment by default rendered against him, and to vacate and set the same aside, tendering with said motion an answer, and which motion was supported by the affidavits of himself, defendant Huling, and W. S. Hartman. The answer tendered by defendant Callantine with his motion to open the default against him set up the same facts substantially as those pleaded in the separate answer of the defendant Huling. The affidavits of both of the defendants in support of the motion to open the default in this case show that the defendant Huling had employed counsel to defend the suit as to both of the defendants, and that in pursuance of such employment counsel had filed a joint demurrer to the complaint of plaintiff. Both these affidavits show that the defendant Callantine believed, and had reasons to believe, that the counsel employed by Huling was employed to defend the action as to both defendants, and that they would do so. Both of these affidavits also show that about the 19th day of January, 1895, both of the defendants, after consultation with counsel then employed and acting in the case, got the impression that it would not be necessary to do anything further in the case before the 1st day of April, 1895, that being the first day of the next term of the district court in said county; that they



both left the court under that impression; and that, as soon as defendant Callantine learned that judgment by default had been taken against him, he took immediate steps to have the same set aside. It appears from the record that the defendant Huling had sold the land in controversy to Callantine, and given him a warranty deed therefor, and that when the summons was served on Callantine he immediately notified his co-defendant, Huling, of the fact, when Huling assured him that he need not give himself any trouble about the matter, and that he would take the necessary steps, and defend the suits; and it appears further that Huling, in accordance with said agreement, did so, and supposed that he had employed counsel to defend the suit to the end of the litigation. The defendant Callantine appeals from the judgment and order of the court refusing to open the judgment by default, and also from an order made by the court refusing to modify the judgment.

Hartman Bros. & Stewart, for appellant.  
Toole & Wallace, for respondent.

PEMBERTON, C. J. (after stating the facts). The only question we deem it necessary to determine in this case is as to whether the district court erred in refusing to open and set aside the judgment by default entered in the case against the defendant Callantine. If the court in this matter abused that sound discretion which should control in such cases, then its action was erroneous. To determine this question we must consider all the facts and circumstances of the case as they were presented to the court at the time of the ruling on the motion to set aside the judgment by default. From the facts as shown in the affidavits of both of the defendants, and contained substantially in the statement, we are of the opinion that Callantine believed, and had a right to believe, that counsel had been employed by his co-defendant to attend to the case for both defendants to the end of the litigation. If he was guilty of negligence in this respect, it was certainly excusable negligence. As soon as he learned that the counsel employed in the case had withdrawn as far as he (Callantine) was concerned, and permitted judgment by default to be entered against him, he took immediate steps to have the same set aside. But there is a more serious question affecting the discretionary action of the court disclosed by the record. Huling's separate answer contained an absolute defense for himself and Callantine as well. Not only so, it set up such a state of facts, which, if true, would show it to be a serious wrong for any court to enter judgment in favor of plaintiff against either defendant. The court's attention had been called to this answer by Huling's counsel asking judgment on the pleadings. The court, properly enough, instead of granting this motion, gave

plaintiff three days to deny the facts pleaded in the answer. For some reason plaintiff declined to reply, preferring seemingly to pursue the easier course of dismissing his action as to Huling, and taking a judgment by default against Callantine, who was technically, but we think excusably, in default. Callantine tendered with his motion to set aside the default an answer containing substantially the same facts which had been pleaded in Huling's answer, and which plaintiff declined to traverse by replication when the court gave him leave to do so. Under all the circumstances of the case we think the court should have opened the default, and permitted appellant to answer, and defend the suit, and that the action of the court in refusing to do so was error.

All cases of this kind depend largely upon their own facts. It seems to us that a judgment against the appellant for a large sum of money, under all the circumstances of the case, would operate as an injustice, and that a refusal of the court to open the default and permit the appellant to defend the suit, when the circumstances showed such injustice, was such an abuse of judicial discretion as to constitute reversible error in the case. Counsel for respondent contends that, as there are three appeals in this case, to wit, an appeal from the judgment, an appeal from the order refusing to open the default, and an appeal from the refusal of the court to modify the judgment, and that as only one appeal bond is given, such bond is insufficient to give this court jurisdiction of the case. This point is not raised by counsel for respondent by a motion to dismiss, but in his printed brief. It is urged also in his oral argument. We do not think the question of the insufficiency or invalidity of the appeal bond is properly presented. The bond, in our opinion, is evidently not absolutely void; and, if the bond should be considered for any reason defective, we are of opinion that the appellant would have the right, on a motion to dismiss the appeal on account of any defect therein, to make and file, pending such motion, a sufficient bond. See *Spreckles v. Spreckles* (Cal.) 45 Pac. 1022. And besides, this court has not only held to the doctrine that, if an appeal bond was defective, a sufficient one might be filed pending a motion to dismiss on account of such defect, but in *Watkins v. Morris*, 14 Mont. 354, 36 Pac. 452, this court held that "but one cost bond is required in appealing from a judgment and an order, where such appeal is consolidated into one record."

There are other assignments of error in the record. The appellant contends that the court erred in overruling the demurrer of the defendants, among other things. But we think it unnecessary to pass upon these questions, as the case must go back with instructions to sustain the motion to set aside the judgment entered by default against the appellant. The question of sufficiency or insufficiency of the pleadings may also again be presented to the

court, or the appellant may rely upon the merits of his case as disclosed in his answer, which, under this decision, he will be permitted to file. The judgment and orders appealed from are reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

HUNT and BUCK, JJ., concur.

(19 Mont. 123)

HEFFERLIN v. KRIEGER et al.

(Supreme Court of Montana. Jan. 25, 1897.)

PROMISSORY NOTE—PLEADING—LIABILITY OF SURETY—MISAPPROPRIATION BY PRINCIPAL—SUBSEQUENT INSOLVENCY.

1. In an action against sureties on a note it is no defense that the money raised on the note was, by the principal maker, diverted from the use intended, and in consideration of which the sureties signed, and that plaintiff had knowledge of the diversion.

2. The holder's failure to sue the principal debtor at the maturity of a note does not discharge the sureties, though the principal afterwards become insolvent. *Smith v. Freyler*, 1 Pac. 214, 4 Mont. 489, followed.

Appeal from district court, Gallatin county; F. K. Armstrong, Judge.

Action by C. S. Hefferlin against F. A. Krieger and another on a promissory note. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

This is a suit on a promissory note. The plaintiff, as indorsee, seeks to recover judgment against the defendants, Krieger and Thompson, on a promissory note which was executed on the 22d day of April, 1887, by one J. J. McBride and these defendants to William Hefferlin, for the sum of \$350, payable six months after date, with interest at 1¼ per cent. per month from date, with attorney's fees in case payment should have to be enforced at law, and which note plaintiff alleges was assigned to him for a valuable consideration by the said William Hefferlin on or about the 1st day of May, 1887. The answer admits the execution of the note, but denies on information and belief that the same was assigned on the 1st day of May, 1887, or at any other time, for a valuable consideration, by indorsement or otherwise, or delivered to plaintiff by the said William Hefferlin; and it is denied that the note was ever delivered to William Hefferlin, or any one for him. The answer denies further that the plaintiff is the owner or rightful holder thereof. The answer further alleges as an affirmative defense that on or about the 22d day of April, 1887, the defendant J. J. McBride, having been appointed postmaster at the post office of the city of Livingston, and being desirous of purchasing the fixtures then owned and used by F. W. Wright, the former postmaster, in the building on the lot adjoining the property of the appellants, importuned these appellants to sign a note with him for the purpose of raising money to purchase said fixtures, promising these

defendants that if they signed the note, and so enabled him to raise the money, he would use the same for that purpose, and continue the use of the said fixtures in the building where the post office had been kept by the said F. W. Wright prior thereto. The answer further alleges that the said McBride did not use the money raised on said note for said purpose, but diverted it to other and different purposes, which other and different purposes are not stated in the answer. It is also alleged in the answer that the plaintiff had full knowledge of the fact that these appellants were sureties for said McBride, as well as of the purposes for which said note was executed. It is denied in the answer that William Hefferlin ever advanced any money on said note, and it is alleged that, if any money ever was advanced on said note, it was advanced by the plaintiff as agent for William Hefferlin, who advanced it with full knowledge of the circumstances under which the note was executed, as well as of the purposes for which it was executed. As another and further defense it is alleged in the answer, upon information and belief, that from the 25th day of October, 1887, up to and until the 1st day of March, 1888, the said J. J. McBride was solvent, and in good circumstances, and able to pay said note, and, if the said note had been presented to the bank for payment, the same would have been paid, and that the defendants could have recovered the amount thereof from the said McBride; that he had sufficient property from which they could have collected the same, and that by plaintiff's laches the defendants lost their indemnity, which they would have had if the plaintiff had been diligent in collecting said note. It is alleged that on or about the 4th day of June, 1888, and prior to the time the note was presented to the bank or to these appellants for payment, the said McBride became insolvent, and absconded from the state, and that these defendants are thereby without remedy if they have to pay the note. The plaintiff demurred to the answer, whereupon the court overruled the demurrer as to the denials of the material allegations of the complaint, and sustained it as to the special defenses contained therein. Defendants elected to stand upon their answer, whereupon proof was heard as to the material allegations of the complaint and judgment entered for the plaintiff for the amount of said note. The defendants appeal from the judgment.

Campbell & Stark, for appellants. John T. Smith, for respondent.

PEMBERTON, C. J. (after stating the facts). The evidence is not presented in the record. The judgment recites that the court overruled the plaintiff's demurrer to the answer as to the first defense contained therein, and sustained it as to all special defenses pleaded by defendants. It also recites that thereafter the court heard the evidence on

the issues raised by the complaint and first defense contained in the answer, and rendered judgment thereon for the plaintiff in accordance with the terms of the note. In the issues tried were involved the ownership of plaintiff of the note as alleged in the complaint; in other words, under the issue joined as stated above the plaintiff was required to prove the material allegations of his complaint in order to authorize a judgment, and, in the absence of the evidence, we must presume that the evidence authorized the rendition of the judgment. This disposes of all the material allegations of the complaint, and the denials thereof contained in the answer, and leaves us the task of dealing with the special defenses contained in the answer.

The answer alleges that McBride, the principal in the note, diverted the money raised on the note from the purpose for which he obtained it, and for which purpose appellants were induced to sign the note as his securities, and that plaintiff had knowledge thereof. The answer is uncertain and indefinite, in that it does not state what McBride did with the money. But suppose he did use it for a different purpose than that for which it was obtained. How were the appellants injured thereby? It is not shown. It is not alleged that the post-office fixtures were not purchased and used by McBride in the building adjoining appellants', where it seems they wanted the post office kept. 1 Daniel, Neg. Inst. (4th Ed.) § 792, says: "In order to constitute a misappropriation, there must be a fraudulent diversion from the original object and design; and it is now well settled that, where a note is indorsed for the accommodation of the maker, to be discounted at a particular bank, it is no fraudulent misappropriation of the note if it is discounted at another bank, or used in the payment of a debt or otherwise for the credit of the maker." See, also, *Moreland's Assignee v. Bank* (Ky.) 30 S. W. 637, where this doctrine is treated elaborately. We think the allegations of the answer in this respect constitute no defense.

The appellants also allege in their answer that the plaintiff was guilty of laches in presenting and undertaking to collect the note sued on as shown in the statement. This court, in *Smith v. Freyler*, 4 Mont. 489, 1 Pac. 214, where this question is fully treated, and the authorities collated, says: "It will not release a surety on a promissory note from his liability thereon, though the creditor fail or refuse to sue the principal debtor, after notice by the surety, even though at the time of such notice the principal debtor was good, and afterwards became insolvent. The surety's remedy is to pay the note, and himself sue the principal debtor." In the case at bar no such laches are alleged on the part of plaintiff as were shown to exist in *Smith v. Freyler*, supra. In that case the holder of the note refused to sue after notice to do so by the security when the principal

debtor was solvent at the time, and, after notice, became insolvent. Mere delay and passivity of the creditor in presenting or collecting the debt does not discharge the surety. 2 Daniel, Neg. Inst. (4th Ed.) § 1326. We think *Smith v. Freyler*, supra, decisive of this question.

These are the only errors assigned which appellants' counsel ask us to consider. There are other assignments, but they are included in the questions treated above; and, if they were not, we think them so immaterial as not to require separate treatment. We think the matters treated above cover substantially all the errors assigned in the record. We see no error in the action of the court in sustaining the demurrer to the special defenses contained in the answer of appellants, and which we have discussed above. The judgment appealed from is affirmed. Affirmed.

HUNT and BUCK, JJ., concur.

(19 Mont. 110)

GENERAL ELECTRIC CO. v. BLACK et al.  
(Supreme Court of Montana. Jan. 18, 1897.)

TRIAL—ISSUES FOR JURY.

In an action on an account which plaintiff had alleged was assigned to it in 1894 by the original creditor, the answer averred that the debt had been paid; that in 1890 the account sued on was assigned by the creditor to a certain electric company, and paid to it. The replication denied payment, and that the account was ever assigned to such electric company. *Held*, that it was not error to submit only the issue whether the account was assigned as alleged in the answer.

Appeal from district court, Gallatin county; F. K. Armstrong, Judge.

Action by the General Electric Company against M. M. Black, W. M. Nevitt, and Rosa G. Black, on an account. From a judgment in favor of the defendants, plaintiff appeals. Affirmed.

This suit was brought by the plaintiff to collect of the defendants, who are the trustees of the Bozeman Electric Light Company, an account which it is alleged was due and owing from the Bozeman Electric Light Company to the Thomson-Houston Electric Company on the 20th day of November, 1889, and which it is alleged the Thomson-Houston Electric Company assigned to the plaintiff company on the 1st day of November, 1894; recovery being sought in this case against the trustees of the Bozeman Electric Light Company on account of their failure to file a statement of the condition of said company, as required by the statutes of Montana. The answer of the defendants denies the indebtedness of the Bozeman Electric Light Company to the Thomson-Houston Electric Company sued for, and avers that all the indebtedness which said Bozeman Electric Light Company ever owed to the Thomson-Houston Electric Company had been fully paid before the commencement of this suit. The answer also denies that the Thom-

son-Houston Company, for value or otherwise, ever sold or assigned the account sued on to the plaintiff company. The answer affirmatively alleges that the account sued on was transferred and assigned by the Thomson-Houston Electric Company to the Northwest Thomson-Houston Electric Company on or about the 24th day of March, 1890, and that on or about the 6th of April, 1891, the Bozeman Electric Light Company fully paid off and discharged the account sued on to the Northwest Thomson-Houston Electric Company, which was the owner and assignee of said account. The evidence that payment of the account sued on was made to the Thomson-Houston Electric Company as alleged is not contradicted, nor is it contended by the plaintiff that the account was ever reassigned to the Thomson-Houston Electric Company. The replication of the plaintiff denies payment of the account, and also denies that the account was ever assigned by the Thomson-Houston Electric Company to the Northwest Thomson-Houston Electric Company. The case was tried to a jury, who rendered a verdict for the defendants, on which verdict the court rendered judgment. The plaintiff appeals from the judgment and the order denying a new trial.

Luce & Luce, for appellant. Toole & Wallace, for respondents.

PEMBERTON, C. J. (after stating the facts). The appellant contends that the only issue tried in the court below was as to whether the account in suit had been paid, and that the court, at the close of the evidence, erroneously took this question from the jury, and, by instructions, confined and limited the jury to the question as to whether the Thomson-Houston Electric Company had assigned the account to the Northwest Thomson-Houston Electric Company, as alleged in the answer before suit. We think this contention is not supported by the record. The question as to whether the assignment of the account had been made by the Thomson-Houston Electric Company to the Northwest Thomson-Houston Electric Company before suit was a very material issue tried in the lower court. The evidence of the bookkeepers of the Thomson-Houston Electric Company and of the Northwest Thomson-Houston Electric Company was introduced, and by this evidence it appears from the books of both these companies that the account sued on had been assigned as alleged in the answer of defendants. If it be conceded that the assignment was so made, then the question of payment of the account became immaterial, although it is not disputed that payment was made to the Northwest Thomson-Houston Electric Company; for, if the account had been assigned as alleged in the answer, then this plaintiff company, which claims the account was assigned to it in 1894, long after its assignor had parted with its title to the account, acquired no title thereto by

its alleged assignment. We think the evidence set up in the answer sufficient to support the verdict. We think the only material question to be determined at the trial below was as to whether the account was assigned, as alleged in the answer, before suit. And we see no error in the action of the court in confining the inquiry of the jury to that one issue by the instruction given, which we think was correct, as declaring the law applicable to the facts and pleadings in the case.

We cannot close this opinion without noticing what we consider a reprehensible practice, as disclosed by the record. As we view the case, there is but one material question presented by the record. That we have treated above. But there are 100 assignments of error contained in the record. We are utterly amazed that counsel occupying a prominent and enviable place in the ranks of the profession should feel called upon to so encumber a record with useless and immaterial matter and assignments. It is a profitless labor to them. It entails labor and hardship upon this court, that can find no reasonable excuse, besides entailing unnecessary expense upon litigants. This practice is so common that we feel it our duty to thus protest against it. Let our strictures be understood as applying to this practice generally, and not specially to the record and counsel in this case. The judgment and order appealed from are affirmed.

HUNT and BUCK, JJ., concur.

(19 Mont. 104)

STATE ex rel. HARMON v. CONROW et al  
(Supreme Court of Montana. Jan. 18, 1897.)  
SALES—DELIVERY AND ACCEPTANCE—ASSIGNMENT  
OF RENT—ASSENT OF DEBTOR.

1. A cashier, personally indebted to the bank, at the request of a director, and to secure his indebtedness, executed a bill of sale of property in another town. The bill of sale was deposited in the vault by the cashier, with the knowledge of the director, and a clerk notified of its whereabouts. No other officers of the bank were present, or cognizant of the transaction. A few hours later, the bank closed its doors, insolvent. *Held*, that there was a delivery and acceptance of the property as security sufficient to pass title to the bank.

2. A cashier, to secure his indebtedness to the bank, executed a bill of sale of a building situated in another town, and occupied by a tenant. The bill of sale was duly delivered to and accepted by the bank. The cashier notified the tenant of the sale, directing him to pay the rent then due or to become due to the bank. *Held*, that the order to pay the rent to the bank was an assignment sufficient to give the bank an equitable interest in the fund as against a subsequent attachment, without an express assent to the transfer by the debtor.

Appeal from district court, Park county:  
Frank Henry, Judge.

Action on the relation of Leo C. Harmon, receiver of the Stock Growers' National Bank of Miles City, Mont., against John M. Conrow and others, upon a sheriff's bond, for damages for a wrongful levy. From a judgment on

a verdict directed for the defendants, plaintiff appeals. Reversed.

Action by plaintiff, as receiver of an insolvent national bank, upon a sheriff's bond, for damages for the unlawful levy upon a frame building, alleged to be plaintiff's property, situate upon a railroad right of way. The writ was issued in the case of W. B. Jordan, plaintiff, vs. E. E. Batchelor, defendant. Defendants admitted the attachment, denied the ownership of plaintiff, and pleaded a justification by virtue of the writ of attachment heretofore referred to, and execution and sale under process in said suit. The cause was tried before a jury, and plaintiff's testimony was introduced. On defendants' motion the court instructed the jury to return a verdict for the defendants upon some one (although it does not appear which) of the following grounds: "(1) It appears from the evidence that the property described in the complaint, if transferred at all, was transferred to the Stock Growers' National Bank as security for an indebtedness, the amount and extent of which does not appear from the evidence; neither does it appear from the bill of sale, marked 'Plaintiff's Exhibit A,' and the said Exhibit A is not executed with the formalities governing chattel mortgages required by law; nor was there any transfer of the possession of the property to the Stock Growers' National Bank. (2) The evidence fails to show that the said bill of sale, marked 'Plaintiff's Exhibit A,' was ever received or accepted by the Stock Growers' National Bank, either as security or otherwise. (3) The evidence fails to show that the Stock Growers' National Bank, or any one for it, ever accepted the property described in the complaint, either as security or otherwise. (4) The evidence fails to show any consideration whatsoever passing from the Stock Growers' National Bank to Elmer E. Batchelor for the transfer of the property described in the complaint. (5) The evidence fails to show any delivery of the property described in the complaint to the Stock Growers' National Bank, or any one for it. (6) The evidence fails to show any acceptance by any officer of the Stock Growers' National Bank prior to its insolvency, or by any one having authority from the comptroller of currency." Judgment was entered for defendants. Plaintiff appeals.

H. C. Loud and Campbell & Stark, for appellant. Savage & Day and Strevell & Porter, for respondents.

HUNT, J. (after stating the facts). The well-established doctrine of practice under the former Codes of this state was that on a motion for a nonsuit everything the evidence tended to prove was assumed to be true on appeal to the supreme court. *Emerson v. Ditch Co.*, 18 Mont. 247, 44 Pac. 909. To ascertain, therefore, whether there was a sale and delivery of the building, we must look into the evi-

dence. The facts are as follows: On July 29, 1893, the Stock Growers' National Bank of Miles City, Mont., became insolvent, and in the afternoon of that day closed its doors to business. As there were numerous persons who owed the bank considerable money, Mr. Middleton, a director in the bank, in the forenoon of July 29th, advised Batchelor, the cashier, that it was desirable to obtain security upon these various loans. Batchelor himself owed the bank a considerable sum, and in the forenoon, in accordance with Middleton's prior suggestions, executed to the Stock Growers' National Bank a bill of sale, reciting that in consideration of one dollar he sold and assigned unto the Stock Growers' National Bank of Miles City the following described property, to wit: "One one-story frame building situated in what is known as the 'right of way' in the town of Red Lodge, Park county, Montana; said building being occupied at present by H. J. Armstrong & Co." There were also included in the bill of sale a saddle horse in the possession of W. W. Alderson at Muddy, Mont., one Victor bicycle, and one set of bedroom furniture. The bill of sale was witnessed by Mr. Middleton. The bicycle and bedroom furniture were left by Batchelor in the bank, and subsequently passed into the hands of the receiver for the bank's benefit. Batchelor was the only officer of the bank in town upon the day of the failure, and Mr. Middleton thinks he himself was probably the only director in town. Mr. Batchelor was advised by Mr. Middleton, who by profession was and is a lawyer. When the bill of sale was executed, Batchelor put it into the vault of the bank in the presence of Middleton. Batchelor notified the bookkeeper of the bank of the execution of the bill of sale, and of his having deposited the same inside the vault, and told the bookkeeper to inform whoever came to take charge of the bank that he had given a bill of sale, and placed it in the safe of the vault. The building described in the bill of sale was occupied by the firm of druggists of H. J. Armstrong & Co., at Red Lodge, Mont., under a written lease made February 14, 1893, between Batchelor and Armstrong & Co., running for two years from February 14, 1893. Upon August 8, 1893,—10 days after the failure, but before the levy of attachment in the suit of Jordan vs. Batchelor,—Batchelor notified Armstrong & Co. in writing that he had given to the Stock Growers' National Bank a bill of sale for the drug-store building, and directed said firm to pay rent then due, or to be due in future, to the parties in charge of the bank. When the sheriff levied upon the property, the person in charge of the business of Armstrong & Co. at Red Lodge told him that Armstrong & Co. had received Batchelor's order notifying them of the sale of the building to the bank. In answer to the notice of garnishment served by the sheriff, Armstrong & Co. stated that they had in their possession the sum of \$50 due Batchelor for rent to date. The sheriff put one of

the firm of Armstrong & Co. in charge as keeper when he levied the execution, and advised him that he must pay the rent to the sheriff. The member of the firm told the sheriff that he did not care to whom he had to pay the rent, as he would just as soon pay it to the sheriff as to the Stock Growers' National Bank.

It seems to us quite clear that the tendency of this evidence was to prove a sale and delivery of the building to the bank, and a valid acceptance thereof by its officers. Batchelor, an officer and debtor of the bank, which was to close its doors in a few hours, in obedience to the request of the only then present director of the bank, to protect the institution executed a bill of sale of certain property including a building several hundred miles away, in the possession of a tenant under a written lease. The consideration for this transfer was Batchelor's debt to the bank. There being no official of the bank present other than the director, upon whose advice Batchelor acted, Batchelor, in the director's presence, put the bill of sale in the vault, also telling a clerk of his action, and of the whereabouts of the bill of sale. "I did nothing," testified the director, "at that time, after the execution of the bill of sale, except to witness it, and see it was put in the vault." The circumstances were peculiar. It is conceded that there is no element of intentional fraud in the case. The property was incapable of physical tradition, and lawfully in possession of a tenant. The bill of sale was executed and deposited where other valuable papers of the bank were naturally kept; all at the suggestion of a director, who seems to have acted for the bank with a measure of authority which was recognized by Batchelor. These acts by the director and Batchelor, together with the latter's subsequent act of advising the tenants of the sale to the bank, constituted a delivery and acceptance, valid against creditors under the statute. Comp. St. 1887, § 226. The respondents' argument that the acts of the seller cannot alone constitute a delivery is not applicable, because the evidence warrants the assumption by us, on the motion for a nonsuit, that the vendee, the bank, did, by its director, as fully as it possibly could at the time, accept the building. To hold otherwise would lead to the proposition that, if a bank is failing, and the only officer in charge is personally one of its debtors, that officer cannot personally execute a bill of sale of a leased building to the bank in good faith to protect it, and the bank cannot accept the same through the only other officer present, a director. We cannot assent to this where the circumstances show an honest purpose to transfer the property, and where the receiver subsequently ratifies the director's acceptance. As we view it, the delivery was sufficient on the ground that no other delivery was practicable under the circumstances, and that the

acts performed were intended as a delivery of the house and an assignment of rents under the lease thereof. *Tuttle v. Bank*, 19 Mont. 11, 47 Pac. 203; *Thomas v. Hillhouse*, 17 Iowa, 71; *Tied. Sales*, § 106. Respondents say that the assignment of the lease and rentals was not complete until accepted by the assignee, or acted upon by the debtor; and that a mere direction by the creditor to his debtor to pay the debt to a third person, without the latter's knowledge or assent, is not sufficient to defeat a garnishment. But the evidence is that the notice of sale to the tenants, and the order to pay rentals, was received by the tenants before the attachment was levied by the sheriff. As tenants, Armstrong & Co. were indifferent to the complications arising by claimants to the rentals or building, and so expressed themselves to the sheriff, who ordered them to pay the rent to him. They explained their position—and the evidence of their explanation was not objected to—the sheriff, and evidently did not mean to deliberately acknowledge themselves as holding any property or money belonging to Batchelor as against the bank. In this respect the case is to be distinguished from *Bank v. Barnes*, 18 Mont. 335, 45 Pac. 218. The case is, therefore, not within the rule of decision as announced by Wap. Attachm. § 416, and other books cited by respondent, where there was an absence of any notice or acceptance of or assent to an agreement whereby the debtor, instead of paying the debt to the creditor, agrees to pay it to a third person. The facts at bar rather bring our decision upon this point within the rule of *Bank v. Barnes*, 18 Mont. 335, 45 Pac. 218, where it was laid down that an order to pay to a creditor money due or to become due creates an equitable interest in the fund in favor of the assignee, and that it is not necessary that the debtor upon whom the order is drawn should assent to the transfer. Batchelor having parted with his interest in the property before attachment and garnishment, and notice of such sale having been brought home to the officer before seizure, the rights of the bank are paramount to those acquired under the process. *Drake*, Attachm. § 223. This discussion disposes of the points relied on by respondents, and leads to the conclusion that the court ought not to have directed a verdict for the defendants. Judgment reversed.

PEMBERTON, C. J., and BUCK, J., concur.

(19 Mont. 115)

#### STEBBINS v. MORRIS.

(Supreme Court of Montana. Jan. 25, 1897.)  
HUSBAND AND WIFE—AGREEMENT FOR SEPARATION  
—VALIDITY.

1. While an agreement between husband and wife for immediate separation, immediately followed by separation, is not void at common law, the relations between them at the time it is

entered into must be of such a character as to render the separation reasonably necessary for the health or happiness of one or the other; and that there was a moving cause for it in addition to the mere volition of the parties must be shown by the complaint in an action to enforce provisions therein for division of property.

2. An agreement for separation, if in contemplation of and to facilitate a divorce, is void; but its being merely incidental to a divorce obtained without collusion does not vitiate it.

3. A provision in a separation agreement for division of the property is not void because the provisions for the division cannot be fully executed at the date of the agreement.

4. Intervention of a trustee is not necessary to validity of an agreement for separation.

Appeal from district court, Park county; F. K. Armstrong, Judge.

Action by Ellen M. Stebbins against Robert O. Morris. Demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

In her complaint the plaintiff alleges "that on the 20th day of June, 1885, for the purpose and object of settling and adjusting the interest and right of herself and husband in and to certain property, and for the purpose of providing for the future support and maintenance of the plaintiff by the said defendant, and as evidence of their determination and agreement not to live together as man and wife any longer, the said parties made and entered into a contract in writing and articles of separation, a copy of which is hereto attached, marked 'Exhibit A.'" Further on it is alleged that the defendant, although often requested, has failed and refused to pay over to the plaintiff any of the proceeds derived from the sale of the product of the oil wells mentioned in the agreement, but has converted the same to his own use. Continuing, she avers "that since the said 20th day of June, 1885, and since the making of said contract, this plaintiff, in an action commenced by herself against this defendant in the district court of the First district of the territory of Montana, holding terms at Bozeman, Montana, obtained a decree of divorce dissolving the bonds of matrimony heretofore existing between them; that this plaintiff, relying upon the terms and provisions of said contract so made and entered into by and between them relative to their said property so acquired and owned by them as aforesaid, did not make any demand or claim for any adjustment or decree as to their said property or right therein, but relied upon said contract, and believed that the defendant would carry the same out." Exhibit A reads as follows: "This article and deed of separation, made and entered into the 20th day of June, 1885, by and between Robert O. Morris, husband, of Gallatin county, and Montana territory, party of the first part, and Ellen M. Morris, wife, of the said county and territory, party of the second part, witnesseth: That for and in consideration of the sum of one hundred dollars in hand paid by the said party of the first part to the said party of the second part, and other and divers considerations hereinafter mentioned, have by these presents agreed, and by these

presents do agree, for the rest of their natural lives to live separate and apart from each other, and to renounce and surrender each to the other all of their marital rights; and it is agreed and understood that the said first party is to pay to the said second party the sum of one hundred dollars on the 20th day of October, 1885, and the further sum of two hundred dollars on the 20th day of March, 1886; and it is further agreed and understood by the parties hereto that the party of the first part, or his agent, J. L. Morris, of McKean county, Pennsylvania, or any other agent the said first party may select to act for him, shall pay to the said second party the one-half of the net proceeds arising from the sale of oil on what is known as the 'Morris Homestead,' in Bradford township, McKean county, Pennsylvania, to the extent of the interest now owned by the said Robert O. Morris in the oil wells upon said land. The one-half of all proceeds due the said first party arising from the sale of oil as aforesaid to be paid to the said second party, her agent or attorney, monthly after and immediately upon the sale of oil being made and as long as oil is produced upon said tract of land. And it is further provided that the said first party shall have and make no claim for the services of the party of the second part, and shall not be liable for her support and maintenance, or for any debts hereinafter contracted by her. That the said party of the second part agrees to release, and does hereby release, all claims of dower or other demands against the personal or real estate of the said party of the first part. In witness whereof the said parties have hereinafter set their hands and seals the day and year first above written. Robert O. Morris. [Seal.] Mrs. Ellen M. Morris. [Seal.]" (Duly verified and acknowledged.) The prayer is for an accounting, and for the enforcement of the terms of the agreement. Defendant filed a general demurrer. This the court sustained, and, upon the plaintiff's abiding by her complaint, judgment was rendered against her. She appeals from this judgment.

Smith & Wilson and H. J. Miller, for appellant. Campbell & Start, for respondent.

BUCK, J. (after stating the facts). The main question discussed in the briefs on file in this case is whether or not the contract set forth in plaintiff's complaint is void as against public policy. Under the Montana Codes which took effect in 1895 (sections 215, 216, Civ. Code), an agreement for an immediate separation between a husband and wife is expressly allowed, and their mutual consent is declared to be a sufficient consideration. The present controversy arose, however, even prior to the enactment in 1887 of what is generally known as the "Married Woman's Emancipation Act." This necessitates a consideration of the question with reference to the common-law status of a

married woman, as this was substantially the legal status of the plaintiff when she entered into the agreement. Agreements for separation have been a fruitful source of litigation. To an investigator of the many decisions on the subject, both in the United States and England, it is apparent that a majority of the later judges, in sustaining such agreements, have acted reluctantly, with a latent suspicion in their own minds of the legal logic of their conclusions. They seem to have yielded to precedent with a disagreeable consciousness that what they declare to be the law is such rather as a result of judicial legislation than anything else. Chancellor Walworth, in *Carson v. Murray*, 3 Paige, 500, says: "It may well be doubted whether public policy does not forbid any agreement for a separation between husband and wife, except under the sanction of a court of justice; and whether it does not also require that such agreements should be limited to those cases where, by the previous misconduct of one of the parties, the other is entitled to have the marriage contract dissolved, either wholly or partially, by a decree of the competent tribunal." And then, after commenting on the protests of Lord Eldon against the doctrine of sustaining such agreements, expressed in *St. John v. St. John*, 11 Ves. p. 526, and *Westmeath v. Westmeath*, Jac. 126, the chancellor proceeds: "It has, however, long since become the settled law in England that a valid agreement for an immediate separation between a husband and wife, and for a separate allowance for her support, may be made through the medium of a trustee. And, as many of the decisions which have gone to the greatest length on this subject took place previous to the Revolution, they have been recognized here as settling the law in the state to the same extent." In somewhat the same manner the supreme court of the United States, in *Walker v. Walker*, 9 Wall. 750, expresses its adherence to the doctrine. In that case the court said: "It is contended that deeds of separation between husband and wife cannot be upheld, because it is against public policy to allow parties sustaining that relation to vary their duties and responsibilities by entering into an agreement which contemplates a partial dissolution of the marriage contract. If the question were before us, unaffected by decision, it would present difficulties, for it cannot be doubted that there are some serious objections to voluntary separations between married persons. But contracts of this nature for the separate maintenance of the wife, through the intervention of a trustee, have received the sanction of the courts in England and in this country for so long a period of time that the law on the subject must be considered as settled." See, also, *Schouler*, Dom. Rel. § 215 et seq.; *Bish. Mar., Div. & Sep.* § 1263 et seq. The reason for this doubt and reluctance on the part of

these judges is due to the fact that the public is directly interested in the inviolability of the marriage contract, and that the power to sever the tie is vested in the courts alone. It also results from the general doctrine that at common law a married woman had no contractual capacity. *Legard v. Johnson*, 3 Ves. Jr. 352. Certainly, when confronted by these rules of law, the doctrine that a contract entered into by a married woman and her husband for separation is enforceable without enabling statutes, trenches strongly on judicial legislation. The later English courts have gone much further in this direction than most of the American courts. In commenting upon the language used in his decision on this question by an English judge, Mr. Bishop, in his work on *Marriage, Divorce and Separation* (section 1263, volume 1), indulges in the following somewhat too vigorous criticism: "In the United States public opinion changes law as often as it does in England, but with us legislation ratifies the change; and, until the ratification in this form transpires, the judiciary is compelled, however much against its will, to remain quiescent." But a more elaborate discussion of the arguments for and against the doctrine would be of interest only to the curious student. However logical and sound the reasoning that has been and may be urged contra, by force of precedents it is firmly imbedded in the common law as interpreted by many of the best courts in the United States. See cases supra; also *Bettle v. Wilson*, 14 Ohio, 257; *Garbut v. Bowling*, 81 Mo. 214; *Randall v. Randall*, 37 Mich. 563; *Blaker v. Cooper*, 7 Serg. & R. 502; *Wells v. Stout*, 9 Cal. 480; *Clark v. Fiedick* (N. Y. App.) 22 N. E. 1111; *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324, and numerous other authorities. We are compelled to accept the general doctrine of these cases. But we are of the opinion that it is clearly subject to these limitations. An agreement for a separation which is to take place in the future is void as against public policy. So, too, after such an agreement is entered into, its terms must be immediately complied with on peril of nullity. And at the time of the making of such an agreement the relations between the husband and wife must be of such a character as to render the separation a matter of reasonable necessity for the health or happiness of the one of the other. There must be a moving cause for it in addition to the mere mutual volition of the parties. If it is the outcome of mutual caprice only, or a reckless disregard of the obligation of the marriage tie, then the courts will not enforce it. In almost all the cases that we have investigated, either from the recitals in the agreement for separation itself or from extrinsic evidence offered in connection therewith, the court has had before it an unhappy condition of marital relations as a moving cause for the contract. Judges have carefully discriminated be-



tween agreements for separation, outgrowths of domestic sorrow, entered into for the purpose of avoiding public scandal or notoriety, and those which have resulted from a wanton or reckless disregard of one of the highest obligations of life,—the duty which the husband and wife mutually owe to each other and to the public at large. In this view of the law, an agreement for separation of the latter kind would be a mere usurpation of the power conferred upon the courts alone to adjust marital dissensions in decrees of divorce.

Tested, then, by these rules, what does this complaint show? Merely that the plaintiff and defendant agreed to separate, and divide the property which they had hitherto enjoyed together. No intimation is contained in the complaint that there was any necessity or moving cause for the separation other than mere caprice or purely voluntary consent. There is no allegation under which any other evidence in respect to it could be presented to the court. The demurrer was properly sustained. Had the complaint properly set forth any urgency or reasonable necessity for the agreement, then, no doubt, a cause of action would have been stated. Had it properly averred that the plaintiff had been imposed upon or defrauded by her husband in respect to this agreement, such averments would no doubt have altered the phase of the situation, and entitled the plaintiff to the relief demanded. But no such allegations appear. The complaint, too, while not perhaps directly susceptible of the inference,—from the ambiguous manner in which it refers to a subsequent divorce obtained by the plaintiff,—might very readily have engendered a suspicion in the mind of the district judge that the agreement had been entered into in contemplation of the divorce. In fact, from his written opinion, now before us, it appears that he did entertain such a suspicion. Moreover, counsel for respondent assert in their brief (and the statement is uncontroverted by the counsel for appellant) that the divorce was obtained on the same day that the agreement was entered into. If this is a correct statement, there is no impropriety in our citing another line of authorities, which, while generally illustrative of the principles of law governing agreements for separation we have been discussing, may also particularly apply and settle this controversy. It is a general and uniform rule that any agreement entered into between husband and wife with a view to facilitating the dissolution of their marriage contract is void. See *Phillips v. Thorp*, 10 Or. 494; *Speck v. Dausman*, 7 Mo. App. 165; *Cross v. Cross*, 58 N. H. 373; *Kilborn v. Field*, 78 Pa. St. 194. If, then, the agreement relied upon in this case was entered into between the parties in contemplation of and for the purpose of facilitating the divorce obtained by the wife, it should be held void, as collusive. If, however, it can be

established that it was entered into without any collusive intent, and as merely incidental to a decree of divorce obtained without collusion, the plaintiff's right to recover would assume a different aspect. See *Schmieding v. Doeblner*, 10 Mo. App. 373; *Storey v. Storey*, 125 Ill. 608, 18 N. E. 329.

Respondent's counsel claim that this agreement is executory in character, and for this reason not enforceable; but we do not approve the attempted distinction. Nor do we agree with their contention that the agreement is void because there was no intervention of a trustee. Many of the courts have clung to the old doctrine that the intervention of a trustee is essential to the validity of an agreement for a separation, but we are of opinion that the more correct and modern rule is that no such intervention is necessary. See *Boone v. Chiles*, 10 Pet. 255; 1 Beach, Mod. Eq. Jur. § 198. The judgment is affirmed, with costs, but it is ordered that the cause be remanded, with directions to the lower court to grant leave to the plaintiff to amend her complaint within a reasonable time, if, bringing herself within the tests of the law as herein stated, she has a cause of action.

PEMBERTON, C. J., and HUNT, J., concur.

(19 Mont. 128)

RICHARDS et al. v. LEWISOHN et al.

(Supreme Court of Montana. Jan. 25, 1897.)

MECHANICS' LIENS — SERVICE BY PUBLICATION — SUFFICIENCY OF STATEMENT — NAME OF OWNER.

1. Under Comp. St. 1887, div. 5, § 1383, relating to mechanics' liens, a personal judgment cannot be rendered against a defendant who has been served by publication only, and has not appeared.

2. Under Comp. St. 1887, div. 5, § 1373, providing that, on the filing of a mechanic's lien, the recorder shall make an abstract of the lien account, showing the name of the person against whose property the lien is filed, etc., an account of lien stating that the amount due is claimed "from L. (whose Christian name is unknown)," and that the work was done "at the special instance and request of L. (whose Christian name is unknown) the owner of said building and ground," etc., are sufficient to support a mechanic's lien on property belonging to L. Bros.

Appeal from district court, Silver Bow county; William O. Speer, Judge.

Action by Theodore Richards and Patrick Culkin, co-partners as Richards & Culkin, against Lewisohn Bros., to enforce a mechanic's lien. There was judgment for plaintiffs, and defendants appeal. Modified.

Foreclosure of mechanic's lien. Plaintiffs, as co-partners, allege, among other things, that defendants Lewisohn Bros., a firm composed of persons unknown to the plaintiffs, are the owners and reputed owners of the property upon which the plaintiffs, as plasterers, performed certain work; that, to secure and perfect their lien upon the building and

lands, they filed their claim, duly verified, and made part of the complaint. The exhibits attached to the complaint were marked "A" and "B." Exhibit A, reads as follows:

Butte City, Montana, Dec. 26, 1892.  
 Lewisohn (whose Christian name is unknown)  
 to Theodore Richards and Patrick Culkin, Dr.  
 To 2,497 yards lathing, at 4 cts. per  
 yard ..... \$ 99 88  
 To 187 yards lathing, at 8 cts per yard 14 96  
 To lath patching ..... 4 00

Total amount due ..... \$118 84

Exhibit B, after reciting that the work was done as set forth in the preceding itemized statement, continued, "that said lathing, and the whole thereof, was done at the special instance and request of Lewisohn (whose Christian name is to us unknown), the owner of said building and ground on which same is situated, and the person for whose immediate use and benefit the said lathing was done," etc. Both plaintiffs verified the notice of lien and statement of account. Summons was served by publication upon the defendants, who failed to appear. Judgment was entered against them for the amount of the lien and costs, and it was decreed that the premises involved be sold to satisfy the judgment. Defendants appeal from the judgment.

C. R. Leonard, for appellants. Paschal & Darrow, for respondents.

HUNT, J. (after stating the facts). The appellants ask a reversal of this case upon the single ground that the complaint does not support the judgment. This question is properly raised on appeal from the judgment alone. *Foster v. Wilson*, 5 Mont. 53, 2 Pac. 310; *City of Helena v. Brule*, 15 Mont. 429, 30 Pac. 456, 852; *Tracy v. Harmon*, 17 Mont. 465, 43 Pac. 500.

Appellants first object to the judgment itself. The judgment was that plaintiffs have and recover of the said defendants the sum of \$140.60, the amount of the lien and debt, together with costs, due from defendants to plaintiffs. It was also further ordered, adjudged, and decreed that, all and singular, the premises mentioned in the complaint be sold, or so much thereof as might be sufficient to raise the amount due the plaintiffs upon said judgment, interest, and costs, and that the sheriff sell the same in manner provided by law. Inasmuch as it appears that service was had by publication, this judgment, if otherwise valid, is supported by the complaint only so far as it awards to plaintiffs a recovery of the amount of the indebtedness found to be due, and costs, to be levied out of the property charged with the lien thereof, and described in the judgment. Comp. St. 1887, div. 5, § 1383. No personal judgment could be rendered in this state against the owners of the realty in a suit to foreclose a mechanic's lien, where the service was by publication. Phil. Mech. Liens, §

307. If, therefore, the judgment is otherwise supported by the complaint, it can, in this respect, be modified so that the plaintiffs may be granted that remedy which the statutes above cited grant, and that alone.

But the appellants further contend that no judgment at all can stand in the case, because the lien does not connect Lewisohn Bros. with the ownership of the property, or with the work alleged to have been performed. The argument of counsel is that because the lien shows that the work was performed by plaintiffs for Lewisohn, whose Christian name was unknown, the lien paper itself disproves the allegations of the complaint that defendants Lewisohn Bros., a firm of persons unknown to plaintiffs, are the owners and reputed owners of the lots of ground. Tested by the familiar general principle that mechanics' liens are of an entirely statutory and extraordinary nature, and that a person who strictly pursues the statute must be granted his remedy, if justly entitled thereto, we think plaintiffs properly recovered in this case.

We are not called upon to positively decide whether, under section 1371, Comp. Laws 1887, or the amendments thereto, approved September 14, 1887 (Laws Ex. Sess. 1887, p. 71), a notice of lien must contain the name of the owner or reputed owner of the property sought to be charged; but it would seem that, when sections 1371 and 1372 are considered together, there should be a statement of the owner's or reputed owner's name, if known to the claimant. It will be noted that sections 1371 and 1372 simply, in substance, require the filing by the claimant of a just and true account due or owing, after allowing all credits, and containing a correct description of the property to be charged with the lien, and verified by affidavit. Considered without reference to any further section of the law, it would doubtless be held, under the sections cited, that it was not essential that the name of the owner or reputed owner of the property be given. It was so held in *Hays v. Mercier*, 22 Neb. 656, 35 N. W. 894. But it is provided by section 1373 of the Compiled Laws of 1887 that the recorder of the county shall make an abstract of the lien account, in a book kept for the purpose, containing (1) the name of the claimant, (2) the amount of the lien, (3) the name of the person against whose property the lien is filed, and (4) the description of the property. The objects of having these particulars specified by the county recorder in an abstract book are to enable owners to have notice that their property is sought to be charged, and to inform them of the claims filed. *Beals v. Congregation B'nai Jeshurun*, 1 E. D. Smith, 654. Now, as the county recorder must make this abstract of the contents of the claim filed, clearly he can only secure his information for the entries from the account filed in his office; and, if this be correct, he must secure the name of the own-

er of the property from the lien notice itself. It would therefore appear to be necessary that there be some statement in the notice or account of the name of the owner or the reputed owner, if known. This construction of the statutes puts the several provisions relating to the subject of lien notices in harmony with one another, and is but a reasonable imposition apparently contemplated by the law to be put upon the lien claimant. The case in hand, however, is not one where the name of the owner was omitted in the account or statement, but one where the Christian name of an alleged sole owner was left out because "unknown" to the claimants, and where the complaint filed afterwards alleged there were two owners (the one named in the account and another) whose names are unknown to the plaintiffs. So that if our views just expressed upon the necessity for naming the owner, if it can be done, are to be applied, we shall find respondents have brought themselves within the rule approved of, by naming an owner or reputed owner, and even excusing themselves from giving his Christian name. The averments in the account and in the statement, which are verified, are, respectively, that Lewisohn, whose Christian name is unknown, owes the account, and that the lathing was done at the request of Lewisohn, whose Christian name is unknown, the owner of the building and lots. The lien notice was sufficient. It named as an owner one Lewisohn, to whom it gave notice of the claim against the property described.

The facts in the case before us are analogous to those before the court in *McPhee v. Litchfield*, 145 Mass. 565, 14 N. E. 923. There the plaintiff filed his petition to enforce a mechanic's lien. The statute provided, among other things, that the lien should be dissolved unless the petitioner desiring to avail himself thereof \* \* \* filed in the registry of deeds a statement of a just and true account of the amount due him, with all just credits given; a description of the property \* \* \* and the name of the owner or owners of such property, if known. The petitioner, *McPhee*, in his statement, averred that the lot of land was owned, to the best of his knowledge and belief, by *Catherine Broderick*. Upon the trial it appeared that in fact the property was owned by the defendant *McNamara*, but the petitioner believed that the defendant *Broderick* was the owner when he filed his statement. The supreme court decided that it was important that the name of the owner should be given in the certificate, if it could be done, and went on to say: "But the statute contemplates that there may be cases where the name of the owner need not be given in the certificate. The name is to be given 'if known.' This implies that, if the name is not known to the petitioner, the certificate is good if it does not name the owner. In this case the petitioner did not know the

owner, and thus it differs from *Kelly v. Laws*, 109 Mass. 395, and *Amidon v. Benjamin*, 128 Mass. 534. This case, then, is one where the name of the owner is unknown. If the certificate had so stated, no fault could be found with it. Does the fact that the petitioner innocently states his belief that the respondent *Broderick* is the owner vitiate the certificate? So to hold would be to import into the statute a provision not found there. We are of opinion that this cannot be done, especially in a case like this, where the honest mistake of the petitioner has not in any way misled or injured the respondents." The opinions of this court since the decision in *Black v. Appolonio*, 1 Mont. 342, have been in line with the approved rule which treats the mechanic's lien statute as remedial. "Such a statute," said Judge Knowles in *Black v. Appolonio*, "should be strictly pursued, while it should be liberally construed." See, also, to like effect, *Smith v. Mining Co.*, 12 Mont. 524, 31 Pac. 72. The statute of California requires the statement in the claim of lien to give the name of the owner or reputed owner, if known. In *Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231, where plaintiff sued to foreclose a mechanic's lien, the complaint charged that the claim filed stated the name of *E. B. Newkirk* as owner and reputed owner of a leasehold interest in the property to be charged, and stating in the lien that the owner of the fee was unknown. The court there said: "This averment shows a compliance with the requirement of the statute above quoted. It is substantially an averment that it was stated in the claim filed that neither the name of the real owner nor of the reputed owner was known to the plaintiff when he filed his lien. The plaintiff is only required to state the names mentioned, if known. If the names are not known, the claim filed is sufficient if it is silent on this subject." Surely, if the claim need aver nothing on the subject of ownership where the owner's name is unknown, an honest omission to give the Christian name of an owner, and to include another owner by the same surname, because unknown, ought not to be fatal to the lien, where the complaint contains sufficient averments of the names, or gives an excuse for not making them more specific. *Jones, Liens*, § 1400; *Phil. Mech. Liens*, § 345. This doctrine appeals to reason, and finds high authority to sustain it in the case of *Cleverly v. Moseley*, 148 Mass. 280, 19 N. E. 304, where the claimant's statement averred that the lot, to the best of his knowledge and belief, was owned by *Herbert Moseley*. It turned out on trial that *Herbert Moseley* was not the owner. Upon the objection to the statement, it was held that while, to conform to the law, the owner's name should always be given in the statement, if possible, the omission of it, or a mistake in it, if it is not known to the claimant, is not neces-

sarily fatal to the lien. The opinion adds the following: "An incumbrance created by filing a statement claiming a lien can in no event remain long before the lien is enforced by proceedings in court. The possible existence of such an incumbrance is commonly suggested by the condition of the property so far as to put purchasers upon inquiry, and the statute contemplates that one examining a title may find it necessary to look beyond the names indexed in the register, to the descriptions of the lands in the statements recently filed." Whether or not the complaint in the case before us should have been more definite in its allegations concerning the statements of ownership in the lien is not material. The only question we are to pass upon is whether it supports the judgment. Our conclusion is that it does, but that the decree should be modified as hereinbefore discussed. The case is therefore remanded for modification of the decree as indicated, and when the decree is so modified it will be affirmed.

PEMBERTON, C. J., and BUCK, J., concur.

(19 Mont. 78)

MCDONALD v. LANNEN et al.

(Supreme Court of Montana. Jan. 18, 1897.)

WATERS AND WATER COURSES—IRRIGATION—DATE OF APPROPRIATION—EXTENT OF APPROPRIATION—TRANSFER BY PAROL—VALIDITY OF PAROL TRANSFER.

1. Evidence that plaintiff had constructed his ditch in April or May, 1871, and that in a statutory declaration of water right filed in 1885 he had claimed his appropriation as made in May, 1871, was sufficient to justify a finding that his appropriation was made May 15, 1871, and that certain other appropriations antedating plaintiff's were made on or about May 1st.

2. It is no objection to such finding that the date fixed was arbitrarily selected so long as the priority is not affected.

3. Where a settler constructed a ditch of sufficient capacity to irrigate his entire tract of irrigable lands, but conveyed the water to only a small portion thereof, it was an appropriation to the extent of the capacity of the ditch entitling the owner to construct and maintain ditches to other portions of his land, provided the total amount of water taken did not exceed the capacity of his original ditch.

4. A transfer by parol of a settler's right of entry of lands carries with it a water right appurtenant thereto, entitling the transferee to the benefits of the priority of the appropriation.

5. The validity of a verbal transfer of a settler's right of entry of unsurveyed lands cannot be questioned by a third person, not claiming under the government.

6. A finding that a ditch owner is entitled to 150 inches of water is not justified when the only evidence as to the extent of his right fixes his appropriation as not exceeding 60 inches.

Appeal from district court, Granite county; Theo. Brantley, Judge.

Action by Angus A. McDonald against Edward Lannen and others to determine the priorities between water rights. There was a judgment for defendants, and plaintiff appeals. Modified.

This action was commenced on the 7th day of November, 1893, under section 1260, p. 997, div. 5, Comp. St. Mont., for the purpose of determining the respective priorities of the plaintiff and the defendants, who were claimants of the use of the waters of Willow creek, in the county of Granite, state of Montana, and was tried by the court sitting without a jury. The plaintiff appeals from the decree, and claims that the court committed errors of law in admitting testimony, and that certain findings of fact are not supported by the evidence.

Durfee & Brown, for appellant. Rodgers & Rodgers, for respondents.

BUCK, J. (after stating the facts). Appellant (plaintiff in the lower court) complains that the trial court was not justified by the evidence in finding May 15, 1871, to be the date of the appropriation of the water. Appellant testified that he had commenced to dig his appropriation ditches in the fall of 1870, and that he completed them in the spring of 1871. A witness called in his behalf testified that the said ditches had been "taken out" in 1871, "early in the spring, April or May," he was not sure which; that he (witness) had assisted in the construction of one of these ditches in the spring of 1871; and that at the time this ditch was the only one he had seen on the place. Another witness testified that appellant had no ditches on his land in 1872. A statutory declaration of water right, made and filed under oath, by appellant in 1885 (introduced in evidence), recited that appellant's appropriation of water from Willow creek had been made in the month of May, 1871. There was before the court also testimony in behalf of several other appropriators who claimed rights prior to appellant's. The court found these latter rights antedated appellant's; and while, from the testimony, it was impossible to determine the exact date of any one of them, established the dates as of May 1, 1871. There being evidence to support the lower court in deciding the relative priorities aforesaid, we are of opinion that appellant was not injured by the establishing of these dates as of May 1, 1871, and his own as of May 15, 1871. In water-right suits, testimony relating to original appropriations, some of them made many years before the controversy arises, is very often indefinite as to dates, and when this condition arises at the end of the suit the trial court, for the purpose of framing a decree specifically settling the respective rights of parties, of necessity must often arbitrarily fix a particular day or days for appropriations of water. Therefore, while the selection of these specific days of May 1st and May 15th was, in a sense, arbitrary, it being incidental merely to the determination of the question of priority, the action of the court was proper.

Appellant claims again that the court erred

In finding that one Thomas was entitled to 150 inches of the waters of Willow creek as of May 1, 1871. As to the alleged error in the matter of finding the particular day of the appropriation, the previous reasoning applies. While conceding that there is some testimony to support the finding as to the amount of water, appellant urges that the first of the Thomas appropriation ditches constructed was only used to reclaim land on the north side of the creek, and, regardless of the question of its capacity, had no more than 40 acres of land subject to its irrigation; and that it was found necessary to construct another ditch to reach that portion of the ranch on the south side of the creek. The test of the extent of an appropriation with reference to a subsequent right to the waters of a stream is dependent upon the capacity of the first ditch before such subsequent appropriation is made. When an owner or possessor of land makes an appropriation of water in excess of the needs of the particular portion of the land upon which he conveys the water, and other portions of his land also require irrigation, his water right is not limited by the requirements of the particular fraction. He may still, despite the fact that another's water right has attached, construct other ditches through his remaining land, provided that the total amount of water conveyed by all the ditches on his place does not exceed the original capacity of the first ditch. As between his appropriation and the subsequent water right, the capacity of the ditch by means of which he first made his appropriation is the test of the extent of it. There was no error, therefore, in the amount of the water awarded to Thomas.

The court found that the estate of John Gird, deceased, was entitled to 150 inches of the waters of Willow creek as of May 1, 1871. The testimony discloses these facts: The first appropriation of water on the 160-acre Gird ranch was made by one John Pickens, who settled upon it some time in 1869. Pickens sold the land to one Fahey some time later, who, after taking possession, subsequently sold and turned it over to one Patrick, to whose possession one Bradburn succeeded as a purchaser. Gird acquired possession of the land in 1884 by trading ranches with the widow of Bradburn, and subsequently filed upon it as a homestead. All the transfers aforesaid were verbal. For many years it had been unsurveyed land. One settler followed another in the possession thereof. The possession of the land and the use of the water, however, were continuous on the part of John Gird and his predecessors. Appellant contends that all evidence as to any appropriation of water made by any possessor of the land prior to Gird was inadmissible, for the reason that a verbal sale of a water right operates as an abandonment of the same by its owner. It is claimed that the case of *Barkley v. Tiele-*

*ke*, 2 Mont. 59, settles the law in this respect. This case has frequently been cited in the text-books as a precedent on the question. It is to be borne in mind, however, that *Barkley v. Tieleke* was decided in reference to mining water rights and ditches considered by themselves, rather than with reference to the mining claims to which they were appurtenant; and whether or not the court in deciding it meant to establish a precedent to be applied to agricultural water rights of the character involved in this suit is extremely doubtful. At the time when *Barkley v. Tieleke* was decided,—in 1874,—litigation in Montana in respect to water rights for agricultural purposes was comparatively in its infancy. Within the past few years (see *Quigley v. Birdseye*, 11 Mont. 439, 28 Pac. 741, and *Ditch Co. v. Henry*, 15 Mont. 558, 39 Pac. 1054,—opinions rendered by that able jurist, Mr. Justice De Witt, the subjects in controversy being in reference to water rights for agricultural purposes) this court has viewed somewhat doubtfully the applicability of this decision as a precedent for suits involving agricultural water rights. *Barkley v. Tieleke*, under the condition of facts involved therein, was a most just decision. But one of the premises therein upon which the decision is apparently, though not necessarily, based, we are compelled, after mature consideration, to disapprove at least in so far as it affects conflicting water rights of the present character. The language of the territorial court in that case was, substantially, that where an appropriator of a water right transfers it by an imperfect or verbal conveyance he thereby abandons it, and his transferee in possession is to be regarded, not as a successor in interest, but only as an appropriator by recapture, and therefore debarred from availing himself of the date of his predecessor's appropriation. A squatter or settler upon unsurveyed public lands of the United States has never been regarded as a trespasser. Such a possession of unsurveyed public land taken in good faith is clearly recognized in the general spirit of congressional legislation (see particularly acts granting government lands to railroads), and is always carefully protected by the courts. Of course, it is subservient to the United States government, or an actual or inchoate grantee of the government. But, as against all others, such a right, based though it be upon mere possession, is absolute. The settler may build and make other improvements upon the land. He has such a possession as to admit of the legal appropriation of a water right therefor. See *Tucker v. Jones*, 8 Mont. 225, 19 Pac. 571. To hold, then, that a settler who sells and transfers the possession of his claim, together with a water right he has appropriated for its benefit, to another settler, by doing so abandons said water right to such an extent as to render it unavailable to his transferee as against an appropriator of water subse-

quent in time to the first appropriation, is an inequitable doctrine. With reference to water rights of the character before us, an inconsistency in the application of the decision of *Barkley v. Tieleke* would at once become apparent.

We are not aware that it has ever been held in Montana that a squatter on the public domain could not transfer the possession of his claim and the improvements thereon verbally. He unquestionably can; and the transferee whom he puts in possession becomes his successor in interest. To hold, therefore, that this is true of the transfer of a real estate claim, and not true of a water right, merely incidental and appurtenant thereto, is wholly unreasonable. In this connection we have read with interest the pertinent decision of the supreme court of Oregon (see *Hindman v. Rizor*, 27 Pac. 13), and also the recent decision of the supreme court of Colorado (*Nichols v. Lantz*, 47 Pac. 70). In rendering his opinion in this case, Judge Brantley, the judge of the lower court, uses the following apt language: "It is true that conveyances of lands, or any interest therein, must be in writing, or they fall within the statute of frauds, and are void under certain circumstances. It is an elementary principle, however, that no person can take advantage of the void character of a contract unless he be a party to it, an innocent purchaser, or some one who stands in some sort of privity to one of the parties; in other words, no one but a party to a contract, or one who stands in privity with him, can avoid the contract under the statute of frauds. For instance, A. sells B. his farm, and delivers him the possession of it. He executes no deed to B. As long as B. or A. does not seek to avoid the contract, or some one who stands in privity with one of them, what has the rest of the world to do with the matter? If they do not care to take advantage of the statute of frauds, no one else can plead it for them." We cannot comprehend the logic of the language in *Barkley v. Tieleke*, which is claimed generally to hold, if it does, and the decision of the supreme court of California, rendered in 1872 (see *Smith v. O'Hara*, 43 Cal. 373), which does hold, that an appropriator of a water right by verbal transfer abandons it, and therefore divests his transferee, to whom he has honestly intended to surrender the property, of all rights of priority he himself acquired therein. The error seems to lie in the failure to properly distinguish in this connection the true sense of the word "abandon." See *Ditch Co. v. Henry*, 15 Mont. 576, 377, 39 Pac. 1054. By transferring his possession of land, together with a water right appurtenant thereto, a settler certainly does abandon any intention he may have had of personally acquiring a government patent to the property by a compliance with the United States statutes. But a mere failure to execute a deed in no wise justifies the inference that he intends to throw away his hon-

est buyer's rights as well as his own. He personally, and any grantee from him with notice, would be estopped, as intimated in *Barkley v. Tieleke*, from reasserting his rights as against his purchaser. Why, then, should a stranger to his title be allowed a greater privilege; a stranger, too, not in privity with the United States government itself? Different rules apply to the acquisition of title to mining claims from those applicable to agricultural. The right to the possession of a mining claim comes only from a valid location which is a grant. See numerous Montana authorities. We are satisfied that a verbal transferee of a settler's claim and water right appurtenant thereto, who takes possession of the same, is the successor in interest of the original appropriator of the water, that he does not take it by recapture, and that he can avail himself of his predecessor's priority. With appellant's contention that the court was not justified in finding that the first predecessor of Gird (*Pickens*) appropriated 150 inches of water, we agree. The lower court must have overlooked the fact that said *Pickens* himself and his son both testified that the ditch of the original appropriation carried about 50 or 60 inches of water, and the record shows no other contemporaneous evidence on the question. It is ordered, therefore, that this case be remanded to the lower court with directions that either from the evidence heretofore before it, or, if the judge, in his discretion, sees fit to direct the taking of further evidence on the subject, then from all the evidence, a new finding be made as to the original appropriation of water by the first predecessor of John Gird.

PEMBERTON, C. J., and HUNT, J., concur.

(19 Mont. 55)

**MULVILLE v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA.**

(Supreme Court of Montana. Jan. 18, 1897.)

LIFE INSURANCE—DEATH BY PERSONAL INJURY—  
CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF  
—ADMISSIBILITY OF EVIDENCE—ADMINISTRATOR  
—COMPROMISE OF CLAIM.

1. Where contributory negligence has been pleaded as a defense, the burden of proof is on defendant, though plaintiff has alleged that his intestate was "using due diligence for his personal safety."

2. On the trial of an action on a life insurance policy, where the assured was killed by a railroad train, it may not be shown, on the issue of contributory negligence, that the deceased was wont to jump on the train while it was in motion.

3. On the trial of an action on a life insurance policy, where the assured was killed by a railroad train, and it has been shown, on the issue of contributory negligence, that the assured was found between the rails of the track, the space between the cars and the track may be shown, in rebuttal, to establish that the assured could not have been between the cars and the track without being more crushed.

4. Without a contrary showing, it will be

presumed that the sworn and subscribed testimony of a witness given before a coroner's jury is all of his testimony given at that time, and hence he may be contradicted by it.

5. On the trial of an action to which contributory negligence would be a defense, the instruction "that, if the deceased, by any act of negligence on his part, caused his death, then the plaintiff cannot recover, and your verdict should be for defendant," is properly refused, as too sweeping in its terms.

6. Under Prob. Prac. Act (Comp. St. 1887) § 232 (Code Civ. Proc. 1895, § 2737), which provides that an executor or administrator may, with the approbation of the probate court, compromise a claim due decedent when it appears to be for the best interest of the estate, the compromise of a claim against a life insurance company on a policy issued to the decedent may be authorized to be made "to the best possible advantage," though the terms have not been definitely ascertained.

7. Under Prob. Prac. Act (Comp. St. 1887) § 350 (Pol. Code 1895, § 4528), which provides that, when no direction is given for the government of a public administrator, the provisions of the preceding chapters must govern, the authority to compromise a claim, as provided for in Prob. Prac. Act (Comp. St. 1887) § 232 (Code Civ. Proc. 1895, § 2737), may be granted to a public or private administrator without distinction.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by Samuel Mulville, administrator of the estate of Charles F. Young, deceased, against the Pacific Mutual Life Insurance Company of California. There was a verdict for plaintiff, and from an order granting defendant a new trial plaintiff appeals. Affirmed.

This action was brought in the lower court to recover the amount of an accident insurance policy taken out by one Charles F. Young in the defendant company. Young was injured by a train of cars operated by a railroad company in Silver Bow county, and died almost immediately from the effects of his injuries. Letters of administration upon his estate were issued to the public administrator, George Pascoe, of Silver Bow county, and subsequently to the present plaintiff. The complaint sets forth a cause of action under the terms of the policy. The answer sets up two defenses: First, contributory negligence on the part of the deceased Young; and, secondly, a settlement and compromise between the insurance company and the public administrator, Pascoe, while he had charge of the estate. The replication, among other things, sets forth bad faith between the public administrator, Pascoe, and the company, in the settlement and compromise. As to this portion of the replication, however, plaintiff offered no evidence. In order to maintain its second defense, the defendant offered in evidence an order of the probate judge authorizing a compromise, and a receipt from the public administrator, Pascoe. This order and receipt were as follows: "In the Probate Court of Silver Bow County, Montana Territory, March Term, 1887. Journal Entry, April 27, 1887, Journal B, Page 349. [Title of Cause.] It appearing to the satisfaction of this

court that it will be for the best interest of the said estate that the claim for insurance money held under policy of insurance issued to said deceased by the Pacific Mutual Accident Life Insurance Company of California be compromised, it is hereby ordered, and the administrator of said estate is hereby directed to settle said claim, and make a compromise with said insurance company to the best advantage possible. Caleb E. Irvine, Probate Judge. Dated April 27, 1887." The receipt reads thus: "Office of Curtis & Majors, Attorneys at Law, Real Estate and Insurance Agents, and Mining Brokers. Money Loaned on Real Estate, and Special Attention Given to Collections. Butte, Montana, April 27, 1887. Received of the Pacific Mutual Life Insurance Company, by the hands of Thomas Bennett, agent for said company, the sum of two hundred dollars for any amounts now due upon policy No. 5,565 issued by the said company to one Charles F. Young on the 9th day of February, 1887, and being in full of a final settlement for said policy; and I do further acknowledge this to be a just and final settlement of the claim against said company, whom I hereby fully discharge from all obligation, of whatsoever kind or nature. Said settlement is hereby made by the order of the probate court of Silver Bow county, Montana territory. In witness whereof, I have hereunto set my hand and seal the day and year first above written. [Signed] George Pascoe, Administrator of the Estate of Chas. F. Young." The defendant, before the case was submitted, requested the following instructions: "Instruction No. 8: In the policy sued on in this case, there is a provision that it shall not cover a case where the insured sustains injuries or is killed while violating the rules of any company or corporation. Now, if you find, from the evidence, that the deceased, Charles F. Young, received the injuries which caused his death while in the act or attempt to violate the rules of any company or corporation knowingly, then the defendant is not liable under said policy of insurance, and your verdict should be for the defendant." "Instruction No. 15. If the deceased, Charles F. Young, by any act of negligence on his part, caused his death, then the plaintiff cannot recover, and your verdict should be for the defendant." The trial resulted in a verdict for the plaintiff. The trial court subsequently granted defendant's motion for a new trial, and from this order plaintiff appeals.

Wm. Scallon, for appellant. Stapleton & Stapleton, for respondent.

BUCK, J. (after stating the facts). The district judge, in granting the motion for a new trial in this case, considered the following alleged errors: First, the refusal to direct a verdict for the defendant when, at the beginning of the trial, plaintiff declined to offer any evidence, upon the ground that the

burden of proof under the pleadings was upon the defendant; second, the exclusion of the probate order and receipt of compromise; third, the exclusion of evidence as to the deceased having made a practice of jumping upon the train which killed him while in motion; fourth, the admission of evidence as to the space between the cars and the track, for the purpose of showing that it was impossible for the deceased to have been between the cars and the track without being crushed to pieces; fifth, the admission in evidence of the written and subscribed testimony of one of the witnesses previously taken at the coroner's inquest; sixth, the court's refusal to give instructions numbered 8 and 15 requested by the defendant. There were other assignments of error, but they are substantially embraced in the one above numbered third.

Inasmuch as it does not appear from the record that the district judge, in setting aside the verdict of the jury, assigned any special grounds therefor, it becomes necessary to pass upon all the questions involved in these alleged errors. It is the law of this state that contributory negligence is a matter of defense. *Higley v. Gilmer*, 3 Mont. 90; *Wall v. Railway Co.*, 12 Mont. 44, 29 Pac. 721; *Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905. It is true, in the plaintiff's complaint, it is alleged that, at the time he was injured, he was "using due diligence for his personal safety." Such an allegation, however, was unnecessary, and no proof of the same was required of plaintiff in making out a prima facie case. *Higley v. Gilmer*, supra. There was no error, therefore, in the trial court holding that the burden of proof was upon the defendant to establish contributory negligence on the part of the deceased.

Nor was there any error in excluding evidence as to the deceased having made a practice of jumping on the train while in motion. Upon this we cite, with approval, the language of the supreme court of Pennsylvania, in the case of *Baker v. Irish*, 172 Pa. St. 531, 33 Atl. 558. The court said: "Defendant proposed to prove that Baker had made a practice of jumping from the elevator while in motion. \* \* \* What Baker had done before would warrant no inference, or one so remote, that he had done the same on the day of the accident, that the evidence was inadmissible."

Again, the trial court committed no error in allowing evidence as to the space between the cars and the track. It had been stated by a witness that he had found the wounded man between the rails of the track. This evidence, tending, as it did, to establish that it was a physical impossibility for the man to have been between the cars and the track without being more crushed, was clearly admissible in rebuttal. This follows as a corollary of the proposition that the burden of proof as to the alleged contributory negligence was upon the defendant.

We find no error in the admission of the sworn and subscribed testimony of a witness before the coroner's jury in order to contradict him. The main ground of defendant's objection was that it did not appear whether all the testimony given by the witness before the coroner had been taken down. In the absence of any showing to the contrary, it should be presumed that it had been.

Instruction No. 8, requested by defendant, was properly refused. As appellant contends, no rules of the railroad company which defendant claims to have been violated had been introduced in evidence. Instruction No. 15, requested by the defendant, was also properly refused. It was too sweeping in its terms.

In the exclusion of the probate order and receipt of compromise, however, we are satisfied the lower court erred, and that it was on this ground alone the district judge granted a new trial. The authorities are to the effect that an administrator has authority to compound or compromise with a debtor of his decedent, when it is to the interest of the estate, irrespective of any statutory power conferred upon him. See *Jeffries v. Insurance Co.*, 110 U. S. 305, 4 Sup. Ct. 8; *Moulton v. Holmes*, 57 Cal. 337. Whether this be the law of Montana, where, judging from the general tenor of the probate acts, the legislature seems to have intended to expressly define the duties and powers of executors and administrators, it is unnecessary to determine, because section 232, Prob. Prac. Act, Comp. St. 1887 (section 2737, Code Civ. Proc. 1895), expressly confers this power upon administrators. It is as follows: "Whenever a debtor of a decedent is unable to pay all his debts, the executor or administrator, with the approbation of the probate court or judge may compound with him and give him a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just and for the best interest of the estate."

Appellant urges that section 232 aforesaid contemplates that the approbation of the probate judge or court must be obtained to a compromise upon terms which have been definitely ascertained by the administrator and presented for approval. We cannot agree with this construction of the statute. In the order before us it appears that, after the determination of the necessity for a compromise under the statutes authorizing it, the judge directed the administrator to settle upon the best terms he could obtain. This was equivalent to giving his approbation to a definite agreement for a compromise. So far as this record discloses, no evidence having been introduced in regard to plaintiff's charge in the replication that the compromise between the public administrator, Pascoe, and defendant was the result of bad faith, the presumption is that both the public administrator and the



probate judge discharged their duties to the dead man's estate, in the matter of the alleged compromise, as honest and careful officers should. Unassailed, and considered by itself, the presumption attaching to this order would be that, before signing it, the probate judge was fully informed both as to the circumstances rendering a compromise proper and expedient under the law, and the proposed terms upon which the administrator intended to settle. The statutes in force prescribed no formal method in which the administrator should obtain the approbation of the court or judge to the compromise he contemplated, nor did they require any notice to be given of the application for it. Evidently what the law had mainly in view in such a case was that the administrator should consult with the probate judge, as a conservator of the estate of decedents, and obtain his assent as such to any compromise he proposed to make. The order might well have been more definite in its recitals, and have set forth carefully the facts upon which it was based, and the terms within which the judge's approbation was given to the proposed settlement. But while, no doubt, this order is open to criticism for informality, we nevertheless cannot hold it invalid.

Appellant claims there is a distinction between a compromise effected by a public administrator and one brought about through an administrator appointed to take charge generally of the affairs of an estate. Under section 350, Prob. Prac. Act, Comp. St. 1887 (section 4523, Pol. Code 1895), the public administrator had the same powers as administrators and executors. Section 350 is as follows: "When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provision of the preceding chapters of this title must govern." Entertaining this view of the law, we are of opinion that the order, and, as a necessary consequence, the receipt, should have been admitted in evidence on the trial. The order appealed from is affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(9 Colo. A. 103)

DENVER & R. G. R. CO. v. PRIEST.

(Court of Appeals of Colorado. Jan. 11, 1897.)

RAILROADS—INJURY TO STOCK—NEGLECT.

Evidence that plaintiff's stock went upon defendant's inclosed track, in the night, through a gate which had been left open without defendant's fault, and were killed by a train running at ordinary speed, and that the shortest distance in which such a train could be stopped was 450 feet,—the utmost limit at which the headlight would show obstructions,—did not show negligence on defendant's part.

Appeal from district court, Fremont county.

Action by James M. Priest against the

Denver & Rio Grande Railroad Company to recover for the killing of stock. From a judgment for plaintiff, defendant appeals. Reversed.

Wolcott & Valle and W. W. Field, for appellant. Joseph H. Maupin, for appellee.

REED, P. J. This suit was brought to recover the value of two male asses killed by the engine of appellant. The animals were killed in a gorge or cañon a short distance—a mile and a half or two miles—up the river above Cañon City. At that point the road is on the north side of the river. The trackway was cut out of the mountain, which for some distance rises almost perpendicularly to a great height, and forms a barrier on the north side over which stock seldom, if ever, pass. On the south side of the track the distance to the river was but a few feet, and was built up by the material blasted from the cliffs to make the roadbed. For some distance, commencing at a point below, there was a wire fence, which continued up to and by the point where the animals were killed. At a point some distance below there was a fence of the same character on the north side, which continued up to the point from which the cliffs were considered impassable, and then connected with the face of the cliff. At the lower end of the inclosed track there was a gate, made and used for the convenience of others, but not used by appellant. The testimony shows that appellant's employes were required to keep the gate closed, which they did, observing it closely, and closing it when found open. On the night in question the gate had been left open. The asses, straying about, entered it, strayed up the track one-half or three-quarters of a mile, and at 1:30 in the morning were struck, and both killed. In regard to the facts stated, there is no controversy. Damages were laid at \$400. A trial was had to a jury. At the close of plaintiff's testimony, defendant moved for a nonsuit, which was denied, and an exception taken. There was a verdict for plaintiff for \$175, and judgment upon the verdict.

The contention of appellee was that the engineer should, under the circumstances, have seen them, and stopped, and that a failure to do so was negligence, for which appellant was responsible. The asses clearly had no business at the point where they were killed, and the negligence in leaving the gate open so as to allow an entry was not that of appellant. Another suggestion may be pertinent: The roadway was supposed by the engineer to be inclosed, and stock thought to be excluded, and seldom, if ever, found there. The engineer would not, nor would he ever be expected to, exercise the same vigilance in regard to stock as at points where their presence might be expected. The only question of negligence was whether, under the conditions and cir-

cumstances, negligence could be predicated upon the fact of the killing. The train was running at ordinary speed. The road was crooked, and a curve occurred at the point where the killing was done. The gorge was dark, from its narrowness and the overhanging cliffs. The only light that would disclose the presence of the animals was the headlight of the engine. The evidence of the different witnesses shows that under favorable circumstances, and on a straight track, objects the size of the asses could be seen from 300 to 450 feet. It was also shown that in going around a curve the light would be projected directly ahead of the engine, and not upon the arc of the track. How far the efficiency of the light was affected by the curvature at the point is not shown. The train was about 450 feet long, and witnesses supposed to have practical knowledge and experience testified that the shortest practical distance in which a train could be stopped, running at that speed, would be the length of the train, 450 feet,—the utmost limit at which, under the most favorable circumstances, the headlight would show obstructions. The evidence shows the train to have been stopped, but at what point, with reference to the animals, and whether as quickly as possible after they were killed, is not shown. All the authorities agree that, where negligence is alleged as the basis of recovery, the onus of proof establishing the negligence is upon the plaintiff, and it, like any other substantive fact, must be clearly established. A jury cannot base a verdict upon conjecture and inference, nor upon the theory that the bare fact of the killing is sufficient. Not only was there no proof of negligence, but the presumption was rebutted by the evidence and circumstances. Proof of the killing of an animal by an engine is only the proof of the result from the collision; but, to establish negligence, it must be shown that the circumstances were such that the collision and consequent injury might have been avoided. See *Thornt. R. R. Fences*, § 326, and the numerous authorities cited in note 1. That the burden of proof of negligence was upon the plaintiff, see *Id.* § 325, and authorities cited in note 5; *Shear. & R. Neg.* § 13.

A careful examination of the instructions shows them full and unobjectionable. The verdict was against the evidence and the instructions. The court should have granted a nonsuit, or set the verdict aside and granted a new trial. There was no proof of negligence warranting a verdict. It is evident from the record that the jury disregarded the great preponderance of evidence, and the instructions of the court. The verdict appears to have been the result of bias and prejudice, and based upon the single fact that the asses were killed by the engine of appellant. The judgment will be reversed, and the cause remanded. Reversed.

(9 Colo. A. 34)

## DENVER &amp; R. G. R. CO. v. NYE.

(Court of Appeals of Colorado. Jan. 11, 1897.)

INJURY TO ANIMALS ON TRACK—NEGLIGENCE—QUESTION FOR JURY—DEFENSE—INSTRUCTIONS—DAMAGES—TRIAL—REMARKS OF COUNSEL.

1. Where a locomotive engineer, on seeing several horses on the fenced right of way, unsuccessfully attempts to get by them without exciting them, and does not sound the whistle, etc., or "slow down," so as to get his train under control, the question of negligence is for the jury.

2. Where animals on a right of way are seen by an engineer a long time before reaching them, and struck by his engine, it is no defense that the right of way was inclosed by a lawful fence.

3. Where improper remarks to the jury, in the argument of counsel, are stopped by the court as soon as its attention is called to them, error cannot be predicated thereon.

4. As defendant knew the stock was on the track, it was its duty to exercise ordinary care to prevent injury; and if defendant was negligent, and such negligence was the proximate cause of the damage to the horses, which a reasonably prudent person ought to have apprehended, plaintiff was entitled to recover.

5. For injury by a locomotive, the amount of recovery was the difference between the value of the stock just before injury and the value thereafter; but for injury caused by running into the fence, or in any other way than being struck by the engine or train, though caused by fright, defendant was not liable.

6. It was not an abuse of discretion to refuse five special interrogatories, where the answers to the first three questions were necessarily embraced in the general verdict, and answers to the other two, if given, would have been of no legal importance.

Appeal from district court, Montrose county.

Action by S. W. Nye against the Denver & Rio Grande Railroad Company to recover damages for horses killed or injured on defendant's right of way. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Appellee brought suit to recover the value of two horses alleged to have been killed, or so injured as to necessitate the killing of them by an engine on the road of appellant. The value was alleged to have been \$250. The killing was charged with being by the negligence of the company in operating the engine. Defendant answered, denying the allegations of the complaint, and for a second defense pleaded the following: "That plaintiff negligently permitted the horses in said complaint mentioned to run and be upon the right of way of defendant, and knowingly allowed them to remain thereon, and on defendant's track, at such a point and in such a way that defendant's servant, in the running and management of its locomotive and cars, could not, by the exercise of due care, have prevented such injury, and that such injury complained of was caused by and through such negligent acts of plaintiff, and while the defendant was in the exercise of due care in the operation of its locomotive and cars." There was a further special defense, which was stricken out upon demurrer. An exception was taken to the judgment

of the court. Trial was had to a jury. Verdict and judgment for the plaintiff for \$250.

Wolcott & Valle and W. W. Field, for appellant. Black & Catlin, for appellee.

REED, P. J. (after stating the facts). There was no conflict of testimony in regard to the value of the animals; nor was there any in regard to the injuries having been inflicted by the engine. It is shown that the injury occurred at a point where the road for some distance was inclosed by a substantial wire fence. At a point one-fourth of a mile from where the collision occurred there was an opening or gate that had been left open. Through this opening, the herd of horses, 8 or 10 in number, entered from the common or range, and were grazing on the inclosed right of way of appellant. The circumstances attending the accident can be better understood from the evidence of Mr. Trusdale for appellee, and Mr. Layton, the engineer, sworn for appellant. The evidence of the former was: "I was, perhaps, four or five hundred yards from the railroad. The train was coming south or up the road, and I noticed some horses on the railroad. I don't remember how many. I never counted them, but I saw the horses on the road; heard the engine whistle some distance below, not at the horses, but before they came into the switch. I looked up, and I saw the horses on the track, or right close to it; and I stopped right where I was, and watched them, to see how the train would get through them. I supposed there might be a chance for an accident. The train came along up the road. They were not running at any very great rate of speed, or I didn't think they was. They didn't whistle when they came anywhere near where the horses were. The horses didn't appear to be frightened; kept eating along and walking along the side of the road, or on the road, until the train got almost among them, and all at once they got excited, and started to run, some across the road and on the road. They run across. They seemed to be on the east side, or northeast side, rather of the track, and they crossed the road to the west or south-west side, I believe it is; and afterwards only two of them seemed to be hurt to amount to anything, a gray horse and a bay mare; and, after the train passed through among them, they didn't whistle, ring the bell, or anything. I supposed they were trying to slip through among the horses quietly as possible, not to create any excitement. After they got through among the horses, I seen some of them were hurt pretty badly, limped, and we had some horses of our own out, and I went out to see whose horses they were. I didn't know whose horses they were when I got there, but found two of them to be considerably hurt. Some of them run through the wire fence, and were scratched up a little, but not much hurt." Mr. Layton,

the engineer, testified: "I was coming east on No. 6, engine No. 175, passenger train; and, as I got in sight of Menoken, I saw some horses inside the fence; saw them a good long ways. I supposed that, if I would keep still, I could pass by them without causing them to get on the track. So I run up without making any noise of any kind, only the natural noise of the engine and train, thinking I could slip by them; but, before I got to them, they started to run this way,—east we call it. Then I didn't like to ease up, as I thought, if I did, possibly they would get ahead of me, and try to cross over. So I thought that I would try to go a little faster to head them off,—that is, to beat their speed; but, before I got quite to the horses, they took a sudden notion they wanted to cross the track, and then I didn't have time to do anything only try to stop, as there's a little bridge ahead, and I knew I was going to get them into the bridge. I applied the brakes, and I think I reversed the engine, and about that time the accident was over. I reversed the engine again, put off the brakes, and went on. I struck the horses near the bridge. They were not on the track when I first saw them. They were close to the fence. I don't know how far the fence is. It is quite a distance from the track. Sometimes it is close to the track, and sometimes further, but it is a good ways. I couldn't tell; probably a hundred feet, may be more or less. I didn't notice what they were doing. I saw them there, and my object was to let them stay there if possible, and go by them. I got in a hundred feet of them, possibly, before they started to run. This bridge was probably a hundred yards from the end of the switch where the fence crosses the east end. It was my object to slip by them without disturbing them. When they started, they run east or south along the line of the fence, close to the fence as far as I could see, until the engine obstructed my view. It would obstruct my view when I got the engine between me and the horses. The fireman, I think, told me, 'Look at them; they are going to cross.' And I then tried to stop, as I was afraid to get them in the bridge, as it would probably cause a wreck or something else. I didn't want to hit them in the bridge, nor anywhere else. I know I tried to stop. They crossed over until they got to the fence on the other side, and then ran up along that fence until the fence turned them into the cattle guard this way, and I expected possibly they were so excited they would run into the cattle guard; and I had the train under full control, expecting them to do so, but they didn't. They run up to the guard, and turned, and jumped the fence. There were six or eight of them. Q. Did you notice how many of them, if any, were hurt? A. Yes; there was one I reported left on the track; knocked it down, and left it there. It was a bay. I couldn't tell much about it. I don't remember anything of any gray

knocked down there. The only thing I know of was the bay animal. There was a gray that got fastened on the fence, and I was by some time before he got loose. I couldn't tell just how he got fastened. I don't know anything about it. I saw the horses try to jump over, and they all did get over pretty well but this one, and he got fastened. He got very near through, and got in here, and hung there for some time. They jumped the fence on the right side. They were on my left coming this way when I first saw them. After they started to cross the track, it wasn't possible for me to stop the train. The fill, where I first saw them, was about two feet. That would be my judgment. I might possibly exceed that a little. I don't know." And upon cross-examination: "When I first saw the horses, I was very nearly three-quarters of a mile from them. I was running about thirty miles an hour at the time I entered the switch. After I saw the horses begin to run, I increased my speed. They were possibly a hundred feet ahead of me when they began to run. They were over a quarter of a mile from the north end of the switch when they began to run; probably a hundred yards from the east end. They were at the fence to my left, one hundred feet ahead of the engine."

There having been no conflict in the evidence in regard to the facts and circumstances of the accident, we are relieved of the necessity of discussing it. The question of negligence was one of fact, to be determined by the jury. The finding was against appellant. Whether the course pursued by the engineer was prudent or reckless can only be determined by those more familiar with the management of trains than I am. The testimony of the engineer clearly shows an admitted error in judgment. The view was not obstructed. He saw the horses three-fourths of a mile, which were known to be within the fences on either side. What under the circumstances a band of horses would do could not be anticipated. Not knowing what they would do, it seems that common prudence would require that, in any attempt to pass them, the train should be "slowed down," and under perfect control, so it could at once be stopped in case the horses should attempt, as they did, to cross ahead of the engine. The evidence shows such lack of control, that, after the horses got upon the track, they ran for some distance in advance, until a bridge was encountered, before the collision occurred. Showing that the train was not so handled as to render the accident unavoidable. Whether through error of judgment or recklessness, the result was the same, and it was fortunate that there was not a loss of human, as well as animal, life. The conditions were such that the engineer should not have tried an experiment.

The defense of the right of way being fenced with a lawful fence was properly rejected. Whether rightfully or wrongfully

there, they were there, seen by the engineer a long distance, and it was his duty, so far as was possible, to prevent a collision or injury. Hence proof in regard to a right of way, fenced with strong fences, would have presented no defense.

It is assigned as error that the court permitted plaintiff's attorney, in his argument to the jury, to make improper and irrelevant statements and arguments, for the purpose of prejudicing the jury against the defendant. What occurred in this respect was as follows: "Counsel for defendant excepts to counsel for the plaintiff stating in his argument to the jury that the defendant expects nothing before this jury, but are proceeding with the case, as is their practice, with a view of taking the case to a higher court. The Court: 'What was done in reference to other cases is not proper, but counsel may comment upon the course of the defendant in this case.' Counsel for defendant excepts to the ruling of the court, and asks that the record contain the statements of counsel, the statements referred to being in substance as follows: By Mr. Black: 'The defendant can have but one object, and that is to annoy and harass this plaintiff, and make the prosecution of this case so expensive that the very idea will defeat him, overwhelm him, subdue him, drive him home, and compel him to suffer any injury rather than come into court and ask for damages. They don't expect anything in this case before this jury. They have simply laid the foundation to take the case to a higher court, where, with the aid of a fifty thousand dollar library, and the counsel of the United States senator, they may defeat justice.'" It appears that the language used by the attorney preceded the very proper ruling and caution of the court, and that line of argument appears to have stopped there. The practice in such cases is well settled. Considerable latitude within the limits of the case is allowed an attorney. When he oversteps the line of professional practice, and drags in extraneous matter for the purpose of creating prejudice, or in any way exceeds professional limits, and the opposing counsel objects, it becomes the duty of the court to stop it. If he fails to do so, and the objectionable argument is continued, it is error. As shown by the bill of exceptions, it was stopped as soon as the court's attention was called to it. Consequently, no error could be predicated upon it.

The instructions given, five in number, including the one as to the form of a verdict, were each excepted to, and errors assigned. The first two were in regard to facts about which there was no controversy. The third and fourth were important as to the questions of negligence and liability. I give them in full: "You are therefore instructed that the first and principal question for you to determine is whether or not the defendant company, through its servants operating said locomotive, so negligently managed and

operated the same and the train of cars attached thereto that the said horses were run into and against thereby; for inasmuch as the defendant company was duly apprised of the proximity of said stock to the track, where its said locomotive and train would pass, it was its duty to exercise reasonable and ordinary care, skill, and diligence to prevent the same running into and against said horses. In law, negligence is defined to be the want of that care and prudence which a person of ordinary intelligence would exercise under all the circumstances of the case; so that, if you should find and believe from the evidence that the defendant company was guilty of negligence in the operation of its said locomotive and train, that the damage to said horses, by running against the same, was the natural, ordinary result of such negligence, and the proximate cause of the injury to said animals by said locomotive striking them as aforesaid, which a reasonable, prudent, and cautious person ought to have apprehended would result from so running and operating said locomotive and train, then plaintiff would be entitled to recover; otherwise, not. In establishing these facts, the burden of proof rests with the plaintiff to prove the same by a preponderance of the evidence in the case." Excepted to by defendant. "(4) In the event you find the plaintiff entitled to recover, then you are instructed that the amount of such recovery would be the difference between the reasonable value of said horses just prior to the injury and the value thereof as injured; and on this question of damages you are further instructed that the burden of proof rests with the plaintiff to establish the amount of said damages by a preponderance of evidence in the case, and likewise establish that said horses were injured by said locomotive or train running against or upon the same. For any injury to said stock caused by running against, into, or attempting to jump, the fence along said right of way, or injury in any way caused other than being run into or against by said locomotive or train, though caused by fright at the speed or noise thereof, or the escape of steam or smoke from said locomotive, and the noise occasioned thereby, defendant would not be responsible for, no matter in what manner it might have been operating its locomotive and train aforesaid." They are full, carefully worded, and seem to fairly state the law of the case. I do not see that they are in any way open to criticism. The following instruction was given upon the request of the defendant: "You are further instructed on the question of negligence that if you believe from the evidence that the engineman running the engine in question saw said horses while several hundred yards away and used his best judgment to get by said horses without frightening them, and that, after they became so frightened, he used his best

47 P.—42

judgment in operating his train or engine so as to avoid any injury or damage, and to avoid striking said horses, and that his judgment and acts were such as would have been employed by a reasonable, prudent man and engineman under like circumstances, and that, notwithstanding this, said stock was struck and injured, still such acts of said engineman would not constitute such negligence as to render defendant liable herein." The instructions given are as favorable to the defendant as the facts established would warrant.

The instructions offered by the defendant were refused, exceptions taken, and errors assigned. The same, in effect, had been given. Those offered only elaborated the propositions previously plainly stated, and were very properly refused.

Five questions were propounded by defendant's counsel for special findings by the jury, and refused by the court. Such refusal is assigned for error. It was a matter in the discretion of the court, and the exercise of such discretion is not subject to review, unless there was an evident and apparent abuse of it. The refusal of the court was warranted. The three first questions were: (1) Was there negligence? (2) If so, in what did it consist? (3) Was the gray horse injured by a collision with the engine, or by the wire fence? It will at once be seen that, without a determination of these questions by the jury, upon the instructions of the court no verdict could have been found. They were the factors, and the only ones; and the answer was, of necessity, embraced in the general verdict. The answers to the other two, if given, would have been of no legal importance. They were whether the horses' legs were broken, etc. Both might have been answered in the negative, and yet not influence the general finding. We find no serious error, and the judgment of the district court will be affirmed. Affirmed.

(9 Colo. App. 86)

DENVER & R. G. R. CO. v. PILGRIM.

(Court of Appeals of Colorado. Jan. 11, 1897.)

CARRIERS—RAILROADS—NEGLIGENCE—PROXIMATE CAUSE—INSTRUCTIONS—SPECIAL QUESTIONS.

1. There being a snowstorm in the mountains over which a passenger train was about to pass, it was not negligent for the company, in order that schedule time might be kept, to make up the train with a snowplow ahead, and a flanger behind the leading locomotive and between said locomotive and the two locomotives which were the real motive power of the train proper.

2. The fact that a train was improperly made up does not justify a recovery by a passenger thereon for injuries received in a derailment which resulted wholly from a totally independent cause.

3. A company operating a railroad over mountains was not negligent in running a train during a severe snowstorm, and hence was not liable to a passenger injured by the train's derailment by a snowslide; such an accident never before having occurred at the same point,

and there having been no reason to anticipate one.

4. Where a passenger charged negligence in operating the train by the derailment of which he was injured, and there was evidence that the company improperly made up the train, but there was no evidence whatever that the derailment resulted from that fact, it was not harmless error to instruct that, if the train was derailed because of negligence in making it up, plaintiff should recover.

5. The putting to the jury of a specific interrogatory is in the discretion of the trial court.

Appeal from district court, Arapahoe county.

Action by Christopher A. Pilgrim against the Denver & Rio Grande Railroad Company to recover damages for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

Wolcott & Vaile and Henry F. May, for appellant. Caypless & Brown, for appellee.

BISSELL, J. In the winter of 1892 and 1893, Pilgrim was a Pullman car porter, working on a sleeper attached to a train running between Alamosa and Denver. One day in February the train to which this sleeper was attached reached Antonito, and left there on its way for the trip. From Antonito, for about 40 miles, the Rio Grande Railroad follows an up grade through the mountains, until it reaches the divide at the top of the range. On that day Cole Lydon, the superintendent of the Fourth division of the road, was on the train, in the discharge of his duties. Before leaving Antonito he had been advised by some of the operators of a snowstorm in the mountains, and he arranged the train for the purpose of making time, and to overcome the difficulties which would result from the storm. The way in which the train was made up will be stated, though this is not deemed of very vital consequence. A good deal of stress was laid at the trial on this fact, and it is much discussed in the briefs, and might possibly have had a good deal of influence with the jury. As we read the case, however, it was not a pivotal question, and it is only referred to because an instruction based on it lacked some limitations which were requisite and important. There was an engine with a snowplow at the head of the train; behind this was a flanger; and thereafter came two engines. The air controlling the brakes on the train was connected with the one in the rear. Behind the locomotives there was a baggage car, coach, the sleeper in question, and a caboose, on which the superintendent was riding, and wherein were carried laborers to aid in a case of emergency. There was some testimony offered which tended to show that the use of a flanger between the forward locomotive and those attached for hauling purposes was a dangerous method of coupling a train, since the purpose of the flanger was to cut the snow out between the tracks, and running, as it necessarily must, for this pur-

pose, very close to the rails, was in danger of catching obstructions and causing accidents. The superintendent, however, and the engineers and conductors connected with the train, assert its frequent use in this manner, and its safety and propriety. The plaintiff produced rules of the company in which directions were given with reference to the severance of a train into sections under some circumstances, and which, according to the testimony of the superintendent, could not well be done in a snowstorm. This is likewise of little consequence, but it is stated because some reliance is placed on this fact in the argument. After the train left Antonito it struck snow 22 or 23 miles before it reached the point of the accident, which was near what is called the "Farrow Cut." Just at that cut there is a very sharp curve, of about  $1\frac{1}{2}$  per cent., and the grade of the road at this point is about 75 feet to the mile. The plaintiff, in his complaint, charged that the accident was occasioned by the negligence of the company in running and operating its train, and charged that the accident happened in the cut which was on this curve. The plaintiff's theory was that the accident was occasioned because the train was made up in this particular manner, and run over this curve, and through the cut filled with snow, and that by reason of such combination of circumstances the cars were forced from the track. There is no question that the cars left the track, went down the embankment, and that the porter was carried with the sleeper to the bottom, was quite severely cut about the hip, and suffered some loss of time and injury. The company does not question the amount of the judgment, or the extent of the recovery in case the judgment should be affirmed. On the conclusion of the plaintiff's case, as well as after the testimony was all in, the company requested the court to charge the jury to find for the defendant, and asked several instructions which were refused, and gave others to which exceptions were taken. In discussing the case we will group the errors, rather than discuss each, and state generally the reasons which influence us to reverse the judgment.

The appellee insists that his position on the train, as a porter in the Pullman car, in the employ of the Pullman Company, took him out of the class known as "fellow servants," and that he may recover his damages even though it should appear that the accident was occasioned by the negligence of those engaged in operating the train. It has been decided in this and other jurisdictions (*Railway Co. v. Kelley*, 4 Colo. App. 325, 35 Pac. 923) that an express messenger who runs on a train, looking after the business of the express company, under contract between the express company and the railroad, is not a fellow servant, and that none of the principles which control actions by fellow servants are operative. The appellee,

of course, insists that, as a Pullman porter, he is brought into the same relations with the railroad company, and may recover on proof of the happening of an accident, like a passenger, who, by making this proof, thereby casts the burden on the railroad company to show care and due caution in the management and operation of their trains. This is probably a debatable question, because of the relationship which the porter sustains to the passengers traveling, although the precise point has been adjudicated in favor of the porter in another state. We do not intend to decide this question. It may be conceded, for the purposes of this opinion, that the porter was a passenger, showed an accident, the extent of the injury, and amount of his damages, and he might recover on this proof unless there was evidence exculpating the company. This we assume. There was no evidence tending to show that the railroad company was at all negligent in the management or operation of its train. There was no evidence that the accident resulted from the company's negligence. On the other hand, there was precise and definite proof that the accident did not result from the company's negligence, but from circumstances over which it had no control. According to the proof, the train struck the storm very shortly after leaving Antonito, and ran in and through it for some miles while they were climbing up the mountain. When they got to a point near the Farrow Cut, snow had fallen to the depth of nearly three feet. It was a severe storm, as was evidenced by the fact that it was necessary to use a snowplow and flanger in order to clear the way. It cannot be held negligent for a railroad company to organize and arrange its train for the purpose of pushing it up the mountain, and over the grade and through the snow, to make its regular time and connections, so long as due regard is had to the situation and the circumstances under which it is done.

We must recur again to the evidence offered with reference to the running of a train with a snowplow ahead and a flanger behind, and between the leading locomotive and those which are the real motive power of the train itself. While we concede that there was some evidence tending to show that this was a dangerous method in which to run a train, there was absolutely none that the accident came from this irregular construction. Under these circumstances, we do not understand that a cause of action necessarily comes to a plaintiff who may prove that a train is improperly made up, unless this is followed by other evidence which shall likewise demonstrate that those circumstances either had, or might have had, something to do with the accident. In this case there was a total want of such supporting testimony. The train had not reached the cut nor the curve at which the plaintiff alleges

the accident happened; nor was it derailed because it was made up in this way, and running over the curve and through the cut. The train was on a straight piece of track which lay between the curve and Antonito, and was running at its usual schedule rate of about 18 miles an hour. But for some very clear and persuasive evidence given on the subject, we might be unable to discover the cause, and might then agree with counsel for the appellee that if the cause was unexplained, and the jury should be convinced that the train was improperly made up, the verdict might be sustained. This, however, clearly demonstrates that the train was pushed off the track by a snowslide which came down the mountain. A snowslide had never been known at that point before, nor has one ever been heard of since, according to the record. To run a train made up in this way over that particular part of the road, and under the specified circumstances, is not, therefore, necessarily negligent; nor are we at all clear that the company could be adjudged negligent to attempt to run its train in a snowstorm up this grade, and over the divide. If this should be held, it would practically result in forcing a railroad company to cease the operation of its trains in snowstorms, and over the mountains, through the greater part of the winter. The court and everybody else knows that every winter all roads running through the mountains must operate their trains in snowstorms, and they must make their connections in order to carry on their business, and they must arrange their trains for the purpose of furnishing force and power to meet the obstruction which the snow occasions. Of course, if it happens that a case is developed which demonstrates that the method by which the train was operated was a negligent one, tending to produce the accident complained of, the company would be held responsible. This is not such a case. The company had no reason to anticipate a slide at that point, nor is there anything in the record to show that the train was being operated in a negligent or dangerous way, which contributed to the injury. All the evidence tends in a contrary direction. The snowslide came, struck the train, and pushed the cars off the track and down the hill. Whether, on the subsequent trial of the case, the plaintiff will be able to show that the method of operation had anything whatever to do with the accident, we are unable to say. On the case as it stands, he showed no negligence on the part of the company, but, on the other hand, the company proved due care, and offered evidence which tended to show that the accident was occasioned by a circumstance over which they had no control, and which their antecedent experience neither led them to expect nor obligated them to anticipate. Under these circumstances, we regard the third instruction given by the court, with reference to the formation of the train,

as prejudicial to the company, and one which ought not to have been given without other limitations and qualifications. It seems to us that the situation of the case did not authorize the court to tell the jury that if they found that the train was made up in violation of its own rules, and in a negligent and dangerous manner, and by reason of this fact the cars were thrown off the track, they might find for the plaintiff, because there was nothing in the case to show this to be true. What the plaintiff proved, the evidence which the defendant offered, either or both together, wholly failed to warrant a finding that the accident resulted from the way in which the train was made up. If this be so, such an instruction, of necessity, operated to the prejudice of the defendant, because, if the jury should find from the testimony that the train was made up in violation of its rules, they would very readily conclude that this might have had something to do with it. Courts all thoroughly understand the tendency of juries in cases of this description, and nisi prius judges are bound to carefully limit and guard any instructions so as to protect the rights of the plaintiff as well as guard the interests of the defendant. An instruction which is based on a hypothesis which the case does not warrant must necessarily be prejudicial, so long as there is evidence in the case to which it might be applied, although it may not be evidence which warranted it.

Some complaint is made of an instruction which the court gave wherein it attempted to show the distinction between testimony and evidence. It is possible this instruction is justified by some lexicographer, and possibly by intimations in some adjudications. It is, however, far too refined for us, and we are unable to see its significance or its applicability. It was wholly unimportant, and in no manner tended to enlighten the jury, and was probably perfectly harmless, and the case would not be reversed on that ground. Our suggestions are made in deference to counsel's argument, rather than because of the importance of the inquiry.

Before the case went to the jury, the company asked the court to put an interrogatory with reference to the cause of the derailment of the train, and the rolling of the cars down the embankment. We do not understand that the refusal to put a specific interrogatory can be assigned as error. Possibly, the court might have put the question, and asked a specific answer, and the party could not have complained if the answer had been against him. These matters are so largely in the discretion of the court that a case is never disturbed because of what the court may have done. It would have been a very satisfactory inquiry, and the special finding of the jury thereon would probably have been controlling in determining the question whether the accident came from the negligence of the company, or under circum-

stances which would be an absolute excuse if proven. We confess that we should have been very glad if this fact had been directly determined by special verdict. If it had been found with the railroad company, it would be a perfect basis on which to rest this decision, which is simply our conclusion on the evidence, without any direct knowledge of what the opinion of the jurors may have been regarding this particular fact.

It may seem rather hard to disturb so small a verdict in favor of one who was injured, and, if the plaintiff's case had been sustained by any testimony which seemed to warrant a recovery, we might have found a way to affirm the judgment. Since the record is barren of evidence supporting it, we cannot do otherwise than reverse it, even though we subject the plaintiff to the expense of another trial. The judgment will be reversed. Reversed.

(9 Colo. App. 245)

### SANBORN v. FIRST NAT. BANK OF GREELEY.

(Court of Appeals of Colorado. Jan. 11, 1897.)

LANDLORD AND TENANT—ASSIGNMENT OF REVERSION—APPURENTANCES.

There being competition for several locations offered for a post office, persons occupying property adjacent to its then present location, who wished it to remain there, agreed to pay a certain sum annually to the owner of the premises which it occupied, or his assigns, in consideration that he would lease the premises to the government for a term of five years at an inadequate rental. *Held*, that the agreement did not create the relation of landlord and tenant; hence the right to receive payments under it was not appurtenant to the land, and accordingly did not pass by a conveyance of the premises.

Appeal from district court, Weld county. Action by Burton D. Sanborn, assignee of Samuel D. Hunter, insolvent, against the First National Bank of Greeley. From a judgment for defendant, plaintiff brings error. Reversed.

H. N. Haynes, for plaintiff in error. Charles D. Todd and James W. McCreery, for defendant in error.

THOMSON, J. The plaintiff in error brought suit against the defendant in error upon the following contract:

"Greeley, Colo., Jan. 1st, 1889.

"We, the undersigned, agree to pay each the sum set opposite his name, or such proportion thereof as is necessary, yearly, in advance, to Samuel D. Hunter, or his assigns, in consideration that said Hunter and assigns give a lease to the United States government of the room now occupied by the post office in Park Place, Greeley, for the use of the post office, for the term of five years, at a lower rate of rent than at adequate compensation for said premises, to the end that the post office in Greeley may



be kept in its present location, for the better accommodation of its patrons.

"First National Bank, by J. M. Wallace, Pres..... \$200."

The complaint alleges that other interested parties signed the agreement, subscribing different amounts, and that the total subscription aggregated \$435 per annum; that, to meet the active competition for the location of the post office, Hunter was obliged to rent the room to the United States for \$600 per year, whereas its rental value was \$1,200 per year, and that he effected a lease to the United States at an annual rental of \$600 for five years; that, by virtue of the lease, the post office remained on the premises for the full term of five years; that the defendant made payments on its subscription, aggregating \$400, but refused any further payment; and that, on the 26th day of December, 1890, Hunter made a general assignment of all his property for the benefit of his creditors to the plaintiff, Burton D. Sanborn, who duly qualified as assignee, and has ever since been acting as such. The answer denies that the rent reserved in the lease to the United States was not an adequate compensation. Alleges that the amount paid by the bank to Hunter was \$490, and that, prior to January 1, 1890, Hunter sold and conveyed the premises to one Warren Currier, and indorsed on the lease an assignment to Currier of all his right, title, and interest in the lease, to take effect on that day. The answer further alleges that, on July 1, 1891, on the written request of Currier and Hunter, the postmaster, Rudolph H. Johns, attorned to Currier, and agreed to pay the rent thereafter to him. The defendant moved to strike out all that portion of the answer relating to the assignment of the lease by Hunter to Currier, and to the attornment of the postmaster to Currier, as irrelevant and immaterial. The motion was overruled, and the plaintiff replied at some length, setting up a variety of matters in connection with the transfer to Currier, and the assignment of the lease, to which we do not feel called upon to give special attention. The judgment was for the defendant.

The contention is made on one side, and resisted on the other, that, by the transfer of the property and the assignment of the lease, the ownership of the contract passed from Hunter to Currier, and that whatever is due upon it is due to him. It is true, as a general proposition, that in the case of a lease for years a transfer of the land carries with it the rents accruing under the lease. Currier was entitled to the rent falling due from the United States after the conveyance to him, by virtue of his deed, and without a special assignment of the lease; but was the contract with the bank of such a character that he was also entitled to the several sums, as they became due, which the bank

agreed to pay? To determine this question we must look into the contract itself. Both parties agree that the meaning of the contract is that the bank should pay \$200 yearly, if that sum should be necessary, and, if it should not be necessary, then such portion of the amount as should be necessary, to make good to Hunter the loss he would sustain in consequence of being compelled to take less than the rental value of the premises in order to effect the lease. The uncontradicted evidence was that the yearly rental value of the premises was \$1,200. The annual rental reserved was \$600. The bank was therefore liable for the full amount of its subscription. The agreement was to pay the \$200 to Hunter or his assigns; and, were it not for what immediately follows, it might be said that the money was payable to Hunter while he remained the owner of the property, and afterwards to his grantee or grantees. But the expressed consideration of the agreement was that Hunter and his assigns should give the lease. The effect of the language is that the lease should be given by the owner of the property at the time the contract with the government should be completed, so that the property should be bound by the lease, to the end, as the instrument says, that the post office might be kept in its then location. The word "assigns," in the connection in which it is used, means any person or persons to whom the property might be transferred before the execution of the lease, and cannot refer to persons who might succeed to the title afterwards, because no lease from them would be necessary. They would be bound by the lease already existing. If Hunter should remain the owner, and make the lease, the money would be payable to him. But if, before the lease was made, Hunter should transfer the property, and his grantee should make the lease, then the money would be payable to the grantee. Hunter did make the lease while he had the full power to bind the property, and the money was therefore payable to him. No point, however, is made on the word "assigns" as it appears in the contract; the sole contention being that the right to receive the money was appurtenant to the land, and passed by the conveyance. We are unable to assent to the proposition. The contract created no relation resembling that of landlord and tenant between the parties. The subscribers acquired no interest or right in the premises. The money agreed to be paid was not payable as rent. The law of landlord and tenant had no applicability whatever to the transaction. Between landlord and tenant there is a privity of estate. The tenant holds by his landlord's title. Each owes to the other, so long as the relation of landlord and tenant exists, certain duties which are incident to that relation, and are the legal consequences of the privity of estate. It is in virtue of this privity that the rents fol-

low the reversion, and that the successor in title becomes the landlord. Tayl. Landl. & Ten. §§ 425, 436; Washb. Real Prop. marg. pp. 315, 337. The defendant, presumably having in view some benefit, direct or indirect, to be derived to itself from the retention of the post office in the location it then occupied, and in order to compensate Hunter for the disadvantageous lease he would, by reason of competition, be probably compelled to make in order to accomplish the purpose, agreed to pay him a sum of money, in yearly installments, on consideration that he would make the lease. The moment he executed the lease to the United States the contract was fully executed on his part, and the money which the bank agreed to pay became an indebtedness against it in his favor. The contract gave the bank no right in the premises, or interest in the lease. When Hunter made the lease he had, so far as the bank was concerned, nothing further to do. He owed it no further duty. The absence of privity of estate involved the absence of its consequences; and the transfer of the land, while it carried the accruing rents, which were the product of the land, did not carry a mere indebtedness, in an action for the recovery of which the land or its possession could not figure. The motion to strike "should have been sustained. The matter objected to was wholly irrelevant and immaterial. The evidence showed that the defendant was entitled to a credit of \$490, instead of \$400; but there was no evidence whatever which authorized the rendition of judgment in favor of the defendant. Upon the record the plaintiff was entitled to the full unpaid balance. The judgment must be reversed.

(9 Colo. App. 81)

TAYLOR et al. v. BLYTH.

(Court of Appeals of Colorado. Jan. 11, 1897.)

OFFICIAL BOND—ACTION—PARTIES.

Under Gen. St. §§ 2069, 2071, 2074 (providing that, in suits on constables' bonds, judgment shall be entered for the full penalty in favor of the people; that execution shall only issue for the amount found to be due; and that executions may, from time to time, be awarded for other breaches, etc.), but one action on such bond can be brought, which is maintainable only in the name of the people; the judgment recovered being for the benefit of all who are or may be interested in the enforcement of the bond.

Appeal from district court, Boulder county.

Action by Mary J. Blyth against William A. Taylor and others on a constable's bond. From a judgment for plaintiff, defendants appeal. Reversed.

O. F. A. Greene, for appellants. Adams & Adams, for appellee.

THOMSON, J. Mary J. Blyth brought suit in her own name upon the official bond of William A. Taylor, a constable of Boulder

county, for an alleged misfeasance in the discharge of his official duties. The defendants Clark and Giles were sureties on the bond. The bond is set forth in full in the complaint. It was conditioned according to law, and its penalty of \$2,000 was made payable to the people of the state of Colorado. The defendants demurred to the complaint, on the ground, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the case went to trial, with the result that final judgment was entered against the defendants for \$143.86. They come here by appeal.

The question for determination is, does the complaint show a cause of action in the plaintiff? In other words, can the plaintiff maintain, in her own name, an action upon a constable's official bond, in which the obligors bound themselves to pay the penalty of their obligation to the people of the state of Colorado? We must answer this question in the negative. This bond was in due statutory form. The statute provides that, in all cases of suits on constables' bonds, judgment shall be entered for the full penalty in favor of the people of the state of Colorado, but that execution shall only issue for the amount found to be due, with interest and costs; that, after judgment is obtained, executions may, from time to time, be awarded for other breaches of the conditions, upon proper proceedings instituted for the purpose; and that sureties shall not be liable in execution beyond the amount of the penalty. Gen. St. §§ 2069, 2071, 2074. It is evident from the language of the statute that there can be but one action on a constable's bond. Judgment in the action must be in favor of the people, and must be for the full amount of the penalty. The amount due to the party causing the institution of the suit must be ascertained, and execution awarded to him for that amount. If others are damaged by the misfeasance or nonfeasance of the officer, they may, by the institution of proceedings which the statute prescribes, procure executions on the same judgment for the amounts severally due them; and, after successive executions have exhausted the judgment, the sureties are discharged. The action is statutory, and, in its institution and all subsequent proceedings, the method provided by the statute must be pursued. It is maintainable only in the name of the people, and the judgment recovered is for the benefit, not only of the person on whose relation the suit is brought, but of all others who are or may become interested in the enforcement of the bond. The Code provision that every action shall be brought in the name of the real party in interest would not enable the plaintiff to maintain this suit in her own name. She is not the owner of the bond, and judgment for the amount of the penalty, which is the only judgment recoverable, could not be awarded in her favor. All she

can demand, if her claim is sustainable, is the payment of a small sum due to her on account of the constable's official misconduct. But the statute gives no action on the bond for that sum, and beyond that sum she is not interested. In a suit for the recovery of the penalty of the bond, she is not the real party in interest, within the meaning of the Code. See *Carmichael v. Moore*, 88 N. C. 29. It was error to overrule the demurrer, and the judgment must be reversed, with instruction to the court below to dismiss the case. Reversed.

(9 Colo. App. 249)

**TOWN OF COLORADO CITY v. TOWNSEND.**

(Court of Appeals of Colorado. Jan. 11, 1897.)

**PAROL EVIDENCE — CONSTRUCTION OF CONTRACT.**

1. Evidence of conversations and negotiations leading to the making of a written contract between the parties is inadmissible to add other terms and conditions thereto.

2. Evidence that, previous to the making of a written contract between plaintiff and defendant, the defendant was offered better terms by another, is inadmissible to prove that conditions additional to those required by the contract were to be performed by the plaintiff.

3. It is no defense to an action to recover from a town for electric lights furnished under a contract, which provided that it should not be assignable without the consent of the town, but did not bind the plaintiff to furnish the light from any particular source, that plaintiff has sold and removed his own plant, and has procured the light to be furnished from the plant of another company.

Appeal from district court, El Paso county.

Action by O. C. Townsend against the town of Colorado City on contract. Judgment for plaintiff, and defendant appeals. Affirmed.

On the 19th day of June, 1893, appellant and appellee made the following contract: "For and in consideration of the sum of thirteen dollars (\$13.00) per month for each arc light furnished to said party of the second part, the said party of the first part agrees to furnish lights, and to light the streets and parks of Colorado City by electricity, for the period of ten (10) years from the first day of October, 1893, with as many arc lights as said party of the second part shall require, not less than nineteen (19); said lights to be arc lights known as two thousand (2,000) candle-power lights, such as are furnished to the said party of the second part. Said party of the first part further agrees to furnish additional lights in excess of the number of nineteen (19) as the city council of the party of the second part may require and demand, and also agrees to locate and maintain the lights so furnished at such points and in such places as the second party may direct, but no new lights furnished as aforesaid shall be located at a greater distance than two (2) blocks from the next adjoining light; and said second party agrees to pay to said party of the

first part, for each additional light so furnished, the sum of thirteen dollars (\$13.00) per month, said party of the second part hereby agreeing to accept said lights of the above-mentioned power and kind for the period of ten (10) years, upon the terms and conditions herein named. Said second party agrees to pay said first party on the 10th of each and every month at and after the rate of \$13.00 per month for each arc light used the preceding month. Said party of the first part hereby agrees to turn on the light so furnished at a time not more than one hour after sunset in each day, and reserves the right to turn off said lights at not earlier than one hour before sunrise in each day. It is further agreed that said party of the first part may assign and transfer all his rights, or any portion of the same, in this contract, to any individual or electric light company hereafter to be formed, upon consent of said party of the second part, upon the condition that said assignee shall agree to conform to all the conditions, terms, and reservations of this contract. The said party of the first part further agrees that if, at any time during the term of this agreement, it shall become a well known, fixed, and established fact in electric lighting, that electricity for the purpose of arc lighting can be distributed by other and less costly processes than those at present known to be practicable, and as a proper and legitimate method, fully developed and in general use, then in such case said party of the second part may demand from said party of the first part, or his assigns, such modifications of this contract as shall give said second party an equitable benefit arising from such new process. Such demand for modification of this contract shall be made in writing by said party of the second part, and in case said parties hereto shall not be able to agree as to the terms, conditions, and modifications hereof, the same shall be submitted to three (3) arbitrators, one arbitrator to be chosen by each party hereto, and the two so chosen shall choose a third. The finding of such arbitrators so named to be final and conclusive on each party as to all matters submitted to them." On December 8, 1894, appellee brought suit to recover \$1,235 and interest; alleging nonpayment of \$247 each month for the months of June, July, August, September, and October, 1894; alleging full compliance by him with the terms of the contract. Appellant answered, denying any indebtedness; that appellee had complied with his contract,—and denied that appellee had furnished any lights after the 1st day of June, 1894, and added the following special defenses: "(1) That on the 10th day of June, 1893, said O. C. Townsend entered into a contract with defendant, and agreed to erect an electric light plant at the glass works, and to light the defendant town from said plant, for a period of ten years, at thirteen dollars per light per month. (2)

That said plaintiff did, under said contract, erect an electric light plant, procured a franchise from said town, and erected poles, wire, and arc lights, and began to furnish lights and light said town, and continued so to do until about the 22d day of May, 1894, when said plaintiff took out his plant, removed it from said town, took down his wires, poles, and lights, and put it out of his power to fulfill said contract. (3) That after said contract was entered into, on, to wit, the 19th day of June, 1893, plaintiff and defendant made a supplementary agreement for the government of the proposed electric light company which said plaintiff represented he was about to form, and which is the alleged contract set forth in plaintiff's complaint. And for a second and further answer defendant says that on or about the 22d day of May, 1894, the plaintiff transferred his right to light the said defendant town to the El Paso Electric Company, a company formed and in existence on or before June 19, 1893, without the consent and against the protest of this defendant, and as soon as the said transfer became known to this defendant, to wit, on or about the — day of June, 1894, said plaintiff, his successors, attorneys, and agents, were, and have been many times since, notified to furnish no more lights, and to do nothing whatsoever under said contract, and that said contract was wholly rescinded. The defendant further says that the alleged contract was made with the plaintiff for the sole purpose of establishing a local and home industry, as the plaintiff well knew, and that in order to induce the plaintiff to establish the said electric light plant, and make it a substantial and permanent institution, the defendant agreed to pay him (the said plaintiff) a large sum of money in excess of what other companies, located at Colorado Springs and elsewhere, would have furnished them for; and all this the plaintiff well knew, but, disregarding the spirit and letter of the contract, he, on or about the 22d day of May, 1894, removed the said plant, together with all the poles, wires, and all other appliances necessary to supply the said lights to the defendant town, and assigned his right to the contract to the El Paso Electric Light Company, as aforesaid." The case was tried to the court on the 27th and 28th days of February, 1895. The court found for the plaintiff (appellee). A motion for a new trial was made and overruled, and judgment entered for \$1,272.50, and exception taken, and an appeal to this court.

John R. Watt and O. F. Ingraham, for appellant. Vanatta & Cunningham, for appellee.

REED, P. J. (after stating the facts). There are several errors assigned, some of which are not sufficiently specific to notify the court of what counsel complain. The third, fifth,

sixth, seventh, eighth, and ninth are of this character,—so general that they fail to designate anything. The first and fourth are to the effect that the court erred in excluding evidence of the negotiations of the parties prior to the making of the written agreement, and also erred in not considering the negotiations and conversations that occurred before the making of the agreement. The second, that the court erred in refusing to allow appellant to prove that the El Paso Electric Company offered to furnish the lights, under a contract of the same kind, at \$10 per light. The eighth, to the effect that the court erred in awarding a judgment to the appellee, because "the record shows that appellee assigned his contract to the El Paso Electric Light Company without the consent of appellant." These are the only assignments of error that need be noticed, and some of them can be very summarily disposed of.

The testimony offered and refused, upon which the first and fourth assignments were based, in regard to negotiations and conversations between the parties preceding the making of the contract, was, according to a well-settled and universal rule of law, clearly inadmissible. The agreement reached by the parties was embodied in the written contract. What, in the way of bargaining, that preceded, was of no importance whatever.

The second assignment may be disposed of equally as summarily. It may have been the duty of the officers of appellant to have accepted the offer of the El Paso Electric Company at \$10 per light; but, failing to accept, and contracting to pay appellee \$13 for each light, we cannot conceive how evidence of the offer at \$10 could affect appellee's right to recover the amount appellant had agreed to pay. If the testimony had been admitted, its only effect could have been to convict appellant of a want of business sense, or of fraud.

The only question of legal importance is that presented by the eighth assignment of error,—that the court erred in finding for appellee, because he had assigned his contract without the consent of appellant. The contract clearly provides that there can be no assignment without the consent of appellant. The testimony shows that appellee appeared before the board, produced an assignment that he proposed to execute, assigning his contract to the El Paso Electric Company, and asked consent to make the transfer, which was refused, and he notified that he would be required to furnish no more lights. There is no evidence that he made any transfer of his contract, or that any one else was substituted in his stead, or attempted to be, or succeeded him. He had sold out his "plant," and it had been removed. By reference to the contract, it will be seen that there was no provision that appellee should erect and maintain a plant for generating

electricity. Such may have been the intention of appellant, but it was not expressed by the contract. He was to light the town as specified. There is no allegation of failure to perform. It is true that it was averred in the answer that he had sold out his machinery, and made it impossible to generate the electricity in the town; but that did not disqualify him from complying with the contract, and furnishing electricity from another source, which it appears he did. It is not alleged nor shown that, by reason of anything done by appellee, appellant had to supply and pay for lights from another. It appears that appellee had contracted with the El Paso Electric Company to supply him with electricity at Colorado City to continue his contract, and that he, in person, was complying with the contract by means of the contract made by him with the El Paso Company. The appellant having failed to establish by the evidence any legal defense to the action, the judgment of the district court must be affirmed. Affirmed.

(9 Colo. App. 83)

CRAWFORD v. LAMAR et al.

(Court of Appeals of Colorado. Jan. 11, 1897.)

INJUNCTIONS—SALE ON EXECUTION—TITLE IN DISPUTE.

1. Equity will not enjoin a sale of land under execution, on the ground that it will cast a cloud on complainant's title, where the validity of such title is in doubt.

2. Evidence that a debtor transferred his livery stock to plaintiff whom he owed for board, but retained possession thereof; that he subsequently traded the livery for land, a deed to which he took in his own name; and on the same day, after executing a trust deed to secure a person who had released his mortgage on the livery, conveyed the land to plaintiff,—casts such doubt on the validity of plaintiff's title as will prevent the court from granting him an injunction against a sale of the land on execution in favor of a person to whom plaintiff's grantor was indebted at the time of the conveyances.

Appeal from district court, Arapahoe county.

Bill by George E. Crawford against F. H. Lamar and others to restrain a sale of land on execution. From a decree dismissing the bill after trial to the court, complainant appeals. Affirmed.

N. Q. Tanquary, for appellant. Henry Howard, Jr., for appellees.

REED, P. J. This suit was brought by the appellant to restrain appellees from selling a tract of land in Logan county by execution on a judgment obtained by Lamar against one W. E. Baker, appellant claiming to be the owner of the land, and that Baker had no interest in it whatever. The facts as testified to by the plaintiff were that Baker was engaged in livery business in the city of Denver; that there was a chattel mortgage on his stock, etc., to one Williams,

for \$600; that Baker and family had boarded with appellant, and on July 1, 1893, owed \$600 for board, which he was unable to pay, and proposed to turn over the livery stock, subject to the Williams chattel mortgage, which was accepted, and a bill of sale made July 13, 1893. All the testimony shows that there was no change of possession of the livery stock. The testimony of appellant in regard to the transaction was "that Baker continued in possession of the livery in question just the same as he had always done, until the same was turned over to Vance. I requested Mr. Baker to look after it, as I could not attend to it, until we could make some disposition of it. He found this ranch. I went down to look at the ranch near Sterling. I came back, and told Mr. Baker to make the trade. In order that I might not sign the note to secure the six hundred dollar chattel mortgage, the property was conveyed to Mr. Baker. The property was conveyed to Mr. Baker, in order that he might sign the note and trust deed, as I did not care to sign it. The warranty deed from Vance to Baker, and the trust deed securing the Williams mortgage and the deed from W. E. Baker to me, were made at the same time, and signed before the same notary. The two deeds, one from Vance to Baker, and one from Baker to me, were placed in the same envelope, and mailed to the recorder at the same time." Cross-examination: "I did not testify that I took possession under chattel mortgage. I do not remember my testimony in the county court, but I never had any chattel mortgage. Baker conveyed to me the books, but he still remained in possession of the stable. Mr. Baker remained in possession of the livery barn until I turned it over to Mr. Vance. Vance removed the stock to another part of town. I think it was the day the deeds were executed." The livery stock was traded by Baker to one Vance for the land in question. Williams' security upon the stock was released, and put upon the land. On July 21st, Vance executed to Baker a warranty deed of the land. Baker executed a trust deed to Williams, and a warranty deed to appellant. The two warranty deeds were mailed on the same date, in the same envelope, to the recorder of Logan county, for record by Williams. On the 22d, the recorder wrote, declining to record without payment of fees. The fees were remitted; the records made, bearing indorsement of July 25th. At the time of the conveyances, Baker was indebted to appellee Lamar for feed furnished the stable, who brought suit by attachment, which was served upon Baker, and levied upon the land in controversy on July 24th. On the 13th of September, Lamar obtained judgment. An execution was issued, and levied upon the land. On the 15th of November, this suit was instituted, to prevent the sale under the execution. A

trial was had to the court; a decree dismissing the bill; and an appeal to this court.

The bill must be regarded as purely for injunctive relief to prevent the sale under the execution. The right to invoke the aid of a court of equity is alleged to be that the sale will create a cloud upon the title, and work irreparable injury. Under certain circumstances and conditions, well defined, bills in equity can be maintained to remove a cloud from title, and an injunction will be granted to restrain acts that will result in casting a cloud. The questions presented are such that they could not be tried and judicially determined on an application for injunction. The facts established are such as to cast a doubt upon the bona fides and honesty of the whole transaction. The livery was sold, as alleged, in payment of a board bill. There was no delivery. Baker remained in the possession and control as the ostensible owner, made the trade with Vance, and delivered the possession to him, took the conveyance to the land, executed the trust deed to Williams, and then conveyed his equity to appellant. These circumstances were such that, if not sufficient to establish fraud, they were sufficient to cast grave doubts upon the honesty of the transaction. Under such circumstances, the judge of the district court was warranted in refusing the injunction and dismissing the bill. After sale upon execution, the court might, on proper showing, enjoin the making of the deed. Previous to the sale the granting of an injunction to prevent a cloud upon the title is said to be discretionary with the court. *Goldstien v. Kelly*, 51 Cal. 301; *Drake v. Jones*, 27 Mo. 428. There is no question in regard to the right of a court to grant an injunction to restrain a sale by a sheriff under an execution where it would cast a cloud upon the title, where there is no question in regard to the legality of the title of the applicant; but, where there are serious doubts in regard to the validity of the applicant's title, the injunction should not be granted.

We do not find it necessary to examine and settle the questions argued by counsel in regard to the conveyance and proceedings by attachment, as to which was entitled to precedence. No title had passed by operation of law under a sale by execution, and, until there was such, no question in regard to its validity could be determined; nor could the district court, nor can this court, on application for an injunction, try and determine the legal title to the property. The decree of the district court will be affirmed. Affirmed.

(14 Utah, 472)

#### PETROVITZKY v. BRIGHAM.

(Supreme Court of Utah. Jan. 30, 1897.)

#### CHATTEL MORTGAGE—AFFIDAVIT—SUFFICIENCY.

Section 2801, Comp. Laws Utah 1888, requiring a chattel mortgage to be accompanied by

an affidavit of the parties that the same was made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor, is substantially complied with if the word "hinder" is omitted, provided it appears from the affidavit that the mortgage was given without any design to delay or defraud creditors. The words "hinder" and "delay" have practically the same meaning. The omission of the word "hinder," and the use of the words "delay" or "defraud," does not render the affidavit defective. A substantial compliance with the statute is all that is required.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; John A. Street, Judge.

Action by Jacob Petrovitzky against Nat. M. Brigham. There was a judgment of nonsuit, and plaintiff appeals. Reversed.

Richard B. Shepard and Cherington & Harkness, for appellant. Booth, Lee & Gray, for respondent.

MINER, J. This action was brought to recover damages against the defendant for the unlawful conversion of certain personal property, upon which the plaintiff held a chattel mortgage made by Herman Jacobs to secure the payment of the sum of \$400, by virtue of which plaintiff claimed to be the owner of, and entitled to the possession of, the property. The defendant denies the conversion, but admits the taking and sale of the property, as United States marshal, under an execution issued upon a judgment against Herman Jacobs and Minnie Jacobs for the sum of \$222 and costs, and alleges that the mortgage was placed upon the property to hinder, delay, and defraud the creditors of the plaintiff, and that the mortgage was void because the parties thereto had failed to take, subscribe, and attach to said mortgage the oath required by the statute. Upon the trial the plaintiff was called as a witness, and identified the note and chattel mortgage in question, under which he claimed title, and offered the same in evidence. The defendant objected to the introduction of the mortgage in evidence for the reason that it was incompetent, and was not executed in compliance with the laws of this state with reference to chattel mortgages. The objection was sustained, and the mortgage was rejected as evidence, the court holding that the affidavit was defective, because the word "hinder" was not used in it. The plaintiff's attorney here remarked, "If we are not allowed to introduce the chattel mortgage in evidence, we cannot prove our case, then, sir, and we rest right here." On motion of defendant the court granted a nonsuit, to which an exception was taken by plaintiff, and the ruling of the court assigned as error.

The following is a copy of one of the affidavits referred to:

"Territory of Utah, County of Salt Lake—ss.: J. Petrovitzky, of Salt Lake City, territory of Utah, being first duly sworn, says that he is the mortgagee named in the foregoing mortgage, and that the said mortgage is made in good faith for the purpose of securing the amount therein named, and without any design to delay or defraud creditors. J. Petrovitzky.

"Sworn to and subscribed before me this 25th day of July, A. D. 1896. H. S. McCallum, Notary Public."

Section 2801, Comp. Laws Utah, 1888, provides: "No mortgage of personal property shall be valid as against the rights and interests of any person (other than the parties thereto), unless the possession of such personal property be delivered to, and retained by the mortgagee, or unless the mortgage provide that the property may remain in possession of the mortgagor, and be accompanied by an affidavit of the parties thereto, or in case any party is absent an affidavit of the parties present, and of the agent or attorney of such absent party, that the same is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor." The mortgage contains a provision that the property should remain in the possession of the mortgagor. The language of the statute is, "and without any design to hinder or delay the creditors of the mortgagors." The affidavit reads, "without any design to delay or defraud the creditors." This affidavit was printed with the mortgage, on a form doubtless in common use. The question is raised whether the words "delay or defraud," as used in the affidavit, is a substantial compliance with the statute, without the use of the word "hinder." The words "hinder" and "delay" are used as synonymous terms. Webster's International Dictionary defines the word "hinder" as to check, retard, impede, delay, block, clog, prevent, stop, interrupt, counteract, thwart, oppose, obstruct, debar, embarrass. The same author defines the word "delay" to mean to hinder, detain, keep back, or retard. Webster's International Dictionary defines the word "defraud" to mean to deprive of some right, interest, or property by deceitful devices; to withhold from wrongfully; to injure by embezzlement; to cheat; to overreach, as to defraud a creditor." The Encyclopedia Dictionary defines the word "defraud" as meaning to deprive of a right by withholding from another, by indirection or device, that which he has a right to claim or obtain. The words "hinder" and "delay" are so practically of the same meaning that the omission of the word "hinder" in the affidavit does not substantially detract from the object of the statute, or lessen the force of the words used in the affidavit so as to make it defective, when used in connection with the word "defraud." A substantial compliance

with the statute is all that is required. To hinder or delay is to do something with an intent to defraud; to place some obstruction in the path; to interpose something, unjustifiably, before the creditor can realize what is due him out of his debtor's property. "To defraud" implies or includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another." *Burdick v. Post*, 12 Barb. 186; *Burnham v. Brennan*, 42 N. Y. Super. Ct. 63; *Black, Law Dict. tit. "Hinder"*; 1 Story, Eq. Jur. (13th Ed.) § 187; *Hoffman v. Mackall*, 64 Am. Dec. 641; *Bump, Fraud. Conv.* (4th Ed.) 22, 23; 2 *Bigelow, Fraud*, pp. 292, 293, and note; *Gardiner v. Parmalee*, 31 Ohio St. 551. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application in this state, and the Code should be liberally construed with a view to effect its objects and to promote justice. Section 2937, Comp. Laws 1888.

We are of the opinion that the court erred in rejecting the evidence offered. The judgment of the court below is reversed, with costs, and a new trial granted.

ZANE, C. J., and BARTCH, J., concur"

(14 Utah, 463)

MCCORNICK v. SADLER.

(Supreme Court of Utah. Jan. 28, 1897.)

ASSIGNMENT OF CLAIM — ACTION BY ASSIGNEE — EVIDENCE.

1. T. & K. were contractors, who built a house for S., upon which a certain sum of money was due on a certain day, and the same assigned for a valuable consideration to McC., subject to a deduction of any amount that might be a valid lien to subcontractors or material men. In a suit by McC. against S. for the amount assigned, *held*, that evidence of a prior assignment by T. & K. of portions of the fund to the subcontractors was properly excluded where it appears that T. & K. retained control of the fund and power of revocation until duly assigned to McC.

2. *Held*, also, that declarations by T. & K. in disparagement of title, made before assignment to McC., are admissible against him, and that it was error to exclude such declarations.

3. *Held*, that it was not error to exclude testimony of the architect as to the market value of material furnished for the house, the relation between the market value and the contract price not having been shown.

4. Testimony of a witness was rightly excluded where it was based solely upon a monthly statement not made by the witness, and of which he had no information, and neither the statement nor the books from which it was taken being offered in evidence.

5. After the books of M. & Co., one of the subcontractors or material men, were in evidence, it was competent to show that these books did not contain an account of all the material furnished by them to the contractors for S.'s house, as also a bill for glass, in the handwriting of the witness, sent to T. & K., the witness testifying that the glass went into the house in question, said bill should have been admitted in evidence with the other testimony for what it was

worth, and it was prejudicial error to exclude it.

6. After showing that all of certain material in the house was furnished by M. & Co., it was error not to admit testimony of the architect as to the quantity of such material in the house. *Held*, also, that the testimony that the material was not paid for as delivered should have been received in evidence.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; John A. Street, Judge.

Action by William S. McCornick against Henry Sadler. Judgment for plaintiff, and defendant appeals. Reversed.

Bennett, Harkness, Howat & Bradley and Charles Baldwin, for appellant. Brown, Henderson & King and C. S. Varian, for appellee.

HART, District Judge. This case has twice before been considered on appeal by this court. 10 Utah, 210, 37 Pac. 332; 11 Utah, 444, 40 Pac. 711. The facts are that a co-partnership firm of contractors, Taft & Kropfganz, under a contract with the defendant, Sadler, built a house for him, upon which was due, on or about January 14, 1891, the sum of \$2,320.80, which on said day was assigned by a written order, executed by Kropfganz, to the plaintiff, McCornick, in consideration of an indebtedness of about the same amount due from said contractors on a bank account. The defendant was duly notified by plaintiff of the assignment. It was understood by plaintiff at the time of taking the assignment that there were some claims for material which were liens upon the house, to be paid out of the fund due. This was also talked of by plaintiff and defendant at the time notice was given defendant of the assignment. This action is brought to recover the fund assigned, and the defense is that the full amount of \$2,320.80, was due certain parties for work and material furnished the contractors for the Sadler house, and the same actually paid by defendant after the assignment to plaintiff, as follows: Mason & Co. \$1,844, Irwin & Buse \$100, Spencer, Bywater & Co. \$71, and G. F. Culmer & Bros. \$305.80; that the right of lien existed for these several claims, and that the same were paid by defendant in pursuance of an agreement and assignment of the contractors made on January 10, 1891, for the payment by defendant of these several claims. The former decisions of this court determine that the burden of proof rests upon the defendant to establish the validity of the claims as liens in order to entitle him to a credit in this case of amounts paid by him to material men and laborers. In the last trial below it was admitted by the plaintiff that the sum of \$71 paid Spencer, Bywater & Co., and the sum of \$305.80 paid G. F. Culmer & Bros., were proper credits for the defendant, and the contest was made on the other two claims. It was admitted by plaintiff that

the time for filing liens by subcontractors had not expired, and that defendant should have credit for any claims that were or would have been valid liens upon the defendant's house. A verdict was returned for plaintiff in the sum of \$1,524.35 principal and \$664.11 interest, and the defendant appeals, assigning as error numerous rulings upon the admissibility of testimony. It will not be necessary to notice all the questions raised. All useful purposes will be subserved by selecting representative questions which will stand for classes.

Many of the questions asked by the defense of the defendant, and many of the interrogatories of the deposition of the witness Kropfganz, objected to by plaintiff, and sustained by the court, go to the question of whether there was a prior assignment by the contractors to Mason & Co., and Irwin & Buse, of the respective amounts due them. As it is apparent from the answers in the deposition of Kropfganz, and from the whole record, that there was not a valid assignment, prior to the assignment to the plaintiff, and that the contractors or assignors retained control of the fund and power of revocation, until the assignment was made to plaintiff, it is evident that the court did not err in excluding such testimony. A more serious question is whether declarations in disparagement of title made by Taft or Kropfganz, before the assignment to plaintiff, are admissible against the plaintiff in this action. The former decisions of this court determine the true relation of the defendant in this litigation to be that of the lien claimants; that he stands in their shoes, and "must defend from their bulwarks." It is also said that the plaintiff stood as the representative of the "assigned fund, which was representative of the building." 11 Utah, 447, 40 Pac. 711. But the "assigned fund" came to plaintiff from Taft & Kropfganz, and the question whether the declarations of the assignors should be admitted against the assignee was not before passed upon.

The plaintiff succeeded only to the rights of Taft & Kropfganz. Plaintiff's counsel admit the general rule that declarations in disparagement of the title of the declarant are admissible as original evidence, but claim that this rule applies to the title to the particular chattel or chose in action assigned. We do not see how this distinction can be claimed for this case. If it be true that the assignors, during the continuance of their title to the fund, admitted that only a part of the fund really belonged to them, or that no part belonged to them, but to the subcontractors, who could file a lien, and thus require payment to them, it is difficult to understand why such a declaration does not go to the question of their title to the fund, and why the same should not be admitted under the general rule. This view would admit interrogatories and answers from 8 to 17, in-



clusive, of the Kropfganz deposition, excluded by the trial court, in reference to a book entry by Kropfganz, on or about January 12, 1891, as follows: "Lumber bill due Mason & Co. on Sadler job, \$1,718.22, time of settlement." If not admissible because of being a general entry,—a conclusion,—it would be competent as a declaration against title. If the declarant owed Mason & Co. what he admits by the above entry, the sum that he would be entitled to and could legally demand from the house owner would be diminished by that amount due Mason & Co., and which they had a lien claim for. If this action were by Taft & Kropfganz against Sadler, would it be contended that such declarations by them would not be admissible against them? The defendant should not be placed in a less advantageous position in his defense by reason of the assignment to plaintiff. The plaintiff should occupy no more profitable position than would his assignors in a suit by them. Defendant, then, should have been permitted to show, if he could, as he offered to, "that at a meeting between Taft & Kropfganz and Henry Sadler on the night or on the afternoon of the 10th of January, Taft & Kropfganz, who were the assignors of the claim of plaintiff, admitted that the amount due from them to Mason & Co. on account of material furnished for Mr. Sadler's house was \$1,718.22, and that the amount due Irwin & Buse for material furnished for that house was something over \$100."

Before offering in evidence the books of Mason & Co., containing the account with Taft & Kropfganz, and before attempting to show that this account did not contain a full list and account of all the material furnished by Mason & Co. for the Sadler house, and before showing that the contract price of the material was the same as the market value, defendant attempted to show by the architect, Kern, the market value of the lumber, lath, sash and weights, doors, nails, and glass that were used in the house. This testimony was rightly excluded by the court at that stage of the trial.

Objection is made by the defense to the court not permitting the witness Mason, of the firm of Mason & Co., to testify from bills made by his clerk at the end of each month from the books of the firm, of the material furnished Taft & Kropfganz for the Sadler house. The witness did not write the bills, did not claim the bills were anything more than copies of the books, had no independent recollection of the items of the bills, and neither the bills nor the books were at this time offered in evidence. The only thing offered was the testimony of the witness, based solely upon the bills, and not even upon his own memory refreshed from an examination of the bills. Besides, no such exceptions were taken to rulings upon this testimony as can be relied on upon appeal. The account books of Mason & Co.

with Taft & Kropfganz were subsequently produced, and admitted in evidence, after which defendant attempted to show that the books did not contain an account of all the material furnished by Mason & Co. In particular, a certain bill of glass, made out in the handwriting of the witness Mason, dated January 6, 1891, and sent to Taft & Kropfganz, for beveled plates, for the Sadler house, in the sum of \$156.70, was offered in evidence, as showing material furnished and not paid for, and not charged for on any books that could be found. The witness testified that he made out the bill, and that the glass mentioned in it went into the Sadler house; supposed he made the bill from the books, but did not see it in the books in court; but some of the counter books were burned. This bill was excluded by the trial court. We think this testimony was clearly admissible, and that it was prejudicial error not to admit it. After the defense had shown that the lumber, lath, sash, weights, doors, nails, and glass for the erection of the Sadler house were furnished by Mason & Co., and after showing the items and prices thereof, so far as the same appeared by the books of Mason & Co. (now in the hands of their assignee, for the benefit of their creditors), it was competent to show by the architect the quantity of such material in the Sadler house, and it was error not to admit such evidence. Similar proof was attempted as to labor and material furnished by Irwin & Buse, but, as the exclusion of this testimony is not assigned as error, the same will not be further considered.

The defendant should have been permitted to show that no material furnished Taft & Kropfganz for the Sadler house was paid for as delivered, the theory of the plaintiff and the court being that, if material was furnished, and not charged on the books, the presumption was that the same was paid for. The books of Mason & Co. show that one single running account was kept by them with Taft & Kropfganz for material furnished for the building of several houses besides and including the Sadler house, and that marginal notations of the name of the owner of the house or the street number was the only entry to indicate which house the material went into. In some instances these marginal notes are omitted, thus leaving nothing except parol evidence to determine which house the material was for. In view of the way in which the books were kept, as well as upon established general principles, the defendant should have been permitted to show, if he could, material furnished in addition to that shown upon the books. He was not precluded from showing that the books did not contain all the charges, and was not bound by the general statement of the one witness, Mason, made in answer to cross questions on behalf of the plaintiff, to the effect that an

account was kept of whatever was furnished, in regular book form, and appears upon the books. This testimony was given before the books were produced in court, or examined by the witness, and it is doubtful if he would have so testified after examining the books. The defendant complains that certain book-account entries should not have been admitted against his objection, showing that Mason & Co. were paid \$1,000 on account of the Sadler house. There is a dispute between counsel as to whose book accounts these were, and the record falls to definitely disclose the fact, but they were probably Mason & Co.'s books, and, if so, were properly received in evidence. Defendant also claims that he should have been permitted to show that the \$700 payment was made by Taft & Kropfganz to Mason & Co., not on account of material for the Sadler house, but on the general account, in which event the payment would have to be applied by the creditor to the earliest items of the account. While, in general, this might be shown by the defendant, yet, in view of the testimony of the witness Taft for the plaintiff, that the payment of this item was made to Mason & Co. by an order on Sadler, and presumably paid by him, and consequently rightly to have been credited to Sadler by Mason & Co., the question asked by defendant's counsel, and objected to and sustained, did not properly go to the question, as it then stood, of how the payment was made. If the payment was actually made to Mason & Co., by Sadler, the same would have to be credited to Sadler, and this would not be changed by the omission of Taft & Kropfganz to direct Mason & Co. to apply the same to any particular account, or to the account of the defendant Sadler.

There are a great many other questions of minor importance raised by this appeal, which are not necessary to discuss in this opinion, as they are not likely to arise again upon a retrial of this case. It is evident from the matters herein considered, and from an examination of the entire record, that such competent and material evidence was excluded as necessitates a rehearing. The judgment and order of the trial court is therefore reversed, and set aside, and the case is remanded for a new trial.

ZANE, C. J., and MINER, J., concur.

(14 Utah, 345)

RITCHIE v. RICHARDS, State Auditor,  
et al.

(Supreme Court of Utah. Dec. 21, 1896.)

STATUTES—ENACTMENT—LEGISLATIVE JOURNALS—  
EVIDENCE—JUDICIAL NOTICE—SCOPE OF TITLE—  
CONSTRUCTION—DISTRICT JUDGE—TERM OF OFFICE—  
ELECTIONS—CANDIDATES—SECRECY OF BALLOT—  
CONSTITUTIONAL LAW—JURISDICTION OF COURTS.

1. The title of an act, expressed as follows: "An act relating to and making sundry provisions concerning elections," limits its subject

to provisions concerning elections, and is sufficiently definite and certain, under section 23, art. 6, of the constitution of the state of Utah.

2. When the language of the title is, in terms, limited to provisions concerning elections, provisions concerning appointments to office cannot be included in the law; but, if included, those concerning elections may stand, while those relating to appointments must fall, unless they are so dependent on each other that the former cannot be executed without the latter.

3. So much of section 5 of the act approved April 5, 1896 (Sess. Laws, p. 369, c. 125), as relates to elections, is valid; but the provisions of said section which relate to filling vacancies in certain offices by appointment are invalid, because in conflict with section 23 of article 6 of the constitution. Likewise, section 42 of the same act is void because in conflict with section 23 of article 6 of the constitution.

4. The first term of district judges commenced in January, 1896, and extends until January, 1901, and the plaintiff was appointed in May of the first-named year to fill a vacancy in the office. *Held*, that his term expired upon the qualification of his successor, elected in November, 1896, under a law providing therefor, passed in pursuance of section 10 of article 7 of the constitution, which declares that, if the office of district judge becomes vacant, it shall be the duty of the governor to fill the same, and the appointee shall hold until his successor shall be duly elected and qualified as may be provided by law.

5. A law providing that electors may vote for all the candidates of a party by making a cross opposite a party emblem, and requiring those who do not vote for all such candidates to make a cross opposite the name of those voted for, and requiring those who have not been nominated by a party to present a petition to an officer mentioned, signed by a number of electors, in order to have their names printed on the ticket, *held* to be valid.

6. The limitations and restrictions contained in article 6, §§ 14, 22, 24, and in section 8, art. 7, of the constitution of this state, respecting the enactment of laws, are mandatory and binding upon the legislature. The mandatory provisions of the constitution are conclusive upon all departments of government. *Per Bartch, J. Miner, J., concurring.*

7. The courts have power to declare any act of the government, in any of the departments, which violates the constitution, to be utterly void; and, in exercising this function in regard to an act of the legislature, they do not trench upon the domain of the legislative department. *Per Bartch, J. Miner, J., concurring.*

8. When the validity of a statute is questioned in a court of law, the enrolled act of the legislature, duly signed, approved, and deposited with the proper custodian, is *prima facie*, but not conclusive, evidence of its constitutional enactment, and of what the law is. *Per Bartch, J. Miner, J., concurring.*

9. Courts take judicial notice of legislative journals required to be kept by the constitution. Such journals possess the character of public records, and the entries therein contained constitute evidence which courts may consider in determining the question of the constitutional enactment of a statute. *Per Bartch, J. Miner, J., concurring.*

10. Where it affirmatively appears upon the legislative journals, or either of them, that in passing an act the legislature disregarded a mandatory provision of the constitution, the court is justified in holding the act unconstitutional and void; but, where journals are merely silent as to the subject-matter under investigation, the court will presume that the legislature acted in accordance with its delegated power, and will hold the act valid, unless an omission of some matter which the constitution expressly requires to be entered thereon be shown by such journals, or either of them. *Per Bartch, J. Miner, J., concurring. Zane,*

C. J., did not concur in holding that a law duly signed by the presiding officers of the respective houses, approved and signed by the governor, and filed in the office of the secretary of state, is not conclusive evidence of its passage, under a constitution which does not require the yeas and nays to be entered on the journals.

11. No legal voter in this state can be compelled to disclose for whom he voted, or to have his ballot so marked that it may be ascertained therefrom how he voted; and any contrivance or method by which the ballot can be identified, and the voter exposed, is unauthorized, and no legislative enactment can give it the force of law. Per Bartch, J. Miner, J., concurring.

12. So much of section 26 of the act approved March 28, 1896 (Sess. Laws, p. 183), entitled "An act in relation to elections," etc., as provide for the identification of the ballot by numbering it, is void; such provision being in conflict with section 8, art. 4, of the constitution, which provides that "all elections shall be by secret ballot," etc. Per Bartch, J. Miner, J., concurring. Zane, C. J., dissenting.

13. The constitution secures to the voter impenetrable secrecy. Per Bartch, J. Miner, J., concurring. Zane, C. J., held legal secrecy sufficient.

(Syllabus by the Court.)

Application by Morris L. Ritchie against Morgan Richards, state auditor, James Chipman, state treasurer, and A. C. Bishop, attorney general, as the board of state canvassers, for a writ of prohibition. Denied.

Arthur Brown, C. F. Loofbourow, John M. Zane, and C. O. Whittemore, for petitioner. W. H. Dickson, H. P. Henderson, J. W. Judd, and Richard B. Shepard, for respondents.

ZANE, C. J. The plaintiff is one of the judges of the Third judicial district of the state of Utah, appointed by the governor on May 21st to fill the vacancy caused by the resignation of Judge Le Grand Young, whose term of office extended to the first Monday of January, 1901. In pursuance of an act entitled "An act relating to and making sundry provisions concerning elections," in force April 5, 1896 (Sess. Laws Utah 1896, p. 369), and of an act in relation to elections, defining offenses against the same, and prescribing punishments therefor, in force March 28 (Id. p. 183), a general election was held on the 3d day of November of that year, at which a person was elected to fill the vacancy so held by the plaintiff. The plaintiff asks the court to issue a writ prohibiting the defendants from canvassing the returns of the election of his successor, held and conducted according to those laws. The plaintiff insists that they are void, and that, therefore, the writ should issue. The journals of the legislature do not expressly show how the votes were taken on the final passage of the bills, but the plaintiff claims that the entries authorize the inference that they were *viva voce*. The fact is entered upon the journals of the respective houses that the presiding officer of each house over which he presided signed both bills.

It is conceded that the bills were properly enrolled, signed by the presiding officer of each house, and approved and signed by the

governor, and duly filed in the office of the secretary of state. The defendants insist that these bills, so authenticated, should be deemed complete and unimpeachable; that such authentication furnishes conclusive evidence that the legislature complied with all requisite constitutional provisions in their enactment, and that they were duly enrolled, signed, approved, and deposited in the public archives.

Section 14 of article 6 of the state constitution declares that "each house shall keep a journal of its proceedings, which, except in cases of executive sessions, shall be published, and the yeas and nays on any question, at the request of five members of such house, shall be entered upon the journal." This section requires the yeas and nays upon any question to be entered on the journals upon the request of five members. If such entry had been required for evidence of the passage of the bill, it would not have been made to depend on a request. The purpose of this entry appears to be for future reference and publicity, that the members may act under a consciousness of their responsibility to their constituents and to the public. Section 22 of the same article provides: "The enacting clause of every law shall be: Be it enacted by the legislature of the state of Utah, and no bill or joint resolution shall be passed, except with the assent of a majority of all the members elected to each house of the legislature, and after it has been read three times. The vote upon the final passage of all bills shall be by yeas and nays; and no law shall be revised or amended by reference to its title only; but the act as revised, or section as amended, shall be re-enacted and published at length." This section prescribes the enacting clause of every law, and requires the assent of a majority of all the members elected to each house thereto after it has been read three times, and a vote by yeas and nays upon its final passage; and forbids the revision of any law by reference to its title, but requires the act revised, or section as amended, to be enacted and published at length. This section does not expressly require the yeas and nays to be entered on the journals, nor does it say by what means the acts specified shall be evidenced. Section 24 of the same article declares: "The presiding officer of each house in the presence of the house over which he presides shall sign all bills and joint resolutions passed by the legislature, after their titles have been publicly read, immediately before signing, and the fact of such signing shall be entered upon the journal." This section requires the title of each bill passed to be publicly read in the presence of each house, and the bill to be then signed, and the fact of signing to be entered on the journals. Section 8 of article 7 of the same instrument so far as necessary to quote it, is: "Every bill passed by the legislature before it becomes a law, shall be presented

to the governor; if he approve, he shall sign it, and thereupon it shall become a law." This provision, in effect, says that every bill passed by the legislature becomes a law upon being signed by the governor, but it does not say how the passage of a law shall be evidenced.

Constitutional provisions prescribing modes of enacting laws should be observed. But whether the proof of such observance consists of the enrolled laws deposited in the office of the secretary of state, duly signed by the presiding officers of the respective houses, and with the approval and signature of the governor, or of the entries found on the journals of the respective houses, furnishes a question as to which the courts of last resort in the various states differ. Objections may be urged to either means of proof. Minutes and memoranda may not always be correctly transcribed upon the journals. And the minutes and memoranda are sometimes made amid circumstances calculated to confuse and distract the attention, and to divert it from the business in hand. Bills may sometimes be enrolled, and signed by presiding officers, and approved by the governor, that have never been duly passed. Either source is subject to possible error. Courts and lawyers will differ as to which is the surest and best source of information. However, when statutes are published people shape their actions and conduct with respect to them; they incur obligations, acquire rights, and discharge duties in reliance upon them. If such a law, in any instance, should turn out to be void, because some requirement of the constitution had not been observed in its passage, great injustice would be likely to follow. We must regard the enrolled bill, duly signed, approved, and deposited in the public archives, as a more accessible and convenient source of authentication, and, if referred to, less liable to overturn law, and quite as reliable as the journals of the two houses. The people ought not to be required to ransack such journals to ascertain whether laws have been duly passed, and they cannot be expected to do so. Nor should lawyers, before advising clients, be required to search such journals. Statutory enactments should not depend nor stand upon such a sandy and uncertain foundation, if a better one can be found. Laws evidenced by the signatures of the presiding officers, and the approval and signature of the governor, and the filing in the public archives, ought not to be overthrown by memoranda on the journals which the constitution does not require to be made.

We are of the opinion that the enrolled bill, duly signed, approved, and deposited in the office of the secretary of state, is quite as reliable, and more accessible and convenient than the entries, or the absence of entries, of legislative action shown by the journals of the two houses, and, if relied upon as unimpeachable, will be less liable to overturn

laws upon which the people have relied, and under which they have acquired rights, incurred obligations, and performed duties,—less liable in that way to cause litigation and confusion. The question involves consideration of public policy. In *Lafferty v. Huffman* (a late case decided by the Kentucky court of appeals) 35 S. W. 123, the objection to the law was "that on the final passage in the senate of the bill, as amended in the other house, the vote was not taken by yeas and nays." After a thorough examination of the question, similar to the one now under consideration, the court said: "From every point of reason, therefore, we are convinced that the enrolled bill, when attested by the presiding officers as the law requires, must be accepted by the courts as the very bill adopted by the legislature, and that its mode of enactment was in conformity to all constitutional requirements. When so authenticated, it imports absolute verity, and is unimpeached by the journals. When we look to the authorities, we find, as indicated before, a great diversity of opinion. They are too numerous to be reviewed here. We notice, however, that the more recent cases are adopting the English rule, and holding the enrolled bill conclusive. In several of the cases, where the courts felt constrained to follow their former rulings, holding the journals competent, regret is expressed that a different rule had not prevailed." *Warren v. Board* (Mich.) 40 N. W. 533; *State v. Young*, 32 N. J. Law, 29; *Sherman v. Story*, 30 Cal. 253; *State v. Swift*, 10 Nev. 176. In *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, the court, after stating that it was not necessary to decide in that case to what extent the validity of legislative acts may be affected by the failure to enter on the journals matters which the constitution expressly requires to be entered, used the following language: "The signing by the speaker of the house of representatives, and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that passed congress. It is a declaration by the two houses, through their presiding officers, to the president, that a bill thus attested has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him. And when a bill thus attested receives his approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable." *Harwood v. Wentworth*, 162 U. S. 547, 16 Sup. Ct. 890. The constitutions of many of the states expressly require the yeas and nays on the passage of a bill, as well as other matters, to be entered on the journals, while the constitutions of other states do not expressly require such entries. The decisions holding that the court

may look beyond the enrolled bill in the public archives, duly signed and approved, in nearly every instance, were made in states whose constitutions expressly require such entries upon the journals, while the decisions, with some exceptions, holding the law, duly signed and approved, in the public archives, as unimpeachable, were made under constitutions not requiring such entries. There are, however, well-considered cases that hold such laws, so deposited, signed, and approved, as conclusively authenticated, though constitutional provisions expressly require such entries to be made on the journals. It is not necessary for us to go that far in this case, as our constitution does not expressly require such entries to be made, except when demanded by five members; and that entry, we have seen, is mainly for the purpose of publication. English statutes found in the proper custody, duly authenticated, import absolute verity. Such has been the common law of England from early times. The statutes in question having been duly signed, approved, and deposited in the office of the secretary of state, we must conclusively presume that all constitutional requisites were complied with in their enactment.

It is also claimed that section 26 of the act in force March 28, 1896, supra, is void because it conflicts with section 8 of article 4 of the state constitution, which reads: "All elections shall be by secret ballot. Nothing in this section shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election: provided, that secrecy in voting be preserved." It is conceded that this section requires a secret ballot, but defendants claim that the statute provides for a secret ballot. The portion of section 26 objected to is as follows: "The judge or clerk shall immediately write the name of such voter upon the poll list, and shall take the ballot of such voter and number it in ink in one corner upon the top thereof, in such manner as not to expose or show how the voter has voted. The same to be numbered in the order in which it shall be received consecutively, and so as to permit the corner to be turned and pasted down with mucilage, which shall then be done so that the number is not thereafter visible, and such seal shall only be broken in case of a contested election; and the same number shall be recorded by the election judge or clerk on the list of voters beside the name of such voter." Without a violation of law, no one can ascertain from this numbering for whom any citizen has voted, without a contest, and then the court or tribunal before whom the contest is conducted should only allow tickets cast by persons who are not legal voters to be examined, and persons casting such votes cannot insist upon secrecy. If a person succeeds in getting an illegal ticket into

the box, it cannot be thrown out without identification; and without the number, or some other character or mark, upon the ticket, it cannot be identified. When the name of a person who has cast an illegal ticket is ascertained, and the number is learned from the poll list, some authorized person must open the box and break the seals until the right number is found; but, until that one is reached, such person has no right to examine the names on any ticket. The number being on the corner, it would not be necessary, nor would it be lawful, for him to examine the names on any lawful ticket. If it should become necessary to count the tickets in the box, it would not be proper to break the seals and examine the numbers for that purpose. It is clear that an examination necessary to a contest cannot disclose for whom any persons, except fraudulent voters, have voted, without a violation of the spirit of the law. We cannot presume that the authors of the constitution intended to prevent election contests,—to prevent any proceeding by which ballots cast by illegal voters can be thrown out. The method devised by this law preserves legal secrecy. The members of the convention must have known that election contests were permitted in all the states, and that they are deemed necessary wherever the people express their will at the polls. Justice should be permitted to pursue fraud, even into the ballot box. No man should be allowed to hold an office obtained by corrupt or illegal votes. To prevent it, a numbering of ballots is necessary in some cases. It is sanctioned by authority. *Hodges v. Linn*, 100, 111, 397; *Ledbetter v. Hall*, 62 Mo. 422; *West v. Ross*, 53 Mo. 350. While we are of the opinion that a law might be framed, permitting an election contest, and better adapted to secure a secret ballot, we are disposed to hold the present law valid notwithstanding this objection.

The plaintiff insists further that the subject of the act in force April 5th, supra, is not clearly expressed in its title, and that it contains more than one subject, and that it does not conform to section 23 of article 6 of the constitution, which declares that, "except general appropriation bills, and bills for the codification and general revision of laws, no bill shall pass containing more than one subject, which shall be clearly expressed in its title." Undoubtedly this provision requires the subjects of all bills not within the exceptions to be clearly expressed in their titles, and the title limited to one subject. Such limitations were not imposed formerly on legislation, but observation and experience have demonstrated a necessity for their application. It is believed that such restrictions tend to prevent hasty, inconsiderate, improvident, and sometimes corrupt legislation, to the detriment of the common good. The object

may be a general one, however, and it may be stated in terms sufficiently comprehensive to embrace every means and end necessary or convenient for the accomplishment of the general purpose. Their purpose is not fragmentary legislation, however, nor will they permit subjects to be included not connected with the general purpose,—not necessary or convenient as a means to the general end. The title of the act in question is expressed as follows: "An act relating to and making sundry provisions concerning elections." The title, as expressed, indicates provisions relating to or concerning elections. It states a general purpose. It asserts that the entire act relates to elections, and that it contains sundry provisions concerning elections. In that way the title describes the act, and the provisions it contains. The elections which the act concerns, and for which it professes to make provision, are described in general terms, broad enough to include all elections, special and general elections to fill offices for the term, or to fill a vacancy. Thus the subject is expressed, and we think it is expressed with sufficient clearness. *Cooley, Const. Lim.* pp. 170, 172; *People v. Mahaney*, 13 Mich. 481; *Tuttle v. Strout*, 7 Minn. 465 (Gil. 374).

This brings us to the further question, is the act what the title says it is, and do its provisions concern elections? Two of its sections we will consider with respect to the title: Section 5 is as follows: "If a vacancy occurs in the office of judge of the supreme or district court, secretary of state, state auditor, state treasurer, attorney general or superintendent of public instruction, the governor shall appoint a person to hold the office until the election and qualification of a successor to fill the vacancy, which election shall take place at the next succeeding general election, and the person so elected shall hold the office for the remainder of the unexpired term." In case of a vacancy in either of the offices mentioned, this section makes provision for filling it by election at the next succeeding general election, and requires the governor to appoint a person to hold it until that time. The provision for the election of a person to fill the vacancy is indicated by the title of the act, but the provision for appointing an incumbent in the meantime is not. The general purpose described in the title includes the election, but does not include the appointment. The provision for the election is valid unless it conflicts with section 10 of article 7 of the constitution. This provision for an election will be considered with respect to said section 10 further on. But the power to appoint a person to hold the office is conferred on the governor by section 10 of the constitution mentioned, and the invalidity of the provision for such appointment, because it is not embraced in the title of the act, is immaterial. It also appears in sec-

tion 42 of the act under discussion that "all appointive officers in said cities and towns shall hold their respective offices until their successors shall be appointed and qualified." This section does not relate to elections, nor does it concern elections. Therefore the title does not embrace it. The other provisions of the act appear to relate to elections, and are therefore valid, so far as they depend on the title, and they are not affected by those held to be void. If the act is broader than the title, the rule is that the provisions indicated by the title may stand, while those not indicated must fall, unless they are so dependent on each other that they cannot be executed separately. *Cooley, Const. Lim.* (6th Ed.) p. 177.

As we have seen, this is the first term of office of district judges under the constitution, and that the term extends to the first Monday in January, 1901, and that plaintiff was appointed in May last to succeed Judge Young, who had resigned; and a further question in this case is, can he hold until the end of the term, on the first Monday of January, 1901, or until the qualification of the person who was elected in pursuance of section 5, supra, on the 3d day of November last? If that section governs, his successor was duly elected as provided by law, and upon his qualification the petitioner's right to the office will be at once terminated. Whether it shall govern depends upon the meaning of section 10 of article 7 of the constitution. That section reads as follows: "The governor shall nominate and, by and with the consent of the senate, appoint all state and district officers, whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for. If, during the recess of the senate, a vacancy occur in any state or district office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate, when he shall nominate some person to fill such office. If the office of justice of the supreme court or district court, secretary of state, state auditor, state treasurer, attorney general or superintendent of public instruction be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified as may be by law provided." This section is composed of three distinct clauses or provisions. The first makes it the duty of the governor to nominate, and, with the consent of the senate, appoint, all state and district officers whose offices are established by the constitution, or which may be created by law, and whose appointment or election is not otherwise provided for. If a vacancy occurs in any state or district office during the recess of the senate, the second clause requires the governor to appoint a fit person to discharge the duties

of the office until the next meeting of the senate, and then it requires him to nominate a person to fill the office. If the office of justice of the supreme or district court, secretary of state, state auditor, state treasurer, attorney general, or superintendent of public instruction becomes vacant, the third and last clause of the section makes it the duty of the governor to fill the same by appointment, and provides that such appointee shall hold the office until his successor shall be elected and qualified as provided by law. Doubtless a legislative enactment was contemplated. In the absence of such a law, there would be great force in the claim that such appointee would hold until the general election to fill the office in 1901, and until the qualification of such person, or a successor after that time. But so much of section 5 of the act of April 5th, above quoted, as relates to elections, we hold to be valid, and it must be held to govern.

The plaintiff also insists that ballots prepared and printed according to the act of March 28th, above mentioned, and exclusively used at the November election, do not afford equal facilities to vote to all voters; that a ballot may be cast for party candidates with less difficulty than for those candidates who have no emblem on the ballot to represent them; that a partisan can vote easier than an independent; and that the law does not operate equally and uniformly on all voters. It is true that party organizations may, by the observance of certain requirements, have the names of their candidates and their emblem printed on the ticket, while other candidates are required to obtain the signatures of a specified number of voters to a certificate before their name can be printed on the ballot. And by simply placing a cross opposite a party emblem a vote may be cast for all the candidates of a party, while a vote for any number of candidates of a party less than all can only be given by a cross opposite the name of each candidate; and, if a voter wishes to cast a vote for a candidate whose name is not on it, he is obliged to write the name on the ballot, and place a cross opposite to it. Of course the voter should be allowed to perform this duty with the least difficulty and inconvenience consistent with an honest and fair election. No unnecessary impediments or inconveniences should be thrown in his way. The system tends to encourage the voting of straight tickets, and to discourage independent voting, which some think is an objection. The system has its merits as well as its demerits, and the legislative department of the state government has seen fit, in its wisdom, to enact the law; and we do not feel authorized to overturn the people's will, as expressed through that body, in the law. The court holds that none of the various objections urged by the plaintiff is well founded. We therefore deny the application for the writ.

BATCH, J. I concur in the result, that the application for the writ must be denied. But I do not concur in the proposition, which appears to be maintained in the opinion, that when an enrolled act of the legislature is duly signed, approved, and deposited in the office of the secretary of state, this court must conclusively presume that all constitutional requisites were complied with in its enactment. This, it occurs to me, is extending the rule further than is warranted by the decisions of the courts of the United States, or by the welfare of this state, or by the will of the people, as announced in the constitution. Carried to its legitimate effect, this proposition means that when an enrolled act has been properly signed, approved, and deposited with the secretary of state, it is the law of this commonwealth, even though, in its enactment, express limitations of the constitution have been violated, and that when drawn in question the judges who are called upon to determine its validity have no power to go beyond the enrolled act, and look into the journals of the legislature, required to be kept by the constitution, to satisfy the judicial mind of its constitutional passage. This would place the legislature, in the mode of the enactment of laws, beyond the control of the sovereignty itself, and the limitations contained in the constitution respecting the manner of enacting laws would be mere useless verbiage. With all due respect to that co-ordinate branch of the government, I cannot consent to a proposition that would invest it with a power so arbitrary. Because such a rule obtains as to the parliament of Great Britain, under a monarchical form of government, that cannot be regarded as a very potent reason for its application in this state, where the will of the sovereign power has been declared in the organic law. The people, in their sovereign capacity, after great deliberation, adopted a constitution, and established a government consisting of an executive, a legislative, and a judicial department. That constitution is their supreme will, which must be obeyed by every individual, be he of high station or of low. Those composing the several departments are but agents, and in their acts are bound by the organic law; and the limitations and restrictions contained therein are not mere abstract principles, but solemn declarations by the people themselves. They are as conclusive upon such agents as any other portion of the written charter. Limitations are not peculiar to any one branch of the government, but there are those, which apply to each department, and they are imposed as a security to the rights of the principal,—the people. The power of the government is vested in the three departments, to be exercised subject to these limitations. The power to declare what the law shall be is legislative. The power to declare what is the law is judicial. The power to declare what is the law is delegated to the judicial depart-



ment, and therefore the courts have the unquestioned right to declare any act of the government, in any of the departments, which violates the constitution, to be utterly void. This right or power necessarily includes the power to declare what enactments of the legislature are, and what are not, laws; and in exercising this function the courts do not trench upon the domain of the legislative department, although they pass judgment upon its official acts. When the enrolled act is assailed in a court of law on the ground that it was not constitutionally passed by the legislature, the court must determine whether there was a compliance or noncompliance with the mandatory provisions of the constitution respecting the mode and manner of the passing of the act. For this purpose, I have no doubt that, upon principle, as well as authority, the court may take judicial notice of the legislative journals, and, in a proper case, go behind the enrolled act, even when such act has been properly authenticated and deposited with the secretary of state, and examine such journals, giving their contents such weight as evidence as they may be entitled to receive, considering the manner in which they are kept, and circumstances under which the entries have been made; and if, in such case, it should affirmatively appear upon the journals, or either of them, that in passing the act the legislature had disregarded a mandatory provision of the constitution, the court would be justified in holding the same unconstitutional and void. If, however, the journals are merely silent as to the subject under investigation, then the presumption that the legislature acted according to its delegated power should prevail, unless an omission of some matter which the constitution expressly requires to be entered therein be shown by such journals, or either of them. It seems that even the English rule admits the journals of parliament to be evidence for such purposes as they are there considered to be provided, but they cannot there be referred to for the purpose of impeaching the enrolled act. I am therefore of the opinion that in this country the enrolled act of the legislature, duly signed, approved, and deposited with the proper custodian, is *prima facie*, but not conclusive, evidence of its constitutional enactment and of what the law is; that the courts may take judicial notice of the legislative journals required to be kept by the constitution; and that such journals possess the character of public records, their value in each case being a question for the courts. In fact, some of counsel for respondents, in their oral arguments, admitted that the courts had the right to take judicial notice of the journals, but claimed that they contained nothing derogatory to the validity of the act, and in this I think they were correct. The journals required to be kept by the constitution were evidently intended for the purpose of making a record of the daily proceedings

of the legislature. They are therefore public records made in perpetuum memoriam rei entered therein, and where questions arise as to what is contained therein, or what proceedings were had, the court has the right to inspect the record. Such record is like any other public record, which, in the language of Sir Edward Coke, is "a monument of so high a nature, and importeth in itself such absolute verity, that, if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself." 3 Bl. Comm. 331.

When a similar proposition was before our late territorial supreme court, in *People v. Clayton*, 5 Utah, 598, 18 Pac. 628, Chief Justice Zane, then speaking for the court, observed: "Whenever such a question arises, the court, in deciding the issue, should take judicial notice of such facts as it may properly consider. The evidence of public laws should be preserved in public and permanent records,"—and, after reviewing a number of authorities, said: "In the light of authority, we are of the opinion \* \* \* that where the journals of the two houses, showing their action, are kept in pursuance of law, the court may look to such journals to ascertain whether the constitutional requirements have been complied with." Thus, the journals were at that time recognized as evidence by the court. Why should this case be overruled, and a different doctrine prevail now? It certainly cannot be successfully contended that the reasons for recognizing the journals as evidence then were stronger than now, because, in addition to the reasons which then existed, we have now the mandate of the constitution that "each house shall keep a journal of its proceedings." Article 6, § 14. Clearly, the affirmative of the question is supported by the weight of authority in the several states of the Union, as well as by eminent text writers. Judge Cooley, in his treatise on *Constitutional Limitations*, on page 162, says: "Each house keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to take judicial notice. If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence, and adjudge the statute void." Judge Sutherland, in his work on *Statutory Construction* (section 46), states the law as follows: "When an act is found lodged in the office of the secretary of state, with the public acts passed at the same session, signed by the presiding officers, approved and signed by the governor, and it is published by authority as one of the public statutes of the state, or is otherwise authenticated according to law, and in proper custody, the presumption is that it was regularly passed, unless there



is evidence of which the courts take judicial notice showing the contrary. The journals are records, and, in all respects touching proceedings under the mandatory provision of the constitution, will be effectual to impeach and avoid the acts recorded as laws, and duly authenticated, if the journals affirmatively show that these provisions have been disregarded. In the absence of such an affirmative showing, and even in cases of doubt, it will be presumed that a quorum was present; that the necessary readings occurred; that amendments made by one branch, though extensive, were germane; that they were concurred in by the other branch,—though the journals may be silent.” And in section 42 he says: “The tendency, however, of the law’s growth, is to preserve the supremacy of constitutional authority, leaving it to the wisdom of the legislature to mitigate any incidental inconvenience by closer observance of the prescribed procedure, and more diligent attention to the making and preservation of a public record of the essentials. The cases cited in the preceding section hold the constitutional injunctions imperative, and, as the constitutions require the keeping and publication of legislative journals, these are treated as sources of information to be relied on by the courts as well as the public.” In section 44 he says: “The journals, by being required by the constitution or laws, are records. At common law the legislative journals were not strictly records. While admissible in evidence for certain purposes, as official memorials or remembrances, they were not admissible to show that an act of parliament had not been passed according to its own rules. But when required, as is extensively the case in this country, by a paramount law, for the obvious purpose of showing how the mandatory provisions of that law have been followed in the methods and forms of legislation, they are thus made records in dignity, and are of great importance. The legislative acts regularly authenticated are also records. The acts passed, duly authenticated, and such journals are parallel records, but the latter are superior, when explicit and conflicting with the other; for the acts authenticated speak decisively only when the journals are silent, and not even then as to particulars required to be entered therein.” See, also, section 41. So Black, in his late work on Interpretation of Laws (published in 1896) p. 225, after speaking of the right of referring to the journals of the legislature in aid of the interpretation of statutes, says: “It will be observed that this question is an entirely different matter from resorting to the legislative journals to ascertain whether an act was constitutionally passed; that is, passed with the requisite majority, or after the required number of readings, or with a call of the house on its final passage, or otherwise in conformity with the requirements of the constitution.

On this point the rule settled by a majority of the courts is that it is competent to go behind the enrolled act, and consult the journals, but that the act will not be declared void for lack of compliance with the constitutional forms, unless their nonobservance is shown affirmatively by the journals. If the journals are silent as to these matters, it will be presumed that the legislature complied with all the constitutional requisites. In any event, no evidence can be received to contradict the journals.”

In the state of New Hampshire, in 1858, an act was found lodged in the office of the secretary of state, with other public acts passed at the same session. It was signed by the speaker of the house of representatives and the president of the senate, and had upon it the approval of the governor, and had been published, by authority, as one of the public statutes enacted at that session. The validity of the act having been questioned, because in its enactment the legislature had failed to comply with a certain requirement of the constitution, the governor submitted the question of its validity to the supreme court of that state. In their opinion (35 N. H. 579), unanimously holding the act invalid, the court, upon the question whether they could look into the journals, said: “We are of opinion that the journals which the constitution thus requires to be kept by the senate and house of representatives, to be lodged and preserved in the general public depository of the state records, and to be published annually in the same manner as the public laws, were intended to furnish the courts and the public with the means of ascertaining what was actually done in and by each branch of the legislature, not merely for the purpose of enabling the people to judge of the manner in which their public servants have conducted themselves in their office of legislators, but also for the purpose of determining whether the proceedings of the legislature have been in conformity with the provisions of the constitution; that these journals, under our constitution, are not to be regarded as ‘mere remembrances of proceedings,’ kept by each house for its own use and convenience, which expire when the act is passed, or the business is disposed of, to which they relate. But we think they are to be treated as authentic records of the proceedings, and that we may resort to them in this case to ascertain whether the two houses in fact concurred in the passage of the before-mentioned act; that, if it appears by the journals that they did not, the prima facie evidence derived from an examination of the act itself will be overcome.” Mr. Justice Gray, in *Post v. Sup’rs*, 105 U. S. 667, said: “The copies of the journals, certified by the secretary of state, and the printed journals published in obedience to law, are both competent evidence of the proceedings in the legislature.” In *Hall v. Steele*, 82 Ala. 562,

2 South. 650, Mr. Justice Clopton said: "We have uniformly held that, when the constitution does not require the journals to affirmatively show that a particular thing necessary to the validity of the legislative action was done, mere silence will not invalidate; and in such case we will presume that the legislators observed their obligation, and did not pass such bill without sufficient proof that the proper notice had been given. The unconstitutionality of an act enrolled, authenticated by the signatures of the presiding officers, and approved and signed by the governor, must be affirmatively and clearly shown, before the courts are authorized to treat it as void because not having been passed in accordance with the rules of parliamentary law prescribed in the constitution." So, in *Supr's v. Heenan*, 2 Minn. 330 (Gil. 281), Mr. Justice Flandrau stated: "The court may inspect the original bills on file with the secretary of state, and have recourse to the journals of the houses of the legislature, to ascertain whether or not the law has received all the constitutional sanctions to its validity."

In *Gardner v. Collector*, 6 Wall. 499 (Mr. Justice Miller delivering the opinion of the court), it was said: "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when the statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question,—always seeking first for that which, in its nature, is most appropriate,—unless the positive law has enacted a different rule." In the case of *People v. Mahaney*, 13 Mich. 481, the supreme court of Michigan, speaking through Mr. Justice Cooley, said: "As the court are bound judicially to take notice of what the law is, we have no doubt it is our right, as well as our duty, to take notice, not only of the printed statute books, but also of the journals of the two houses, to enable us to determine whether all the constitutional requisites to the validity of a statute have been complied with. The printed statute is not even *prima facie* valid, when other records, of which the court must equally take notice, show that some constitutional formality is wanting." The supreme court of Illinois, in *Illinois Cent. R. Co. v. People*, 148 Ill. 434, 33 N. E. 173, said: "It is not denied that the amendatory act received the signatures of the speakers of both houses, and the approval of the governor. Such verification is *prima facie* evidence of its validity as a legislative enactment. But it is the settled law of this state that the journals of either branch of the legislature may be resorted to for the purpose of overcoming such *prima facie* evidence. It may be shown from the journals that an act was not passed in the mode prescribed by the constitution." So the

supreme court of Florida, in *State v. Brown*, 20 Fla. 407, says: "If the journals show conclusively that any material portion of a bill, as passed, was omitted in the enrolling, so that it may be considered that the act, as approved, was not passed by the legislature, and does not express the legislative will, the act, as approved, at least to the extent that it is affected by the omission, must be held invalid. This is a rule well settled now by the American courts. The constitution requires the keeping of journals of their proceedings by the respective houses of the legislature, and these journals are received as evidence of such proceedings. When an act is duly approved and published, it is *prima facie* a law; but if the legislative journals show that, instead of being passed, it was defeated, or that it is not the same that was passed, it is not a law." Sedg. St. & Const. Law (2d Ed.) §§ 54, 55; Black, Const. Law, 60, 265; End. Interp. St. § 33; 1 Whart. Ev. §§ 290-295; 1 Greenl. Ev. § 491; 2 Whart. Ev. § 1300; *Henderson v. State*, 94 Ala. 95, 10 South. 332; *State v. Wright*, 14 Or. 365, 12 Pac. 708; *Chicot Co. v. Davies*, 40 Ark. 200; *Spangler v. Jacoby*, 14 Ill. 397; *Currie v. Southern Pac. Co.*, 21 Or. 560, 28 Pac. 884; *State v. Robinson*, 20 Neb. 96, 29 N. W. 246; *Osburn v. Staley*, 5 W. Va. 85; *In re Roberts*, 5 Colo. 525; *Hart v. McElroy*, 72 Mich. 446, 40 N. W. 750; *State v. Hagood*, 13 S. C. 46; *Com'rs v. Higginbotham*, 17 Kan. 62; *Koehler v. Hill*, 60 Iowa, 542, 14 N. W. 738, and 15 N. W. 609; *Wise v. Bigger*, 79 Va. 269; *Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3; *People v. Dunn*, 80 Cal. 211, 22 Pac. 140; *Glidewell v. Martin*, 51 Ark. 559, 11 S. W. 882; *State v. Robertson*, 41 Kan. 390, 21 Pac. 382; *State v. Van Duyn*, 24 Neb. 586, 39 N. W. 612; *State v. Klesewetter*, 45 Ohio St. 254, 12 N. E. 807; *Berry v. Railroad Co.*, 41 Md. 446; *State v. Algood*, 87 Tenn. 163, 10 S. W. 310; *State v. Platt*, 2 S. C. 150; *Brown v. Nash*, 1 Wyo. 85; *People v. Campbell*, 3 Gilm. 466; *State v. McBride*, 4 Mo. 302; *State v. Mead*, 71 Mo. 266; *Southwark Bank v. Com.*, 26 Pa. St. 446; *City of Watertown v. Cady*, 20 Wis. 501; *State v. Babbitts*, 46 Ohio St. 173, 19 N. E. 437; *People v. Clayton*, 5 Utah, 598, 18 Pac. 628; *Meracle v. Down*, 64 Wis. 323, 25 N. W. 412; *Territory v. O'Connor*, 5 Dak. 397, 41 N. W. 746; *Hughes v. Felton*, 11 Colo. 489, 19 Pac. 444; *San Mateo Co. v. Southern Pac. R. Co.*, 8 Sawy. 238, 13 Fed. 722; *State v. Deal*, 24 Fla. 293, 4 South. 899; *People v. Burch*, 84 Mich. 408, 47 N. W. 765; *Burritt v. Com'rs*, 120 Ill. 222, 11 N. E. 180; *Nelson v. Haywood Co.*, 91 Tenn. 596, 20 S. W. 1.

The above constitutes but a small portion of the cases which support the views herein contended for. They are sufficient, however, to show that over 20 states have held that the journals of the houses of the legislature may be looked to in deciding the constitutionality of an enrolled act. 23 Am. & Eng. Enc. Law, 208. Seven states appear to have no decisions on the subject. Connecticut, Indiana,

Kentucky, Louisiana, Maine, Nevada, and Mississippi have decided that the enrolled act is conclusive, and in several other states the decisions do not appear to be uniform. *Fleld v. Clark*, 143 U. S. 649, 661, and note, 12 Sup. Ct. 495. It will be noticed, from an examination of the cases which hold the affirmative of this proposition, that the decisions, in the main, are not based on any peculiar constitutional provision, but on principle, and the ground that the constitution requires the journals to be kept.

It is quite clear that under the American rule, adopted by a large majority of the states of the Union, the legislative journals may be consulted to determine whether the enrolled act was constitutionally passed; and this has also the support of the text writers. That to hold a statute void may work a hardship upon people is quite true, but that fact has no more force when the law is held void because of the violation of a mandatory provision of the constitution than when it is held void for any other reason. It is the solemn duty of courts to declare what the law is, regardless of consequences. In this case, looking to the journals, there appear to be no affirmative statements recorded which conflict with the validity of the enrolled act; and the mere silence of the journals as to the mandatory provision of the constitution here in question will not justify the holding of the act void, because the presumption in such case that the legislature proceeded properly is conclusive.

I am also unable to agree with the Chief Justice in his views as to a secret ballot. The constitutional provision on this question (article 4, § 8) is as follows: "All elections shall be by secret ballot. Nothing in this section shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election; provided, that secrecy in voting be preserved." This is an express provision for a secret ballot, and clearly the word "secret" should, in the interpretation of this section, receive its plain and ordinary meaning, because it does not appear from the context that any other meaning was intended by the framers of the constitution. In fact, the words "secret ballot" appear to be emphasized; for, while the use of a machine or mechanical contrivance is permitted for a certain purpose, it is only permitted "provided, that secrecy in voting be preserved." Used as an adjective, Webster defines the word "secret" as "hidden; concealed." As a noun, "something studiously concealed; a thing kept from general knowledge; what is not revealed, or not to be revealed." Doubtless this latter is the sense in which the words "secret ballot" were used in the constitution. This view is in harmony with public thought and expression respecting the ballot systems at the time of and before the holding of the constitutional convention, and the courts have the

right to take notice of the history of the times, for the purpose of ascertaining the intent of the framers of the constitution. It is well understood that the questions of open and secret ballots created much discussion in the several states, as well as in Utah territory, on account of the improper influence, whether supposed or real, which could be brought to bear upon the humble citizens by their employers, or those to whom they felt under obligations, or which might result from wealth and station. The secret ballot is a question of public policy, and the framers of the constitution doubtless intended to make the veil of secrecy impenetrable, so that the voter could make promises to whom he pleased, and vote as he pleased, without fear of afterwards having the secrecy of his ballot violated. The object to secure an independent ballot would be very imperfectly accomplished if the secrecy was limited to the moment of casting the ballot. It is apprehended that it is not so much the fear of the voter of being exposed then, as the fear of afterwards having his ballot identified and becoming exposed, whether clandestinely or otherwise, that deprives him of independence. Beyond all reasonable controversy, the object aimed at by this provision of the constitution was to secure the independence of the voter. How, then, can this object be attained, if the voter be compelled to cast a ballot which can be identified? To my mind, the conclusion is inevitable that any contrivance or method by which the ballot can be identified and the voter exposed is unauthorized, and no legislative enactment can give it the force of law, under our constitution, be the same for the purpose of contest in a court of justice, or for any other purpose. In arriving at this conclusion, I am not unmindful of the grave duty of the sovereign power to protect individual rights by suppressing election frauds. Such frauds shock the conscience of every true American citizen. But is it not possible to perpetrate the gravest kind of such frauds by the intimidation of the independent voter? Remove the safeguards, and will it not be possible to commit frauds at elections which will strike at the very foundation of government itself? Then why annul a wise provision of the constitution by judicial construction, and render it possible to perpetrate the very offenses which all good citizens condemn? From the time of placing a number on the ballot, as provided by the section of the act in question which renders it susceptible of identification, its secret character is gone, whether the court pronounces it a legal secret ballot or not. The fact is that such a ballot is not secret, within the meaning and intent of the constitution. Whether the method provided by the legislature is the best or only method which can be of avail in an election contest does not concern this court. It might be suggested, however, that election contests

occupied the attention of courts before such a ballot was invented, and considerations of convenience in election contests can have no influence with the court in determining the question under consideration. A legal voter, even in a contest, cannot be compelled to disclose his ballot. Much less should he be compelled to vote one from which it may be ascertained by others, or even a court, how he voted. And this upon consideration of public policy that the secrecy and purity of the ballot may be preserved.

In *Cooley*, Const. Lim. (5th Ed.) 762, the author says: "The system of ballot voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases, and with what party he pleases, and that no one is to have the right, or be in position, to question his independent action, either then or at any subsequent time. The courts have held that a voter, even in case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others, who may accidentally, or by trick or artifice, have acquired knowledge on the subject, should not be allowed to testify to such knowledge, or to give any information in the courts upon the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it. His ballot is absolutely privileged, and to allow evidence of its contents, when he has not waived the privilege, is to encourage trickery and fraud, and would, in effect, establish this remarkable anomaly, that while the law, from motives of public policy, establishes the secret ballot with a view to conceal the elector's action, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated, and the voter's action disclosed to the public." So in *McCrary*, Elect. § 453, it is said: "The secret ballot is justly regarded as an important and valuable safeguard for the protection of the voter, and particularly the humble citizen, against the influence which wealth and station may be supposed to exercise. And it is for this reason that the privacy is held not to be limited to the moment of depositing the ballot, but is sacredly guarded by the law for all time, unless the voter himself shall voluntarily divulge it." In *Paine*, Elect. § 453, the author states the law as follows: "A constitutional provision that all elections shall be held by ballot guarantees the secrecy of the ballot, and is violated by a statute requiring the tickets to be numbered to correspond with the voters' numbers on the poll list." In the case of *People v. Cicott*, 16 Mich. 283, Mr. Justice Campbell said: "The reason why the ballot is made obligatory by our constitution is to secure every one the right of preventing any one else from knowing how he voted, and there is no propriety in any rule which renders such a safeguard valueless." And again he says: "It would be better to

do away at once with the whole ballot than to have legal tribunals give any aid or countenance to indirect violations of its security." So the supreme court of Minnesota, in *Brisbin v. Cleary*, 26 Minn. 107, 1 N. W. 825, speaking through Mr. Justice Berry, said: "The statutory provision with regard to the numbering of tickets, above quoted, clearly interferes with and violates the voter's constitutional privilege of secrecy. The voter cannot be required to submit to its application the ticket offered by him, and if, upon refusing to so submit, he is debarred from voting, he may maintain his action for damages against the persons debarring him." The constitution of Indiana (article 2, § 13) containing a provision that "all elections shall be by ballot," a statute was enacted which provided as follows: "It shall be the duty of the inspector of any election held in this state, on receiving the ballot of a voter, to have the same numbered with figures on the outside or back thereof, to correspond with the number placed opposite the name of such voter on the poll list kept by the clerks of said election." 3 Rev. St. Ind. 1870, p. 235. The supreme court of that state, in *Williams v. Stein*, 38 Ind. 89, held that the ballot secured by the constitution was a secret ballot. Mr. Justice Pettit, delivering the opinion of the court, said: "My convictions are clear that our constitution was intended to and does secure the absolute secrecy of a ballot, and that the act in question, which directs the numbering of tickets to correspond with the numbers opposite the names of the electors on the poll lists, is in palpable conflict, not only with the spirit, but with the substance, of the constitutional provision. This act was intended to and does clearly identify every man's ticket, and renders it easy to ascertain exactly how any particular person voted. That secrecy which is esteemed by all authority to be essential to the free exercise of suffrage is as much violated by this law as if it had declared that the election should be viva voce." Mr. Chief Justice Denio, in *People v. Pease*, 27 N. Y. 45, 81, used the following language: "I have already alluded to the policy of the law providing for a secret ballot. The right to vote in this manner has usually been considered an important and valuable safeguard of the independence of the humble citizen against the influence which wealth and station might be supposed to exercise. This object would be accomplished but very imperfectly if the privacy supposed to be secured was limited to the moment of depositing the ballot. The spirit of the system requires that the elector should be secured then, and at all times thereafter, against reproach or animadversion, or any other prejudice, on account of having voted according to his own unbiased judgment, and that security is made to consist in shutting up within the privacy of his own mind all knowledge of the manner in which he has

bestowed his suffrage." Cooley, Const. Lim. (5th Ed.) p. 760; McCrary, Elect. § 454; Williams v. Stein, 38 Ind. 89; Pennington v. Hare (Minn.) 62 N. W. 116; Attorney General v. McQuade, 94 Mich. 439, 53 N. W. 944; Parvin v. Winberg (Ind. Sup.) 30 N. E. 791; State v. Anderson (Fla.) 8 South. 1; Ex parte Arnold, 128 Mo. 256, 30 S. W. 768, 1036.

In states where the constitution expressly provides for numbering the ballots, the courts doubtless hold such numbering lawful, and the provision mandatory. This is so in Texas, where the constitution, in article 6, § 4, provides: "In all elections by the people, the vote shall be by ballot, and the legislature shall provide for the numbering of tickets," etc. State v. Connor, 86 Tex. 133, 23 S. W. 1103. As will be seen, in that state the numbering of ballots is expressly authorized by the organic law, whereas our constitution not only has no such provision, but expressly commands a secret ballot. The case of Hodge v. Linn, 100 Ill. 397, cited in the opinion of the Chief Justice, ought not to be regarded as a controlling authority in the case at bar, because the constitution of that state does not expressly provide that the ballot shall be secret. See Const. Ill. 1870, art. 7, § 2. The same may be said of the Missouri cases cited in the opinion. See Const. Mo. 1865, art. 2, § 1.

I am of opinion that so much of section 26 of the act approved March 28, 1896 (Sess. Laws, p. 183), as provides for the identification of the ballot, is in violation of the constitution and void; and, in arriving at this conclusion, I am not unmindful of the salutary rule that in the interpretation of statutes all doubts should be solved in favor of the constitutionality of their enactment. The rule is well established, and founded in the highest wisdom. Because, however, a small portion of an act is invalid, it does not necessarily follow that the whole act is void. All that portion of the act which is not repugnant to the constitution is valid. While the numbering of the ballots was improper, still that circumstance should not have the force to avoid the act and overturn the election. The electors were not responsible. Their ballots were honestly cast, and there has not been sufficient reason shown why they should not have been so counted. The writ ought to be denied.

**MINER, J.** I concur in the opinion of Justice BARTCH, and in the holding that the journal of proceedings to be kept by the two houses composing the legislature, under section 14, art. 6, of the constitution, may be examined and inquired into for the purpose of determining any conflict between them and the enrolled acts. In cases of conflict the journal entries should govern and control the presumption arising from enrollment. I also concur in holding that part of section 26, c. 69, p. 183, Laws 1896, with reference to numbering the ballots as be-

ing in violation of section 8 of article 4 of the constitution, which requires all elections to be by secret ballot. I also concur in the opinion of Chief Justice ZANE, with the exception of the matters above referred to.

(115 Cal. 657)

## PIERCE v. BIRKHOLM et al.

(No. 15,464.)

(Supreme Court of California. Jan. 26, 1897.)

BUILDING CONTRACTS — STATUTORY PROVISIONS — MECHANIC'S LIEN.

1. A contract to erect a house in conformity with plans prepared by and in the possession of a designated architect, filed with the recorder without a copy of the plans, does not comply with Code Civ. Proc. § 1183, which requires building contracts to be in writing, and to be filed before work is commenced.

2. A building contract, filed with the county recorder under the mechanic's lien law, was void for failure to set out the plans. Code Civ. Proc. § 1183, provides that in such case labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the instance of the owner. Section 1187 provides that all persons save the original contractor must file claims of liens within 30 days after the completion of the building. *Held*, that where the original contractor abandoned the building, and the owner finished it, persons furnishing labor and materials were entitled to liens on filing their claims within 30 days from the completion.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Separate actions by David T. Pierce and others against H. H. Birkholm and others. The actions were consolidated, and there was a judgment for defendants, and plaintiffs appeal. Reversed.

William H. Jordan, Parker & Eells, and Morrison & Foerster, for appellants. W. S. Goodfellow, for respondents.

**BELCHER, C.** The plaintiff and six other parties commenced actions to foreclose mechanics' liens for labor and material furnished and used in the construction of a building for the defendant Birkholm. The actions were consolidated, and tried together. The court below gave judgment in favor of the defendants, from which the plaintiffs have appealed, without any statement or bill of exceptions.

It is alleged in the complaint of Pierce, and the other complaints are substantially the same, that on the 15th day of March, 1889, the defendant Birkholm and one Willis entered into a written contract whereby Willis agreed to construct for Birkholm a two-story dwelling house and shed connected therewith, upon certain described real property, and to furnish all the materials therefor, for the sum of \$5,445, 25 per cent. of which sum was to be paid 36 days after the building should be fully completed and accepted; that the building, as shown by the written contract, was to be constructed in conformity with plans, drawings, and specifications for the same, made by an architect

employed by the owner, and signed by the parties to the contract; that neither the said contract nor any memorandum thereof was ever filed in the office of the recorder of the county where the property was situated, and that the said plans, drawings, and specifications were never so filed; that the building was fully completed and accepted by the owner on the 20th day of August, 1889; that prior to its completion it had been abandoned by the contractor; that during the progress of the work of construction the plaintiff, at the instance of the contractor, furnished labor and materials therefor, and subsequently, within less than 30 days after the date of completion, filed his claim of lien upon the property for the amount unpaid to him; and within 90 days thereafter the action was commenced.

The defendant, by his answer, denied that either the contract or any memorandum thereof was filed in the office of the county recorder; denied that the plans, drawings, and specifications referred to in the complaint were a part of said contract; and then set up the character and substance of the written instrument which he alleged was actually filed. He further denied, upon information and belief, many other averments of the complaint. Subsequently, by an amendment to his answer, he admitted that on the 12th day of June, 1889, while the building was in process of construction, the contractor abandoned the building, and failed and neglected to complete the same, and that on or about said last-named day, and more than 30 days before the filing of plaintiffs' claims of lien, or any of them, he, the said contractor, "ceased from labor upon said unfinished and uncompleted contract, nor was labor ever resumed thereon."

At the trial of the cause, no evidence, other than documentary, was introduced by either party, and the case was submitted upon the following admissions: It was admitted that all the allegations contained in the complaints were true as therein alleged, save and except the allegation that the contract between Willis and Birkholm was not filed for record, nor any memorandum thereof, before the commencement of work upon the building, and also save and except the allegations regarding attorneys' fees.

The court found the facts to be as follows: (1) "Before the commencement of the work referred to in the complaints, there was filed for record in the office of the county recorder of the city and county of San Francisco a written instrument subscribed by the defendant Birkholm and the defendant Willis, a copy of which is hereto annexed, marked 'Exhibit A,' and made a part hereof, and the same was the only instrument at any time filed for record. No plans, drawings, or specifications were at any time filed with said contract, or at all. Nor were any plans, drawings, or specifications ever at any time annexed to said instrument." (2) "The de-

fendant Willis, the contractor who was constructing the building for the defendant Birkholm, as alleged in the complaint, did, while the said building was in process of construction, to wit, on the 12th day of June, 1889, abandon said building, and failed and neglected at any time to complete the same, or his contract with the defendant for the construction of said building, and on the said last-named day, and more than thirty days before the filing of the plaintiffs' claims of lien, or any of them, ceased from labor upon said unfinished and uncompleted contract; nor was labor ever resumed thereon by him, or any person representing him. That after the said contractor had so abandoned his contract, and within less than thirty days from and after said 12th day of June, 1889, the defendant Birkholm, with his own independent means, commenced work upon said building, and completed the same on the 20th day of August, 1889." And as conclusions of law the court found "that the liens of the plaintiffs, and each of them, were not filed within the time required by law, and also that the plaintiffs are entitled to take nothing as against the defendant Birkholm, and that said defendant Birkholm is entitled to judgment for his costs."

The instrument referred to in finding 1 as "Exhibit A" is fully set out, and it appears that the only provision therein in regard to the general character of the work to be done is as follows: "The contractor agrees within that on or before the 15th day of July, A. D. 1889, that he will, from the date hereof, furnish the necessary labor and materials, including tools, implements, and appliances required, and erect and complete in a workmanlike manner a two-story dwelling house and shed, and deliver the same to the owner free from all liens and charges, in conformity with the plans, drawings, and specifications for the same made by Charles C. Shang, the authorized architect employed by the owner, and which are signed by the parties hereto, and are to be kept and remain in the office of said architect, subject to the inspection of the parties hereto and others concerned in said erection."

The first and principal question is, were there any plans, drawings, and specifications, and, if so, did they constitute a part of the building contract? This question must, in our opinion, be answered in the affirmative. The language of the contract above quoted clearly implies that there were plans, drawings, and specifications, in conformity with which the building was to be constructed; and the fact that the contract did not state in terms that they were annexed to it, and made a part of it, was immaterial. That they did constitute an essential part of the contract abundantly appears, for without them the "general character of the work to be done" could not be ascertained. It could not be told what was to be the size or shape of the house, or what materials—whether wood, brick, or stone—

were to be used in its construction. In the case of *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913, the provisions of the contract that the building was to be erected and completed in a workmanlike manner, and delivered to the owner free from all liens and charges, "in conformity with the plans, drawings, and specifications," etc., were the same as in this case. And the court said: "In the matter of 'the general character of the work to be done,' the contract as filed was, without the 'plans, drawings, and specifications,' which formed an essential part thereof, fatally defective. If it be urged that the contract did not in terms recite that the 'plans, drawings, and specifications' were attached thereto and made a part of the contract, the answer is twofold: (1) It abundantly appears that they formed an essential part of the contract, and they became a part thereof as effectively as though in express terms so designated. (2) Without them the contract is so indefinite and uncertain as not to comply with the requirements of the statute." And in that case it was held, as it has been held in many other similar cases, that the contract was void. *Willamette Steam Mills Lumbering & Manuf'g Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111; *Barker v. Doherty*, 97 Cal. 10, 31 Pac. 1117; *Dunlop v. Kennedy*, 102 Cal. 443, 36 Pac. 765.

This being so, the only remaining question is, were the plaintiffs' claims of lien filed within the time required by the statute? Section 1183 of the Code of Civil Procedure provides that, if the contract or a memorandum thereof is not filed in the office of the county recorder before the work is commenced, it shall be wholly void, and no recovery shall be had thereon; and in such case the labor done and materials furnished by all persons except the contractor "shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." And section 1187 provides that "every person, save the original contractor, claiming the benefit of this chapter," must file his claim of lien within 30 days after the completion of any building, improvement, or structure. Here, the contract being void, there was no original contractor, and the plaintiffs are deemed to have furnished their labor and materials at the personal instance of the owner. And under section 1187 they were required only to file their claims of lien within 30 days after the building was completed. It appears from the findings that there was no cessation of labor on the building for the period of 30 days, and that the building was completed on the 20th day of August, 1889; and it is admitted that the plaintiffs filed their claims of lien within 30 days thereafter. This was in time to meet the requirements of the law, and to entitle the plaintiffs to the relief demanded. The case of *Johnson v. La Grave*, 102 Cal. 324, 36 Pac. 651, is not in point. In that case there was a valid contract for the

construction of a building, and the contractor, after performing a portion of his contract, abandoned it, and refused to proceed further in its execution. Section 1187, Code Civ. Proc., provides that "cessation from labor for thirty days upon any unfinished contract \* \* \* shall be deemed equivalent to a completion thereof for all the purposes of this chapter." Laws 1887, p. 154. It was held that under these circumstances it was incumbent upon parties claiming liens by virtue of the original contract to file their claims of lien within 30 days after there had been a cessation of labor for 30 days upon the unfinished contract. Here there was no valid contract, and hence the rule declared in that case does not apply. The judgment should be reversed, and the cause remanded.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

(115 Cal. 642)

RICHARDS v. LAKE VIEW LAND CO.

(L. A. 173.)

(Supreme Court of California. Jan. 26, 1897.)

CONTRACT TO PAY MONEY—AVERMENT AS TO BREACH.

An allegation that "there is now due and owing from defendant," etc., on a contract for the payment of money, is not sufficient as an allegation of nonpayment constituting a breach of the contract.

Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by Charles E. Richards against the Lake View Land Company. From a judgment for plaintiff, defendant appeals. Reversed.

Knight & Harpham, for appellant. E. B. Stanton and O. P. Widaman, for respondent.

McFARLAND, J. Defendant appeals upon the judgment roll from a judgment for plaintiff, the point made by appellant being that the demurrer to the first, fifth, and seventh counts of the complaint should have been sustained. The complaint contains several different counts. In each count there is an averment of an indebtedness of the appellant to a certain person upon a contract, and an assignment by such person of the alleged cause of action to respondent. In each of the counts, except the first, fifth, and seventh, there is an averment that the amount claimed "has not been paid, or any part thereof"; but in the first count the only averment on the subject of nonpayment is that "there is now due and owing from said defendant to the said plaintiff" a certain stated amount. In the fifth count the only averment is that "there is now due," etc., and in the seventh count the averment also is that "there is now due," etc. It has

been settled in this state by a long line of decisions from *Frisch v. Caler*, 21 Cal. 71, to the very recent case of *Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891, that in an action to recover money upon a contract "the failure to pay constitutes the breach, and must be alleged," and that such language as that used in said counts is not the equivalent of an averment of nonpayment, but is a mere conclusion of law, and not an averment of fact. See *Ryan v. Holliday*, *supra*, and cases there cited. It is useless, at this late day, to discuss the merits of the rule. It is a rule easily complied with, and, being firmly established, cannot now be disregarded in order to meet the exigencies of particular cases. Respondent contends that this defect in the fifth count is cured by the answer. Upon looking at the answer, it does not seem to us to bring the case within the rule contended for by respondent; but it hardly seems necessary to now determine that question definitely, for, as the other two counts will have to be amended so as to directly aver nonpayment, a similar amendment can readily be made to the fifth count, which will avoid this question. The judgment is reversed, with directions to the court below to sustain the demurrer to the first, fifth, and seventh counts of the complaint.

We concur: HENSHAW, J.; TEMPLE, J.

(5 Cal. Unrep. 586)

**BANCROFT v. SAN FRANCISCO TOOL CO.**  
(S. F. 484.)<sup>1</sup>

(Supreme Court of California. Jan. 27, 1897.)

**PASSENGER ELEVATOR — CONSTRUCTION CONTRACT — IMPLIED WARRANTY — DEFECTIVE DESIGN — ACTION FOR BREACH OF WARRANTY — LIMITATIONS.**

1. A warranty in a written contract to manufacture and put up a passenger elevator, that the contractor would furnish first-class work, and keep the elevator in repair for one year, does not include a warranty that the design submitted with the specifications would be suitable.

2. The implied warranty created by Civ. Code, § 1770, which provides that one who manufactures an article under an order for a particular purpose warrants that it is reasonably fit for such purpose, forms a part of a written contract to manufacture and put up a passenger elevator, so that an action for breach thereof is one on a written contract (Code Civ. Proc. § 337), for breach of which action may be brought within four years.

3. A cause of action for a breach of warranty that the design of a passenger elevator would be suitable for the purpose for which it was intended accrues when the elevator is completed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by H. H. Bancroft against the San Francisco Tool Company. There was a judgment for defendant for costs, and from an order denying a new trial plaintiff appeals. Reversed.

<sup>1</sup> Rehearing granted.

Galpin & Zeigler, for appellant. E. J. Pringle, for respondent.

SEARLS, C. This is an action to recover damages from the corporation defendant, alleged to have been sustained by plaintiff by reason of the fall of a passenger elevator erected by said defendant for plaintiff in the History Building, Market street, San Francisco. Defendant, among other defenses to the action, set up the bar of the statute of limitations as found in subdivision 1 of section 339 of the Code of Civil Procedure, which provides that "an action upon a contract, obligation, or liability, not founded on instrument in writing, or founded upon an instrument of writing executed out of this state," shall be brought within two years. At the trial, and upon the close of plaintiff's testimony, defendant moved the court for a nonsuit, which motion was granted, and judgment entered in favor of defendant for costs. This appeal is from an order of the court denying a motion on behalf of plaintiff for a new trial.

Whether or not plaintiff's cause of action is barred by the statute of limitations is the only question necessary to be considered on this appeal. Some minor questions were made at the trial, none of which, however, have any bearing upon the main point, viz. the bar of the statute; and, manifestly, if the cause of action was barred, the nonsuit was properly granted, while, if not so barred, the nonsuit was clearly erroneous, and a new trial should have been granted. It appears from the record that early in 1887 the plaintiff was engaged in the construction of what is known as the "History Building," on Market street, San Francisco, — a building consisting of five stories and a basement; that he required three elevators therein, viz. two freight and one passenger elevator. On the 4th day of April, 1887, the defendant corporation submitted to plaintiff a proposition in writing, which is in part as follows:

"San Francisco, April 4, 1887. A. L. Bancroft & Co., City: We will furnish three hydraulic elevators as follows, and as per plan submitted with this specification.

"Elevators: Three hydraulic cylinders complete, with elevating sheaves mounted on same as shown on plan.

"Details of erection: 1,300 feet of 5/8-inch wire rope."

Then follows a long list of materials to be furnished, consisting of iron sheaves, shafting, counterweights, water gates, casing, elbows, cast-iron tees, flanges, sewer pipe, steam pump, tank, cages, "one cage to be made for carrying passengers," etc., which need not be mentioned in greater detail. The offer proceeds as follows: "We will furnish the work heretofore mentioned in a first-class, workmanlike manner for the sum of five thousand dollars (\$5,000), guarantying these elevators for one year; that is to say, we will keep them in first-class order



for one year, free of charge to you. Payments to be made as follows: On completion of the two freight elevators we to receive two thousand dollars, and on the completion of passenger elevator we to receive fifteen hundred dollars, and after thirty days' satisfactory running we to receive balance due on contract." The proposition was accepted by plaintiff on or before April 6, 1887, except that by mutual agreement the payments were to be made in monthly sums of \$500 each, the first payment of \$500 being made by plaintiff on said April 6, 1887. The elevators were constructed by defendant, and the final payment on account thereof was made February 15, 1888. It is not quite clear from the testimony when the elevators were completed. Plaintiff, in his amended complaint, avers that in February, 1888, all of said elevators had been erected in said building, except that various parts thereof were, as plaintiff is informed and believes, altered by the defendant from time to time, and were not in good running order down to August, 1888, and "that in said month said plaintiff accepted said elevators." Defendant, in his answer to the amended complaint, avers that the elevators were completed July 1, 1887, and kept by it in first-class order until July 1, 1888. Plaintiff, in his testimony, admits that the passenger elevator started to run about July, 1887, but says it would run a while and then stop for repairs and alterations, etc. It ran that way, he says, for two or three months; one of his (plaintiff's) employes running it. We may assume, for the purposes of the case, that it was finally accepted by plaintiff in August, 1888, as stated in the complaint. The passenger elevator fell September 19, 1888, causing the damage complained of. This action was commenced September 18, 1890, more than two years after the work was accepted, and within two years after the injury occasioned by the fall of the elevator. The testimony tended to show that the drum over which the cables ran was 15 inches in diameter, and the wire cable running over it was five-eighths of an inch in diameter; that, in order to be safe, the drum should be at least 60 times the diameter of the cable, or, in the present instance, should be  $37\frac{1}{2}$  inches in diameter, etc. We may, for the sake of brevity, discard all scientific terms, and say the evidence tended to show a faulty design in the machinery, and that by reason thereof, and not in consequence of bad workmanship, the cable or cables were overtaxed. That the wire ropes should not have been taxed over one-sixth of their breaking resistance, the co-efficient of safety in a passenger elevator being six, while in the present instance it was only about two; and that, by reason of being overtaxed, the cables soon gave out, and the accident occurred.

1. The only language used in the proposition or offer of the defendant which is or can

be construed into a warranty is hereinbefore set out, and we repeat it: "We will furnish the work heretofore mentioned in a first-class, workmanlike manner for the sum of \$5,000, guarantying these elevators for one year; that is to say, we will keep them in first-class, order for one year free of charge to you." This language only exhibits an intent to warrant the character or quality of the work to be performed upon the elevator, and cannot, by any fair canon of interpretation, be extended so as to include the suitableness of the design. The plan or design of the elevators was submitted with the specifications. The offer was to "furnish three hydraulic elevators as follows, and as per plan submitted within this specification." According to this plan, the materials were to be furnished and the work performed "in a first-class, workmanlike manner." There is no warranty of the plan or design in the language used. As was said by the court below in granting the nonsuit: "First-class materials and workmanship may be furnished on a poor design or device, as well as on a good one." No particular form of words is necessary to constitute an express warranty. If it appears from the language used that an intent to warrant exists, and is relied upon, it is sufficient. Indeed, some of the authorities go so far as to hold that the positive affirmation of a material fact by the vendor, which is relied upon by the vendee, will be treated as a warranty, regardless of the actual intent of the vendor. This last position is, however, not supported by the weight of authority. Where, as in the present instance, the contract is in writing, we cannot go beyond the instrument to formulate an express warranty, since the written instrument is conclusively supposed to embody the whole contract. *Lamb v. Crafts*, 12 Metc. (Mass.) 353; *Reed v. Wood*, 9 Vt. 286; *Boardman v. Spooner*, 13 Allen, 353; *Dean v. Mason*, 4 Conn. 432; *Benj. Sales* (6th Ed.) p. 625, and cases there cited; *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625. As the contract contains no language importing a warranty of the plan or design of the passenger elevator, and as the evidence shows that it was such design that was faulty, and caused the injury to plaintiff, defendant was not liable as and for an express warranty.

2. Independent of express contractual specifications, the law implies certain warranties in given cases. In this state a contract of sale or agreement to sell does not imply a warranty, except as provided in the Civil Code (section 1764). Section 1770 of the same Code is as follows: "One who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose." This section applies to the case in hand, and the only question involved is this: Does the implied warranty of the statute become a part of the written contract, so as to enable plain-

tiff to maintain an action for a breach thereof within four years, or does it constitute an obligation or liability, not founded upon an instrument in writing, upon which an action must be brought within two years, as provided by subdivision 1 of section 339 of the Code of Civil Procedure? The contention of appellant is "that the warranty implied by law, that the elevator was reasonably fit for the purpose of carrying passengers, is a part of the written contract," and hence, of course, that the limitation of four years applies, as in case of written contracts. In other words, the contention is that what is by the law implied in an express contract is as much a part of it as what is expressed. Implied warranties are created by law, or spring from the facts existing at the time of sale. We think this contention is founded upon a firm basis. "What is implied in a contract is as much a part of it as what is expressed." 1 Beach, Mod. Cont. § 710; Jones v. Turner, 80 Hun, 157, 30 N. Y. Supp. 65. Thus, A. contracts for the sale of goods to B., and no time is provided for delivery. The law adds that delivery must be made within a reasonable time. To put it in the form of a syllogism as in pleading, the law becomes the major premise, the contract the minor premise, and from these the conclusion flows. Thus, one who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose. The defendant manufactured for plaintiff, under an agreement in writing, an elevator, to be used in the conduct of passengers, which was not reasonably fit for that purpose. The conclusion is that there was a breach of the warranty for which defendant is liable. The law did not make a new or separate contract between the parties, but attached the legal obligation of a warranty to that which they made. The obligation attaches to and becomes an integral part of the contract, which is discharged upon the fulfillment of the latter, and which exists in all its rigor upon a breach of such a contract, and is only barred by time upon the expiration of the four years prescribed by section 337 of the Code of Civil Procedure, as the limitation for commencing actions on contracts in writing. The breach of the warranty is based upon the erroneous design of the passenger elevator, and such breach occurred when the elevator was completed. Wood, Lim. p. 394; Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, and cases there cited; Byrum v. Agricultural Works, 91 Cal. 657, 27 Pac. 1093. In case of the warranty of title of personal property sold the rule is different. There there is no breach until the possession of the purchaser is disturbed by the true owner. Gross v. Klerski, 41 Cal. 111. As four years had not elapsed between the completion of the contract and the date of suit brought, the cause was not barred, and we recommend that the order of the

court below denying plaintiff's motion for a new trial be reversed, and a new trial ordered.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order of the court below denying plaintiff's motion for a new trial is reversed, and a new trial ordered.

(115 Cal. 694)

JOHNSTON et al. v. BROWN et al.  
(S. F. 353.)

(Supreme Court of California. Jan. 28, 1897.)  
ATTORNEY AND CLIENT—EXISTENCE OF RELATION  
—JUDGMENT—RES JUDICATA.

1. In one of several actions between the same parties, depending on the same facts, it appeared that on a previous trial of one of them the partner of one of the attorneys for defendants assisted in the trial, and acted as one of the attorneys. *Held*, that the court was justified in finding that he was an attorney for defendants, the other evidence as to such fact being conflicting, within Code Civ. Proc. § 170, disqualifying a judge related to the attorney of a party.

2. The doctrine of res judicata does not apply to motions in a pending action.

Department 1. Appeal from superior court, San Benito county; James F. Breen, Judge.

Action by Johnston, administratrix, and others, against Brown and others. From an order changing the place of trial, defendants appeal. Affirmed.

Scott & Dooling and N. C. Briggs, for appellants. D. W. Burchard (Frs. E. Spencer, G. B. Montgomery, and L. W. Jefferson, of counsel), for respondents.

HARRISON, J. Appeal from an order changing the place of trial. The motion was made upon the ground that the judge of the court was disqualified by reason of being related, within the third degree, to one of the attorneys for the defendants. At the hearing of the motion it was made to appear that John L. Hudner was the husband of a niece of the Honorable James F. Breen, the judge of the superior court for the county of San Benito, in which the action was pending, and for more than three years prior to the making of the motion had been the general law partner of N. C. Briggs, one of the attorneys of record for the defendants, and was such general law partner at the time of the appearance herein. One of the plaintiffs made an affidavit, which was read at the hearing of the motion, in which she stated "that the said John L. Hudner, Esq., has been acting continuously since the filing of defendants' answer herein, in conjunction with his law partner, as one of the attorneys in the case, although the answer is signed by his law partner, N. C. Briggs, Esq.; that, at all times since the appearance of the defendants in this action, said John L. Hudner has been actively engaged in the exam-

ination of witnesses and preparation for trial, in conjunction with his said law partner, N. C. Briggs, Esq., and as counselor for the defendants herein." In an affidavit by one of the defendants it was stated "that said Hudner has not been employed by said defendants as one of their, or either of their, attorneys in said action, and that said Hudner has not performed any services in said action, or in any respect assisted defendants in their defense to said action." It was also stated in this affidavit that Mr. Hudner "has nothing coming to him by reason of any fee due or payable to N. C. Briggs for his services as attorney in said action, nor by reason of any partnership or business association with said Briggs." The defendants also presented a document, signed by Mr. Hudner, by which they were "released" from any and all liability to him as attorney for them, and in which he declared that "I am not an attorney, directly or indirectly, in said cause, and that I have no interest therein, and will not participate in the trial of the said cause," and also a document, signed by both Briggs and Hudner, by which they agreed that their partnership, "so far as the same relates to the legal or other services to be performed in the above-entitled action," was dissolved. It was also shown that this action is one of several of the same nature brought by the same plaintiffs against the defendants to set aside certain deeds of land in San Benito county, and depending upon the same facts. One of these actions had been tried before the present motion was made, before another judge, who had been called in therefor by reason of the claim of Judge Breen that he was disqualified; and it was shown that at the trial of that cause Mr. Hudner "sat at the table with his law partner, and assisted at the trial of said cause, and acted as one of the attorneys for the same defendants that are now defendants herein." Upon this showing the court found that Mr. Hudner was, in legal effect, one of the attorneys for the defendants, within the contemplation of section 170, Code Civ. Proc., and that by reason thereof he was disqualified to sit or act as a judge in the action, and accordingly made an order transferring the cause to the county of Santa Clara for trial. From this order the defendants have appealed.

Whether a judge is disqualified to sit or act in an action or proceeding pending in his court is a question of law, depending upon the existence of the facts which are necessary to constitute such disqualification; and, although the decision of the question may affect the judge who makes the decision, the rules for determining the existence of the facts are the same as though the decision affected another person than the judge. Whether Mr. Hudner was an attorney of the defendants was to be determined by Judge Breen from the matters presented to him at the hearing of the motion, and, if

there was any conflict in the affidavits of the respective parties, his decision upon such conflict is not open to review. It was not requisite that Mr. Hudner should be an attorney of record in the case, nor did his relation as attorney for the defendants depend upon their obligation to compensate him for his services, or upon the continuance of his partnership with Mr. Briggs. The fact that at the previous trial of one of the actions, in which his relation to the cause and to the defendants was the same as in the present action, he sat at the table in court with his partner, took notes of the evidence offered, and assisted as one of the attorneys in the trial of said case, as found by the court in its order changing the place of trial, justified the court in determining between the conflict in the respective affidavits, that he was in fact an attorney for the defendants, and in holding himself disqualified to try the cause.

The court was not precluded from making the order by reason of a former application having been denied. The doctrine of res judicata is not applicable to motions in a pending action. *Ford v. Doyle*, 44 Cal. 635; *Bowers v. Cherokee Bob*, 46 Cal. 279. A previous denial of the same motion may be a sufficient reason for the court to refuse to entertain it again. Code Civ. Proc. § 182. But this is a matter which is addressed to its discretion, and it will be presumed to have properly exercised its discretion if it permits the motion to be presented a second time. *Hitchcock v. McElrath*, 69 Cal. 634, 11 Pac. 487. The order is affirmed.

We concur: VAN FLEET, J.; McFARLAND, J.

(115 Cal. 430)

GRAY et al. v. LUCAS et al. (S. F. 458.)  
(Supreme Court of California. Jan. 28, 1897.)  
In bank. On rehearing. Affirmed.  
For opinion, in department 1, see 47 Pac. 354.

PER CURIAM. A rehearing is denied. The opinion filed herein is modified by striking out the words, "And these grounds should therefore be embodied either in a finding of facts, or in a bill of exceptions."

BEATTY, C. J., dissents.

(115 Cal. 648)

SIEVERS v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 432.)  
(Supreme Court of California. Jan. 25, 1897.)  
MUNICIPAL CORPORATIONS—GRADING STREETS—INJURIES TO ADJOINING PROPERTY—NEG-  
LIGENCE OF CITY ENGINEER.

1. Where a street ordered to be graded up to the "official grade" is, by the errors of the city engineer in giving the levels, filled to a height eight feet above the official grade, causing sur-

face water to accumulate on adjoining property, the city is not liable for the injury thus caused.

2. The rule of respondeat superior does not apply to render a city liable for injuries caused by the negligence of the city engineer in the performance of a duty imposed upon him by law.

Department 2. Appeal from superior court, city and county of San Francisco; W. R. Dalingerfield, Judge.

Action by John H. Slevens against the city and county of San Francisco. From a judgment of nonsuit the plaintiff appeals. Affirmed.

Otto Tum Suden (F. W. Van Reynegom, of counsel), for appellant. H. T. Creswell and Rhodes Borden, for respondent.

HENSHAW, J. Plaintiff brought his action to recover of the defendant damages for injury occasioned to his property by the grading of Van Ness avenue at the crossing of Chestnut street. The work, as done, dammed a well-defined channel, through which surface water was wont to flow, and backed the water upon the land of plaintiff. It was developed upon the trial that a contract had been let, after regular proceedings, by the authorities, to grade Van Ness avenue to the "official grade" at a stipulated price per cubic yard of filling. The official grade was 75 feet above base. An attempt had been made by the supervisors to change the grade to 83 feet above base. This attempt, however, was admittedly abortive, as in *Warren v. Riddell*, 106 Cal. 352, 39 Pac. 781, and during all of the time the official grade remained established at 75 feet. The city engineer and surveyor, whose duty it was to furnish grade lines and levels (St. 1891, p. 206), assumed 83 feet to be the official grade, and the contractor filled in accordingly. It is conceded that filling to the true grade would have occasioned plaintiff no damage, and that the injury which befell him was caused by the extra 8 feet of superimposed earth. Plaintiff averred that the city caused and procured the crossing to be filled with soil, sand, and rock to a height of 83 feet above base. Upon the showing above indicated, he suffered a nonsuit, and appeals from the judgment.

His charge is that the city procured the work to be done. Unless the proofs support this averment, the nonsuit was properly granted. It does not appear that the supervisors, in any of their proceedings, called for any grading except "to the official grade and line." The bids were received under this call, and the contract ran in the same language. Precisely as in *Warren v. Riddell*, supra, the contractors, through error induced by the city surveyor, or superintendent of streets, or by both, graded 6 or 8 feet above the line called for by the contract. The extra 6 or 8 feet of filling, which alone, it is admitted, caused the injury, were not placed under any contract with or directions from the city. The case, then, differs radically from the many cited

and relied upon by appellant, where the injury has resulted from work done for and as directed by the municipal authorities. Thus, in *Reardon v. San Francisco*, 66 Cal. 492, 6 Pac. 317, the injury resulted from street filling done exactly in accordance with the contract. In *Conniff v. San Francisco*, 67 Cal. 45, 7 Pac. 41, Montgomery avenue was graded as the city directed. But the work dammed a natural water course, and the city was held responsible for the resulting injury to property. In *Spangler v. San Francisco*, 84 Cal. 12, 23 Pac. 1091, the city had diverted the waters flowing in a natural water way into a sewer, and had negligently permitted the sewer to fall into a defective condition, whereby the escaping waters caused damage, for which the city was held liable. In *Bachus v. Railway Co.*, 103 Cal. 614, 37 Pac. 750, the grading was properly done to the official grade, but for resulting damages defendant was held responsible. In *Tyler v. Tehama Co.*, 100 Cal. 618, 42 Pac. 240, a bridge was built as and where the supervisors directed. But it was constructed upon private property, for the injury to which the owner received compensation. In all of these cases the act or omission had the sanction, express or implied, of the municipal authorities. In the case at bar the injury resulted from the act of the contractor, neither contemplated nor called for by the supervisors. It is apparent, therefore, that the injury did not arise from the act of an independent contractor in doing what his contract called for.

But appellant contends that the error of the surveyor and superintendent of streets in fixing the grade level was the mistake which misled the contractor and occasioned the injury, and that for this error of its servants and agents the city is responsible. But the doctrine respondeat superior has found little favor in this state, when it has been invoked against a municipal corporation for dereliction or remissness of its agents in the performance of public or governmental functions of the city, or in the performance of duties imposed upon those officers and prescribed and limited by express law. In the performance of its governmental or public functions the corporation is either deemed a public agency, a mandatory of the state, as in *Barnett v. Contra Costa Co.*, 67 Cal. 77, 7 Pac. 177, and, therefore, not liable to be sued civilly for damages, or it is considered, in the performance of these functions, to be clothed with sovereignty, and therefore not liable in an action. *Lloyd v. Mayor, etc.*, 5 N. Y. 369. Where the injury results from the wrongful act or omission of an officer charged with a duty prescribed and limited by law, the officer is not treated as the servant or agent of the corporation in the performance of these duties thus expressly enjoined, but is held to be the servant and agent of and controlled by the law, and for his acts the municipality will not be held liable. Thus, in *Crowell v. Sonoma Co.*, 25

Cal. 813, the county was not held responsible, in an action for injuries to property, for the negligent act of the road overseer in the performance of his duties, upon the ground that the relation between the road overseer and the county bore no resemblance to that of employer and employé. In *Winbigger v. Los Angeles*, 45 Cal. 36, the city was held not to be liable for the failure of the street superintendent to keep a bridge in repair, and *Crowell v. Sonoma Co.* was cited as authority. In *Chope v. City of Eureka*, 78 Cal. 588, 21 Pac. 364, the negligence of the city marshal, who under direction of the city council was constructing a sewer, occasioned injury for which the city was sued. The rule was again announced that, in the absence of a statutory provision imposing the liability, a municipal corporation is not liable for injuries occasioned through the neglect of the officers of the corporation properly to perform their duties. In some of these cases the complaint was for negligent omission; in others, for negligent commission by the officers. In the first the damages claimed were for injury to property, in the others for personal injuries; but the principle underlying them all is, as above pointed out, that in its governmental functions the municipality is to be treated either as an independent sovereignty, not liable to be sued, or as an agent and mandatory of the state, upon which alone the responsibility rests. There being no common-law liability upon a municipal corporation to keep highways in repair, for injuries which resulted to person or property by reason of their defective condition the municipality was not held responsible. Then, as pointed out in *Barnett v. Contra Costa Co.*, supra, if the legislature enjoined it as a duty upon the municipality, it was considered a public and not a corporate duty, and, when any specific duty in this regard was imposed by statute upon any officer of the municipality, for his failure to perform it, he alone, and not the city, is generally deemed responsible. *Huffman v. San Joaquin Co.*, 21 Cal. 427. In a learned and very instructive note to *Goddard v. Inhabitants of Harpswell (Me.)* 30 Am. St. Rep. 373, 24 Atl. 958, Mr. Freeman, after careful and critical review and analysis of many authorities, deduces and expresses the rule of liability for the acts of an officer of the municipality in the following language: "When an officer of a municipality has no other authority than that intrusted to him by law, and he acts beyond that authority, and commits a tort whereby a citizen is injured, either in person or property, the tort is the act of the officer only, and, ordinarily, no recovery of damages can be had, except against him."

Now, in the particular matter under consideration, the surveyor and the street superintendent drew none of their powers in the premises from the orders or directions of the board of supervisors. They derived them

47 P.—44

all from the express provisions of the statute. They were the servants of the law, not of the supervisors. Neither of these was vested with any discretion whatsoever in the performance of the particular duties enjoined upon them. It was the duty of the engineer to give the true grade, and no other. It was the duty of the superintendent to see that the street was filled to the official grade, and to no other. In the performance of these duties they were not subject to nor controlled by the supervisors of the city. If agents of the city at all in this regard, they were agents acting under limited and restricted authority, fixed by statute. *Chambers v. Satterlee*, 40 Cal. 529. They could no more bind the city by instructing the contractor to grade above the line called for by the city than they could bind it by instructing the contractor to take his dirt for filling from plaintiff's private property. Having negligently performed a duty imposed upon them by express law, and not by order of the municipality, a duty in the performance of which they were vested with no discretion, so far as concerns the particular matter under consideration, the city cannot be held responsible for their dereliction.

There was no error of which plaintiff may justly complain in the admission of evidence. Plaintiff pleaded and proved that the official grade was in fact 75 feet. He also proved that the grading actually done was to 83 feet. He further showed the proceedings of the board of supervisors, all of which called for grading to the official grade, and none of which specified what that grade was in feet. The evidence objected to and admitted upon cross-examination went to charge the surveyor with the commission of the error which caused the extra filling. In the absence of such evidence there would be nothing to connect the city with the matter. The evidence, then, tended to strengthen, rather than to weaken, plaintiff's case. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; BEATTY, C. J.

(115 Cal. 644)

VAN SLYKE v. BROADWAY INS. CO.  
(S. F. 542.)<sup>1</sup>

(Supreme Court of California. Jan. 26, 1897.)

CONTRACT — INDEFINITENESS — PAROL EVIDENCE.

1. A contract between an insurance agent and the company for "a contingent commission of five per cent.," which does not give the facts on which the contingency depends, or state the sum on which the 5 per cent. is to be calculated, obviously fails to express any meaning, and hence cannot be aided by parol.

2. So, also, of a contract which provides that the company shall share the expenses of the agent's office pro rata with another company, to a certain sum per year, as shown by the agent's ledger, but does not state in what proportion the expenses shall be paid by the two companies.

<sup>1</sup> For opinion on rehearing, see 47 Pac. 928.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by E. W. S. Van Slyke against the Broadway Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Rhodes & Rhodes, for appellant. Pierson & Mitchell, for respondent.

SEARLS, C. This is an action to recover from defendant, a corporation, upon three several causes of action, sums of money aggregating \$1,596.65. Plaintiff had judgment for a balance of \$1,309.73. Defendant appeals, and the cause comes up on the judgment roll, without any bill of exceptions.

The whole contention arises over plaintiff's third cause of action. It appears that defendant, the Broadway Insurance Company, is a corporation organized under the laws of the state of New York, and engaged in the insurance business in California. Plaintiff was the general agent of defendant in the state of California. It appears from the third cause of action, as set out in the complaint, that there were from October 1, 1893, to October 1, 1894, several written agreements between plaintiff and defendant, stating the terms of plaintiff's agency, and providing for his compensation as such agent, and in each of which agreements defendant bound itself to pay to the plaintiff, in addition to other compensation for his services: (1) "A contingent commission of five per cent." (2) "To share the expenses of the general agent's office in San Francisco pro rata with the Mutual Fire Insurance Company for clerks' salaries, rent, and office furniture and fixtures, to the maximum amount of \$3,200 per year, as shown by the ledger of the general agent in San Francisco, Cal." After citing from the agreements the clause in relation to the "contingent commission of five per cent.," the pleader avers in apt terms that by said agreement both plaintiff and defendant intended and understood that defendant should pay to plaintiff on the amount of premiums actually received and collected by plaintiff, after deducting therefrom the amounts paid by plaintiff as return premiums, and for reinsurance and for losses against which defendant had insured. The complaint then proceeds to show the amount collected as premiums, the sums paid out as return premiums for reinsurance and for losses, and shows, as a result, that there is due plaintiff, on this basis, the sum of \$596.66. Touching the item of office expenses, it is averred, in substance, that it was intended and understood by both plaintiff and defendant that defendant should pay to plaintiff such proportion of his office expenses as the amount collected by him for defendant bore to the amount collected by him for the Mutual Fire Insurance Company. The complaint then shows the amount

of office expenses incurred for the several services mentioned in the agreement, and that upon such basis there is due from defendant on account thereof, and as its proportion, the sum of \$937.53. At the close of this third cause of action, plaintiff admits that there is due to defendant from him the sum of \$628.46, on certain accounts stated between them; and the prayer for judgment is for the several sums demanded in the several counts, less the sum so admitted to be due to defendant. Defendant demurred to the third count of the complaint upon the grounds (1) that it did not state facts sufficient to constitute a cause of action; (2) that several causes of action are improperly united, and not separately stated, to wit, a cause of action for a contingent commission of 5 per cent. with a cause of action for a pro rata share of the general agent's office, and a cause of action upon an account stated. The demurrer was overruled by the court, and the ruling is assigned as error.

We are of opinion that the demurrer to the third cause of action should have been sustained. The clause of the written agreement relating to the commission to be received by plaintiff is, "a contingent commission of five per cent." The agreement is silent as to the basis upon which the contingency depends, and as to the sum or sums upon which the "five per cent." is to be calculated. The case presented is one of a patent ambiguity, which cannot be "holpen by averment." That parol evidence is inadmissible for the purpose of altering the legal operation of an instrument by evidence of an intention to an effect which is not expressed in the instrument is elementary. 1 Starkie, Ev. 666. The agreement as pleaded is void for uncertainty. *Marriner v. Denison*, 78 Cal. 202, 20 Pac. 386. The second clause of the same cause of action is subject to similar objections. According to the complaint, defendant was to share the expenses of the general agent's office at San Francisco pro rata with another company, up to \$3,200 per year, "as shown by the ledger of the general agent in San Francisco, Cal." Upon what rate the portions of expenses to be paid by the two several companies, respectively, is to be computed, does not appear. It is not more definite in this respect than it would have been had it declared that each of the companies should pay a part of the expenses, without designating what part or proportion. The complaint is silent as to what the ledger of the general agent showed. The two clauses of the count are as indefinite, and the meaning thereof as impossible of ascertainment by construction, as would be the quotient of a specified number divided by an indefinite divisor. These defects being patent on the face of the agreement, are not subject to be aided either by averment or evidence. The case of *Balfour v. Irrigation Co.*, 109 Cal. 221, 41 Pac. 876, relied upon by respondent, is not at all in

point. There the language of the contract of the parties was held to be susceptible of either one of two interpretations, and it was held that a latent ambiguity was presented, which might be explained by proof of extrinsic circumstances showing the sense in which the parties intended and understood the expression used. The difficulty in the present case is that the parties have failed to use any expression from which a definite meaning can be deduced. We do not deem it necessary to discuss the elementary principles of patent and latent ambiguities, and the distinction between them. The subject is too well understood to need exposition. It may be well, however, to state that where the agreement between the parties is one not required to be in writing to avoid the statute of frauds, and is one and entire, and only a part of it is reduced to writing, the residue may be proven by extrinsic evidence. *Jeffery v. Walton*, 1 Starkie, 267. That case was an action for not taking proper care of a horse hired by the defendant of the plaintiff. The following memorandum made at the time of hiring was offered in evidence: "Six weeks at two guineas. Wm. Walton, Jr." Lord Ellenborough regarded the memorandum as incomplete, but conclusive as far as it went. "The written agreement," said he, "merely regulates the time of hiring and the rate of payment, and I shall not allow any evidence to be given by the plaintiff in contradiction of these terms, but I am of opinion that it is competent to the plaintiff to give in evidence suppletory matter as a part of the agreement." There are other authorities to the same effect. In the present case it may well be that similar conditions existed. If so, the entire contract should be pleaded. We recommend that the judgment be reversed, and the court below directed to sustain the demurrer to the third count of plaintiff's complaint, and that plaintiff have leave to amend if he shall be so advised.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to sustain the demurrer to the third count of plaintiff's complaint, and that plaintiff have leave to amend if he shall be so advised.

(115 Cal. 663)

TILLAUX v. TILLAUX. (S. F. 342.)

(Supreme Court of California. Jan. 26, 1897.)

DEED TO WIFE—CONSIDERATION—UNDUE INFLUENCE.

1. Love and affection are a sufficient consideration for a deed from a husband to his wife.

2. There is no presumption from the marriage relation that a deed from the husband to his wife was the result of undue influence.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by Paul Tillaux against Clare H. Tillaux. Judgment for defendant, and plaintiff appeals. Affirmed.

Curtis Hillyer, for appellant. Jos. K. Hawkins, Lennon & Hawkins, and Lloyd & Wood, for respondent.

McFARLAND, J. A demurrer to the complaint was sustained, and judgment rendered for defendant; and from the judgment plaintiff appeals. On the 15th day of April, 1890, the plaintiff executed and delivered to defendant a deed conveying to her a certain described lot or parcel of land. It was duly acknowledged by plaintiff, and was on said April 15th duly recorded in the proper county. Upon its face, the deed was an absolute conveyance to defendant of the title in fee to said land, without any reservation, condition, or limitation. It declared no trust, and limited no use to any person other than the defendant herself. By the said deed, the land was conveyed to defendant, "and her heirs and assigns, forever," together with all "appurtenances," etc., and "the reversion and reversions, remainder and remainders, rents, issues, and profits thereof." The consideration expressed was "love and affection" for defendant, and also "for her better maintenance, support," etc. More than four years afterwards, on June 19, 1894, this present action was commenced to procure a reconveyance of said land from defendant to plaintiff; and on May 4, 1895, there was filed a fourth amended complaint, which was somewhat different from the original, and to which the demurrer was sustained.

Counsel for respondent insist, among other things, that the demurrer was properly sustained, because upon the face of the complaint the alleged cause of action is barred by the statute of limitations, because it is stale from laches, and because the complaint is fatally defective on account of uncertainty; but we do not deem it necessary to determine these points, for the reason that, in our opinion, the complaint does not in other respects state facts sufficient to constitute a cause of action.

It is averred in the complaint, in addition to the facts above stated, that at the time of the execution of said deed, and "as a part of the same transaction," the parties executed a certain written agreement, marked "Exhibit A," set forth in the complaint. In this agreement it is first stated that the parties "finding that, by reason of domestic difficulties that have arisen between them, they cannot, with their existing opinions, live together, they do hereby promise and agree one with the other, in and for good and proper considerations flowing to each other, to live separate and apart a mensa et thoro." It is then mutually covenanted that "they do

hereby, each of them, agree not to molest or interfere with one or the other in or about the business or living of the other." It is then covenanted that the husband should have certain personal property, and the wife certain other personal property. Then the plaintiff agrees to "give and convey" to the defendant the lot of land here in controversy; and at the same time he did execute and deliver to defendant a deed of conveyance of said lot, as hereinbefore mentioned. It is further covenanted as follows: "It is further agreed that the term of existence of these articles of separation, so far as the same affects the living apart of the parties hereto, shall be for such time as the parties hereto may mutually determine hereafter, and for all other purposes for the period of the whole future." It is averred in the complaint that, after the making and delivery of said agreement and deed, "the plaintiff and defendant continued to live together," and that they did continue to live together continuously for nearly four years thereafter. It is further averred that, before the execution of said deed, the said parties had frequent quarrels, and that defendant had at divers times abused plaintiff, and caused him grievous bodily and mental suffering; that after the execution of said deed, and while the parties were living together as aforesaid, the defendant "for a time [no definite period being mentioned] did cease to molest and abuse plaintiff, and did permit him to live in peace and quiet"; that "thereafter" defendant "recommended her abuse of plaintiff," and by various acts, which are described, caused plaintiff great bodily and mental suffering; and that about the month of February, 1894, the plaintiff, on account of her abuse, left the defendant and has not since returned.

The main points made by appellant in support of the sufficiency of the complaint seem to be that there was no consideration for the deed; that, if the promise of defendant not to molest plaintiff can be taken in any sense as a consideration, such consideration is void, because it was a mere agreement to do what the law expressly required her to do; and that, generally, the deed must be held void on account of the confidential relation of husband and wife that existed between the parties. We do not think that these positions are tenable.

A deed by the owner of land, duly signed and acknowledged by him, and delivered to the grantee, conveying the land to the latter in fee simple, is one of the most solemn of civil acts. It is not a thing to be played with, or reclaimed at pleasure, as a hawk in falconry. It is not void on account of either want of failure of consideration; nor does want or failure of consideration raise a resulting trust. Leading authorities declaring this principle are cited in the opinion of the supreme court of Michigan in *Jackson v. Cleveland*, 15 Mich. 94. The court, among

other things, say: "A voluntary deed, which purports to be for the beneficial use of the grantee, and which was made deliberately and without mistake or contrivance, does not differ from any other deed in binding the grantor, and can only be attacked by those having superior equities which the grantor had no right to cut off, as creditors and the like. \* \* \* This doctrine of resulting trusts has never been applied to mere voluntary conveyances. Mere want of consideration has never raised resulting trusts out of these." After alluding to the old common-law rule that a feoffment without consideration was practically no conveyance, and explaining the technical ground upon which it rested, and showing that it did not obtain when any consideration was expressed, the court say: "A court of chancery has never ventured, against the expressed will of the donor appearing on the face of the deed, 'to take the use from the donee, and give it back to the donor.'" In *Devlin on Deeds* (section 1189) the author says: "It is now settled law that a trust does not result to the grantor merely because there was no consideration for the conveyance;" and he cites a multitude of authorities in support of the proposition,—among others, *Burt v. Wilson*, 28 Cal. 632, which is strongly in point. See, particularly, *Young v. Peachy*, 2 Ark. 257; *Lloyd v. Spillet*, Id. 150; *Groff v. Rohrer*, 35 Md. 327, and cases there cited; *Sturtevant v. Sturtevant*, 20 N. Y. 39; *Hill, Trustees*, p. 106 et seq. In *Hill on Trustees* (page 107) the author says: "It may therefore be stated, as the clear result of the authorities, that when a person, being a stranger in blood of the donor,—and a fortiori if connected with him by blood,—is in possession of an estate under a voluntary conveyance, duly executed, the mere fact of his being a volunteer will not of itself create any presumption that he is a trustee for the grantor; but he will be considered entitled to the enjoyment of the beneficial interest, unless that title be displaced by sufficient evidence of an intention on the part of the donor to create a trust; and as was observed by the chancellor in the case of *Cook v. Fountain*, 3 Swanst. 590, he need not bring proofs to keep his estate, but the plaintiff must bring proofs to take it away from him." And the author further says: "But parol declarations cannot be received with this object; for in these cases there exists no resulting or presumptive trust, and the admission of such evidence would be for the purpose of contradicting the written instrument, and establishing a trust in the very teeth of the statute of frauds." "The grantor cannot claim that a trust results to himself when he has executed a deed without consideration." *Devl. Deeds*, § 834. Therefore, in the case at bar, if it appeared from the complaint that there was no consideration for the deed in question, it would not for that reason be void, nor would the want of con-



sideration raise any resulting trust. This is not an action to enforce an executory contract. It is an action to set aside a completely executed conveyance of land, which transferred the legal and equitable title. As a matter of fact, however, the deed expresses a full and meritorious consideration, viz. love and affection of a husband for a wife, and a purpose to provide for her support and maintenance,—a consideration which, as was said in *Barker v. Koneman*, 13 Cal. 11, the law regards with favor, and supports even as against subsequent creditors. Neither is there any such difficulty here about direct conveyances between husband and wife as existed at common law when they were considered as one person, and a deed from one to the other was void at law, although it could be made effective in equity. They may have here any transactions with each other respecting property which either might have if unmarried. There is no necessity for the interposition of a third person as trustee.

Of course, a conveyance of land may be avoided when made or procured through accident, mistake, fraud, or undue influence, and the facts constituting any of such grounds of avoidance are fully alleged and clearly proven. In the case at bar there is no pretense that the deed was executed through accident or mistake. The main contention of appellant really seems to be that undue influence must be presumed from the confidential relation of husband and wife; and that, on account of such relation, the deed must be held to be presumptively fraudulent. But such is not the law. Our Code allows a husband and wife to deal freely with each other in all transactions touching property; and the proposition that under our law a conveyance from one to the other is *prima facie* void cannot be maintained. Of course, when in such a case facts are alleged upon which undue influence is asserted, they will be considered in view of the confidential relation; but to say that a deed of conveyance of land from a husband to a wife is on its face invalid would be to dispense with the statute, and go back to the rule of the common law. This question has frequently been raised and determined adversely to appellant's contention in contests of wills, where it has been attempted to upset wills of deceased husbands on account of the alleged undue influence of their wives; and it has been settled in such cases that the mere fact of the marriage relation was not sufficient to sustain the charge of undue influence, and that "there is no legal presumption against the validity of any provision which a husband may make in a wife's favor." See *Estate of Langford*, 108 Cal. 622, 623, 41 Pac. 705, and cases there cited. And there is no reason why the principle should not apply more strongly to deeds. With respect to deeds, while they have frequently been attacked on the ground of intent to defraud creditors, we do not recall a case

where there has ever been a contention by creditors that a deed was *prima facie* void merely because executed by a husband to a wife. At common law, deeds between husbands and wives were void; but courts of equity enforced them. These courts at first looked closely into the transaction, and exercised their discretion to refuse aid when the circumstances showed unfairness. However they always enforced them when they were for the benefit of the wife, and no rights of creditors intervened; and they finally came to hold that all deeds which would be good in law if made to a third party were good in equity if made by a husband to a wife. See *Sims v. Ricketts*, 35 Ind. 181, where the authorities on the subject are elaborately reviewed. But here the subject does not present itself in the shape of ascertaining how far a court of equity should lend its aid to enforce a deed void at law, and therefore many of the earlier decisions on the point are now of no value; for here the old common-law rule has been abrogated, and a deed from a husband to his wife needs no decree of a court of equity to make it effective. If sufficient in form it carries the full legal and equitable title to the land described in it to the grantee, who needs no chancellor to recreate it. She can safely defend it in a court of law. In this state a conveyance from husband to wife has been frequently sustained; and, although the attacks were generally by creditors, yet it must necessarily have been held in those cases that such conveyance was not *prima facie* void on account of the marriage relation; and some of the cases were direct attacks by the husband or his grantee. *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303; *Carter v. McQuade*, 83 Cal. 274, 23 Pac. 348; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869; *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. 715; *Dow v. Mining Co.*, 31 Cal. 653; *Barker v. Koneman*, 13 Cal. 9; *Kohner v. Ashenauer*, 17 Cal. 579. In *Emmons v. Barton*, *supra*, where a deed from husband to wife was attacked, the court said: "A voluntary conveyance is not *prima facie* fraudulent, and a fraudulent intent is not to be arrived at as a presumption of law." In *Taylor v. Opperman*, *supra*, the court said, quoting from a text writer, that "the *prima facie* presumption arising from a deed of the husband to the wife of community real property is that it was intended to change its character from community property to separate property of the wife." And in *Carter v. McQuade*, *supra*, the court said as follows: "In this state either husband or wife may enter into any engagement or transaction with the other respecting property which they might if unmarried. Civ. Code, § 158. A husband may convey real or personal property to his wife, and, whether the property conveyed be his separate property or community property, the presumption is that it thereby becomes, and is thereafter to be treated as, her separate

rate property." The case of *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. 715, is strictly in point; for in that case the husband, having conveyed the land in question to his wife, undertook himself afterwards to get it back; and he relied also upon the fact that the land was a homestead, and therefore could not be conveyed by the husband to the wife. But this court held that, although the homestead character of the land may not have been affected by the deed, yet the legal title to the land passed to the wife, and the husband could not have it declared to be in him. The court, among other things, say: "In this state either husband or wife may enter into any agreement or transaction with the other respecting property which either might if unmarried. Therefore a husband may convey his real estate directly to his wife, as he may to any other person." And the court say further: "We see no just reason for permitting the husband to question his own conveyance of the property, and as no one else is complaining, or could be injured thereby, the same must be upheld." And in response to the point that the transaction was a gift, and, being incomplete, could not be enforced, the court said: "If the gift were not perfectly executed, and this were an attempt to compel a specific performance, the rule invoked would be applicable. But as we have held that the execution of the conveyance was perfect without the signature and acknowledgment of the wife, and the action is by the grantor to avoid the same, the point is not well made." By the foregoing authorities, and others not here collated, the principle is clearly declared that the marriage relation does not ipso facto raise the presumption that a deed of conveyance from the husband to the wife has been the result of undue influence, but that such deed prima facie conveys to the wife whatever, according to the rules of conveying, its terms embrace. We have discussed the subject at some length, because an expression or two in one or two former opinions give some faint color, scarcely visible, to a different doctrine.

Appellant contends that there are facts averred in the case at bar which, viewed in the light of the marriage relation, are sufficient to make the deed in question invalid; and the case of *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186, also 75 Cal. 525, 17 Pac. 689, is cited in support of the contention. The facts in that case were very peculiar, and presented an instance of a wife violating an express promise made by her to a husband, upon which he had the right to implicitly rely, not only on account of the legal confidential relation between them, but also on account of the actual confidence which he had in her, as the relation between them had always been most affectionate and confiding. The husband was about to go from California to another country, where he apprehended danger to his person, and,

being solicitous that in case of his death his wife might have his property without the delay of administration, was advised by an attorney that the best way to accomplish that result was to convey his land to his wife absolutely, "if you have implicit confidence that your wife will deed it back to you." He replied: "If I could not have confidence in my wife, who in the world could I have confidence in? Certainly, I have the utmost confidence in her." Thereupon he made his wishes known to his wife, and explained the situation to her, and she expressly promised to reconvey the land to him when he returned. Under these circumstances, he conveyed the land to her; but upon his return she refused to reconvey, and an action by the husband against the wife for a reconveyance was sustained. The action was sustained, however, not upon the mere ground of the marriage relation between the parties, but because the wife had violated the confidence reposed in her by the husband. This court said (90 Cal. 330, 27 Pac. 187): "The relation of husband and wife between the parties is admitted, and also that the plaintiff had at all times confidence in his wife, and in her devotion and fidelity to him, and that he made the deed to her relying upon that confidence. Upon these allegations, this court said, upon a former appeal (75 Cal. 529, 17 Pac. 691): 'The relation of the parties, therefore, was confidential in fact as well as in law. The plaintiff was induced to make the deed by the confidence which he had in his wife, and the belief thereby engendered that she would perform her promise. But for that, he would not have made it. The betrayal of such confidence is constructively fraudulent, and gives rise to a constructive fraud.' " Again, the court say (90 Cal. 333, 334, 27 Pac. 189) that the husband "was induced to make, and did make, a deed absolute in form of said land to the defendant, instead of making said will, with this distinct understanding between them, that, if he should return from Arizona, the defendant would convey back to him the said land." There, then, were facts which would warrant a court in stretching to its utmost tension the doctrine that an absolute conveyance from the husband to the wife may be invalidated on account of the breach of the wife of a parol promise upon which the husband, owing to the legal and actual confidence which he reposed in her, had the right to rely. However, *Warnock v. Harlow*, 96 Cal. 208, 31 Pac. 166, was a supplement to *Brison v. Brison*. That action presented a contest between Harlow, a grantee of the wife, Mrs. Brison, and Catlin, grantee of the husband, Mr. Brison; and the court there held that "the deed made in 1881 by W. W. Brison to his wife undoubtedly vested in her the legal title to the land"; that the judgment in *Brison v. Brison* did not affect Harlow, because he had received his deed before the commencement of the action; that "as

suming that Mrs. Brison was a trustee for the benefit of her husband, that trust not appearing upon the deed which conveyed to her the legal title, it does not follow that her grantee did not take the property discharged of the trust"; and that "if the deeds of the respective parties were put in evidence, without anything more, appellant's [Harlow's] title must have prevailed, and hence the burden was upon respondent [Catlin] to allege and prove some fact that would qualify or invalidate appellant's title." Of course, if the deed from Brison to his wife had been *prima facie* void on account of presumed undue influence based on the marriage relation, there would have been no need of proof of "some fact" to invalidate it.

But the facts in the Brison Case were very different from those in the case at bar. We may waive consideration of the fact that while appellant avers, generally, that he had confidence in his wife, he shows specifically that he had not. There is no pretense here that the deed was made, as in the Brison Case, upon the promise of the wife to reconvey to the husband. On the contrary, it is shown that the conveyance was to be "for the period of the whole future." After the conveyance she continued to hold the land for several years, with the knowledge of the husband; and there was no condition subsequent. The alleged promise of the respondent "not to molest or interfere" with him "in or about the business or living" of appellant was, in the first place, of no legal consequence, as a mere general promise of a wife; and, in the second place, it was clearly incidental to a separation, and might, perhaps, have some legal value as a part of a contract for separation. But there was no separation until shortly before the commencement of this action; and if appellant did not choose to live separately, as he had a right to do under the articles of separation, he cannot complain that the respondent failed to fulfill a promise which he gave her no opportunity to comply with. Viewed in the light of the other facts shown by the complaint, no importance attaches to the general averment that respondent made certain promises without the intention of fulfilling them. This averment refers exclusively to her alleged promises not to molest appellant, and to let him live in peace and quiet; but, as before stated, these promises, if they can be regarded at all, are to be considered as incidental and referable to a condition of separation. There is no averment that she had no intention to perform the agreement of separation, or that she promised to live peaceably with appellant in the usual affectionate relation of husband and wife; and as, by the consent and act of appellant himself, the separation did not take place, the averment that she never had an intention of doing something which he gave her no opportunity to do must be taken as a mere meaningless assertion of no legal value. We think that the

demurrer was properly sustained; for, upon the averments of the complaint, we see no reason why the appellant should be allowed to repudiate, years after its execution, his own solemn deed. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(115 Cal. 677)

CARPY v. DOWDELL et al. (S. F. 348.)

(Supreme Court of California. Jan. 26, 1897.)  
BANKS—AUTHORITY OF CASHIER FROM COURSE OF  
DEALING—CHATTEL MORTGAGE—ESTOPPEL—PLEADING.

1. The cashier of a bank, who for a number of years, with the knowledge of the directors, has been accustomed to act for the bank in sales of property on which it held mortgages, under contracts approved by him, may bind the bank in a similar transaction without formal authority from the directors.

2. A bank, which has given its consent to a contract for the sale of property on which it held a mortgage, is estopped to deny the validity of such contract after it has been entered into, and a portion of the property delivered for shipment thereunder.

3. An estoppel by matters in pais is sufficiently pleaded by pleading the facts constituting it.

Department 2. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action by Charles Carpy against James Dowdell and others to foreclose two chattel mortgages. Judgment for plaintiff, and defendants appeal from an order denying a motion for a new trial. Reversed.

Rodgers & Paterson and F. E. Johnson, for appellants. Daniel Titus, for respondent.

McFARLAND, J. Judgment went for plaintiff in the court below, and defendants appeal from an order denying their motion for a new trial. The action is to foreclose two certain chattel mortgages executed by the appellants, Dowdell & Son, to the Bank of St. Helena, upon certain wine, to secure two promissory notes given by said appellants to said bank, which were assigned to respondent immediately before the commencement of this action. The notes were overdue when assigned to respondent, and he then knew the facts upon which the defense in this case rests; and it is not seriously contended that he does not stand in the shoes of the bank. If the bank could not have maintained this action, then it cannot be maintained by respondent. The wine was stored in cellars in the town of St. Helena, in Napa county. On April 3, 1895, appellants had negotiations at St. Helena with George F. Chevalier, a wine merchant of San Francisco (doing business under the name of F. Chevalier & Co.), for the sale to him of a large part of said wine. He knew that the wine was mortgaged to the bank, and during the day had a conversation at the bank, with its cashier, about the contemplated purchase. About 7 or 8 o'clock in the evening, in pursuance of a previous appointment, the Dowdells, Chevalier, and the

said cashier met at the said bank for the purpose of completing the said purchase of the wine by Chevalier. The cashier was requested to draw up a written contract, which he did, and it was duly signed and executed by the Dowdells and Chevalier. By this instrument the former sold to the latter, and the latter purchased, 368,000 gallons of the wine, at 11 cents per gallon. Delivery of the wine was to commence immediately, and to be continued at the rate of not less than 50,000 gallons per month. Five thousand dollars was to be paid on May 1st, and thereafter there were to be monthly payments for all wine delivered. When the cashier had nearly completed the writing of the instrument, he said: "I neglected the most important part, as far as I am concerned. This is where I get in; as the payments shall be made to the Bank of St. Helena." Thereupon he inserted the following clause: "All payments on said wine to be made to the Bank of St. Helena for our account, the cashier of said bank to receipt for the same." The preponderance of the evidence shows that Chevalier offered to make to the bank, at that time, the first payment provided by the contract, and that the cashier said it was not necessary; and it fully appears that Chevalier was perfectly able financially to make all the payments provided by the contract, and was so understood to be by the cashier, who so testified. Chevalier & Co. have always been willing, ready, and able to take the wine, and pay for it according to the contract. Immediately after the execution of the contract, Dowdell & Son commenced to deliver the wine to Chevalier & Co., and on April 13th "had delivered on the cars at the station for shipment six car loads thereof, which said purchaser was about to remove from said county of Napa under and by virtue of said agreement of sale." But on April 11th the bank had assigned the notes and mortgages to the respondent, Carpy, who, on the 13th, commenced this action, and by means of a receiver and an injunction stopped the removal of said cars and the delivery of any more of the wine by appellants to said Chevalier & Co.

Appellants contend that under the circumstances above stated the bank could not legally, by a suit to foreclose, prevent the delivery of the wine to Chevalier & Co. pursuant to said contract which it had consented to and induced the parties to make. The contention of respondent is, briefly: First, that what the cashier did does not bind the bank; and, second, that what he did was of no legal consequence whatever, even if his acts in the premises be considered as the acts of the bank. As to the first of said positions, we think that it is clearly untenable. It is in proof without contradiction that, to the knowledge and with the consent and tacit approval of the directors of the bank, this same cashier had for many years been having with others and with appellants the

same kind of transactions as the one here under consideration; that is, the bank had been in the habit of taking mortgages from various persons on wine, and the cashier, with the knowledge and consent of the directors as aforesaid, had permitted wine thus mortgaged to be sold to third parties under contracts similar to the one here involved. This was proven at the trial by the president of the bank and four of its other directors, by the said cashier himself, by several witnesses who had similar transactions with the bank, and by the appellant Arthur B. C. Dowdell, who, prior to this contract, had several similar transactions with said cashier. We have said that this was proven without contradiction, by which we mean that the facts above stated were so proven, although some of the witnesses testified that there had not been any resolution upon the subject passed by the board of directors in corporate body assembled, and that they did not understand that the cashier had been given any power to release a mortgage. Under these circumstances it is not necessary to determine what powers the cashier had merely by virtue of his position as cashier; for when a corporation, by a long course of acquiescence, holds out an officer or agent as having authority to do certain things, it cannot, after he has acted, repudiate his acts. This principle is decided by many authorities, but it is sufficient here to cite *Morse, Banks* (3d Ed.) § 171g. and cases there cited; *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 423; *Merchants' Nat. Bank of Boston v. State Nat. Bank*, 10 Wall. 604; *Bank v. McCarthy*, 7 Mo. App. 318; *Carey v. Petroleum Co.*, 33 Cal. 694. In *Morse on Banks & Banking*, supra, it is said,—and the cases cited fully warrant the text,—as follows: "Evidence of powers habitually exercised by a cashier with the knowledge and acquiescence of the bank defines his powers as to the public, if they are such as the directors have authority to confer on him. A bank for several years permitted its cashier to cancel trust deeds given to secure money loaned, and was thereby estopped to deny his power to cancel." It is also there declared that, where the conduct of a cashier has been open and long continued, "it must have come to the knowledge of any ordinarily vigilant directory"; citing *Bank v. McCarthy*, supra, which fully sustains the text. *Martin v. Webb*, supra, is a case in which the principle under discussion was directly involved and clearly stated. Mr. Justice Harlan, in delivering the opinion of the court, said, among other things, as follows: "While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier—at least where its charter does not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings

of the directors. His authority may be by parol, and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed without interference to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted, without objection, in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, elect the officers of the bank, and to make declarations of dividends. That which they ought by proper diligence to have known as to the general course of business in the bank they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." It is clear, therefore, that the acts of the cashier in the premises were the acts of the bank.

But it is contended by respondent, substantially, that the conduct of the cashier, even if considered as binding the bank, amounted in law to absolutely nothing; that, notwithstanding this conduct, the bank, although having consented to and encouraged the sale, and being in effect a party to it, could interfere with and put an end to it at any time, and without any reason, and merely at its own whim. This would be violative of the principles of fair dealing, and unwarranted, we think, by the law. We do not think it necessary to determine here that the consent of a mortgagee of chattels to the sale of the mortgaged property and its removal from the county amounts to an absolute release of the entire mortgage, and as against all parties who may choose afterwards to deal with it,—although there are many authorities to that effect, some of which have hereinbefore been noted. We think, however, that upon sound principles the bank was estopped, at least, from interfering with the sale by appellants to Chevallier while its terms were being complied with, and from the attempt to disregard and practically annul such sale by the proceedings in foreclosure. There is no pretense that anything whatever took place after the sale and before the bringing of the action to foreclose

that changed the position of any of the parties, or in any manner whatever affected injuriously the rights of the bank. It is admitted that Chevallier was perfectly able to comply with the terms of the sale, and was willing and ready to do so. It is apparent that the money to be paid by him for the amount of wine purchased would have been more than sufficient to satisfy the demands of the bank against appellants. A large part of the wine had been delivered, and there is no justifiable reason apparent why the bank should have then sought to repudiate its acts by which it consented to and induced the sale. Of course, Chevallier would not have purchased without the consent of the bank, and the appellants could have made no effectual effort to sell without such consent. That consent is clearly established, for not only does it appear from the circumstances under which the sale was made, but the cashier testified: "I was satisfied with the responsibility of Chevallier & Co., of course, or I would not have consented to the sale; and if the notes and mortgages had not been assigned, we would not have objected to Chevallier & Co. taking the wine so long as they continued to make payments to the bank as required by the contract." The bank having thus consented to the sale, and shaped the same to suit itself, and induced the parties to enter into the transaction, and encouraged the appellants to make a contract by which they incurred great pecuniary responsibilities, and to forego other attempts to dispose of the wine, and to go to the expense of delivering a large part of it,—upon what principle of fair dealing or legal right can it now, without any apparent reason or worthy motive, abandon the parties in the positions in which it induced them to take? We think that the bank is clearly estopped to deny the validity of the sale and to defeat it by means of the action to foreclose. The principle of equitable estoppel is aptly and concisely stated by the supreme court of the United States in the opinion of Mr. Justice Clifford in *Swain v. Seamens*, 9 Wall. 254, in language that has since been frequently quoted and approved, as follows: "Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the party to change his position, so that he will be peculiarly prejudiced by the assertion of such adversary claim." And the case at bar is not only within that principle, but is a much stronger case than one where a party only "tacitly encourages" an act to be done. In *Dickerson v. Colgrove*, 100 U. S. 380, the United States supreme court states the principle as follows: "The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change

of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." And in the opinion in that case many cases are cited and approved, in some of which the principle was applied to the extent of destroying a chattel mortgage. See, also, *Van Syckel v. O'Hearn*, 50 N. J. Eq. 175, 24 Atl. 1024; *Daniels v. Tearney*, 102 U. S. 420; *Faxton v. Faxon*, 28 Mich. 159, and cases there cited. In California the principle has been frequently so declared as to embrace the case at bar. *Scott v. Jackson*, 80 Cal. 262, 26 Pac. 898; *Dolbeer v. Livingston*, 100 Cal. 621, 35 Pac. 328; *Hostler v. Hays*, 3 Cal. 303; *Mitchell v. Reed*, 9 Cal. 204.

It is contended that there was no consideration for the said acts of the bank; but, in the first place, there was a consideration, for the bank was to receive all the money due it from appellants instead of relying on a forced sale of the wine; and, in the second place, the principle of equitable estoppel does not rest upon a consideration moving to the party estopped. *Van Syckel v. O'Hearn*, 50 N. J. Eq. 175, 24 Atl. 1024, and cases there cited. Our conclusion is that the bank and its assignee were, under the facts above stated, estopped from maintaining this action.

Respondent makes some contention, in a part of his brief which seems to be supplementary, that estoppel cannot be relied on by appellants, because it was not pleaded in the answer. There is some conflict of authorities as to whether the rule requiring estoppels to be pleaded is not confined to technical estoppels by deed or record. *Hostler v. Hays*, 3 Cal. 303; *Caldwell v. Auger*, 77 Am. Dec. 515, and notes; *Clarke v. Huber*, 25 Cal. 594; *Davis v. Davis*, 26 Cal. 823. But, assuming that the rule applies to equitable estoppels in pais, it is sufficient if "the matter"—the facts—upon which the estoppel rests be pleaded so that the opposite party may know its nature. The reason of the rule is given by the court in *Davis v. Davis*, supra, where it is said that "it is but just, and is in accordance with the rules of pleading in equity cases, that the party relying upon an equitable estoppel in pais should inform the adverse party of the nature of the cause of action or defense which he will be obliged to meet." This was done in the answer in the case at bar, in which the facts above stated are fully set forth. Moreover, there was no objection at the trial to evidence of the facts on the score of defective pleading; and the rule is well established that such a course is a waiver of a defect in pleading.

We have followed the course of the arguments of counsel who have discussed the real and ultimate merits of the case without particular references to the form in which the questions involved arise. With respect to the findings, it is sufficient to say that the following part of finding 7 is not supported

by the evidence, viz.: "Said agreement \* \* \* was not approved by said corporation, and said corporation did not agree to its terms, and did not consent that the defendants might deliver said wine to said Chevalier & Co., or that said wine might be removed from the county of Napa, nor was the consent or permission of said corporation to the making of said sale asked or given;" and that there is not sufficient evidence to support the findings in finding 3 that "a removal of said mortgaged property from the county of Napa would have resulted in damage and injury to the plaintiff," and that plaintiff "would have suffered irreparable injury therefrom" had it not been for the appointment of a receiver. It is unnecessary to discuss the other findings. There are quite a number of exceptions to the rulings of the court as to the admissibility of the evidence; but, under the views above expressed, it is not necessary to discuss said exceptions. It can be sufficiently gathered from this opinion what evidence should have been admitted or excluded. The order appealed from is reversed, and a new trial ordered.

We concur: HENSHAW, J.; TEMPLE, J.

(115 Cal. 689)

KAHN et al. v. MATTHAI. (S. F. 490.)  
(Supreme Court of California. Jan. 27, 1897.)  
SERVICE OF SUMMONS—SUFFICIENCY OF SHOWING  
IN JUDGMENT ROLL—AFFIDAVIT FOR PUBLICATION—SUFFICIENCY.

1. Since the affidavit of service of summons and the affidavit for publication and the order of publication are part of the judgment roll (Code Civ. Proc. § 670, as amended by St. 1895, p. 45), a prima facie showing of jurisdiction over defendant, sufficient to sustain a judgment on appeal, is made where the judgment roll, though it does not contain the original summons, contains an affidavit for an order of publication which shows that a summons was issued, an affidavit of the printer containing a copy of the summons, an affidavit showing that affiant had mailed a copy of the summons to defendant, and a decree containing a recital that summons had been regularly served.

2. An affidavit for service of summons by publication, stating that plaintiff's attorney placed the summons and complaint in the hands of five different persons (naming them) for service, and that they returned them, with the information that they could not find defendant, and that she could not be found in the city or county, is insufficient, without showing what diligence was used to procure service on her.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by Sophie Kahn and another against Mary Elizabeth Matthal to foreclose a mortgage. Judgment for plaintiffs, and defendant appeals. Reversed.

J. Brooks Palmer, for appellant. Jos. Rothschild, for respondents.

SEARLS, C. This is an appeal from a judgment of the superior court in and for

the city and county of San Francisco, foreclosing a mortgage executed by the defendant upon certain real estate in said city and county, to secure the payment of a promissory note made by defendant January 17, 1891, for \$2,000, payable to the plaintiff Sophie Kahn, with interest as specified, one year after date. Defendant appeals from the judgment, and brings the cause up on the judgment roll, without any bill of exceptions. The complaint was filed January 3, 1894, and a summons issued, which not being personally served, on February 20, 1894, an order for publication of summons was made, upon due proof of publication of which, and upon proof that a copy of said summons and copy of the complaint had been forwarded to defendant by United States mail, prepaid, etc., the default of defendant for failure to answer was entered May 27, 1895; and thereafter, and on January 6, 1896, judgment was entered by the court in the usual form for foreclosure of the mortgage. The original summons is not found in the judgment roll.

Two points are urged in favor of reversal: (1) That the judgment and clerk's entry of default are void, for want of return of summons; (2) that the judgment is void, because not supported by a sufficient affidavit for publication of summons.

Upon the first point made, it may be remarked that this appeal is a direct attack upon the judgment. To say that a judgment is void for want of return of the summons must be tantamount to saying that the judgment roll fails to show that the court obtained jurisdiction of the defendant, and hence that the judgment is void. The evidence on the subject of jurisdiction of the person of the defendant in the present case, as disclosed by the roll, is as follows: (1) The affidavit for publication of summons shows that a summons issued. (2) The order of publication shows the same thing. (3) The affidavit of the printer showing publication contains a copy of the summons. (4) The affidavit of Isadore Harris shows that he mailed a copy of the summons and copy of the complaint, etc., to defendant at her place of residence. (5) The decree states, among other things, "that the court having heard all the evidence and proofs, \* \* \* and it appearing therefrom to the satisfaction of the court—First, that Mary E. Matthai, the above-named defendant, has been duly and regularly summoned to answer under the plaintiffs' complaint herein, and had made default in that behalf, and that the default of the defendant \* \* \* has been duly and regularly entered," etc. Do these facts afford sufficient proof of service to make out a prima facie case, which will support the judgment upon a direct attack until rebutted? Under our Code as it formerly existed, the affidavit for publication of summons and the order for such publication formed no part of the judgment roll,

but now, under section 670 of the Code of Civil Procedure, as amended in 1895 (St. 1895, p. 45), the affidavit or proof of service of the summons, "and, in case where the service so made be by publication, the affidavit for publication of summons, and the order directing the publication of summons, must also be included" in the judgment roll. The facts necessary to be stated therein are equally evidence of the steps by which jurisdiction of the person of the defendant is obtained as the original summons itself. It is true, the Code requires the summons to be embodied in the judgment roll, but if absent therefrom, and it appears that a summons in fact issued, with evidence of its contents, showing it to be regular and sufficient in form, and that it was duly served, such a prima facie case is made as to jurisdiction of the person of the defendant, even in the absence of the original summons, as will support the judgment upon a direct attack by appeal. If there was no original summons, the fact could easily be made to appear by a bill of exceptions. The main difference between collateral and direct attacks upon judgment and its recitals is that upon collateral attack the record alone can be inspected, and it is conclusively presumed to be correct, while on direct attack the true facts may be shown in contradiction of the record, and thus the judgment itself on appeal may be reversed or modified. But the judgment and its recitals will be presumed to be correct upon appeal, unless the contrary is made to appear. *Lyons v. Roach*, 84 Cal. 27, 23 Pac. 1026; *Siehler v. Look*, 93 Cal. 606, 29 Pac. 220; *Norton v. Railroad Co.*, 97 Cal. 396, 30 Pac. 585, and 32 Pac. 452; *Lick v. Stockdale*, 18 Cal. 219.

As to the point of the insufficiency of the affidavit for publication of summons, we are of opinion the contention of appellant must be upheld. The affidavit is full and explicit as to the cause of action, its nature, the parties, etc., but is fatally defective in failing to show with accuracy the efforts made to serve defendant with summons. It states, in substance, that plaintiff's attorney placed the summons and complaint in the hands of five different persons (naming them) for service, and that they returned them with the information that they could not find defendant or see her, and that she cannot be found in the city and county. This statement is but hearsay, and may be wholly untrue, in fact, without any impeachment of the truthfulness of the affiant. Where service of process upon a defendant within the county is attempted to be made by a person other than the sheriff, his affidavit should, as a rule, be required, showing the nature of the effort made to serve the party, and, where practicable, the reasons why such service cannot be had. The affidavit then proceeds to state that the affiant believes and is certain the defendant is in the city and county

of San Francisco, and that, to the best of affiant's knowledge, defendant resides at 912 Seventeenth street, and that said defendant has evaded the service of summons; that affiant and her attorney have both spoken to the "two daughters of the defendant, requesting them to allow the said defendant to be served with the said copy of summons and complaint; and that said daughters, and each of them, both being of legal age, refuse to allow the defendant herein to be served with said papers, and are using every endeavor in their power to prevent said service." From this rather singular statement it cannot be determined that any duty devolves upon the daughters of defendant to permit or to aid in the service of process upon defendant, or in what manner they have thwarted such service, or that they are colluding with the defendant to evade the service of summons. We are of opinion the affidavit was insufficient to uphold the order of publication of summons, and hence that the court below failed to obtain jurisdiction of the person of the defendant. The judgment should therefore be reversed, and the cause remanded.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

(115 Cal. 635)

In re PAINTER'S ESTATE. (S. F. 326.)  
(Supreme Court of California. Jan. 25, 1897.)

PROBATE COURTS—HEARING OF APPLICATION FOR  
PARTIAL DISTRIBUTION—PROCEDURE.

On a hearing by the probate court of an application by the widow of a testator for a partial distribution of his estate, where the right of the applicant to one-half the estate, as community property, and also to take under the will, is claimed and contested, the court should act only on a full showing as to all matters pertinent, and should determine the extent of the applicant's interest in the estate, or direct suit to be brought for that purpose, as authorized by Code Civ. Proc. § 1664.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Application by the widow of J. B. Painter, deceased, for a partial distribution of his estate, which was contested by J. Milton Painter and Theodore P. Painter. The petition was denied, and the petitioner appeals. Reversed.

R. S. Gray, for petitioner. Edward J. Pringle, for respondents.

TEMPLE, J. This is an application for a partial distribution, made by the widow and children of deceased. J. B. Painter died testate, having by his will made many bequests and devises. Among other things he gave to

his brothers, J. Milton Painter and Theodore P. Painter, his interest in the partnership of Painter & Co., of which firm he had been a member, and also devised to them a certain building, in which the business of the firm had been conducted. There were several minor children, one of whom was born after the execution of the will. The widow and the children then in being received bequests and devises by the will, as did also several other persons. The widow claims that all the property of the estate is community property, and that she is entitled to one-half thereof as surviving wife, and also to the bequests made to her in the will. Naturally, J. M. Painter and Theodore P. Painter deny that the widow is entitled to one-half the property, and claim that she cannot take under the will and still claim her rights as survivor because the testator evidently attempted, by his will, to dispose of his entire estate. The widow states in her petition that, to properly express her interest in the estate, it must be divided into 504 parts; that she is entitled to 252 parts of it for her interest in the community property, 114 parts as devisee under the will, and to 19 parts as assignee of Arthur Painter, a devisee under the will,—making 385 of said 504 parts constituting the estate. J. Milton Painter and Theodore P. Painter oppose the application. They were brothers of the testator, and to them is given, in terms, in the will, the interest of the testator in the partnership property, and also a specific piece of real estate. They are, therefore, interested in the question raised by the application. They set up, in substance, first, that the right of the widow to one-half the property as community property is not beyond question, and that an action had been brought, and was then pending, to determine the claim of the widow to take both under the will and one-half of the community property as survivor; and, second, that an action is also pending between the surviving partners of the firm of Painter & Co. and the estate to settle the accounts of the co-partnership, and to close up its business. In that suit the surviving partners contend that the deceased was indebted to the co-partnership in a large sum. At the hearing the petitioner offered no evidence whatever, but counsel agreed that the parties who appeared in opposition might first offer evidence showing the pendency of the legal proceedings alluded to in their written opposition, and submit to the court the sufficiency of such evidence to cause a denial of the petition and application for partial distribution. Thereupon counsel put in evidence the transcript of an appeal to this court in the case of J. Milton Painter against Theodore P. Painter, R. B. Dallam, and others, and it was admitted that the case is still pending. It was also stipulated that the suit brought to settle the accounts of the partnership was then pending. Thereupon the court denied the application.



The application was made under section 1663, Code Civ. Proc., which permits the application to be made at any time after the lapse of one year from the issuance of letters of administration. It is provided that notice shall be given by posting, which may be but for one or two days, and that the distribution shall be made if at the hearing it appears that the estate was but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate. Under section 1658 a similar application may be made at any time after the lapse of four months from the issuance of letters. It is evident that persons interested in the estate have very little protection in this proceeding, except in the discretion of the probate judge, and he should, therefore, proceed with the greatest caution. Although all parties interested are brought before the court by the notice given, no default can be taken against them, and a plenary showing must be made by the applicant at the hearing. If opposition is made, and the grounds of the opposition stated in writing, that cannot limit the inquiry, nor can the court take the admission of contestants, unless it clearly appears that the admission is made by all parties interested in the proceeding. There is very little in the proceeding which resembles a suit at law. There could be no plea of abatement. One question naturally presented by the application is whether the distribution should be then made. A showing that the distribution cannot be then made is a complete answer to the application. It is also obvious that the court may be called upon to determine other questions than those pertaining to the interests of creditors; as, for instance, whether the applicant is entitled to a share of the estate, and if so what share, is necessarily involved. So, too, it may be that the costs of administration may be so great that there will be no estate to distribute. There are all sorts and conditions of estates. Probably in not one in a hundred would the court be justified in ordering a distribution within four months after the issuance of letters. Yet there are estates in which it would be quite obvious that there would be no danger in so doing. Very much must, therefore, be left to the discretion of the probate judge, and, when he decides that the condition of the estate is such that the distribution cannot safely be made, his conclusion would not often be reversed here. If the distribution were denied because of some doubt upon a question of law, such as, for instance, the construction of a will, such questions could be conveniently determined in such a case. But we cannot well reverse a decision based upon the judgment of the court as to whether the condition of the estate is such as to justify the distribution, especially when the application is denied by the probate judge. The practice pursued in the probate court in this case is anomalous. Naturally, the la-

boring oar is always with the applicant. Whether there be opposition or not, or whatever the opposition may be, the petitioner must show that the estate is but little indebted, that he is entitled to the share he asks, and what, when the expenses of administration are paid, his share will amount to. The only office of an opposition is to rebut this showing. If, in this case, the probate judge had concluded that the facts shown by the contestants did not warrant the denial of the application, still the showing made at the hearing by the petitioner would have to be considered with the evidence offered by the contestants. Whether the widow was entitled to one-half the community property and to take under the will also could have been determined upon this application, although, if the judge saw fit, he could have deferred the distribution, and directed suit to be brought under section 1664, Code Civ. Proc., to determine the extent of her interest.

Whether the claim of the surviving partners to recover from the estate any balance which upon an accounting may be found to be due from the deceased partner to the partnership, after applying all his interest in the co-partnership to such payment, was a claim which should have been presented for allowance, has not been very fully argued, and need not be now decided. Even if it be recognized as a valid claim against the estate, still, whether it should prevent a distribution would depend upon the value of the assets of the estate, and upon that subject I find no evidence. It is averred in the petition that there is a large amount of assets over and above the property of which distribution is asked, and that the property of which distribution is asked is an inconsiderable portion of the estate. But there is no admission of the truth of these allegations, and the showing as to the condition of the estate must be made at the hearing. Upon that subject, therefore, we are in the dark. It is well to observe here that the creditors are not to be deprived of their lien upon the assets of the estate, and given a bond in lieu thereof. The court should see that sufficient assets are left after the partial distribution, to pay them without recourse to the bond. The requirement of a bond is only additional security to provide against unforeseen liabilities and against errors in judgment. The court did not elect to suspend proceedings and direct petitioner to proceed under section 1664 to ascertain the extent of the ownership of the surviving wife in the property, and, upon the showing made, it could not determine whether the distribution could then have been safely made. I think, therefore, the court should proceed with the hearing of the application, notwithstanding the opposition, and, upon the evidence then produced and that submitted by the contestants, determine whether the application should be granted or denied. The order is therefore revers-

ed and case remanded, with directions to proceed in accordance with this opinion.

We concur: McFARLAND, J.; HENSHAW, J.

(30 Or. 268)

BARGER v. BARGER et al.

(Supreme Court of Oregon. Jan. 18, 1897.)

IMPLIED TRUSTS—PURCHASE OF LAND WITH WIFE'S MONEY.

No trust in land in favor of a wife is shown by evidence that the husband bought a ferry franchise with joint funds, that he used part of the proceeds of a sale of the ferry, together with other funds of the wife, in buying cattle, and the proceeds of a sale of the cattle, together with money borrowed by him on his own credit, in buying the land in suit, where title in each case was taken in the husband's name, with her consent, and he was not acting as her agent, and it does not appear what definite sum of the wife's money was used in buying the cattle, or could be traced into the land.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Action by Rebecca J. Barger against Cyrus W. Barger and others to compel a conveyance of land. From a judgment confirming the report of a referee and dismissing the complaint, plaintiff appeals. Affirmed.

C. M. Idleman and W. P. Lord, for appellant. W. Y. Masters, J. B. Cleland, and J. C. Moreland, for respondents.

WOLVERTON, J. This suit was instituted November 1, 1894, for the purpose of charging the defendants Cyrus W. Barger and Eliza Helm as trustees of certain lands in Multnomah county, Or., for the use and benefit of plaintiff. From the testimony it appears the plaintiff was the wife of John Barger, now deceased, and that Cyrus W. Barger and Eliza Helm are their children. Barger left a will by which he devised and bequeathed to plaintiff all his real and personal property for and during her natural life, or so long as she remained his widow, but, in case of her marriage, then a one-third interest absolute in such property. Subject to this provision, the property went to the children in equal portions. The plaintiff and her husband settled in Marion county, near Silverton, in 1847, upon a tract of land entered by them as a donation claim, upon which they lived until 1864. In the meantime Barger was engaged in mining in California and Idaho, in freighting from the Willamette valley to the mines in Eastern Oregon and Idaho, and in the flouring-mill business at Silverton. He made and lost money in these enterprises, but it is now impossible to tell what was the net result. A house and some lots in Salem, purchased by him while thus engaged, remain as part of the assets of his estate, and were appraised as such at \$1,000. The consideration named in the deed, however, is \$4,005, but it is highly improbable that they were worth that amount, and it is difficult to determine from the evi-

dence what their real value was when purchased. In the early part of 1866 the plaintiff and her husband sold their donation land claim, or, rather, what remained of it, for \$2,000. With the funds derived from this source, Barger purchased an interest in a ferry at Salem. Whether he invested other funds with it is by no means certain. He operated the ferry until September, 1867, when he sold out. The sum realized is put by witnesses at from \$2,500 to \$4,500. Out of these funds, Barger paid a note which James Smith, the father of plaintiff, held against him, for about \$1,400. In the spring of 1868 he purchased about 115 head of cattle, at a cost of something like \$1,955, and borrowed \$1,000 to enable him to pay for the same and defray the expenses of driving them to Eastern Washington. There is, however, some dispute as to the amount of this last loan, which was also had of James Smith. The defendant R. W. Helm, the husband of Eliza, bought cattle at the same time, and he and Barger took their families and cattle to Klickitat county, Washington territory, in July of that year. In 1869 Barger and Helm formed a partnership in the cattle business, each putting in his individual stock, and in the adjustment of such assets there was an excess due Helm of about \$1,200. About February, 1871, they made a sale to Phelps & Wadleigh, out of which Barger realized, after payment of said excess, expenses, and debts incurred in the business, about \$7,500. Two thousand dollars of this were applied in payment of a balance due on his note to Seth Smith, a brother of plaintiff, given some time previous to the purchase of the ferry. In June, 1871, Barger bought 10 acres of the land in dispute for \$1,300, and in July the remaining 20 acres at a consideration of \$3,100, and took deeds therefor in his own name. The funds from the sale of cattle being a little short of enough to pay for the two tracts and meet some other expenses, some few hundred dollars were borrowed from Jennings Smith, another brother of plaintiff. In 1872 Barger and his wife, having in the meantime left Klickitat, returned thereto, and made their home there until 1884, when Barger was adjudged insane, and the plaintiff was appointed his guardian. Her account in January, 1886, shows his estate in Washington to have been worth nearly \$10,000. She takes credit therein for expenditures of \$3,545.85, reports \$3,322.82 on hand to be loaned, and values the real estate at \$2,000. In 1865 Simeon Jennings, an uncle of the plaintiff, died in West Virginia, leaving a large estate to numerous relatives, and from this source and from her father's estate the plaintiff received a considerable sum of money, which was paid to her from time to time, ranging from the fall of 1867 down to a time subsequent to the purchase of the land in dispute by Barger. She claims to have received two payments, amounting to about \$900, from her uncle's estate prior to the purchase of the cattle, which is probably correct; and, to estab-

lish the trust relations, she claims that one-half of the proceeds of the donation land claim was her money, and this, she testifies, was invested in the ferry by Barger, with her consent; that he expended in payment of his debts all the proceeds of the sale of the ferry, except \$1,000, and that this sum, together with the \$900 received from Simeon Jennings' estate, was at that time, with her consent, invested in the cattle; that no partnership ever existed in the cattle business between Barger and Helm; and that from the proceeds of the cattle, together with a small sum borrowed by Barger from her brother, the land in dispute was purchased, all with her consent. It is probable that her money repaid the amount borrowed by Barger with which to purchase the cattle; that it contributed in part to the expenses of the cattle business; was used to pay a considerable portion of the \$3,000 note of Barger to her brother, Seth Smith, and to repay the money borrowed to make out the purchase price of the land. No other direct use of her money can be traced. In answer to interrogatories, she testified concerning the purchase of the cattle as follows: "Q. What was the agreement and understanding between you and your husband at that time? A. The understanding was this: It was my money, and I gave it to him to invest in cattle, hoping we might make a profit out of it, and he could get out of debt, and we could have something left for me. Q. Anything said about what interest he was to have in the cattle? A. No, sir; there was nothing said about it. Q. Anything said about your interest? A. Nothing. Q. Anything said about how he was to get any benefit out of it? A. Nothing. Q. Your idea was that the money was to be handled for the good of the family? A. It was more for the good of myself. Q. It was really to get Mr. Barger out of debt, and help the family along. A. I do not know whether there was anything said about that. We went up there partially on Willard's account. We thought, by buying cattle, it would give him a start, and something to do, and we might make something for ourselves." She further testified touching the purchase of the land: "Q. Was there anything said between you, or by you to him, about what kind of an investment you preferred to have? A. Yes; we talked that over, and he asked me what I wanted done with my money, and I said, 'The best thing is to first pay your debts,' and we can decide what to do with the remainder later on. After we went to the Waldo hills, where my brother Jennings Smith lived, we talked it over, and, before we left the Yakima country, I said 'it would be the best plan to put the money in the bank until we decide.' So part of the money was left in Portland, reserving enough to pay that debt to my brother Seth. \* \* \* We finally decided to buy some land, although land was high, but we thought it safer. He came to Portland, and he wanted me, very much, to come; but I did not feel very well, and did not feel able to ride

on horseback that far. So he came down himself, and, with my permission, he bought one piece of land, although the land was very high." She relates that a similar conversation attended the second purchase.

In support of her claim, it was argued that Barger was practically bankrupt at the time he purchased the cattle, and testimony is adduced touching admissions made by him from time to time to that effect, and to the further purport that the money with which he bought the cattle and the land belonged to his wife. We have stated the case thus far as strongly for the plaintiff as the facts will admit. Her testimony is weakened somewhat by the fact that her husband's will received her approval when made, and by the further fact that in September, 1891, she instituted another suit to declare this trust, based at that time upon an alleged express agreement and understanding that the property so purchased in his name should inure to her sole use and benefit. Other circumstances might be enumerated, having the same tendency, to which it is not deemed important to refer. It is quite certain that the money, borrowed by Barger from plaintiff's father was used in the purchase of the cattle, and it is likely that the balance of the purchase price was supplied from the unexpended ferry money, rather than from the funds received by plaintiff from her uncle's estate.

The plaintiff, by the present suit, seeks to establish what is claimed to be an implied trust, but it is not clear, from the contention of counsel, whether they regard it as a resulting or a constructive trust. Although often confused by the authorities, there is a marked distinction between the two, and this case furnishes a fair illustration of the distinction. As is said in *Thomas v. Standiford*, 49 Md. 184, "There is, perhaps, no principle more clearly settled by numerous authorities than that, if a husband purchases an estate with the money of his wife, there is a resulting trust, and the husband holds the property as trustee for the benefit of his wife." This court has applied a similar doctrine. *Springer v. Young*, 14 Or. 280, 12 Pac. 400. But if the transaction is secretly done in violation of a fiduciary duty, the trust would be constructive rather than resulting. This latter is sometimes denominated a "trust ex maleficio." 2 Pom. Eq. Jur. § 1037, note 1, p. 610, and 1 Pom. Eq. Jur. § 155. As applied to this case, if the plaintiff would prevail by the establishment of a trust of the latter kind, she must first establish a fiduciary or trust relation existing between her and her husband at the time of the purchase of the lands, as respects the funds which constituted the consideration therefor. That is to say that some duty towards her had been assumed by the husband, respecting these funds, which must have been the plaintiff's, and that the purchase of the lands

and the taking of the title in his name were in violation of the trust,—in other words, that he acted in bad faith towards her, either in using her money in the manner designated, or in taking the title in his individual name when he ought to have taken it in hers; for if there was an express understanding or agreement that he should purchase lands with her funds, and take the title in his name, there would be an express trust, but it would be within the statute of frauds, and she could not establish it, there being no conveyance or other instrument in writing subscribed by the party creating or declaring the trust. Section 781, Hill's Ann. Laws Or.; *Cooper v. Thomson* (Or.) 45 Pac. 297, 298; *Beecher v. Wilson* (Va.) 6 S. E. 211. It is a trite saying that money has no earmarks, but it is authoritatively settled that, when once impressed with a trust, it may be traced in equity into whatsoever form it may assume, wherever and whenever it is capable of being identified and distinguished. And the right of following trust funds into the property substituted for them, and impressing it with the primary trust, ceases only when the means of ascertainment fail. *Ferris v. Van Vechten*, 73 N. Y. 120. Such means of ascertainment may fail, however, "when the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description." 2 Story, Eq. Jur. § 1250. It may be stated, also, as a settled principle of law, that in order to establish a resulting trust the evidence must be strong, clear, convincing, and indubitable, touching the fact of payment by the alleged beneficiary, or for or in his behalf. 2 Pom. Eq. Jur. § 1040; *Sisemore v. Pelton*, 17 Or. 546, 21 Pac. 667; *Lee v. Browder*, 51 Ala. 288; *Westerfield v. Kimmer*, 82 Ind. 369; *Murphy v. Hanscome* (Iowa) 40 N. W. 717. And, when a payment of a part only is claimed, it must be shown in the same clear, concise, and unequivocal manner,—the exact proportion of the whole price actually paid, and that the payment was made for some specific part or distinct interest in the estate. 2 Pom. Eq. Jur. § 1040, supra; *Cutler v. Tuttle*, 19 N. J. Eq. 561, 562; *Olcott v. Bynum*, 17 Wall. 59; *Baker v. Vining*, 30 Me. 127; *Browne, St. Frauds*, § 86. So it is, also, as respects constructive trusts,—the evidence that the purchase was made with trust funds must be clear and unmistakable. 2 Pom. Eq. Jur. § 1040. And a trust of either description must arise, if at all, at the time of the conveyance, and the money or other consideration for the deed which is the foundation of the trust must then be paid, or secured to be paid. *Taylor v. Miles*, 19 Or. 553, 25 Pac. 143; *Beecher v. Wilson*, supra; *White v. Carpenter*, 2 Paige, 238; *Niver v. Crane*, 98 N. Y. 47; *Westerfield v. Kimmer*, supra; *Appeal of Cross*, 97 Pa. St. 474; *Botsford v. Burr*, 2 Johns. Ch. 408; *Midmer v. Midmer's Ex'rs*, 26 N. J. Eq.

302. These principles governing the establishment of implied trusts such as we are considering are in strict accord with the essential nature of the trusts themselves. The fund or other form of property which it is sought to trace into a different form does not lose its identity, while it may change in semblance, as, if a sum of money is expended for a parcel of land, or a band of cattle exchanged for stock in a bank, the property form is changed, but the identity of the original form is traceable and distinguishable. The same may be true where several parties have contributed in aliquot parts. The relative proportion in the changed form of the property may be traced and distinguished. That which was the property of the cestui que trust in the first instance continues to be his property, in equity, throughout all its metamorphoses, but when the identity is lost the trust escapes. See *Perry v. McHenry*, 13 Ill. 227, 228; *Niver v. Crane*, supra. It is therefore the entire ownership, speaking in an equitable sense, that must be established, and not some equitable lien upon the changed form of property; and, if established, the cestui que trust takes the property thus identified, not that his demand be satisfied out of it. Hence it is that payments made in common by the one asserting the claim and the alleged trustee, unless made in aliquot parts, or payments made out of commingled and indistinguishable trust funds, do not evidence a resulting or constructive trust simply because the identical property is not traceable nor recognizable in its changed conditions. It cannot be said that the cestui que trust is the equitable owner of the new form of property. *Cutler v. Tuttle*, supra; *Ferris v. Van Vechten*, supra; and *Browne, St. Frauds*, supra.

With these premises, let us ascertain whether the plaintiff has established either a resulting or a constructive trust. The first step in the consideration is the purchase of the ferry. This was probably bought with the joint funds of the husband and wife, and of equal proportions, derived from the sale of the donation land claim; and, as their relative rights stood while the husband held the legal title to the ferry, she may have been entitled to have had a trust declared in her behalf in and to an undivided one-half of this property, had it not been that she consented to the purchase with her funds, and presumably to the taking of the title in her husband's name. Such being the case, it is questionable whether or not they did not attempt the establishment of an express trust, and the trust, not having been declared in writing, was within the statute of frauds, and not provable. But it is contended that if Barger purchased the cattle with plaintiff's money, or if he acted as her agent in making the purchase, and in transporting them to Eastern Washington and caring for them, using her money for the

purpose, then the land, having been purchased with the proceeds of the cattle, belonged to her in equity; that is, as to such land he was her trustee. This conclusion involves both the resulting and constructive phases of an implied trust, seeing that the title was taken in his name. The proposition, in either phase, may be conceded, but the difficulty lies in the premises. It is not clear that the cattle were bought entirely with her funds, or that any definite, certain, or distinguishable interest therein was so bought,—probably not, as it is impossible to determine what aliquot or proportional part of the funds was contributed by her towards their purchase and maintenance upon the range. And it is quite clear that he did not act as her agent either in the purchase or in the management of the stock business in Eastern Washington. This latter proposition is evidenced from the fact that he borrowed money upon his individual responsibility with which to contribute towards the purchase, and the further fact that he treated the cattle as his own, with her knowledge and approval, by turning them in as assets of the co-partnership formed between him and Helm in 1869. One of the primary purposes of purchasing the cattle, as was testified by the plaintiff, was to give their son, Cyrus W., then quite a young man, a start in business. And this is further evidenced by the fact that he was given a share in their increase for his services in taking care of them. As a resultant proposition, it is urged that taking the title to the land by the husband in his own name, when the consideration paid therefor was the plaintiff's money, made him a trustee of the title for her. But this assumes that the land was purchased with her money. It is true that the purchase was made mostly with the proceeds of the sale of cattle, but, again, the husband borrowed a portion of it upon his individual responsibility. She says the purchases were made with her consent, and she probably knew from the beginning where the title stood. There was no setting aside or designation of the proceeds of the cattle, or any part thereof, as her individual money, nor was it so treated; the fact being that part of it was deposited in the bank in the husband's name, and the remainder used in payment of his debts and family expenses. It is not deducible from the testimony that the plaintiff's money was used to pay for the land. If it was, she consented to its use for that purpose, and, from the whole course of their dealing, it is quite apparent that she consented to his taking the title in his own name, and she is not now in a position to charge his devisees as trustees of the title for her use and benefit.

The course of dealing between the plaintiff and her husband has been about this: The husband has, with the wife's consent, used her funds, in conjunction with his own, in the promotion of his business. The funds of

each have been so used that they became indistinguishably intermingled and confused, but the business carried on and prosecuted with their joint funds was clearly the business of the husband. This is manifest from the fact that the title to every piece of property, whether real or personal, purchased or obtained during their married life, was taken in his own name, and, while held, was treated by both parties, so far as we are advised, as his property. Under these conditions, it is impossible for the court to trace any particular funds of the plaintiff into the lands in dispute, or to say that the lands represent her funds, and, as a result, cannot declare the trust. There is no doubt but that she has contributed in a large measure to the promotion of her husband's business, but the money furnished by her with that end in view must be regarded as a loan, rather than the imposition of trust obligations upon him. They were apparently quite prosperous, having together accumulated a comfortable estate, and, while it may be conceded that the plaintiff ought to be in some manner reimbursed for such use of her funds, it is clear that we cannot give her relief in this proceeding. The decree appealed from will therefore be affirmed, and the defendants' costs in this court taxed to plaintiff.

(30 Or. 294)

STULLER et al. v. BAKER COUNTY et al.<sup>1</sup>  
(Supreme Court of Oregon. Jan. 18, 1897.)

ACTION AGAINST COUNTY—APPEAL—NOTICE—ADVERSE PARTIES.

In a suit against a county and its treasurer and sheriff to restrain the levy of a tax to meet the payment of certain county warrants, alleged to have been illegally issued, the county is an adverse party, so as to entitle it to notice of an appeal by the other defendants from a decree granting the injunction.

Appeal from circuit court, Baker county; R. Eakin, Judge.

Action by C. H. Stuller and others against Baker county, J. H. Jett, county treasurer, and W. H. Kilburn, sheriff, to restrain a tax levy. From a decree granting the injunction, defendants Jett and Kilburn appealed. Motion to dismiss appeal. Granted.

H. E. Courtney, Dist. Atty., for the motion. C. A. Johns, opposed.

PER CURIAM. This is a motion to dismiss an appeal. The facts are that the plaintiffs, C. H. Stuller, M. J. Hamilton, and J. P. Bowen, instituted a suit against the defendants, Baker county, W. W. Travillian, as county judge, William Brown and J. H. Hamilton, as county commissioners, John H. Jett, as county treasurer, and W. H. Kilburn, as sheriff of said county, to restrain the levy of any tax to meet the payment of certain county warrants, which it is alleged were issued in violation of law; to enjoin the sheriff from receiving them in payment of taxes, and

<sup>1</sup> Rehearing denied.

the treasurer from paying the same with county funds. At the trial the court found that a portion of said warrants had been unlawfully issued; that the sheriff threatened to receive them in payment of taxes, and the treasurer to receive and pay the same,—and thereupon perpetually enjoined the sheriff and treasurer from carrying such threats into execution. From this decree the defendants Jett and Kilburn attempted to appeal by serving a notice thereof upon the plaintiffs. The district attorney, appearing for the county, contends that the county of Baker, and its judge and commissioners, being co-defendants, are adverse parties to the appellants, and no service of such notice having been made upon them, or either of them, this court has acquired no jurisdiction of the cause, for which reason he moves to dismiss the appeal. Lord, C. J., defining the term "adverse party," says, "Evidently, every party whose interest in relation to the judgment or decree appealed from is in conflict with the modification or reversal sought by the appeal." The Victorian, 24 Or. 121, 32 Pac. 1040. To the same effect are *Hamilton v. Blair*, 23 Or. 64, 31 Pac. 197, and *Moody v. Miller*, 24 Or. 179, 33 Pac. 402. If the decree of the court below should be reversed, and one entered here dissolving the injunction, the interests of the defendant Baker county would necessarily be injuriously affected thereby to the extent of the value of the warrants which the court found to be unlawfully issued, and hence it is an adverse party to the appellants (*Osborn v. Logus*, 28 Or. 302, 37 Pac. 456, 38 Pac. 190, and 42 Pac. 997), and, not being served with notice of the appeal, the motion to dismiss must be sustained, and it is so ordered.

(30 Or. 542)

**FRATT v. WILSON.**

(Supreme Court of Oregon. Jan. 18, 1897.)

**APPEAL—JURISDICTION—FILING TRANSCRIPT.**

Where the parties stipulate that a printed abstract shall be filed in lieu of the usual transcript on appeal, one of them cannot afterwards object that the court has no jurisdiction, under Hill's Ann. Laws, § 541, providing that the jurisdiction of the appellate court shall attach only on filing the transcript.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Francis Fratt against H. O. Wilson. Defendant having appealed from a judgment in favor of plaintiff, the latter moves to dismiss. Overruled.

H. B. Gregory, for the motion. C. M. Idleman, opposed.

**PER CURIAM.** This is a motion to dismiss an appeal. The record shows that the appeal was regularly taken and perfected, but, instead of the usual transcript of the cause, there was filed in this court a printed abstract thereof, by agreement of the parties hereto, entered into in pursuance of rule 13

(24 Or. 601, 37 Pac. viii.). Plaintiff's counsel now contends that jurisdiction cannot be conferred by consent of the parties, and, under section 541, Hill's Ann. Laws Or., is not acquired until the transcript is filed, and that, even if the abstract be regarded as supplying the place of the transcript, the one filed herein is not sufficient to enable the court to determine the appeal upon its merits; and for these reasons he moves to dismiss it. Whether the notice of appeal is to be considered in the nature of process, upon the service of which this court obtains jurisdiction, and the transcript as the evidence by which the judgment is to be reviewed on appeal, so that the parties might stipulate the facts involved, and ask a construction of the law arising thereon, or whether the filing of the transcript is to be deemed the final act, without which no jurisdiction can be obtained, we do not feel called upon to decide; for the plaintiff, having stipulated with the defendant that the printed abstract should be deemed sufficient for the trial of the cause on appeal, is not in a position to controvert the legal effect of his agreement, upon the faith of which the defendant, presumptively, relied. An examination of the abstract leads us to the conclusion that it fairly presents the questions involved, and hence the motion to dismiss the appeal is overruled.

(30 Or. 287)

**AVERY et al. v. BUTLER et al.<sup>1</sup>**

(Supreme Court of Oregon. Jan. 18, 1897.)

**MECHANIC'S LIEN—TIME OF FILING.**

Where a building has been accepted as completed according to the terms of the building contract, repairs by the builder on a discovery of defects therein will not extend the time for filing a lien otherwise excluded by a lapse of time.

Appeal from circuit court, Multnomah county; M. G. Munly, Judge.

Action by Avery & Opdycke against Butler & Dill and others, and the Builders' Sash & Door Manufacturing Company. Judgment for plaintiffs, and defendant manufacturing company appeals. Affirmed.

This is a suit to foreclose a mechanics' lien upon a house and lot at Piedmont, Multnomah county, the property of the defendant investment company, a corporation, but which it had agreed to sell and convey to the defendant Ben C. Irwin. The material facts are: That on August 8, 1892, the investment company entered into a contract with the defendants Butler & Dill by which the latter agreed to furnish the material and erect a house on said lot in consideration of \$2,312, \$1,500 to be paid as the work progressed, \$406 when the house was entirely completed and accepted, and \$406 35 days after such final acceptance and surrender of the building to the owner. The contract, in referring to the manner and effect of such

<sup>1</sup> Rehearing denied.

payments, contained the following stipulation: "It is also provided that in each of said cases a certificate be obtained and signed by the said F. Manson White, architect, none of which payments, except the final one, shall be considered as or understood to be an acceptance of any part or portion of the works herein agreed for." That on November 28, 1892, Butler & Dill, claiming to have complied with the terms of the contract, quit working on the building; and on the 8th of the next month the architect, deeming it completed in accordance with the terms of the agreement, executed to the contractors a certificate for \$406, whereupon Irwin, with his family, took possession, and thereafter continued to occupy the house. That the architect, in preparing the plans and specifications, omitted the window blinds, and, at his own expense, agreed to procure them; and, having done so, Butler & Dill, on December 13th, returned, and hung them, completing the work on the 19th of that month. The finishing lumber used in the building having begun to shrink, the architect, on December 18th, wrote to the contractors as follows: "I hereby notify you that I have rejected much of the mill work on the residence you are building at Piedmont for the investment company. All the doors, with one exception, are cracked and checked. The windows do not fit, and the trim has opened at all joinings. The work must be rectified at once, or it will be done at your expense." Thereafter he gave them a list of the imperfect material which he rejected, and notified them that the work must be made good before he could accept it, and on January 16, 1893, sent them the following notice: "You are hereby notified to proceed and complete the work on the residence you are building for the investment company at Piedmont. If this notice is not complied with within three days, we will, as agreed in contract, have the work done ourselves, and have the same charged to you." And Butler & Dill, upon the receipt of these notices, thereafter removed the defective, and supplied other and better, material, completing the repairs on April 30, 1893. The plaintiffs allege that they furnished to Butler & Dill certain material to be used in the construction of said house, and, having perfected a lien thereon, commenced this suit for its foreclosure, alleging in their complaint that the defendant, the Builders' Sash & Door Manufacturing Company, a corporation, claimed some lien upon the premises, to which said company made answer in the nature of a cross bill, alleging that it furnished to the contractors certain material to be used in the erection of the house, and to secure the payment of the amount due therefor, on May 26, 1893, and within 30 days from the completion of the building, filed its claim of lien in the proper office, and prayed that the same might be foreclosed. The investment company and Ir-

win, after denying the material allegations of the cross bill, for further answer thereto, allege that the material so furnished by the Builders' Sash & Door Manufacturing Company did not comply with the plans and specifications; that, after expending large sums in placing said material in the building, they were obliged to, and did, remove it therefrom, and replace it with other and suitable material; and that, having been compelled to do so, they had been damaged thereby in the sum of \$500, for which they prayed a decree. A reply having put in issue the allegations of new matter contained in the answer, a trial was had at which the court, upon stipulation, dismissed the plaintiffs' suit, and the cross bills of other lien claimants, and, having found that the cost of making the changes was greater than the amount claimed by the Builders' Sash & Door Manufacturing Company, decreed a dismissal of its cross bill also, from which it appeals.

G. G. Gammans, for appellant. Wallace McCamant, for respondents.

MOORE, C. J. (after stating the facts). Counsel for the appellant contend that the court erred in its findings of fact, while it is maintained by counsel for the investment company and Irwin that the claim of lien, now sought to be enforced, was not filed within the time prescribed by law, and for this reason the decree should be affirmed. The certificate which called for the payment of the installment, evidencing the final completion of the building, having been obtained by Butler & Dill, they, on December 8, 1892, surrendered to the owner the possession of the property. From these facts it is evident that on this date each party considered the building entirely completed, as far as the contract was concerned; and the architect, having examined the house, and being satisfied with the workmanship and material, accepted the same, although he thereafter wrote to the contractors, requiring them "to proceed and complete the work," implying thereby that the building had not been completed; but, in view of the circumstances and acts of the parties, we deem the language a request to repair, rather than a demand to complete the building, for, at the time this certificate was given, the defects in the material used in the building were not apparent, but, as the lumber seasoned, it began to shrink and check, thereby exhibiting its imperfections, upon the discovery of which the architect demanded that it should be removed, and better material substituted therefor. If the defects had been manifest from an inspection of the work at the date of the certificate, it must be presumed that the architect would not have given it to the builders; but, having done so, we must conclude he considered the building completed, as far as the contract was concerned, for, as a witness, he testifies that, when the

certificate was issued, "the work was completed as called for in the contract." It is true that Butler & Dill thereafter returned and hung the blinds, finishing the work on December 19, 1892; but, the architect having omitted them from the plans and specifications, this evidently was not a part of their original contract, and the certificate ought to be treated as evidence of the acceptance of their work, unless the provisions of the contract preclude such a construction. The final payment was to have been made 35 days after December 8, 1892; but, upon the discovery of the imperfections in the material, it was delayed until after April 30th of the next year, when the repairs were completed. The acceptance of the building must be determined as a question of fact. The stipulation in the contract to the effect that none but the final payment should be construed as or understood to be an acceptance of any portion of the work was for the protection of the owner, and could, of course, be waived by him. Viewed in this light, it must be admitted, we think, that on December 8, 1892, the investment company, by its agent, F. Manson White, the architect, believing that Butler & Dill had fully performed their part of the contract, accepted the building, and issued to them a certificate evidencing this fact. The blinds were not hung, however, until December 19, 1892, at which time the building was fully completed, unless the work thereafter done by Butler & Dill, in removing and substituting other material, served to postpone such completion until April 30, 1893.

This brings us to a consideration of the question whether, after a building, which is sought to be subjected to the payment of a claim for labor and material, has been accepted as completed according to the terms of the contract for its construction, the renewal or repair of some of its parts upon a discovery of their defects will extend the time for filing a lien otherwise excluded by lapse of time. While there is seemingly a conflict of authority upon this question, we think the better reason supports the rule that, after a structure has been completed, inspected, and approved by the owner or his lawful agent, any latent defects, existing in the material or workmanship, that may be cured by the builder upon the request of the owner, are to be considered as repairs, and not omissions in the performance of the original contract. When work demanded by the terms of the original contract has been omitted, the final completion of the structure dates from the time such omissions are supplied by the builder at the request of the owner, although in the meantime the latter may have taken possession of the property (*Stock Yards v. O'Reilly*, 85 Ill. 546; *Holden v. Winslow*, 18 Pa. St. 160); the rule seeming to be that while there is anything to do which it is the duty of the builder to perform, under the terms of the contract, the work upon which he is engaged is not completed until this obligation is accomplished (*Watts*

*Campbell Co. v. Yuengling*, 51 Hun, 302, 3 N. Y. Supp. 869); so that, if the window blinds were demanded by the terms of the original contract, the house could not be considered completed until they were supplied. So, too, when the builder, after a substantial completion of the structure, at the request of the owner, makes additions to it which are useful or necessary to its enjoyment, the final completion dates from the time such additions are made. *Hofer's Appeal*, 116 Pa. St. 360, 9 Atl. 441; *Nichols v. Culver*, 51 Conn. 177. When the work has been apparently completed, but not accepted, the restoration by the builder of a part to which objection has been made is considered as a substitution under the terms of the original agreement, and not a repair, and therefore the statute begins to run only from the final completion of the imperfectly formed obligation. *Bruce v. Berg*, 8 Mo. App. 204; *Scott v. Cook*, Id. 193; *Worthen v. Cleaveland*, 129 Mass. 570; *Harrison v. Association*, 134 Pa. St. 558, 19 Atl. 804; *Water-Supply Co. v. Riter* (Ind. Sup.) 37 N. E. 652. But, after a building has been accepted, repairs made thereon will not revive a lien for labor performed upon or materials furnished to be used in the structure prior to such acceptance. *Berry v. Turner*, 45 Wis. 105, *Dunn v. McKee*, 5 Sneed, 657. In *Conlee v. Clark*, 42 N. E. 762, the appellate court of Indiana reached a different conclusion, which is much weakened, however, by the fact that two of the judges dissented from the opinion announced by the majority. The latter rule also prevails in California. *McIntyre v. Trautner*, 63 Cal. 429. In the case at bar, the house, in our judgment, was completed on December 19, 1892, when the blinds were hung; and any work thereafter done must be considered as repairs, and the notice of lien of the sash and door company, not having been filed within 30 days from the completion of the building, was not filed within the time prescribed by law (*Ainslie v. Kohn*, 16 Or. 363, 19 Pac. 97); and hence the decree is affirmed.

(30 Or. 428)

#### HOLMAN v. DE LIN-RIVER-FINLEY CO. et al.

(Supreme Court of Oregon. Jan. 18, 1897.)

APPEAL—REVIEW—LANDLORD AND TENANT—LEASE—SURRENDER—FORFEITURE.

1. An appeal by defendant from a judgment for plaintiff does not bring up the question of the sufficiency of the answer, as tested by a demurrer which was overruled.

2. A lessee who has assigned his interest in the lease to his co-tenant cannot, by afterwards paying the rent to the end of the term, and taking an assignment to himself of the interest of the lessor, recover on the lease, from his co-tenant, or a tenant of his co-tenant, the amount of rent so paid by him, as by such payment all obligations under the lease are discharged.

3. After the execution of a lease to L. & H., the latter retired from the firm, and assigned his interest in the lease to L. Afterwards a partnership was formed between L. and others, who continued to occupy the premises until a corporation was formed, by which the premises were



then occupied. After H.'s retirement the rent was paid by L., or one of his partners, and receipts made to "L. & Co.," instead of "L. & H.," and no demand was made on H. for the rent for 25 months. H. then paid all rent in arrears and to become due, and took an assignment from the lessors of the lease, and their claims for rent. *Held*, that no surrender of the lease was shown, so as to enable H. to recover for use and occupation by the corporation during the life of the lease.

4. Breach of a condition in a lease against assigning or subleasing without permission of the lessor does not avoid the lease, except at the option of the lessor, shown by re-entry.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Edward Holman against the De Lin-River-Finley Company and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

The basis of plaintiff's action is a claim or demand for rent for use and occupation of certain premises, situate in the city of Portland, from October 1, 1893, to January 4, 1895, at a monthly rental of \$200, payable in advance, alleged to have been assigned to him by T. L. Ray, R. L. Ray, H. Ray, Sarah Ray, J. D. W. Ray, and Mary Arbuckle, who were and are the owners of said premises, as joint tenants. To defeat the action, defendants answer that on September 25, 1889, the owners executed a lease of said premises to the plaintiff and the defendant De Lin, who were then partners as De Lin & Holman, for the term of five years, beginning with March 1, 1890, at a monthly rental of \$200, which the said De Lin & Holman undertook to pay on the 1st day of each and every month during the term; that about December 2, 1892, De Lin & Holman dissolved their co-partnership, and Holman assigned to De Lin his one-half interest in the business theretofore carried on by them as such partners, and the aforesaid lease, and that thereafter De Lin remained in the possession and occupancy of the premises under the lease, but did not undertake or assume, by the assignment, to pay the rent, nor did the lessors undertake to accept or receive De Lin as and for De Lin & Holman, but thereafter continued to collect from, and enforce the conditions of the lease against, both De Lin and Holman, as their tenants; that thereafter, about September 25, 1893, the De Lin-River-Finley Company, a corporation, succeeded to the business of De Lin, and thenceforth occupied the premises under De Lin, and as his tenant, and not otherwise; that about December 27, 1894, the lessors instituted an action in the circuit court of the state of Oregon for Multnomah county against the plaintiff and De Lin, upon the lease, to recover for rent then in default, aggregating \$2,000, and that plaintiff thereupon paid and discharged his liability upon said lease, and by so doing relieved De Lin and every person whomsoever of liability for any rent due or to become due under the lease, but, notwithstanding, plaintiff undertook to obtain from the

lessors a transfer of the lease, and the right to recover for rent reserved, but that the said lease and liability thereunder have been wholly surrendered, satisfied, and discharged. The lease referred to in the answer was in fact executed by T. L. Ray, alone. This the reply shows, and it is further alleged therein that defendants went into possession of the premises, and continued to occupy the same for the time set forth in the complaint, and to pay the owners thereof the rent for their use, and that such owners recognized and treated the defendants as their tenants during such time, and not the plaintiff. A motion was interposed by plaintiff to strike out all of the further and separate answer as sham and irrelevant, which was sustained; but it seems that a demurrer was subsequently filed in the same matter, heard and considered by the court, and overruled. At the trial, and after plaintiff had concluded the introduction of his evidence, the defendants moved for a nonsuit, and, after verdict, moved for judgment non obstante, both of which motions were overruled. The action of the court below in sustaining plaintiff's and overruling the defendants' said motions and in giving certain instructions duly excepted to, is assigned as error on the appeal.

The following facts may be regarded as having been proved at the time plaintiff rested his case in chief: That one B. B. Arbuckle was the agent for the owners of the building or premises, with authority to lease the same and collect the rents. That on the 25th day of September, 1889, Arbuckle, in the name of T. L. Ray, one of the joint owners, executed a lease, not under seal, to plaintiff and the defendant De Lin, partners in business, as undertakers, as De Lin & Holman, purporting to let to them the entire interest in said building or premises for a term of five years, beginning March 1, 1890, at a monthly rental of \$200, payable in advance, which they undertook and agreed to pay. De Lin & Holman occupied the premises to November 28, 1892, when Holman went out. Thereafter De Lin, River, and Finley occupied them as co-partners until September, 1893, when they incorporated as the De Lin-River-Finley Company, which corporation continued in possession until January, 1895, when it ceased to do business and vacated the premises. In the meantime,—about July, 1894,—De Lin sold and transferred his stock or interest in the concern to the defendant Rieger. De Lin paid the rent for December, 1892, being the first coming due after Holman's retirement, which Arbuckle says was paid to him before he knew that Finley had become a member of the company. Thereafter all payments of rent for the company or corporation were made by Finley, except \$100 by De Lin. The rent was paid promptly to and inclusive of the month of August, 1893, but thenceforth the company dropped behind, paying the last

item in October, 1894, which paid the rent in full to April 1, 1894. On December 15, 1894, Arbuckle called upon Holman for payment of back rent then amounting to \$1,800,—which Holman says was the first time he had been called upon since he left the place,—upon failing to pay which he was sued by T. L. Ray on the 26th; and in January, 1895, he paid the rent in full to the expiration of the term of the lease, amounting to \$2,200, in consideration of which he took an assignment or release from all the joint owners of the premises, purporting to assign, set over, release, and quitclaim to him any claim that they, or either of them, jointly or severally, had against De Lin, River, Finley, or Rieger, or either of them, either in their individual, co-partnership, or corporate capacity, for rent of said building, and also any claim for rent due or to become due under the De Lin & Holman lease, which is attached to, and made part of, the assignment. Arbuckle testified, in effect, that Finley always claimed to be trying to pay the rent, saying at one time that, if he could sell some property in California, he would straighten it up, and in May or June, 1894, he said that when Rieger got an interest in the company he expected to be able to pay in full, as he would bring money into the business. River and Finley objected to the receipts for rent being made to Holman & De Lin, and, at their suggestion, Arbuckle made them to "De Lin & Co." after March 3, 1893, but continued to demand the rent of De Lin & Co. under the lease. The lessors, at the time they assigned to Holman, had not canceled the lease, nor released De Lin and Holman, or either of them. It was a question with them who was to pay the rent. Finley requested Arbuckle not to say anything about it to Holman, that he would pay it, and asked for a reduction, which was refused for fear it might invalidate the lease. The purpose of the assignment was to transfer whatever claim the assignors had to Holman, whether under the lease or otherwise. They claimed that De Lin & Holman were held under the lease, and it was a question whether Finley and Rieger were or not, and, if they had any such claim against Finley & Co., they assigned it to Holman. W. C. Kolb testified that he heard a conversation between Finley and River, who claimed there was a clause in the lease prohibiting its assignment or transfer without the consent of the lessees. Finley said that they were not responsible, but that they would go along and do the best they could; that he thought they would be able to pay the rent and expected business to pick up; and that he did not want to move, as it would cost him \$1,000. The witness corroborates Arbuckle touching what Finley said to him about the payment of rent, and the reasons why he was unable to pay. On cross-examination he testified that they (Finley and River) said the rent was too much, and that they had gone to see

Arbuckle to get him to reduce it, and that if they could not, and they could get a cheaper place, they would move out; that they were not responsible, and the lease would not hold them. They tried to get a place from the A. O. U. W. people, and failed. This is, in effect and substance, all the testimony offered by the plaintiff when he had rested.

E. C. Bronaugh and W. D. Fenton, for appellants. G. O. Holman and Rufus Mallory, for respondent.

WOLVERTON, J. (after stating the facts). The motion to strike out was undoubtedly waived by the subsequent filing, hearing, and determination of the demurrer, and thereby treating it as not in the record; and, the demurrer having been overruled, the defendants' appeal does not bring the question of the sufficiency of the answer here, tested by either of these papers or documents. But notwithstanding, as it was so urgently insisted at the argument that the facts stated do not constitute a defense, and as preliminary to the cardinal question in the case,—that of nonsuit,—we are constrained to make the inquiry whether the position is tenable. We think the separate answer states a good defense. It shows that the right of action depends upon a written lease, wherein plaintiff is one of the lessees, while he sues in the right of the lessors, which he claims by assignment from them after having himself paid all rent due or reserved under it to the end of the term. The action is for use and occupation, and it must be supported by a contract of leasing, express or implied. *Jennings v. Alexander*, 1 Hilt. 154; *Hurley v. Lamoreaux*, 20 Minn. 138, 12 N. W. 447. Sections 2984, 2985, Hill's Ann. Laws Or., do not, as supposed, create a right which gives rents, but prescribe a remedy. They relate to the recovery of rents when due, and must be based upon subsisting conventional relations. *Stewart v. Perkins*, 3 Or. 508; *Campbell v. Stetson*, 2 Metc. (Mass.) 504. By accepting the assignment of plaintiff's interest in the lease, De Lin did not assume any additional or new liability to the lessors for the payment of rent, nor did they accept or receive him as their lessee in the place and stead of De Lin & Holman, but continued to treat both as their tenants. Thus far there could be no release of the liability of either De Lin or the plaintiff under the lease. De Lin continued to occupy the premises until the corporation was formed, which took possession under De Lin, as his tenant, and not as the tenant of the owners, nor as assignee of the term; but this did not change the rights and liabilities of the parties to and under the lease. Now, while the conditions were as delineated, the plaintiff, one of the lessees, prior to the expiration of the term, pays all rent reserved, whether due or to become due, takes

an assignment of the lease, and now sues by virtue of alleged rights acquired from the lessors by the assignment. It is perfectly apparent that plaintiff has not acquired any such rights as will support the action. His payment of the rent reserved to the lessors discharged the obligation under the lease to pay rent, as fully and completely as though De Lin or they together had paid it. The lessors thenceforth had no right of recovery in any form upon the lease, by virtue of the particular obligation to pay rent; and the plaintiff, by the assignment, could acquire no higher right than they. The answer is a sort of *reductio ad absurdum* of plaintiff's position. He is placed in the light of acquiring the interest of the lessors for the purpose of suing himself, or, what is equivalent, his co-obligor, upon the instrument, after he had discharged the obligation; the other defendants being the tenants of his co-obligor, and not of his assignors. It was also suggested that the answer is sham, in that the copy of the lease attached, and made part of it, shows that the leasing was between T. L. Ray, one of the joint tenants only, and De Lin & Holman, whereas it is alleged that it was executed by all the joint owners; but if the lease purporting to be of the whole interest is the source of plaintiff's title or right of action, he standing in the shoes of the lessors by virtue of the assignment, and the rent reserved having been paid and discharged by the plaintiff himself, the defense is complete. It shows such an outstanding lease, so treated and considered, as will preclude a recovery by the lessors against subtenants.

We come now to the question of nonsuit. Ordinarily a *prima facie* case would be made, in an action for use and occupation, when occupancy has been shown, and an attornment with the rental value, or an agreement to pay a definite sum, and the proof herein offered is undoubtedly sufficient for that purpose. The reply, however, admits an outstanding lease,—the same as set up by the answer,—but seeks to avoid its effect by alleging an occupancy by defendants under plaintiff's assignors, and an attornment to them for the use of the premises, and a recognition of the defendants by such assignors as their tenants. This presupposes a surrender or nullification of the outstanding lease, although it is not, in terms, so alleged, as while such lease subsisted the plaintiff's assignors could not let to other parties. They could not have two tenants at one and the same time. *Logan v. Anderson*, 2 Doug. (Mich.) 103. It also appears from plaintiff's proof that such a lease was executed, and that plaintiff treated it as outstanding and subsisting, by occupying the premises under it, jointly with De Lin, up to about November 28, 1892. The evidence does not disclose what functions the lease performed after that date, or what was done with it, or how it was treated by the parties concerned, ex-

cept that plaintiff paid the rent under it, and took and accepted an assignment of it to himself; but it must be taken to have continued as subsisting and outstanding until the expiration of the term thereby created, unless it was shown to have been canceled or surrendered by the act of the parties to it. In this connection we may indulge a corollary presumption; and that is, when once it appears that there is an outstanding lease of premises, the occupant thereof, if not the lessee himself or his assignee, is the tenant of the rightful owner of the term, or, rather, that he is a subtenant, in some degree, of the original lessor. Such a tenant is not answerable to the owner of the premises for the rental, because there is neither privity of estate nor of contract between them. *Jennings v. Alexander*, supra; *Simmons v. Fielder*, 46 Ala. 304; *McFarlan v. Watson*, 3 N. Y. 286; 1 Tayl. Landl. & Ten. § 109; 2 Tayl. Landl. & Ten. § 448. It was therefore incumbent upon the plaintiff to overcome in some manner these attendant presumptive conditions touching the incongruous lease. *Rehm v. Weiss* (City Ct. N. Y.) 28 N. Y. Supp. 772; *Doty v. Gillett*, 43 Mich. 206, 5 N. W. 89. And the granting of the nonsuit must depend upon whether the plaintiff has produced evidence from which a surrender of the same may be inferred. If he has, there was enough to go to the jury; otherwise not. A surrender may be effected by express agreement, or by operation of law. It takes place by operation of law when the parties, without express surrender, do some act which implies that they have mutually agreed to consider the surrender as made. 2 Tayl. Landl. & Ten. § 512; *Beall v. White*, 94 U. S. 389; *Wheeler v. Walden*, 17 Neb. 122, 22 N. W. 346. There is no testimony here tending to establish an express surrender. Is there any from which one by operation of law may be inferred? To establish a letting by plaintiff's assignors to the defendants, it is shown that they, through their agent, Arbuckle, collected the rents directly from the defendants, and that the later receipts were issued in the name of De Lin & Co., instead of De Lin & Holman, the original lessees. All this is competent as evidence tending to show a leasing, but it is not of itself sufficient from which to infer the surrender of the subsisting repugnant lease theretofore executed by the plaintiff's assignors to himself and partner. The agent of the assignors positively refused to do anything which would have a tendency to release plaintiff of his liability. So there is here no intention on the part of the assignors to assent to a surrender. De Lin, the partner of plaintiff, surely did nothing from which the remotest inference could be drawn that he had agreed to such an act or transaction. Holman says that he was not called upon for the rent for 25 months after he went out, which is very true, no doubt; but he recognized the subsistence of the lease

at that time, by paying the rent due, not only for the time which defendants had occupied the premises, but to the end of the term fixed thereby, which had not yet expired. And, further than this, he treated the lease as a subsisting document, by taking an assignment of it to himself. Instead of this testimony justifying an inference that the assignors of plaintiff and he had agreed to a surrender, it proves the very opposite,—that there was absolutely no intention by either party to the lease, much less that there was a mutual understanding, that a surrender should take place. So we think the testimony offered failed to show a case sufficient to go to the jury, and the testimony for defendant was not more favorable to plaintiff.

It was argued that, as the lease contains covenants against an assignment or a sub-leasing by the lessees without the consent of the lessors, it was rendered void by reason of the assignment and the occupancy by the defendant company under De Lin; but these covenants were made for the benefit of the lessors, and it was incumbent upon them to re-enter in order to terminate the lease, or revert the estate in them. *Shattuck v. Lovejoy*, 8 Gray, 204. It was not shown that they did this, and hence they were not reinvested of their old estate.

These conclusions render it unnecessary to examine the other questions made in the briefs and at the argument. The judgment of the court below will be reversed, and the cause remanded, with directions to allow the nonsuit.

(30 Or. 312)

#### GRANT v. PADDOCK.

(Supreme Court of Oregon. Jan. 18, 1897.)

EJECTMENT—OUSTER—LIMITATION OF ACTIONS—  
RUNNING OF STATUTE—PARTITION  
AMONG HEIRS.

1. Where defendant, in an action by his co-tenant to recover his share of the premises, denies plaintiff's right, and alleges adverse possession for over 10 years, a finding of adverse holding for less than 10 years is sufficient as a finding of ouster by defendant.

2. Where plaintiff's predecessor in title died April 30, 1884, an action for the recovery of the real estate commenced April 30, 1894, was not barred, under Hill's Ann. Laws, § 4, providing for such actions within 10 years; section 519 providing that the time within which an act shall be done shall be computed by excluding the first day and including the last.

3. A conclusion of law, that the share of one of several joint heirs, capable of making a will, descended on his death to the survivors, is not supported, in the absence of a finding that he died intestate, or that he did not leave a widow, child, or parent surviving.

Appeal from circuit court, Multnomah county; H. Hurley, Judge.

Action by J. M. Grant against Benjamin O. Paddock. From a judgment for plaintiff, defendant appeals. Modified.

This is an action by J. M. Grant, as tenant in common, to recover of his co-tenant

the undivided one-third of the north half of the donation land claim of John A. and Nancy Williams, in Multnomah county. The defendant, after denying the material allegations of the complaint, alleges—First, that one S. E. Paddock, under whom he holds possession, is the owner in fee of the whole of the north half of said claim; and, second, that neither the plaintiff, nor his ancestor, predecessor, or grantor, was seised or possessed of the demanded premises within 10 years before the commencement of this action, during which time the defendant and those under whom he claims have been in the open, notorious, peaceable, and quiet possession thereof, and have held the same adversely as against every one. The reply put in issue the allegations of new matter contained in the answer, and, a jury being waived, a trial was had by the court, which found, in substance, that on December 5, 1860, Nancy Williams died intestate, in Multnomah county, leaving, as her heirs at law, the issue of her marriage with the said John A. Williams, her surviving husband, to wit, Sarah J. Grant, Missouri Dodd, Judith A. Bozorth, Josephine Grant, Milton B. Williams, Wiley C. Williams, and Sanford R. Williams, and the following named grandchildren, John Henry Childs and George Shelly; that Milton B. Williams died in 1861 and Wiley C. Williams in 1863, each being then under age, unmarried, and without issue, and that said John Henry Childs died after April 30, 1884; that at the time of her death the said Nancy Williams was seised in fee of the north half of said donation land claim; that on June 10, 1863, John A. Williams, having a life estate only in said premises, as tenant by the curtesy, executed to one Henry Holtgreve a general warranty deed, purporting and intending thereby to convey in fee the whole of said north half; that on May 1, 1865, Holtgreve and his wife executed a deed for said premises to one John Switzler, and he to J. C. Files in 1876, who, with his wife, on March 14th of that year, executed to the defendant's lessor a deed purporting to convey the same to him, his heirs and assigns; that each of said grantees, on obtaining his deed, entered into possession of this land, and continued to occupy, use, and cultivate the same as a farm, until he executed a deed thereto, and surrendered the possession thereof to his grantee; that their possession had been open, continuous, adverse, and hostile to all other persons, and under a claim of title to the whole of said real property; that, from March 1, 1876, to the commencement of this action, defendant's father, Sylvester E. Paddock, by himself and his tenants, has continued to occupy and use the said premises, and was then in the possession thereof; that John A. Williams died on the 30th day of April, 1884, between 12 o'clock midnight and 2 o'clock of that morning; that the summons in this action was

not delivered to the sheriff of Multnomah county for service until April 30, 1894, after 8 o'clock a. m.; that Judith A. Bozorth died intestate November 29, 1892, leaving three sons, named J. O., M. B., and Scott Bozorth; that on April 18, 1894, said Sarah J. Grant and Josephine Grant executed to the plaintiff a deed purporting to convey an undivided two-sixths of said premises. And the court also found, as conclusions of law, that, upon the death of Nancy Williams, the real property of which she died seised descended to her heirs in equal shares; that the shares of Milton B. and Wiley C. Williams descended in equal shares to the children of Nancy Williams; that the share of John Henry Childs therein descended, upon his death, subsequent to the death of John A. Williams, to the other remaining heirs of Nancy Williams; that the statute of limitations did not begin to run against the heirs of Nancy Williams, as to the north half of said claim, until the death of John A. Williams; that the plaintiff's right of action was not barred; that plaintiff was the owner in fee and entitled to the possession of the undivided one-third of the north half of said claim; and that the defendant wrongfully withholds the possession thereof, to the plaintiff's damage in the sum of one dollar,—and upon these findings gave judgment for the plaintiff, from which the defendant appeals.

S. R. Harrington and W. W. Thayer, for appellant. A. H. Tanner and H. J. Bigger, for respondent.

MOORE, C. J. (after stating the facts). It is contended by counsel for the defendant that, an issue having been joined upon the allegation that plaintiff was the owner in fee of an estate in the demanded premises, as tenant in common with the defendant, upon which the court failed to find an ouster of the plaintiff, or a refusal of the defendant to admit him into possession, it follows that there is no foundation to support the judgment, for which reason it should be reversed. While proof of a denial of the plaintiff's right of possession, or some act equivalent thereto, is essential to the maintenance of an action of ejectment by a tenant in common of real property against a co-tenant (Hill's Ann. Laws Or. § 327), yet the condition of the pleadings may be such as to concede this fact, and thus dispense with such proof (Freem. Co-ten. [2d Ed.] § 292). In *Miller v. Myers*, 46 Cal. 535, the court, in discussing this proposition, say: "It is well settled that a refusal, after a proper demand by a tenant in common in possession to admit his co-tenant into the possession, is itself an ouster, and dispenses with the necessity of further proof on that point. It is equally clear that, in an action by a tenant in common against his co-tenant to be admitted into the possession, a denial in the answer of the plaintiff's title and right of entry is equiv-

alent to an ouster." The answer herein, having alleged adverse possession for more than 10 years as a defense to the action, was clearly a denial of the plaintiff's right, and the court having found an adverse holding for less than 10 years upon the issue joined upon said allegation, necessarily found an ouster of plaintiff. *Harrison v. Taylor*, 33 Mo. 211; *Noble v. McFarland*, 51 Ill. 226; *Clason v. Rankin*, 1 Duer, 337; *Peterson v. Laik*, 24 Mo. 541; *Spect v. Gregg*, 51 Cal. 198.

2. The court having found that John A. Williams died, April 30, 1884, between the hours of 12 and 2 o'clock in the morning, and that this action was not commenced until after 8 o'clock in the morning of the 30th of April, 1894, counsel for the defendant contend that their client, and those under whom he claims, have been in the adverse possession of the premises more than 10 years, and, as the statute declares that no action shall be maintained for the recovery of real property, or for the possession thereof, unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within 10 years before the commencement of such action (Hill's Ann. Laws Or. § 4), the conclusion of law that the plaintiff's right of action is not barred by the statute of limitation is not deducible from, but is contradicted by, the findings of fact; that the prohibitory statute above cited cannot be modified by the general rule, adopted by the courts, to the effect that the time within which an act is to be done shall be computed by excluding the first day and including the last; and that the provision contained in section 519, Hill's Ann. Laws Or., applies only to cases in which the time is expressed in days. In support of the proposition that a statute prescribing the mode for computing time does not apply to divisions thereof expressed by years, counsel for appellant cite and rely upon the doctrine announced in the cases of *Williams v. Lane*, 87 Wis. 152, 58 N. W. 77, and *Aultman & Taylor Co. v. Syme* (Sup.) 36 N. Y. Supp. 528. The first case was an action to foreclose a mechanic's lien, instituted under a statute which required it to be brought within one year from a given date, but, the day on which the year terminated having fallen on Sunday, the action was not commenced until the next day, and it was held that the cause of action was barred. "The case," said Pinney, J., "is not within the statute (Sanb. & B. Ann. St. § 4971), which applies only to cases when the time in the statute 'is expressed in days,' and is not controlled by *Buckstaff v. Hanville*, 14 Wis. 77." Subdivision 24 of the section of the statute cited in that case declares: "The time within which an act is to be done, as provided in any statute, when expressed in days, shall be computed by excluding the first day and including the last, except that, if the last day be Sunday, it shall be excluded." It will thus be seen that, if the

statute had not limited the method of computing time to cases in which it was expressed in days, the rule would have applied as well to cases in which the time was expressed in years. In the second case the court reach a similar conclusion, and say: "It seems to us, upon an examination of the statutes in respect to the computation of time, that a different rule prevails in computing any specified number of days, weeks, or months from a specified event, from that which obtains in the computation of any specified number of years from a specified event. By the provisions of the statutes, the day from which any specified number of days, weeks, or months of time is reckoned shall be excluded in making the reckoning. Laws 1894, c. 447, § 27. But the section relating to computation of time by the year contains no such provision. Laws 1892, c. 677, § 25." Section 27 of the act of 1894, *supra*, declares: "In computing any specified number of days, weeks or months from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified number of days, weeks or months of time is reckoned shall be excluded in making the reckoning." It will be observed, from an inspection of this statute, that the method of computing time, by excluding the day upon which a certain event happened, is limited to divisions thereof to be measured by days, weeks, or months, and, under the maxim of "Expressio unius est exclusio alterius," the rule could not be applied to computing time expressed in years. In *Spencer v. Haug*, 47 N. W. 794, the supreme court of Minnesota—in construing a statute which provided that "the time within which an act is to be done shall be computed by excluding the first day and including the last: If the last day is Sunday, it shall be excluded"—held that this section applied as well to the construction of a statute as to matters of practice, and that 10 years from May 19, 1862, extended to and included May 20, 1872, the preceding day having been Sunday. So, too, in *Cowan v. Donaldson*, 32 S. W. 457, the supreme court of Tennessee, in a suit to revive a decree, say: "Decree having been rendered November 20, 1883, a suit upon it is in time if brought November 20, 1893, under section 46, Mill. & V. Code, which provides that the time within which any act is to be done shall be computed by excluding the first and including the last day." We conclude, therefore, that where the statute prescribing the method of computing time does not limit its application to any specified period, it applies to all divisions of time.

Whether the day of the happening of a certain event should be included as a basis from which to compute time has been a vexed question for many centuries, and, in consequence of a spirited controversy as to whether it should be included or excluded, and to

remove any doubt upon the subject, Gregory IX., in his decretals, introduced the phrase "a year and a day," thus including the first and last day of the term. *Griffith v. Bogert*, 18 How. 158. In the absence of any statute regulating the matter, the rule seems to be that the day upon which the particular event happened should be excluded from the computation of time, when, by doing so, courts are enabled to construe the provisions of a statute or the stipulations of a contract in such a manner as to prevent penalties and forfeitures, and to uphold bona fide transactions. *Seward v. Hayden* (Mass.) 22 N. E. 629; *Merritt v. Ona*, 44 Fed. 369; *Smith v. Dickey*, 74 Tex. 61, 11 S. W. 1049; *End. Interp. St. § 390*. "In the computation of time," says O'Neal, J., in *State v. Schnierle*, 5 Rich. Law, 299, "the day from which the reckoning commences and that on which it terminates may both be included or excluded as will best preserve a right or prevent a forfeiture." But rules adopted by the courts for the computation of time can have no application to the method prescribed by statute, except to apply the reasons upon which such rules are predicated to the construction of statutes in doubtful cases. On June 1, 1863, the Code of Civil Procedure, including sections 4 and 519, Hill's Ann. Laws Or., went into effect; and, as these sections formed part of one general act, they ought to be so construed as to harmonize their apparent discrepancies, and to give effect, as far as possible, to the provisions of each. *End. Interp. St. § 43*; *Holgate v. Railroad Co.*, 16 Or. 123, 17 Pac. 850; *Smith v. Kelly*, 24 Or. 464, 33 Pac. 642. Construing these sections in pari materia, and in such manner as to avoid a forfeiture of the estate involved, it is evident that section 4, *supra*, should be so construed as to exclude the day on which the plaintiff's grantors, by the death of their father, became entitled to the possession of the premises, and that, excluding such day, it appears that this action was commenced within 10 years from the time the plaintiff's grantors were seised in law of an estate in the north half of the John A. Williams donation land claim.

3. The court, having found that Nancy Williams, upon her death intestate, left, surviving her, four daughters, three sons, and two grandsons, the latter being the issue of two of her married daughters then deceased, and that Milton B. Williams and Wiley C. Williams, two of these sons, having thereafter died under age without having been married, also found, as a conclusion of law, that upon the death of these sons the share of each in the real property inherited from his mother descended in equal shares to the children of Nancy Williams. This conclusion of law would seem to limit an inheritance to the brother and sisters, to the exclusion of the grandchildren, John Henry Childs and George Shelly, who, under subdivision 6, § 3098, Hill's Ann. Laws Or. (see *St. Or. 1854-55*, p. 380), inherited, by right of representation, an equal

share with the children of Nancy Williams; but in the judgment rendered the court seems to have rectified the error in the conclusions of law, by treating these grandsons as heirs at law of Milton B. and Wiley C. Williams. The court also found that John Henry Childs, one of said grandsons, died after April 30, 1884, and, as a conclusion of law therefrom, found that, upon his death, his interest in said land claim descended to the remaining heirs of Nancy Williams, and, predicated upon this conclusion, awarded plaintiff the undivided two-sixths of the real property in question. The court found that the mother of John Henry Childs died in 1852. Hence, he was above the age of 21 years, and was, therefore, capable of executing a will. But the court does not find that he died intestate, or that he did not leave, surviving him, a widow, child, or father; and, this being so, the findings of fact do not support the conclusions of law that the share of this person descended to the remaining heirs of Nancy Williams, and for this reason the judgment must be modified. The cause will, therefore, be remanded, with directions to amend the conclusions of law to the effect that the five surviving children and the two grandsons of Nancy Williams each inherited an undivided one-seventh of the real property of which the intestate died seised, and to give judgment that the plaintiff is the owner in fee and entitled to the possession of the undivided two-sevenths of the north half of the donation land claim of John A. and Nancy Williams, in Multnomah county, and for one dollar damages, and the costs and disbursements of this action in the court below; the defendant to recover his costs in this court.

(8 N. M. 667)

## UNITED STATES v. SPENCER.

(Supreme Court of New Mexico. Dec. 18, 1896.)

## CRIMINAL LAW — NEW TRIAL — MISCONDUCT OF JURY — IMPEACHMENT OF VERDICT.

1. New trial will be granted where the jury in a criminal case were permitted by the bailiff to separate and visit saloons to obtain liquor.

2. Where a verdict of guilty is impeached by the affidavits of third persons showing misconduct of the jury, the burden is on the prosecution to show that the defendant was not prejudiced thereby.

Appeal from Second judicial district court; before Justice N. C. Collier.

B. B. Spencer was convicted of unlawfully cutting timber on the public domain, and appeals. Reversed.

The appellant here and defendant in the court below was indicted on a charge of unlawfully cutting timber upon the public domain of the United States, and was on the 9th day of March, 1896, placed on trial; and on the 11th day of March, 1896, the jury returned a verdict of guilty as charged, and after a motion for a new trial was made, argued, and denied, and a motion in arrest

also being denied, the court sentenced the defendant to pay a fine of \$300, and to serve a term of three months in the common jail of Bernalillo county, and the case is here on appeal from that judgment.

A. L. Morrison, Modesto C. Ortiz, and Chas. A. Spiess, for appellant. Geo. P. Money, Asst. U. S. Atty.

LAUGHLIN, J. The record in this case discloses that the defendant was placed on trial, and the jury impaneled and sworn, and placed in custody of two bailiffs, on the 9th day of March, 1896; and that the trial continued until March 11, 1896, when the jury returned a verdict of guilty as charged. Among the grounds assigned in the motion for a new trial in the court below, and as errors for consideration by this court, are: Fifth. "Because said jury after being impaneled, sworn, and placed in the custody of two bailiffs to try the issues in the case, were allowed to separate by said bailiffs, and, while so separated, drank spirituous liquors, before they returned to the jury room." Sixth. "Because said jurors, as aforesaid, were allowed to separate and visit a saloon, to wit, the saloon of Mrs. Muzio, located in Old Albuquerque, New Mexico." Eighth. "Because the sworn bailiffs permitted said jurors to separate and drink spirituous liquors, in disobedience of the strict and sworn instructions received from the court." Ninth. "Because said jury or jurors, while out and so separated, were allowed to talk to outsiders, in disobedience to the orders of this court, and to the prejudice of this defendant." The grounds in the motion were supported by affidavits of a number of persons, not jurors. The first affidavit is that of Panteleon Hill, who testified "that he was a street-car driver at that time, and that at about 10 o'clock at night, March 9, 1896, one of the bailiffs, then in charge of the jury in this case, and two of the jurors, Cesario Grande and C. A. Hudson, boarded his car in front of Mrs. Muzio's saloon; that said Hudson at the time was drunk, and became noisy and quarrelsome, and had a personal difficulty with the affiant, and with the bailiff who was then in charge of the two said jurors; that a number of other persons were there present in the street car." One Frank Di Luki made an affidavit that he was at that time the barkeeper at the said saloon of Mrs. Muzio, and that about 6 o'clock in the morning of March 10, 1896, said jurors C. A. Hudson and Cesario Grande and another member of said jury, Rafael Gabaldson, came to said saloon, called for whisky and drank it at the bar; and that said Grande purchased a bottle of whisky, put it in his pocket, and carried it away with him. One Juan Baca y Salazar also made an affidavit that he saw Cesario Grande, Rafael Gabaldson, Juan Chaves y Trujillo, and said C. A. Hudson all at said saloon between 6 and 7

o'clock on the morning of said 10th day of March, drinking whisky, and that he saw both Grande and said Hudson each take a bottle of whisky away from said saloon, and that he knew all of said persons so named to be at that time members of the jury in this case. There are also affidavits of other persons supporting these facts, and it does not appear that any doubt exists as to the truthfulness of the facts set out in the affidavits. It further appears from the record that these affidavits were filed with the motion for a new trial, and that they are not traversed.

It is contended on the part of the appellee, in support of the verdict and judgment in the lower court, that, before the motion is available, it must appear that the separation or improper conduct of the jury resulted to the prejudice of the defendant. But this contention is not supported by the weight of authority. The general rule in criminal cases is that, where the verdict is assailed in the manner here shown, it is incumbent on the prosecution to repel the assault, and to show that no injury resulted to the defendant by reason of the alleged improper conduct on the part of the jury. *Mattox v. U. S.*, 146 U. S. 149, 13 Sup. Ct. 50. The general rule is otherwise where the jurors attempt by affidavits to impeach their own verdicts. *U. S. v. Reid*, 12 How. 361; *U. S. v. Blena* (N. M.) 42 Pac. 70. When the jury have been impaneled, sworn, and put in charge of bailiffs, it is vital that they should be excluded from all temptations from external influences which might in any manner tend to bias or prejudice their free and impartial deliberation. While it is a general proposition that the granting or refusing of a motion for a new trial is addressed to the sound discretion of the trial court, who is more capable to pass upon the equitable reasons assigned than the appellate court, purely from the reasons appearing in the record, yet there are exceptions to the general rule, and the case at bar appears to be one of them. The court below received the affidavits, permitted them to be filed, and they are here in the record. That, manifestly, was the proper course for the lower court. But the record does not show that the court in any manner considered or passed upon the competency of the affidavits, but denied the motion for a new trial, and passed judgment and sentence on the defendant, and they are now here for consideration by this court as a part of the record, as to their competency. *Mattox v. U. S.*, *supra*.

The affidavits, untraversed, establish a state of facts which cast suspicion on the regularity of the verdict, and it should not be permitted to stand. If the whisky in the bottles which the jurors Grande and Hudson carried from the saloon to their jury room was of the usual standard brand imposed upon the public, it is reasonable to presume that they were under its influence during that day, and while hearing testimony in the

case; and, if this presumption is tenable, then two jurors were not in a frame of mind to dispassionately consider and coolly deliberate on the weight and the importance of the testimony. Their separation afforded opportunities for tampering and improper influences. The sacredness of trial by jury consists and rests in the conscientiousness of the jurors in applying the facts before them to the law as expounded by the court. But jurors whose minds are clouded by a too free indulgence of spirituous liquors, and their powers of conception blunted by its effects, are incompetent to appreciate the high responsibilities of their duties. "When the drinking of ardent spirits by a juror is attended with improper conduct, as where a juror separates from his fellows to drink in a barroom, or where ardent spirits are conveyed to him by one of the parties, a new trial will be granted." *Thomp. & M. Jur.* § 378; *Studley v. Hall*, 22 Me. 198; *Jones v. State*, 13 Tex. 168. In *Fairchild v. Snyder*, 43 Iowa, 23, a civil case, the court said: "Where a juror becomes intoxicated on the evening of the day when the trial commenced, but it did not appear that he was intoxicated while in the discharge of his duties as a juror, held, that the court, in the exercise of its discretion, might properly grant a new trial for this reason." In *Davis v. State*, 35 Ind. 496, the court said: "In a criminal case, after the jury have been charged by the court, and put in care of a bailiff to consider on their verdict, the bailiff went with two of the jurors to a liquor and billiard saloon, where other persons were drinking and playing billiards, and procured for each of the jurors a drink of brandy, ginger, wine, nutmeg, and sugar, which they drank, and one of them paid for it, and it was not shown where the other jurors were at the time said two were absent with the bailiff at the saloon; and the transaction was unexplained, except that the bailiff asked the saloonkeeper, when he called for the drinks, if he could not fix something for the jurors' diarrhea. Held, that this was good cause for setting aside a verdict rendered by said jury against the defendant, and granting him a new trial." The conduct of both jurors and bailiffs in this case shows a flagrant disregard of their sworn duties, and the court would have been justified in rewarding them with most severe punishment. If jurors should be permitted to separate, contrary to orders and instructions of the court, go to a barroom, drink intoxicating liquors, and converse and mingle with people generally, then the sacredness and respect for trial by jury would be destroyed, and the practice of excluding juries from outside and external influences and temptations for tampering and bribery is nullified, and no litigant would be protected in his constitutional right of a fair and impartial trial by a jury. The temptation to influence a verdict of a jury is great under all circumstances, and especially so in all crim-



inal cases; and every opportunity to communicate in any manner whatsoever with jurors while they are hearing or considering a case should be excluded in so far as it is possible; and a verdict tainted with suspicion by improper conduct of a jury should not be permitted to stand. While it is true in the case at bar that the record does not disclose any prejudice to the defendant as a consequence of the separation and improper conduct charged against the bailiffs and some of the jurors, yet the facts show such a flagrant disregard of their duties that, were the verdict sustained, it might tend to establish a dangerous precedent, and one that might prove harmful to the administration of justice, and a due regard for the rights of trial by jury.

For the foregoing reasons, the judgment of the lower court is reversed, and the defendant is awarded a new trial; and it is so ordered.

SMITH, C. J., and HAMILTON and BANTZ, JJ., concur.

(8 N. M. 696)

EBERLE v. CARMICHAEL et al.

(Supreme Court of New Mexico. Dec. 19, 1896.)

MINING—LOCATION—STATUTE OF FRAUDS.

Where each of three persons locates a different mine in his own name, pursuant to an oral agreement that all mines located by either shall be owned in common by them, the statute of frauds has no application to prevent their being owners in common. Laughlin and Bantz, JJ., dissenting.

On rehearing. Denied. For former report, see 42 Pac. 95.

Thos. B. Catron, for plaintiff in error. H. L. Pickett and Wm. B. Childers, for defendants in error.

COLLIER, J. The petition for rehearing in this case was allowed for the purpose of reargument upon the proposition that a parol agreement for the acquiring of an interest in a mining claim in New Mexico was within the statute of frauds, and therefore void. The opinion of the court, reported in 42 Pac., at page 95 et seq., proceeded upon the theory that a parol agreement, whereby three persons associated themselves together for the purpose of prospecting, discovery, location, and development of mines for their joint benefit, and located and developed mines in pursuance thereof, constituted a holding in common of such mines under the mining laws of the United States; that the territorial statutes as to how such location should be made were merely regulatory in their character; and, whether such statutes denominated the possessory interest acquired, real estate, an interest in real estate, a chose in action, or a chattel, mere denomination of such interest could not raise

the statute of frauds as a bar of its acquisition, if it was not there, nor take it away if it was. We held that "such statute must be construed in subordination to the laws of congress, as they are more as regulations than independent legislation"; and this would be so without respect to the fact whether such laws were those of a sovereign state or a dependent territory, as in each case they would be local regulations as to an interest or right sought to be acquired, or acquired under the mining laws of the general government. In the case of *Murley v. Ennis*, which was a Colorado case, reported in 2 Colo. 304, it made no difference that in that state a mining claim was declared by law to be real estate. In the case of *Gore v. McBrayer*, 18 Cal. 583, the agreement was verbal; and it was conceded in the opinion, which was delivered by Baldwin, J., and concurred in by Field, C. J., and Cope, J. (a unanimous bench), that an interest in a mining claim was real estate by the law of California; but the court held the statute of frauds had no application. It is true that case differs from this so far as the location notice is concerned; there the name of the plaintiff appearing on the notice as one of the locators, while here plaintiff appears as sole locator of the Andrew Jackson Mine, and John E. Eberle as sole locator of the Lexington, but the principle which counsel for defendant combats is squarely announced, viz. that such agreement is not within the statute of frauds. Coming down further, we find in *Moritz v. Lavelle*, 77 Cal. 10, 18 Pac. 803, exactly such a location notice as here with reference to the Lexington Mine. The agreement was verbal, and to the effect that plaintiff was to pay all the expenses of the defendant in and about the occupying and relocation of a certain mine. The mine was located in the name of defendant as sole locator in the notice, with plaintiff as a witness, upon the express oral agreement between them that, in consideration of the former agreement about paying expenses, defendant would transfer by deed to plaintiff an undivided one-half interest in the mine. Plaintiff sued for specific performance, and, being met by demurrer that the contract was within the statute of frauds, the demurrer was overruled; *Gore v. McBrayer*, supra, being cited, among other authorities. If this case is authority in point so far as the Lexington Mine is concerned, there can be no doubt as to its being equally pertinent as to the Andrew Jackson, which was located in the name of plaintiff alone. Again, we find a California case (*Settembre v. Putnam*, 30 Cal. 490) which announces the principle that if two or more persons, as mining partners, claim and develop a mine situated upon land owned by a third person, and the partners verbally authorized one of their number to purchase the land of the owner for the benefit of all, and he buys the same in his own

name, he holds the legal title of his partners' proportion in trust for them; Sawyer, J., delivering the opinion of the court.

Why, it may be asked, may not a verbal agreement to acquire a possessory right to a mining claim, and eventually a title thereto from the government, be effectual to constitute a holding in trust, if a title conveyed by an individual to one of the parties constitutes a holding in trust? One title results from the performance of acts required by law; the other, by act of parties. In *Traphagen v. Burt*, 67 N. Y. 30, it was held that verbal agreement to purchase and improve real estate on joint account, showing equally the profits and losses, was not within the statute of frauds where several farms were purchased thereunder, and the deeds as to all save one were taken in the joint names of the parties, and improvements were made at joint expense upon all, and cattle and other property were purchased for each and all. The court, in discussing that case, showed that there was such a part performance as made a resulting trust in favor of the plaintiff. In the case at bar the evidence shows that in pursuance of the agreement to prospect, locate, and develop the three mines located, one in the name of one of the parties, one in the name of another, and one in the name of the third, expense was incurred by plaintiff as to the three, work was done on the three, and the assessment work for some of the years was done off of all three, but for the purposes of developing all by means of a tunnel. Why is this not, as declared in *Traphagen v. Burt*, supra, a partnership for acquiring real estate, and why, under the circumstances, would there not be a resulting trust? It is to be remembered that this objection applies in no way whatever to the status of the plaintiff at the time of bringing suit, for at that time he had, by deeds of conveyance from the other two parties to the verbal agreement attacked here, become vested with the entire interest in the three mines; but it only applies to the question whether such an agreement, and work done and money expended thereunder, constituted a holding in common. Surely, if the statute of frauds has no application to the taking up of a mining claim, as decided by the Colorado and California cases, supra, not to the partnership for the acquiring of land and creating a resulting trust where there is part performance, as decided in *Settembre v. Putnam* and *Traphagen v. Burt*, supra, at least a holding in common under the mining laws should be held to exist.

It is admitted, as we understand the contention and the brief of defendants in error, that the case of *Book v. Mining Co.*, 58 Fed. 119, is an authority directly and pointedly against their contention; and yet, as we pointed out in the opinion as to which the rehearing is asked, this case does not go at all to the extent of that. Here is a

case where location is made for the joint interest of all. There was a case where employees of a corporation made the location for the benefit, not of themselves, but of the corporation employing them. We quote from that decision (*Hawley*, Judge) on the subject of the statute of frauds: "The statute of frauds relied upon by complainants has no application whatever to the facts of this case. An agreement to locate a mining claim for the benefit of another need not be in writing. If a party, in pursuance of such an understanding, at the expense of another, locate the claim in his own name, he holds the legal title to the ground in trust for the benefit of the party for whom the location was made, and such party could, on making the necessary proofs, compel the locator of the mining claim to convey the title thereof to him, although the agreement to do so was not in writing. This familiar principle has often been applied in cases where a party has entered into an oral agreement to locate mining ground for the joint benefit of himself and others, and makes a location in his own name. It has always been held that such oral agreements are not within the statute of frauds. *Gore v. McBrayer*, 18 Cal. 582; *Moritz v. Lavelle*, 77 Cal. 10, 18 Pac. 803; *Hirbour v. Reeding*, 3 Mont. 13; and *Welland v. Huber*, 8 Nev. 203." The case at bar is one where, in the language of the learned judge, "this familiar principle has always been applied." Seeing no error in our former opinion, it will be again ordered that the judgment of the court below be reversed, and this cause stand for a new trial.

SMITH, C. J., concurs. LAUGHLIN and BANTZ, JJ., dissent.

TERRITORY OF NEW MEXICO v. LEYBA.  
(Supreme Court of New Mexico. Jan. 4, 1897.)

GRAND JURY — COMPETENCY — OBJECTION — HOW TAKEN — INSTRUCTIONS.

1. The objection that some of the grand jurors were disqualified by age cannot be taken by motion to quash the indictment.

2. An instruction that, in passing on the credibility of the witness, the jury may consider his manner on the stand, "his relation to the parties, and the interest he may have in the result of this case," is not objectionable as singling out defendant from the other witnesses.

Appeal from district court, Bernalillo county; before Justice N. C. Collier.

Eleuterio Leyba was convicted of murder in the third degree, and appeals. Affirmed.

B. S. Rodey and M. C. de Baca, for appellant. John P. Victory, Sol. Gen., for the Territory.

SMITH, C. J. The appellant was convicted in the district court of Bernalillo county of the offense of murder in the third degree, and sentenced to a term of 10 years in the

penitentiary; but, as the errors assigned and pressed upon this court's attention relate to two matters which require no examination of the evidence in the cause, it is not here alluded to.

The first error assigned is that the court below refused to quash the indictment because of the presence on the grand jury which returned it of two members disqualified by reason of being over the age of 60 years. It is well settled that this objection cannot be reached by motion to quash.

The instruction of the court is in the following language: "In passing upon the credibility of the witness,—on the weight to be given his testimony,—you may consider his manner and conduct upon the stand, his means of knowledge, his relation to the parties, and the interest he may have in the result of this case." The clause, "the interest he may have in the result of this case," is attacked as, in effect, telling the jury that the defendant should be disbelieved because of his "interest." The language of the instruction does not single out the defendant, as the portion of the clause immediately preceding "interest" could not be legitimately applied to the defendant exclusively. We find no objection to the instruction, and, there being no error in the record, this case is affirmed.

LAUGHLIN, BANTZ, and HAMILTON, JJ., concur.

(8 N. M. 658)

# ROGERS et al. v. RICHARDS.

(Supreme Court of New Mexico. Dec. 18, 1896.)

## APPEAL—REVIEW—ASSIGNMENT OF ERRORS.

Errors assigned as to giving or refusing instructions cannot be considered on appeal unless properly made part of the record by motion for new trial.

Error to district court, Santa Fé county; before Justice N. B. Laughlin.

Action by Joseph Richards against W. C. Rogers and others. From a judgment for plaintiff, defendants bring error. Affirmed.

C. A. Spiess, for plaintiffs in error. J. H. Sutherland, for defendant in error.

COLLIER, J. This was an action of replevin begun in the district court of Santa Fé county by the defendant in error against the plaintiffs in error, resulting in a verdict for the plaintiff in the trial court being rendered on April 15, 1896. Notice of motion for new trial was given on the same day, but no motion being filed within five days after verdict, as required by rule of court, judgment was entered on the verdict, on motion of plaintiff, and a writ of restitution issued. Afterwards a writ of error was sued out from this court, and said writ of restitution recalled.

The only errors assigned in this court are

upon the instructions given by the court of its own motion, and the refusal of the court to give requested instructions. Defendant in error claims that, as to the error assigned upon the instructions which the court gave of its own motion, there is nothing for this court to review. In the absence of a motion for a new trial, and that, as to the requested instructions refused by the court, they can be considered only for the reason that such instructions are made a part of the record proper, and that the instructions were rightly refused. Without giving our assent to the doctrine that refused instructions are record in any different sense from those given by the court of its own motion, we will consider the point raised by counsel as to a motion for new trial being necessary to secure review by this court of alleged errors in instructions.

At this term of this court we have decided that, in order to have this court consider errors in instructions, it is required that exceptions should be taken at the time; the case of Padilla v. Territory (N. M.) 45 Pac. 1120, and Laird v. Upton, Id. 1010, showing such ruling, and these decisions according with the uniform ruling of this court, beginning with the case of Leonardo v. Territory, 1 N. M. 291, of date July, 1859. These ruling embrace as well the case of the judge refusing requested instructions as giving instructions of his own motion. We find it unnecessary to go over this ground again, except to observe that our statute (section 2197) places the giving or refusing of instructions in the same condition, in regard to exception thereto, as any other "decision upon any matter of law arising during the progress of the trial." The established practice of this court—established both by statute and decision—being that errors in giving or refusing instructions, and errors in deciding matters of law arising upon a trial, stand upon exactly similar footing as to the necessity of exception, we will advert to decided cases in this court as to a motion for new trial being required to obtain a review of errors arising during the progress of a trial. In Spiegelberg v. Mink, 1 N. M. 308, it was held that, to entitle a party to a revision of the facts by this court, a motion for a new trial was necessary. The cases are almost uniform upon the proposition that an appellate court will not consider an assignment of error to the effect that the verdict is against evidence, or is not supported by the evidence, unless there is a motion for new trial, and it is perhaps needless to append a list of authorities sustaining this view. The case of Sierra Co. v. Dona Ana Co., 5 N. M. 190, 21 Pac. 83, followed Spiegelberg v. Mink, supra; but in the same case the majority of the court considered an alleged error of law arising upon the trial, and Brinker, J., concurred in the result upon the broad ground that, there being no motion for a new trial, there was nothing before this court to consider. In Anderson v. Territory, 4 N. M. 108, 13 Pac. 21, it was held that error in the

exclusion of evidence must be pointed out in the motion for new trial, or the trial court need not, and the appellate court will not, consider such erroneous decision, though it be admitted that exception was duly taken. If the principle of that decision is sound, it would follow, logically, that, if there is no motion for a new trial at all, no error of law arising upon the exclusion of evidence will be considered in an appellate court. The only reason, having a semblance of plausibility, which would entitle errors in instructions given by the court of its own motion to be reviewed in the absence of a motion for new trial, conceding that errors in the exclusion of evidence are not entitled to such review, may be that instructions are contended to be record proper in the case, while errors in the exclusion of evidence only become record by means of a bill of exceptions. The record proper, in general, consists of the pleadings, process, verdict, and judgment. In *Greene Co. v. Wilhite*, 35 Mo. App. 43, it is said to include the original process, with the return thereon, the pleadings, order substituting parties, and the entry of final judgment; and in that case it is said that: "There may be difficulty in restricting the record proper, in all cases, to the limits thus stated; but the largest view of what is deemed the record proper can make it include no more, in addition to what is above stated, than those orders which emanate from the breast of the judge while sitting in court, and which are evidenced only by the entries on the minutes of the court." A definition of "record proper" would seem to be: The pleadings, process, and return thereon; judgments upon pleadings; verdict; judgment; and all orders and rulings which should be entered upon the minutes of the court; but not motions to strike out pleadings, and orders thereon. The definition of a "bill of exceptions" serves also to show what should be considered record proper. "The bill of exceptions is a simple history of the case as tried, and should contain nothing more or less than the facts as they appeared to the court and jury from the commencement of the trial until the final judgment by the court." *Gallaher v. State*, 17 Fla. 379. "A bill of exceptions is a formal statement in writing of exceptions taken by a party in the trial to a ruling, decision, charge, or opinion of the trial judge, setting out the proceedings on the trial; the acts of the trial judge alleged to be erroneous; the objections and exceptions thereto, together with the grounds therefor,—and authenticated by the trial judge according to law." 3 Enc. Pl. & Prac. 378. If this definition further specified that the bill of exceptions should contain all evidence necessary to an understanding of the exceptions, it would be quite complete. "Motions made during the trial of a cause, and the rulings of the court thereon, must be preserved in a bill of exceptions." Id. 392, citing authorities. "The very general doctrine is that a motion for a new trial must be so pre-

served, unless by statute it is made a part of the record proper." Id. 400, citing authorities. "Unless a statute otherwise provides, a bill of exceptions is the sole mode by which the instructions can be brought up to the appellate court for review." Id. 402, and authorities there cited.

From these authorities it appears that there can be no doubt that instructions are not a part of the record proper unless made so by statute. Does our statute so make them? We quote from our statutes as follows:

"Sec. 2055. All instructions asked and the charge of the court shall be in writing."

"Sec. 2057. The court must read to the jury all the instructions he intends to give and none others, and must write the word 'Given' or 'Refused,' as the case may be, in the margin of each instruction."

"Sec. 2058. All instructions demanded must be filed and shall become a part of the record."

"Sec. 2063. When the jury retires to consider its verdict, it shall be allowed to take the pleadings in the cause, the instructions of the court, and any instruments of writing admitted as evidence, except depositions."

As to instructions not demanded, there is nothing said about these becoming record, but they are required to be in writing. If they are given or refused (if they are part of the record proper), that fact appears; but the mandatory terms of our statute require exceptions to secure review. They therefore come within the bill of exceptions as acts done by the judge in the trial of the cause. In the same way as rulings in excluding evidence; and following the decision of this court in *Anderson v. Territory*, supra, a motion for new trial is necessary to obtain a review of error alleged as to them in this court. We believe that the decision in *Anderson v. Territory*, supra, is sustained by the great weight of authority in this country; and, without citing abundant cases on this subject, we refer to *Rindscoff v. Lyman*, 16 Iowa, 260, where the question is treated by Dillon, J., in the lucid and exhaustive manner with which that great jurist disposes of every subject he touches. The conclusion he arrives at in his opinion (citing authorities from numerous states) is "that it is generally held, that exceptions previously taken may be embodied in a motion for new trial, and in this manner preserved and brought before the appellate tribunal; but all rulings not excepted to, and all exceptions not embodied in the motion for a new trial, are by the appellate court deemed waived." The statutes of none of the states he cites, or which we have, in addition, examined, say, in terms, that a motion for new trial shall be made as a condition precedent to review in the appellate court errors not appearing in the record proper; but they merely provide for new trials, and

within what time after verdict they shall be made. Our statute (section 1842) and rules of court, having the force of statute law, provide the same thing. This practice affords to the trial judge the opportunity of correcting errors that may have crept into the trial of a case because of the hurry and press of matters which came up for prompt decision, and which may, upon more elaborate argument,—counsel being surprised by a sudden emergency at the time of the trial,—be shown to be error meriting a new trial. Also, the appellate court may better weigh the discretion vested in a trial judge as to many matters, if, upon solemn argument, after the pressure of the trial has passed, a new trial is refused. These and other considerations carry with them great force, and the practice secures uniformity in procedure, and often lessens expense and delay, if the unsuccessful party shall be required to exhaust his remedy in the lower court.

Though counsel for defendant in error appears to concede that, as to the instructions refused, a motion for new trial was unnecessary, yet we do not think that section 2058, in prescribing that "demanded instructions must be filed and shall become a part of the record," means that they are a part of what is deemed record proper, but they belong to that part of the record embodied in the bill of exceptions, and that error assigned upon giving or refusing such instructions must be saved by a motion for a new trial. It would involve quite a contradictory appearance of things if the giving of erroneous instructions by the court of its own motion differed in any respect from the refusing of right, or the giving of wrong, instructions that were requested, especially when there would be no way of determining whether any instructions were right or wrong, generally speaking, unless there is a bill of exceptions showing the evidence in the case, and the instructions actually given. The provisions of law requiring instructions to be written, and demanded instructions to be filed, are merely directory, and intended to make the clerk of the court their custodian. When the statute says that the demanded instructions are a part of the record, it merely means that they are of the files in the case. Another statute requires the stenographer's notes to be deposited in the office of the clerk of the court, presumably, we may say, because they are a part of the case to which they refer; but it would be idle to call them, either before or after transcription, a part of the record of the case, in any strict sense, for they cannot so become until embodied in a bill of exceptions; and neither, we think, do instructions, whether given by the court of its own motion, or demanded, until they come into a bill of exceptions duly settled. The case of *Anderson v. Territory*, supra, holds that, where an exception is not saved by motion for new trial, the lower court need not, and this court will not, re-

view it; and we therefore find no matter of error here to be reviewed, and the case is accordingly affirmed.

SMITH, C. J., and HAMILTON and BANTZ, JJ., concur. LAUGHLIN, J., not sitting, having heard the case in the court below.

(9 N. M. 1)

WESTERN HOMESTEAD & IRRIGATION  
CO. v. FIRST NAT. BANK OF  
ALBUQUERQUE.

(Supreme Court of New Mexico. Feb. 1, 1897.)

GARNISHMENT—SUMMONS—REVIEW—CORPORATIONS  
—CONTRACTS.

1. On appeal from judgment against garnishee, complaint cannot be made of errors in the original suit, no attempt to review the judgment therein having been made within the statutory period.

2. The process to bring garnishee before the court having been according to the statute, judgment against him will not be reversed simply because he was not served with a summons in the form prescribed by the clerks of the district courts.

3. A corporation having accepted labor and an assignment of stock without any attempt at repudiation, under a contract signed by its general manager alone, but which was agreed to by the officers, and which was reduced to writing, and signed by him in their presence, cannot escape liability thereon because of a by-law requiring that its contracts be signed by at least two of its officers.

4. A contract, to bind a corporation, need not be under its corporate seal.

Error to district court, Bernalillo county; before Justice N. O. Collier.

Garnishment proceedings by the First National Bank of Albuquerque against the Western Homestead & Irrigation Company. Judgment for plaintiff. Garnishee brings error. Affirmed.

This cause came here on error to district court sitting in and for the county of Bernalillo, in the Second judicial district. The defendant in error, the First National Bank of Albuquerque, recovered judgment on March 5, 1895, against Jesse Anthony and George E. Lewis on their promissory note for \$240.16 and costs. Thereafter the defendant in error sued out garnishment proceedings against the plaintiff in error, the Western Homestead & Irrigation Company, alleging it, said plaintiff in error and garnishee, was indebted to said Anthony, said judgment debtor. Thereafter, on the 23d day of May, 1896, the court directed a verdict in favor of the defendant in error and against the garnishee and plaintiff in error for \$288.54 and costs, and judgment was entered accordingly; whereupon the garnishee moved for a new trial, and in arrest, both of which motions were denied; and on the 6th day of June, 1896, error was sued out to this court.

F. W. Clancy, for plaintiff in error. A. B. McMillen, for defendant in error.

LAUGHLIN, J. (after stating the facts). The errors assigned by the plaintiff in error are: (1) "The court below erred in entering judgment

nll dict against the original defendant, while there was in the record, undisposed of, a plea on which issue had been joined." (2) "The court below erred in trying the original cause without a jury." (3) "The court below erred in entering judgment for the amount appearing to be due on the promissory note sued on, for the reason that the same was not denied under oath." These errors apply to the original suit of the First National Bank against Anthony and Lewis. The judgment in that case was entered in the court below on the 5th day of March, 1895, and it does not appear from the record that any motion for a new trial was filed, or any effort made to review the judgment then entered in the court, until the 23d day of May, 1896, and not until judgment had been entered against the garnishee, plaintiff in error. Thus the original judgment remained unappealed from for more than a year from the time of its original entry. "Appeals in equity cases and writs of error in common-law cases may be taken at any time within one year from the date of the rendition of final decrees or judgments." Laws 1891, c. 66, § 5. It is manifest that the writ of error from the judgment in the original case against Anthony and Lewis was not seasonably sued out, and the errors assigned with respect to that part of the case are untenable. And, the judgment having remained undisturbed for more than the period provided by statute in which the writ of error must be availed of, it cannot now be attacked in the collateral manner here sought. *Freem. Judgm. (3d Ed.)* § 249. Under the authority of *Knaebel v. Slaughter* (N. M.) 34 Pac. 199, the first assignment here would have been available if the writ of error had been sued out at any time within one year from the time of the rendition of the final judgment; but it was not, and therefore this objection cannot be maintained. While the garnishment proceeding is ancillary to the original suit, and is a remedy in aid of the execution issued on the judgment in that suit, yet it is a separate and distinct action in rem, and cannot be considered as a part of the original action. It raises separate and distinct issues from the main action, and involves different parties, and is appealable in the same manner as other causes of action of a like nature; and both the original action and the garnishment proceedings might have been brought to this court on separate writs of error. 8 Am. & Eng. Enc. Law, 1257. And it was held in *Pupke v. Meador*, 72 Ga. 230, that the two cases could not be consolidated, but must be brought to the appellate court on separate and distinct writs of error. And the reversal of the judgment in the main case also reverses the judgment in garnishment case, but a reversal of the garnishment judgment does not reverse the main case.

The next objection is as follows: (4) "The court erred in denying garnishee's motion to quash the notice of garnishee." Counsel for plaintiff in error appeared specially, and mov-

ed to quash the notice, "for the reason that the same is not in terms made returnable in the same way as original process for bringing defendants into court." This motion was based on the eighth subdivision of rule 27 of the rules of the district courts, which is as follows: "(8) A like practice shall prevail in garnishee proceedings upon executions, with such omissions, additions and changes as may be applicable thereto; but the notice of the garnishee shall be in terms returnable in the same way as original process for bringing defendant into court." The record shows that the execution was issued on the 14th day of March, 1895, and the notice of garnishment was attached to it, and that both were served on the garnishee on the 13th day of May, 1895, at the county of Bernalillo, and that the notice cited the garnishee therein named to appear on the first Monday of June following. The notice of garnishee was in the form prescribed by the statute and by the rules of the district courts. The statute provides as follows (Comp. Laws 1884, § 1935, subd. 2): "Garnishees shall be summoned by the sheriff, declaring to them that he summoned them to appear at the return term of the writ to answer the interrogations which may be exhibited by the plaintiff, and by reading to them if required." The writ referred to in the statute means the execution. And it is provided further in section 2159: "That if the officer fails to find property sufficient to make the same he shall notify all persons who may be indebted to said defendant not to pay said defendant, but to appear before the court out of which said execution issued and make true answer on oath concerning his indebtedness, and the like proceedings shall be had as in cases of garnishees summoned in suits originating by attachment." It is plain, then, that the process to bring garnishee before the court was in substantial compliance with the statute. The rule of district courts invoked is not in contravention of the requirements of the statute. The garnishee was notified in the manner required by the statute to appear at the first return day occurring 20 days after service, and appeared specially in the motion to quash the notice, which motion was denied by the court. Then a general appearance was entered, and the case proceeded in the regular manner provided in such cases. Judgment rendered, and brought here on writ of error. And this court would not be justified in reversing the case simply because the garnishee had not been served with a summons in the form prescribed by the clerks of the several district courts, when the procedure pursued was in substantial conformity with the requirements of the statute. *Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36.

There are a number of other errors assigned for reversal, one of which is as follows: (7) "The court below erred in overruling garnishee's objection to the admission of oral evidence as to whether E. W. Thomas

had general supervision of the business of the garnishee, and in holding that, if Thomas was accustomed to act in a certain way as to these matters, and the business went on, and he was held out by the corporation to transact such matters, and they ratified such authority by acquiescence, their silence would bind the corporation." It appears that to establish the indebtedness of the garnishee to the judgment debtor, Anthony, the defendant in error offered in evidence a certain contract, signed by said Anthony as party of the first part, and the garnishee corporation, by one E. W. Thomas, as general manager, as party of the second part, and under the terms of this contract it is contended by defendant in error that plaintiff in error is indebted to said Anthony, and therefore liable as garnishee. The contract discloses that on January 3, 1895, the said Anthony was then the owner of certain interests consisting of capital stock and assets in the Rio Puerco Irrigation & Improvement Company, and in the Rio Puerco Irrigation & Agricultural Company, both of which were domestic corporations; that said Anthony then sold all his interests in both said corporations to the said Western Homestead & Irrigation Company, the garnishee, for which the garnishee agreed to pay certain sums of money and securities therefor, as in the contract specified; and the said Anthony further agreed as an additional consideration to give his services and labors to the said garnishee company for a period of 10 months from and after the 1st day of November, 1894. On the day the contract was signed, Anthony assigned his said interests to the garnishee company, and deposited it with the garnishee's attorney at Albuquerque. The garnishee company contends that said Thomas had no authority, under its by-laws, to enter into said contract, and that, therefore, it is not bound by it. In support of this contention garnishee offered in evidence its by-laws, of which the two sections material to this case are as follows, to wit:

"The general manager shall have general charge of the office of the company, and have general supervision of the books and accounts. He shall give general directions as to the work to be done, provide ways and means for doing such work, suggest the form of papers, contracts, and obligations, and in general direct its movements and affairs. He shall have power to draw on the treasurer to carry out the interest of the company, and to make contracts as his judgment may direct. He shall be authorized to receive and receipt in the absence of the secretary any funds which may come into his hands, and account for the same to the secretary, and sign such papers and perform such other duties as the board of directors may prescribe."

"Contracts and Conveyances. All notes, deeds, contracts, and other evidences of debt or obligations, to bind the company, must be signed by two at least of the following

officers: President, general manager, secretary, or treasurer, but no money shall be borrowed or note given except the same is authorized by the board of directors."

Upon the validity of this contract the liability of the garnishee is fastened, if at all. It will be observed from the by-laws that the duties of the general manager are of a very broad and general nature, and pertain to the general management of the business affairs of the garnishee company. It is also apparent therefrom that "all notes, deeds, contracts, and other evidences of debt or obligations, to bind the company, must be signed by two, at least, of the following officers: President, general manager, secretary, or treasurer, but no money shall be borrowed or note given except the same is authorized by the board of directors." It appears from the testimony that at the time the contract was entered into verbally between Anthony and the garnishee company, in October or November, 1894, McChesney, president, Tygert, Thomas, and McMasters, were all directors and officers of the garnishee company, and were present, and made, agreed to, and entered into the verbal contract with said Anthony, which was thereafter reduced to writing, and signed by said Anthony, and by said Thomas as general manager, and that all the directors and officers of the garnishee company consented to and had full knowledge of the contents and existence of the contract at all times, and acquiesced in the same, and never at any time repudiated or in any manner changed the contract in any particular. It further appears that said Anthony, in pursuance of the fulfillment of his part of the said contract, entered upon the duties assigned him by garnishee company, and worked for four months, during which time he received and executed all orders in and about the work assigned to him; that after the expiration of that time, and during the remainder of the 10 months for which he had agreed to work for garnishee company, he at all times remained present at the place, ready, able, and willing to perform any labor or duties which it might assign to him; but that he received no orders or instructions to do any work or to perform any duties, but he was not discharged or released from the employment of the said garnishee company. There is nothing to show, nor is it contended, that the garnishee company ever at any time delivered up the assignments of the interests executed by said Anthony to it, or that any reassignment of the same was ever made, but, to the contrary, in so far as this record discloses, the interests and property assigned by said Anthony are now the property of and in the possession of the garnishee company, which the evidence tends to show amount to several thousand dollars. The facts, as shown from the record, are amply sufficient to sustain the verdict and judgment of the court below.

It would be contrary to sound principles

of law, and a travesty on justice, to hold that an officer of a corporation may enter into a contract in good faith with an individual for the transfer to it of valuable property, hold and keep it, and then decline to pay for it, because, forsooth, the officer so entering into the agreement did not have special authority to make and sign the contract conferred on him by the provisions of its secret by-laws. But the case at bar is much stronger, because all the officers of garnishee company were present when the terms of the contract were agreed upon verbally, which was afterwards written out by the general manager, and signed by him on behalf of garnishee company; and none of them appeared to have at any time attempted to repudiate any part of it until on the trial of this cause. Morawetz on Private Corporations (section 593) says: "It is plain that a person who has dealt with an agent of a corporation in good faith, within the scope of the apparent powers conferred upon him by the company, is not affected by secret instructions limiting these apparent powers. The same is usually true of restrictions on the apparent powers of the agents of a corporation by the company's by-laws. There is no general rule compelling persons dealing with a corporation, at their peril, to take notice of its by-laws. If a corporation appoints an agent of a class having certain functions and powers according to general custom, a person dealing with such agent is not affected by a by-law restricting the powers which would ordinarily belong to an agent of that class, in the absence of actual notice of the by-laws." Mr. Story, in his work on Agency (section 17), says: "A general agency properly exists where there is a delegation to do all acts connected with a particular trade, business, or employment." And the same author, in section 126, says: "In the former case [referring to a general agent] the principal will be bound by the acts of the agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions, which are given to him by the principal, limiting, qualifying, suspending, or prohibiting the exercise of such authority under particular circumstances." And in section 127 he says: "The ground of this distinction is the public policy of preventing frauds upon innocent persons in the encouragement of confidence in dealing with agents. If a person is held out to third persons, or to the public at large, by the principal, as having general authority to act for and to bind him in a particular business or employment, it would be the height of injustice, and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agent, limiting his authority, and thus to defeat his acts and transactions under the agency, when the party dealing with him had, and could have, no notice of such instructions. In such cases

good faith requires that the principal should be held bound by the acts of the agent within the scope of his general authority." When this corporation appointed Thomas as its general manager, and held him out to the public as such, it became bound to all third persons dealing with him on the strength of such apparent power, and within the scope of his duties, for all acts within the legitimate powers of the corporation; and, if Thomas violated any of the secret instructions and by-laws, the principal should suffer, and not an innocent third party, who acted upon the representations of the principal as to the extent of the agent's authority.

It was not necessary to the validity of the contract in question that it should have been made under the corporate seal of garnishee company. Mor. Corp. § 338, says: "In former times it was held that a corporation could not express its will, or enter into a contract, except through an instrument under seal, executed by a duly-constituted agent. This doctrine certainly had no principle based upon reason to support it. On the contrary, it seems to have been the result of the ignorance of the art of writing during the Dark Ages. It was never rigorously applied in all cases, which shows that it did not result from the nature of the corporation. And in modern times the ancient rule has been wholly discarded. It is now a settled rule through the United States that a corporation may make a contract without the use of a seal in all cases in which this may be done by an individual, and it is equally well settled that an agent of a corporation may be appointed without the use of a seal, whatever may be the purpose of the agency." In the case of *Kelsey v. Bank*, 69 Pa. St. 426, on the question of ratification, Williams, J., said: "The law is well settled that a principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own; and the maxim which makes ratification equivalent to a precedent authority is as much predicable of ratification by a corporation as it is of ratification of any other principal, and is equally to be presumed from the absence of dissent." And in the case of *the Indianapolis Rolling-Mill Co. v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S. 250, 7 Sup. Ct. 542, the supreme court of the United States hold that a disavowance of the unauthorized acts of the agent of a corporation within six months after knowledge by the directors is not exercised promptly, and comes too late. And in the case of *Pittsburg, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770, the same court says: "The principal positions taken in the arguments for the appellants were that the Indiana Central Company and the Pennsylvania Company never authorized their officers to execute the bridge contract, or to bind them by it; and that the contract was beyond the scope of their corporate power. But the court is



of the opinion that on the facts of this case neither of these positions can be maintained. When the president of a corporation executes in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act. *Indianapolis Rolling-Mill Co. v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S. 256, 7 Sup. Ct. 542. And when a contract is made by any agent of a corporation in its behalf, and for a purpose authorized by its charter, and the corporation received the benefit of the contract, without objection, it may be presumed to have authorized or ratified the contract of its agent,"—citing many cases. And to the same effect is *Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36.

A number of other errors are assigned, but it is not thought necessary to pass upon each of them, for the reason that those here considered include the others. Counsel for plaintiff in error has cited a great many authorities worthy of consideration from his point of view, but, in our opinion, they are inapplicable to the facts as disclosed at the trial and in the record. There appearing to be no substantial errors of record, the judgment of the court below is affirmed, with costs against garnishee company.

SMITH, C. J., and BANTZ, J., concur.

(3 N. M. 673)

UNITED STATES TRUST CO. OF NEW YORK et al. v. ATLANTIC & P. R. CO. et al.

In re TERRITORY OF NEW MEXICO.

(Supreme Court of New Mexico. Dec. 18, 1896.)

TAXATION BY TERRITORY—EXEMPTION BY ACT OF CONGRESS—RAILROAD RIGHT OF WAY—SUPERSTRUCTURES.

Section 2 of the act of incorporation of the Atlantic & Pacific Railroad Company, containing a grant by congress of the right of way through the public lands for the construction of a railroad and telegraph, and further providing that such way was granted to the extent of 100 feet in width on each side of said railroad through the public domain, "including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turntables, and water stations; and the right of way shall be exempt from taxation within the territories of United States,"—conveys the title of the United States to the lands used for the purposes named to the railroad company, and the right of way, within the exemption clause, includes the roadbed, ties and rails, station buildings, work shops, depots, machine shops, and other such structures necessary in the operation of a railroad, which are not taxable as personality by a territory. Bantz, J., dissenting.

Appeal from district court, Bernalillo county; before Justice N. O. Collier.

Action of foreclosure by the United States Trust Company of New York against the Atlantic & Pacific Railroad Company and others. From an order, made on an inter-

vening petition filed by the territory of New Mexico, requiring C. W. Smith, as receiver of the defendant company, to pay certain taxes, plaintiff and the receiver appeal. Reversed.

This is an appeal from the order of the district court of Bernalillo county, sitting as a court for the hearing and trial of causes arising under the constitution and laws of the United States, taken by the receiver (appointed by it) of the property of the Atlantic & Pacific Railroad Company, and by the United States Trust Company, complainant in that action. The order required the receiver to pay to the treasurer of Bernalillo county taxes aggregating the sum of \$43,254.70, which were levied upon property placed upon the assessment roll in the year 1895 by the assessor, as property omitted by the railroad company to be returned for the year 1893, as property omitted to be returned for the year 1894, and as property omitted to be returned for the year 1895, with 25 per cent. penalty added for the year 1895. The separate amounts of this aggregate being \$13,978 for 1893, \$12,768.78 for the year 1894, and \$16,535.14 for the year 1895. The Atlantic & Pacific Railroad Company was incorporated by the act of congress of the United States approved July 27, 1866. Among the provisions contained in its charter was one authorizing the company to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line from Springfield, Mo., to the Pacific Ocean, practically along the thirty-fifth parallel of latitude, and granting to it, in the second section, a right of way through the public lands, 200 feet in width, with sufficient grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations; also, the power to acquire a right of way and station grounds of the same character through private lands, by condemnation proceedings provided for in the act. The second section of the act exempted from taxation within the territories of the United States the right of way. The sections referred to, and others of the charter, are thereafter, in the brief, set out in full. The Atlantic & Pacific Railroad Company afterwards constructed its line of road from Isletta Junction, 15 miles west of Albuquerque, to the Colorado river, and maintained and operated the same to such point, and beyond, from the year 1882 up to the present time, except that in January, 1894, receivers were appointed, in foreclosure proceedings commenced in the Second judicial district court of the territory of New Mexico, for the property of the Atlantic & Pacific Railroad Company; and such receivers took possession of and operated said railroad up to February 1, 1896, when, in another foreclosure proceeding, and in the same one, the present receiver, C. W. Smith, was appointed receiver of the prop-

erty of the Atlantic & Pacific Railroad Company in New Mexico, Arizona, and California. In the year 1893 the railroad company returned for assessment to the assessor of Bernalillo county property of the value of \$530,960, and for the year of 1894 the receivers returned property to the same value, and for the year 1895 the receivers returned property to the same value. During none of these years was the right of way, station grounds, or superstructures thereon, returned for taxation by the company or by the receivers, as each claimed that the same were exempt from taxation. In the year 1895 the assessor for Bernalillo county, under the instructions of the board of county commissioners, assessed as personal property (describing the same as such) the entire superstructures of the railroad on its right of way and station grounds in Bernalillo county, although each and every part of the property so described and assessed was attached to, and a part of, the right of way and station grounds of the railroad company. A tax was levied upon each of these assessments, and subsequently, in March, 1896, the territory, upon permission of the court, filed in the foreclosure case of the United States Trust Company an intervening petition to recover such taxes. An order to show cause why the intervening petition should not be granted was properly served upon the parties to the foreclosure suit, and subsequently the United States Trust Company, the complainant in the foreclosure suit, and C. W. Smith, the receiver appointed in such suit, filed answers showing cause why the intervening petition should not be granted. Subsequently an agreed statement of facts was made between the parties, and the cause submitted and heard upon such agreed statement of facts. Subsequently the court found that these assessments were valid, and ordered the receiver to pay out of the property and funds in his hands the sum of \$43,254.70 to the treasurer of the county. A stipulation was made between the parties, in which the territory entered its appearance herein, and in which it was agreed as to the parts of the record which should constitute a transcript in this case.

Assignments of errors: First. That the court below erred in holding that the additional assessment of \$539,950 levied and assessed by the assessor of the county of Bernalillo for the year 1893 as property omitted for that year, and placed upon the assessment roll of the year 1895, was a valid assessment, and that the tax levied thereon in the year 1895 was and is a valid lien upon the property and franchises of said railroad company now in the custody and control of the receiver of that court. Second. That the court below erred in holding that the additional assessment of \$539,950 levied and assessed by the assessor of the county of Bernalillo for the year 1894 as property omitted for that year, and placed upon the assessment roll for the year 1895, was a valid

assessment, and that the tax levied thereon in the year 1895 was and is a valid lien upon the property and franchises of said railroad company now in the custody and control of the receiver of that court. Third. That the court below erred in holding that the additional assessment of \$539,950, together with the 25 per cent. penalty added to such amount, levied and assessed by the assessor of the county of Bernalillo as property omitted to be returned for the year 1895, was and is a valid assessment, and that the taxes levied thereon for the said year 1895 are a valid lien upon the property and franchises of the said railroad company now in the custody and control of the court. Fourth. The court below erred in holding and decreeing that the receiver should pay to the treasurer of the county of Bernalillo the sum of \$43,254.70, as taxes due from the Atlantic & Pacific Railroad Company, and the receiver thereof, for the years 1893, 1894, and 1895, upon the property placed upon the assessment roll by the assessor of Bernalillo county as omitted property, and erred as to the amount ordered to be paid as taxes for each of said years.

C. N. Sterry and Karl Snyder, for appellee Atlantic & P. R. Co. John P. Victory, Sol. Gen., and T. N. Wilkerson, for the Territory.

SMITH, C. J. (after stating the facts). It has been adjudicated by the court of last resort (*Railroad Co. v. Peniston*, 18 Wall. 5) "that the state can impose a tax upon the property of corporations chartered by congress as agents to subserve the lawful purposes of the government. Provided that such tax does not deprive such organizations of the power to serve the government as they were intended to serve it, it does not hinder the efficient exercise of their power." It is difficult to appreciate that the legality of a tax must be determined by its effect,—that its constitutionality is contingent upon its operation; and it is suggested that, if such consideration is decisive, the issue is not one of right, but of feasibility. The same case affirms the distinction before made by said tribunal between the franchise and property of such corporations, pronouncing the one exempt from taxation by the states, and the other liable to assessment, upon the ground that the one is upon the operation of said corporation, and the other upon their possessions,—their property; it being represented that existence in the one case is involved, but in the other efficiency only. If the tax is right or wrong, legal or unauthorized, according to its effect, it would seem that it can be placed upon the franchise as well as upon the property, providing that it should not deprive the corporation of the power to fulfill the purposes for which they were created by congress. Banks are not rendered inefficient or failures by a tax upon the right to do business, nor are railroads forced into liquidation by the exactions of the states whose area they traverse. However, *res adjudicata* by the supreme court of the United

States constitutes the law; and it is now established, as the attribute of the nominal sovereignty of states, that they are supreme in their power of taxation upon the property within their jurisdiction,—however, that they cannot so exercise this power as to arrest or impair the operations of the general government. But it is yet to be determined whether the territories are equally absolute in their domain. Territorial governments are the anomalous creatures of the congress of the United States,—conceived, presumably, from the necessity of conditions. They possess neither sovereignty nor prerogative, but enjoy, by the grace of congress, privileges specifically enumerated in the charter of their existence. It cannot be conceived that congress, in any contingency, contemplated that the territories should assume powers which it surrendered in the interest of the public, or interfere with its policy for the country's safety. It would not be legitimate for congress to confer franchises accompanied with inducements to procure their acceptance, and to promote their operations, and, having received the desired and expected benefits, to repudiate the favors granted; and it would seem that to allow the territories to ignore its guaranty would be not less culpable than to do it itself.

Section 20 of the act incorporating the Atlantic & Pacific Railroad Company declares the object of the act to be to promote the public interest and welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes. Congress deemed it paramount for the country to be connected with its exposed Western coast, that it should be protected in the event of hostilities, and, recognizing the probability of antagonism of interest between the sections, remote from each other, and without the facility of communication, incorporated the Atlantic & Pacific Railroad Company to construct a railroad and telegraph line, and, to promote the accomplishment of said object, bestowed privileges upon said company, in the interest and welfare of the public, and to secure to the government at all times, the use and benefit of such road for postal, military, and other purposes. Section 2 of said act of incorporation is as follows: "And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to the Atlantic & Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed. \* \* \* Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turntables and water stations; and the right of way shall be exempt from taxation within the territories of the

United States." Section 3 of said act grants "to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway and its branches," alternate sections of the public lands.

It is manifest that congress appreciated the magnitude of the enterprise proposed, and recognized that the expenditure and difficulties involved would not be encountered except for substantial advantages that might eventually be profitably utilized. It bestowed franchises that contained privileges, and yet so connected with burdens that it recognized that one would not be available unless there was partial relief from the other by exemption from taxation and the donation of land. The right of way was granted, and its exemption from taxation within the territories of the United States declared. It must be recognized that congress acted in good faith, and intended to contribute material, not nominal, assistance to the company, for the construction of the railroad and telegraph line for the convenience of the government at all times, and in the interest and welfare of the public. The alternate sections were granted to aid—it may be said to secure—the construction of said railroad for the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of the said line of railway, and doubtless the right of way exempt from taxation was conceded to encourage the company to embark in the hazardous experiment. Congress, presumably being cognizant of the character of the country along the thirty-fifth parallel of latitude, cannot be suspected, in giving a right of way, to have intended to convey valueless, barren land only, as such consideration would neither encourage nor aid in the construction of the railroad. Congress, in announcing the object of the act of incorporation, distinctly discloses that it regarded the construction of a railroad between the proposed termini a necessity so imperative that it reserved the right to make any alterations or amendments to the act to promote the accomplishment of its object, or to repeal it altogether should it prove an obstacle to the construction of the said road. And it is logical, indeed inevitable, that the concessions of the company should be construed with a view to carry out the congressional conception. The right of way granted is practically nothing, if merely the 100 feet on either side of the roadway, and it is plain that such restriction would be in contravention of the spirit that actuated congress in granting the franchise; and it may be that, if such construction had been apprehended, the franchise would have been neither sought nor accepted. Congress proposed the construction of the railroad for the lawful purposes of the government, and for the interest and wel-

fare of the public, and tendered the inducements it deemed sufficient to secure it,—not the right of way over the land, but the right for a railway; not the right to the soil only, but the right to a roadbed; not the right to a roadbed only, but to a roadbed equipped with ties and rails to constitute a railway over which cars should be conducted for the lawful purposes of the government; not only the right to a roadbed so furnished, but to a railroad provided with the fixtures essential to the fulfillment by the corporation of the purposes for which it was created. If such was the purpose of congress, it should be deferred to by the territories, and no attempt inconsistent with it is legitimate. Congress, having secured for the country a valuable connection in the system, uniting the two oceans, recognized that it has received full consideration for the privileges conferred, and has not attempted to impair them; and it seems that the territories, having received incalculable advantages from the construction of the railroad through an area that appeared irredeemable, rendering it practicable for occupation, and creating opportunities for the development of its resources, should not only forbear the effort to impose burdens upon it, but should foster it by generosity in the recognition of its rights and in the bestowment of favors. The intention of congress should be broadly recognized, and its spirit graciously respected. We have indulged in these observations as suggestive of the considerations which should be potential in the construction of the act in question, and we will now apply them.

It does not appear material whether the grant of the right of way created a fee or an easement, as in either event the exemption from taxation attaches. It is difficult, however, to conceive any reason for the contention that the grant by congress of a right of way for the construction of a railroad does not operate commensurately with all other grants from the government. Grants of land by congress to aid in the construction of a railroad surrender the title of the government, and the lands do not revert, after condition broken, until forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of the law for that purpose, or through some legislation equivalent to a judgment of office found at common law. *Railway Co. v. McGee*, 115 U. S. 469-473, 6 Sup. Ct. 123. It will be deemed, it is to be presumed, that the right of way was granted to the Atlantic & Pacific corporation to aid in the construction of a railroad, and it cannot be legitimately contended that the lands so conveyed could revert to the government upon condition broken, except through proceedings instituted by the government. The United States can only enforce forfeiture of its lands granted, and the title to the right of way must consequently remain in the grantees until the grantor resumes it on account

of the grantee's failure to earn it. No individual can assail the title of the government, as conveyed, on the ground that the grantee has failed to perform the conditions annexed. *Schulenberg v. Harriman*, 21 Wall. 44. *Railroad Co. v. Baldwin*, 103 U. S. 430, contains the following: "The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company should be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given, but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route." In *Bybee v. Railroad Co.*, 139 U. S. 679, 11 Sup. Ct. 641, it is declared that the distinction between a right of way over the public lands and lands granted in aid of the construction of the road is important in this connection. As to the latter, the rights of settlers and others who acquire lands by purchase or occupation between the passage of the act and the actual location and identification of the lands are preserved unimpaired, while the grant of the right of way is subject to no such condition. It will be observed that these decisions establish that a grant of a right of way is, if anything, more absolute, and of a greater degree, than the grants of alternate sections of land. The supreme court of the United States, in *Railroad Co. v. Baldwin*, 103 U. S. 429, has declared that acts similar to that under consideration are a present grant, and import a transfer of interest, so that when the route is definitely fixed the title attaches from the date of the act. It says: "The grant of the right of way by the sixth section contains no reservations or exceptions. It is a present, absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designated. Nor is there anything in the policy of the government with respect to the public land which would call for any qualification of the terms. These lands would not be the less valuable for settlement, by a road running through them. On the contrary, their value would be greatly enhanced thereby." Says the court in the opinion above referred to (139 U. S. 674, 11 Sup. Ct. 642): "The act making the grant in aid of this road does not, in its words of conveyance, differ materially from a large number of similar acts passed by congress in aid of the construction of roads in different parts of the West, which have been considered by this court as taking effect in present, although the particular lands to which the grant is applicable remain to be selected and identified when the road is located, and the map is filed with the secretary of the interior." In *Railway Co. v.*

**Roberts**, 152 U. S. 116, 14 Sup. Ct. 496, it is announced, not as obiter dictum, but as the court's conclusion upon an issue involved, that the right of way granted by congress to the Missouri, Kansas & Texas Railway through lands reserved for the use and occupation of the Osage Indians vested the title to the lands appropriated for said way, to wit, 200 feet in width, in said company, either upon the passage of the act, or the construction of the road. The supreme court of Oklahoma on September 10, 1896, decided as follows in the case of *Churchill v. Railway Co.*, 46 Pac. 503: "An act of congress investing and empowering a railway company with the right of way of locating, constructing, owning, equipping, operating, using, and maintaining a railway through and over public land, and providing that said company is authorized to take and use, for all purposes of a railroad, a right of way over said public land, is a present, absolute grant."

We must accept these authorities as conclusive as to the effect of a grant of a right of way by congress to aid in the construction of a railroad through the public domain. That the title of the government to the lands granted to the company passes absolutely to the company, we must regard as adjudicated, and we will now address ourselves to the consideration of the elements that compose a right of way as intended by congress.

The general rule is that fixtures once annexed to the freehold become part of the realty, where the intention is clear that they should be permanently connected with it. It will not be contended that the ties and rails were temporarily affixed to the roadbed, or that they could be removed without material injury to the freehold. Being annexed to the roadbed for continuous use, and the roadbed being valueless without them, they become as much a part of the right of way as the roadbed. Attached to the roadbed, they are absolutely subject to the mortgages on the road at the time of their attachment, and foreclosure involves them no less than the roadbed. Says the supreme court of the United States in *Porter v. Steel Co.*, 122 U. S. 267, 283, 7 Sup. Ct. 1206, 1208: "Rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company containing stipulations" that the title to the property shall not pass until the property is paid for, and reserving to the vendor the right of removing the property. In *U. S. v. New Orleans R. R.*, 12 Wall. 362, it is stated that, if the company give a mortgage for the purchase money at the time of the purchase, such mortgage, whether registered or not, has precedence of the general mortgages. This rule, however, fails when the property purchased is annexed to a subject

already covered by the general mortgage, and becomes part thereof, as when iron rails are laid down and become part of the railroad. In the case of *U. S. v. Denver & R. G. Ry. Co.*, 150 U. S. 12, 14 Sup. Ct. 11, it is declared that all necessary appurtenances of all railroads may fairly be regarded as parts or portions of the railroad whose construction it was the purpose of congress to aid. In its ordinary acceptation, and large sense, the term "railroad" fairly includes all structures which are necessary and essential to its operation. As already stated, it was not the intention of congress to aid in the mere construction of the roadbed or the roadway, but to aid in the construction of the "railroad," as such, which term has a far more extended signification than the mere "track" or "roadway." If the language of the act had shown an intention merely to aid in the construction of the roadbed or the roadway, it is clear that such structures as station houses, etc., would not have been included, etc.

It is true that the exemption from taxation by a state is construed with strictness in favor of the state, but it will be observed that this discrimination exists where the exemption is the act of the state as to the property within its jurisdiction, not a privilege derived from the general government for the benefit and welfare of the public in a territory belonging to the United States. The Atlantic & Pacific corporation has received no grant from the Territory of New Mexico, and there is no issue between them as to the extent of benefits conferred upon one by the other. And it is not, we conceive, legitimate, in arriving at the rights of the territory in the premises, to consider it as though it had created a factor, and was exacting tribute for its favor. The United States presents no problem, asserts no claim; having, by long acquiescence in the immunity of the company from taxation, conceded that it was in conformity with its intention. Were the controversy between the government and the company, the grant should, in the language of the supreme court (150 U. S. 14, 14 Sup. Ct. 11), receive a liberal construction in favor of the purposes for which it was enacted; and it must be recognized that it would be illegal and oppressive to substitute a different construction between the company and the territory, to settle their respective rights. The company derives its rights from congress, and they should be ascertained and determined by rules that will evolve the intention of congress, and not by principles in the interest of a local government. In *Railroad Co. v. Barney*, 113 U. S. 618, 625, 5 Sup. Ct. 606, Mr. Justice Field, speaking for the court, says that acts making grants ought to receive such a construction as will carry out the intention of congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance.

To ascertain that intent, we must look for the condition of the country when the acts were passed, as well as the purposes declared on their face, and read all parts of them together. Mr. Justice Jackson, in *U. S. v. Denver & R. G. Ry. Co.*, 150 U. S. 14, 14 Sup. Ct 15, in quoting the above rule as announced by Mr. Justice Field, says: "Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act operating as a general law, and manifesting clearly an intention of congress, to secure public advantages, or to subserve the public interest and welfare, by means of benefits more or less valuable, offers to individuals or to corporations, as an inducement to undertake and accomplish great and expensive enterprises, or works of a quasi public character, in or through the immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction, in favor of the purpose for which it was enacted." In *Railroad Co. v. Carland* (Mont.) 3 Pac. 144, Chief Justice Wade, after citing certain authorities, concludes: "It follows from these propositions that the roadbed, the rails fastened to it, station buildings, work shops, depots, machine shops, etc., constructed over, upon, and through the right of way granted to the plaintiffs, and attached to the soil, and annexed to the easement, become a part of the real estate of the railroad company." Again quoting from the opinion in the case of *Railroad Co. v. Carland*, supra: "It is a general rule that a grant of power to accomplish any particular enterprise, and especially one of a public nature, carries with it, so far as the grantor's own power extends, an authority to do all that is necessary to accomplish the principal object. 'It is a well-known and reasonable rule, in construing a grant, that, when anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also.' Shaw, C. J., in *Babcock v. Railroad Corp.*, 9 Metc. (Mass.) 555. Here is a grant of a right of way through the public lands 'for the construction of a railroad and telegraph.' Such a grant carries with it the right to the exclusive possession of the lands described for the purpose aforesaid; to make excavations, cuts, and fills in the soil or ground; to construct a roadbed of suitable width and grade; to lay ties and rails thereon; and to erect upon the lands described as, and included in, the right of way, all buildings, shops, water stations, depots, etc., necessary and suitable to be used in constructing or operating such railroad. This right necessarily implies property in the ground itself. This property is real estate, and the title to it is a legislative grant. By virtue of this grant the railroad company acquired the same interest in the land

as if it had received a deed of the land for the purpose of constructing and operating a railroad. The provision contained in section 2 of the act incorporating plaintiff, declaring that 'the right of way shall be exempt from taxation within the territories of the United States,' therefore carries with it, and exempts from taxation within the territories, the roadbed, the ties and rails there-to attached, and all the station buildings, work shops, etc., necessary for the construction and operating said railroad; and the assessment for taxation and levy for tax thereon of 'twenty miles of railroad' in the county of Custer, as mentioned and described in the complaint, which description must include the roadbed, ties and rails, and all necessary buildings attached to the soil and annexed to the easement of the right of way, was unauthorized, and is illegal and void."

We deem the foregoing principles and authorities sufficient to exclude doubt as to the intention of congress in granting a right of way, and exempting it from taxation within the territories of the United States. And, further, it appears that the second section of the act incorporating the Atlantic & Pacific Railroad Company expressly includes in the right of way all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turntables, and water stations. The second clause of said section reads as follows: "Said way is granted to said railroad company to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turntables and water stations; and the right of way shall be exempt from taxation within the territories of the United States." It is plain that said clause must be construed with reference to its context, and that by such rule, it seems, "said way" is identical with the right of way referred to in the preceding clause, and that the exemption accorded by the succeeding clause includes and extends to the necessary grounds for station buildings, etc. The land being, in its virgin state, distinctly exempt: the roadbed being the land so converted; and the appurtenances,—rails and ties, station buildings, work shops, depots, machine shops, necessary for the construction and operation of the railroad, becoming, by annexation, a part of the realty,—it is inevitable that the aggregate land, roadbed, rails and ties, and said appurtenances, constitute the right of way contemplated by congress. A less consideration could have been no inducement to the company to accept the franchise, and that it should now be deprived of this advantage, distinctly conferred by the supreme authority creating it, by a subordinate, dependent body, deriving its existence from the power that created both, would be unjust, if not iniquitous. The At-

atlantic & Pacific corporation, within the limits of the act creating it, is as complete and independent as the territory of New Mexico under its organic act. Both are creatures emanating from the same source, and it cannot be that the latter impair the rights of the former.

In conclusion, it must be recognized that it is incumbent upon the court to be controlled by the manifest purpose of congress in conferring the franchise upon the Atlantic & Pacific Railroad Company, and as it is palpable that the intention was to contribute substantial aid, promotive of the construction of a railroad by such company, we are constrained to the conclusion that the exemption accorded must be construed to include the fixtures essential to the establishment and operation of the road. The rails and ties are not more a part of the realty exempt than are the structures attached as station houses, etc., and the one is not more indispensable to the completion of the road than are the others to its utilization for the accommodation of the government. We are therefore of the opinion that the right of way, including roadbed, ties and rails, station buildings, work shops, depots, machine shops, etc., is not liable to taxation in the county of Bernalillo, territory of New Mexico, and the decree of the lower court is accordingly reversed.

LAUGHLIN and HAMILTON, JJ., concur.

BANTZ, J. I cannot agree with my associates in the conclusion reached in this case. The inquiry is not as to what has been granted, but is as to what has been exempted from taxation. The grant is the right of way, including necessary grounds for station houses, shops, depots, etc. It is not material whether that grant conveyed the ownership of the soil, or only an easement. It is not everything which the grantee erected thereon or affixed thereto which is exempt, but the thing exempt is the right of way. While it may be that this exemption is broad enough to extend beyond the mere ownership or use of the soil, and may cover such improvements as the roadbed, ties, rails, culverts, and bridges, which are affixed to the right of way, and necessary to the use of it as such,—a proposition by no means clear,—I am of the opinion that the exemption does not cover other improvements not essential to the use of the right of way, however convenient and necessary such improvements may be to the orderly and economical conduct of the company's business. Nor do I believe that such exemption extends to the additional grounds for station houses, depots, work shops, etc., or to such improvements thereon. *Portland, S. & P. R. Co. v. Saco*, 60 Me. 196; *People v. Commissioners of Taxes*, 82 N. Y. 459. If the exemption of a right of way can cover station

houses, work shops, and depots, there is nothing to prevent a like exempting from extending to dwelling houses for lodging employés, or hotels for entertaining patrons, when erected on the right of way. If the exemption extends so far, it must comprehend something more than the right of way, and something by implication, and liberal implication at that. Some stress has been laid upon the point that the additional grounds for station houses, shops, etc., are a part of the right of way. But in my opinion this is not well founded. The act does not make the additional grounds a part of the right of way, but the act grants the right, "including" all necessary ground for station houses, etc. Grounds additional to the right of way are included in the grant, but, when we look into the clause exempting from taxation, we find it does not extend to all the property granted, but only, and in terms, to the "right of way." It has been settled by a long line of decisions, from *U. S. v. Arredondo*, 6 Pet. 738, and the *Charles River Bridge Case*, 11 Pet. 420, that grants from the sovereign are to be construed strictly against the grantee, who takes nothing by implication, or which is not manifestly intended by the clear terms of the grant; and this rule applies as well in favor of third persons as it does in favor of the power making the grant. This rule is applied for a stronger reason, and with greater strictness, when the grant involves a surrender of one of the great powers essential to government, like that of taxation. *U. S. v. Denver & R. G. Ry. Co.*, 150 U. S. 1, 14 Sup. Ct. 11. In a recent case the supreme court of the United States say: "The taxing power is essential to the existence of government, and cannot be held to have been relinquished in any instance unless the deliberate purpose of the state to that effect clearly appears. The surrender of a power so vital cannot be left to inference or conceded, in the presence of doubt; and, when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power." *Railroad Co. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72. It does not matter whether the grant which is to operate as a relinquishment of the power of taxation is one made by a state legislature, or by congress; its terms are subject to the same rule of interpretation. And, unless congress has exempted this property from taxation, the territorial legislature has the same power to tax it which it has to tax like property of other owners. Reading the act creating this exemption in the light of established judicial decisions, I am of the opinion that the exemption does not extend to the additional grounds for station houses, depots, shops, etc., nor to improvements thereon, nor to telegraph lines and poles on such right of way.



(5 Idaho, 154)

**HAYS v. HAYS.**

(Supreme Court of Idaho. Jan. 28, 1897.)

CONSTITUTION — AMENDMENTS — HOW PROPOSED —  
JOINT RESOLUTION — TITLE — DATE OF  
GOING INTO EFFECT.

1. A substantial compliance with the provisions of sections 1, 2, art. 20, of the constitution of Idaho, in the matter of proposing amendments to the constitution and submitting them to the people for ratification, is sufficient.

2. Under the provisions of section 1, art. 20, of the constitution, amendments may be proposed by the legislature by joint resolution.

3. The power of the legislature to propose amendments to the constitution is not governed by the provisions of section 16, art. 3, of the constitution.

4. It is not essential that the subject of a proposed amendment shall be expressed in the title.

5. It is sufficient if such joint resolution clearly designates the section and article of the constitution to be amended.

6. The amendment to section 18, art. 5, of the state constitution, creating the office of prosecuting attorney, does not go into full operation until the close of the term of office for which district attorneys were elected at the general election of 1894.

7. Said amendment is not self-executing. It requires legislation to prescribe the duties of the prosecuting attorney, the board of county commissioners to fix his compensation, and the qualified electors to elect such officers at the next general election.

8. The law prescribes the date on which the county officers so elected shall take possession of their offices, and that is the date said amendment goes into full operation.

9. In determining the time at which a constitutional amendment becomes fully operative, the intention of the people adopting it should be ascertained. This should be done from the context of the amendment, and, in case of doubt, the court should also consider the existing conditions, and the results which would follow if the amendment was held to have become immediately operative.

(Syllabus by the Court.)

This is an original proceeding in this court, and is an application for a writ of mandate to compel the defendant to deliver to the plaintiff the records of the office of district attorney belonging to Ada county, and to require the defendant to admit the plaintiff into said office, and to the use and enjoyment of it and the emoluments thereof. Writ denied.

Henry Z. Johnson, for plaintiff. Hawley & Puckett and John A. Bagley, for defendant.

SULLIVAN, C. J. This is an application for a writ of mandate to compel the defendant, Charles M. Hays, to deliver to the plaintiff certain records belonging to the office of district attorney of the Third judicial district, and to compel the admission of plaintiff to the use and enjoyment of the office of prosecuting attorney for Ada county. The facts on which the application is based are substantially as follows: Under the provisions of section 1, art. 20, of the constitution of Idaho, the legislature, at its regular 1895 session, submitted a constitutional amendment to the electors of the state, to be

voted on at the general election held in November, 1896. Said amendment was designated as "Senate Joint Resolution No. 5," and is as follows:

"Be it resolved by the legislature of the state of Idaho:

"Section 1. That section 18, of article 5, of the constitution of the state of Idaho, be amended to read as follows: 'Sec. 18. A prosecuting attorney shall be elected for each organized county in the state, by the qualified electors of such county, and shall hold office for the term of two years, and shall perform such duties as may be prescribed by law. He shall be a practicing attorney at law, and a resident and elector of the county for which he is elected. He shall receive as compensation for his services a sum not less than five hundred dollars per annum nor more than fifteen hundred dollars per annum, to be fixed by the board of commissioners of the county at its regular session in July next preceding any general election, and to be paid in quarterly installments out of the county treasury.'

"Sec. 2. The question to be submitted to the electors of the state at the next general election, shall be in form as follows: 'Shall section 18, of article 5, of the constitution of the state of Idaho be so amended as to abolish the office of district attorney, and create the office of county attorney?'

"Passed the senate January 29, 1895. Passed the house February 27, 1895. Approved March 5, 1895."

At said general election, as shown by the return of the state board of canvassers, there were 15,055 votes cast on that proposition,—11,643 votes for, and 3,612 votes against, said proposed amendment. It also appears that said board of canvassers have not filed a certificate declaring that said amendment had been adopted. The petitioner, or plaintiff, alleges that he was duly appointed prosecuting attorney for Ada county, by the board of county commissioners of said county, on the 11th day of January, 1897, and that he thereafter duly qualified, as required by law, to take possession of and hold said office of prosecuting attorney, as created by said amendment. He further alleges that Charles M. Hays, the defendant, was duly elected district attorney for the Third judicial district (which district included, as a part thereof, said Ada county), at the general election held in November, 1894; that said Hays thereafter qualified as required by law, and entered upon the discharge of the duties of said office, and that the office of district attorney has, by the adoption of said amendment, been abolished; that, after due demand by the petitioner on the said Charles M. Hays, he refuses to deliver to petitioner the records of the office of district attorney pertaining to said Ada county; and that said Hays unlawfully claims the right to conduct the prosecution for crimes in the courts of said county, and to act as



the legal adviser of the board of county commissioners, and excludes petitioner from the use and enjoyment of such rights and office. The defendant appeared, and demurs to the petition, and moves to quash the alternative writ, on the ground that the petition does not state facts sufficient to entitle the petitioner to the relief demanded. The case came on for hearing on said demurrer and motion, on which counsel for defendants contend as follows: First. That the resolution did not pass the two houses of the legislature in the manner provided by the constitution. Second. That it is not so entitled as to render it effective for any purpose. Third. That it does not provide for a proper presentation of the amendment to the electors. Fourth. That it was not properly submitted to the electors at the general election. Fifth. That it is not in force, never having been promulgated or declared upon by the board of canvassers. Sixth. That, if the five preceding points are not well taken, the defendant is entitled to hold the office of district attorney until the end of his term, because (1) it was the intention of the legislature, as shown by the resolution itself, to have the amendment take effect in the future; (2) that the legislature could not deprive a duly elected and qualified officer of his office; (3) that the resolution shows the amendment was to be prospective; (4) that it requires legislative action to make it effective.

Under the first point urged by defendant, it is claimed that the amendment to the constitution was presented as a joint resolution, and not as a bill, and for that reason was not properly passed by the legislature. There is no merit in this contention. In proposing an amendment to the constitution it may be done by joint resolution, and in proposing an amendment to the constitution it is not necessary for the legislature to pass a formal "act" or statute. The provisions of section 15, art. 3, of the constitution are not applicable to this case. *Julius v. Callahan* (Minn.) 65 N. W. 267; *State v. Dahl* (N. D.) 68 N. W. 418; *Nesbit v. People* (Colo. Sup.) 36 Pac. 221.

The second contention of defendant is that the joint resolution has no title, and he urges that the provisions of section 16, art. 3, of the constitution require the resolution to have a proper title. This contention is also without merit. The power of the legislature to propose amendments to the constitution is not governed by the provisions of said section. It is not essential that the subject of a proposed amendment shall be expressed in its title. In *Nesbit v. People*, supra, the court says: "A proposed amendment need not have any title, except as it designates the article of the constitution to be amended. The opinion in that case is an instructive one, and covers several points in this case.

We have carefully considered the third, fourth, and fifth contentions of defendant,

and are of the opinion that the points urged are not well taken. The joint resolution proposing said amendment provided for a proper presentation of said amendment to the electors, and it was properly submitted to them. The state board of canvassers canvassed the votes cast on said proposed amendment, and declared that there were cast for the amendment 11,643 votes, and 3,612 against it. Our attention has not been called to any provision of the statute requiring said board to declare, in terms, whether, in their opinion, said amendment had been adopted or not.

The most important point in the case for determination is the date that said amendment goes into effect or force, for until that time the section amended remains in full force and operation. The amendment does not provide, in express terms, when it shall go into effect. That being true, we look to its terms to ascertain whether, by necessary implication, it can be determined at what time the legislature intended it should go into operation. By an examination of said amendment it will be ascertained that it is not self-executing. It requires legislation to give it force and effect. It provides that the prosecuting attorney shall perform such duties as may be prescribed by law. The legislature is thereby required to prescribe, in due course of legislation, the duties incumbent on such officer, and, until that is done, it is an office without duties. It also provides the method of filling said office, and that is by election by the qualified electors of the county. It does not authorize a special election to be held for the election of such officers. The general election laws of the state provide the time and manner for the election of county officers, of whom the prosecuting attorney is made one; and, under the provisions of those laws, no general election can be held for that purpose prior to November, 1898. The prosecuting attorneys provided for by said amendment cannot be elected until that time. Said amendment does not provide for the filling of said office prior to the time that it commands it to be filled by election. The question of filling said office was prominently before the legislature when said amendment was formulated and passed as a joint resolution, and it contains no intimation that said office should be filled in any manner, except by the qualified electors of the county, and then not until the next general election after the adoption of said amendment. Said amendment also provides that the compensation of the prosecuting attorney shall be fixed by the board of county commissioners prior to the election of said officer, the minimum and maximum compensation being fixed by said amendment. It thus specifically provides the manner of filling the office, and by whom and the time when the compensation shall be fixed, and clearly negatives the idea that said office shall be filled prior to the time fixed for fixing the compensation, and also negatives the idea that such compensation could be fixed

by any person or body other than the board of county commissioners. From a careful consideration of the provisions of said amendment we are forced to the conclusion that the legislature in proposing, and the people in adopting, said amendment, did not intend that it should go into full operation until the time fixed by law for county officers to qualify and enter upon the discharge of their duties by virtue of their election in November, 1898.

The clear intent of the provisions of said amendment is that the district attorneys should hold their offices for the full period for which they were elected. How very easy for the legislature, in formulating said joint resolution, to have stated that said amendment should go into operation immediately upon its adoption by the people, if they had so intended, and also to have provided for the appointment of a successor to the district attorneys, to fill those offices until the next general election, and also provided for fixing the salaries of such appointees, as well as to prescribe their duties. In cases of this kind, we are admonished by eminent authority to look at the results that would follow if it were held that such amendment became operative as soon as it was ascertained that it received the requisite number of votes to ratify it. If this amendment became operative at the time the canvassing board found that it had received a majority of the votes cast on the proposition, to wit, on the 27th day of November, 1896, then the office of district attorney was abolished. The several counties of the state would have been without public prosecutors. There would have been no officers in the various counties authorized to perform the many grave (and, to the public, important) duties to be performed in the prosecution of criminal cases, and in other public matters. The conditions resulting would have caused confusion throughout the state. We cannot believe that the legislature in proposing said amendment, or the people in ratifying it, contemplated or intended such results as must inevitably follow from its becoming operative upon its ratification by the people. It is far more reasonable that the people intended that the old order of things should continue until the new officers had been elected, their duties prescribed by law, and their compensation fixed in conformity with the provisions of said amendment.

It is no answer to say that said offices might be filled by appointment, for the amendment provides that they shall be filled by election, and not by appointment, and, until the duties of the office are prescribed by legislation, it is an office without duties, as above stated, and the amendment expressly provides that compensation shall be fixed by the board of county commissioners of the respective counties at their July session next preceding the general election.

The provisions of said section clearly negative any intention of permitting the appointment of the first incumbents of such office, and also clearly negative the intention of permitting (let alone authorizing) any person or board whatever to fix the salary of such officer prior to the month of July next preceding the general election to be held in November, 1898.

Our attention has not been called to a single precedent upon all fours with the points involved in the case at bar, but the following cases touch upon the main point involved: *Opinion of the Justices*, 3 Gray, 601; *State v. Scott*, 9 Ark. 270; *State v. Ewing*, 17 Mo. 515; *State v. Timme*, 54 Wis. 318, 11 N. W. 785; *Lehigh Iron Co. v. Lower Macungie Tp.*, 81 Pa. St. 482. Our conclusion is that the demurrer and motion must be sustained, that the district attorney continue to hold his office until the expiration of the term for which he was elected, and that the writ must be denied; and it is so ordered.

HUSTON and QUARLES, JJ., concur.

(5 Idaho, 163)

#### BLAKE v. BOARD of COM'RS of ADA COUNTY.

(Supreme Court of Idaho. Jan. 29, 1897.)

CONSTITUTIONAL AMENDMENT—TIME OF TAKING EFFECT—COUNTY SUPERINTENDENT OF SCHOOLS—OATH OF OFFICE—MANDAMUS.

1. A constitutional amendment, separating two offices theretofore combined, which provides that "the legislature by general and uniform laws" shall provide for the "election biennially" of such officers, is not self-executing, and does not go into full operation until such laws have been enacted, and a general biennial election held thereunder.

2. John J. Blake, having been elected probate judge of Ada county, under the laws enacted by the legislature pursuant to section 3, art. 13, of the constitution, as originally adopted, is entitled, ex officio, to admission to the office of county superintendent of public instruction for said county.

3. John J. Blake, who was elected probate judge in and for Ada county, qualified as such, and at the time appointed by law presented his official bond as ex officio county superintendent of public instruction for said county, and offered to take the oath required by law of said county superintendent, before the board of commissioners of said county, who refused to administer such oath, applied for writ of mandate to compel said board to administer said oath, and admit him to said office. *Held*, that he was entitled to such writ, which was ordered to issue.

(Syllabus by the Court.)

Application by John J. Blake for a writ of mandate to compel the defendants, as the board of county commissioners of Ada county, to administer the official oath to admit plaintiff, ex officio, to the office of county superintendent of public instruction in and for said county. Peremptory writ granted.

T. D. Cahalan, for plaintiff. Robert E. McFarland, Atty. Gen., for defendants.

QUARLES, J. This is an original action, commenced by the plaintiff in this court, to obtain a writ of mandate requiring the defendants to admit the plaintiff to the use and enjoyment of the office of "county superintendent of public instruction in and for Ada county." From the petition the following facts appear: Plaintiff was, at the general election in 1896, elected to the office of "probate judge and ex officio county superintendent of public instruction" in and for said Ada county. Plaintiff, on January 11, 1897, the time appointed by law, qualified as said probate judge, and filed a good and sufficient bond as ex officio county superintendent of public instruction in and for said county, and then, on said day, appeared before the defendants, who compose the board of county commissioners of said county, and offered to take the oath required by law of said ex officio county superintendent of public instruction. The said board of county commissioners, and the chairman thereof, refused to administer said oath to plaintiff, whereby plaintiff is denied admission to said office.

This action involves the question of time at which the amendment to the sixth section of article 18 of the constitution, proposed by the legislature, and ratified by the people at the general election in 1896, goes into full operation and effect. We presume that the defendants, as said board of county commissioners, took the view that said amendment is self-executing, and in full effect on the 11th day of January, when they, by their chairman, refused to administer said official oath to plaintiff. Was that conclusion correct? Said amendment, and the object of it, is to separate the offices of probate judge and county superintendent, and is a copy of the original section only in this: The original section made it the duty of the legislature to provide for the election biennially of a "probate judge who is ex officio county superintendent of public instruction" for each county, while the amendment requires the legislature "to provide" by "general and uniform laws for the election biennially in each of the several counties of the state," of the several county officers therein named, among which is the office of "county superintendent of public instruction." The election of plaintiff to the combined office of probate judge and ex officio county superintendent of public instruction in and for Ada county, and the ratification of said amendment to the constitution, were simultaneous acts. If the amendment went into immediate effect, when the state canvassing board found that a majority of the votes cast for or against the adoption of the amendment were cast in favor of its adoption, then it necessarily results that the plaintiff is not entitled to the relief sought; but, on the other hand, if said amendment is not in operation, he is entitled to such relief. The amendment does not in express terms, nor, as we view it, by neces-

sary implication, provide that it shall go into immediate effect. The said amendment says that "the legislature by general and uniform laws shall provide for the election biennially in each of the several counties of the state, of a county superintendent of public instruction," etc. This language clearly shows that it was the intention that the separation of the two offices should not take place until the legislature shall have provided for the election of a county superintendent of public instruction. It requires legislation to give effect to the amendment, however. The said amendment is not self-executing, and is not in operation, nor can it come into full operation, until the legislature, by "general and uniform law," shall have provided for the election, at the general biennial elections, of a county superintendent of public instruction, and such election has been had.

The views herein set forth are fully sustained by the decision of this court in the case of *Hays v. Hays* (decided at the present term) 47 Pac. 732, and by the authorities cited in that decision. The amendment in question makes it the duty of the legislature to provide for the election of county superintendents of public instruction, but does not authorize the legislature to provide for the appointment of such officers. The old order of things will continue until the machinery for carrying the amendment in question into effect, according to the letter and spirit of said amendment, shall have been provided. The probate judges elected in the several counties of the state at the last election were entitled to qualify as "ex officio county superintendents of public instruction" in their several counties. It is the duty of the defendant board to administer the proper oath to admit the plaintiff to the office, ex officio, of county superintendent of public instruction in and for Ada county, and the plaintiff is entitled to the office of county superintendent of public instruction in and for Ada county, and to exercise the powers and enjoy the emoluments thereof, for the full term for which he was elected. The plaintiff is entitled to a peremptory writ, as demanded in his said petition, and it is ordered that said writ issue.

SULLIVAN, C. J., and HUSTON, J., concur.

(16 Wash. 338)

BUCKLEY et ux. v. CONLEY.

(Supreme Court of Washington. Jan. 21, 1897.)

APPEAL—RECORD—No JUDGMENT.

Where the record contains neither verdict nor judgment, the appeal will be dismissed on motion.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by John Buckley and Mary Buck-

ley against M. C. Conley on a written contract to furnish labor and materials and build a certain house for plaintiffs at an agreed price. From an order refusing to set aside the verdict in favor of plaintiffs and grant a new trial, defendant appeals. Dismissed.

L. H. Prather and John Roche, for appellant. James Dawson, for respondents.

**PER CURIAM.** This cause was submitted on the briefs of counsel. Respondents' brief contains a motion to dismiss the appeal because no final judgment has been entered herein. The record transmitted to this court does not contain either the verdict or the judgment. Hence it does not appear that any judgment has been entered from which an appeal would lie. The motion must prevail.

(16 Wash. 376)

**WISS v. STEWART et al.**

(Supreme Court of Washington. Jan. 29, 1897.)

**HOMESTEAD—TIME OF SELECTION—SALE ON EXECUTION.**

1. The fact that the owner of a homestead executes a warranty deed of it does not authorize its sale on execution against her, where the deed is in fact a mortgage.

2. Code Proc. § 481, exempting a homestead, and providing that it may be selected at any time before sale, was not repealed by Act March 13, 1895, defining a homestead and providing the manner of its selection.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by Edith Wiss against W. A. Stewart and Samuel Parker, sheriff, to enjoin the sale of land on execution, and to remove a cloud on plaintiff's title caused by the judgment against her in favor of defendant Stewart. From a judgment discharging a temporary restraining order and dismissing the case, plaintiff appeals. Reversed.

Govnor Teats, for appellant. B. F. Jacobs, for respondents.

**DUNBAR, J.** The appellant, Edith Wiss, before her marriage became the owner of the land in controversy, which is a lot in the town of Puyallup. The property is improved as a residence, and it is uncontradicted that the appellant and her husband have continuously occupied it as their homestead for the three years prior to the trial of the cause, and were at the time of such trial occupying it as such. The value of the place is conceded to be \$700. The respondent W. A. Stewart on September 30, 1895, filed with the auditor of Pierce county a judgment which he had obtained against Frank Wiss and Edith Wiss, his wife, for the sum of \$80.32, and on March 9th caused an execution to be issued on said judgment, and levied on the homestead of appellant, above mentioned, as her property, to sell the same, and the respondent Parker, sheriff of Pierce county, advertised the same for sale on April

20, 1896. On April 11, 1896, the appellant caused to be filed her declaration of homestead; and here we will say that the declaration seems to us to substantially comply with the provisions of the laws in relation to such declarations, although it is contended by the respondent Stewart that it does not. This action was commenced by the appellant to restrain the respondent sheriff from selling the property, and to remove the cloud caused by respondent Stewart's judgment lien from appellant's title. A temporary restraining order was issued, but on the trial of the cause the court rendered judgment discharging the restraining order, dismissing the cause, and for costs against the plaintiff. We think the court erred in rendering the judgment aforesaid. While it appears that the appellant had given what, on its face, purported to be a warranty deed to the land in question, on January 9, 1896, to one Davies, the testimony conclusively shows, and in fact there is no testimony tending to show to the contrary, that the deed was in fact a mortgage to secure a loan, and that a portion of the loan had since been paid.

It is the contention of the respondents that the law which provides that section 481 of the Code of Procedure, which provides that a homestead not to exceed the sum of \$1,000 shall be exempt from execution, and that such homestead may be selected at any time before sale, has been repealed by the act of March 13, 1895, c. 64, an act defining a homestead, and providing for the manner of the selection of the same. We think this contention cannot be sustained. The later act in no way affects the provision in relation to the time of making the selection, but simply undertakes to direct the manner of such selection, and the provision that such homestead may be selected at any time before sale is still in effect. The judgment will be reversed and the cause remanded, with instructions to the lower court to grant the relief prayed for by the appellant.

SCOTT, C. J., and REAVIS, GORDON, and ANDERS, JJ., concur.

(16 Wash. 389)

**GOULD v. FREDENBURG et al.**

(Supreme Court of Washington. Jan. 12, 1897.)

**APPEAL—REVIEW OF EVIDENCE.**

A finding of fact on conflicting testimony will not be disturbed.

Appeal from superior court, San Juan county; John R. Winn, Judge.

Suit by J. A. Gould against Matison Fredenburg and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. H. Thacker, H. S. King, and Newman & Howard, for appellant. Maxwell & Romaine, for respondents.

**PER CURIAM.** Appellant instituted this suit in the superior court of San Juan county

for the purpose of restraining the respondents from constructing a "pound net" on a site located by appellant for catching salmon in the waters of Puget Sound, on the south side of San Juan Island. Each of the parties held licenses from the state fish commissioner, authorizing the construction and operation of pound nets and fish traps. The record presents a single question of fact, the question being which of the parties was first in point of time in selecting and occupying the site in dispute. There were 36 witnesses sworn and examined in the lower court, and the evidence is hopelessly conflicting. With better facilities than we possess for giving credit to whom it belonged the lower court has made its findings of fact upon which judgment was entered for the respondents. An analysis of the evidence would be of little advantage, and is, we think, uncalled for. The judgment is supported by the findings, and it is affirmed.

(16 Wash. 323)

## GLOVER v. COVE et ux.

(Supreme Court of Washington. Jan. 15, 1897.)

## APPEAL—INSUFFICIENT BOND—DISMISSAL.

Where the sufficiency of an appeal bond is challenged, and the judge, on the report of the referee, makes an order that the sureties were insufficient, and declares it null, and no other bond is filed, the appeal will be dismissed.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by Thomas Glover against Charles Cove and Julia Cove. Judgment for plaintiff, and defendants appeal. Dismissed.

L. H. Prather and John Roche, for appellants.

**PER CURIAM.** A motion to dismiss the appeal in this cause is made by respondent, on the ground that the bond on appeal filed by appellants was declared void by the judge in the superior court, and no additional bond was filed. The bond filed by appellants was excepted to by respondent for insufficiency of the sureties, and notice of time and place for examination of the sureties was given appellants, and counsel for both parties appeared for such examination before the judge, one of the sureties only appearing at the time. The judge thereupon appointed a referee to take and report testimony. Upon such examination, the referee reported the sureties on the bond insufficient; and the judge made an order on the 26th day of May, 1896, that the sureties were not qualified and sufficient in the bond, and declaring it null and void.

Some question is made by the appellants of the regularity of the order annulling the bond, because it is alleged that no written report was filed by the referee appointed to examine the sureties; but this is immaterial at this time, and the certificate of the judge that a report was made is conclusive upon

this point. When the sufficiency of the sureties of an appeal bond is challenged by the respondent, and notice of exceptions to the hearing thereof filed, as required by law, it is the duty of the appellant to have the bond approved by the judge. It is no longer a sufficient bond unless so approved. Such approval was not had in this case, and the motion to dismiss the appeal must prevail.

(16 Wash. 333)

## AMBROSE v. GWINNUP et al.

(Supreme Court of Washington. Jan. 20, 1897.)

## APPEAL—FAILURE TO FILE BRIEFS—EXCUSE.

It is no excuse for a failure to file briefs "that, owing to other business which demanded the attention of counsel," they were unable to get the briefs out within the time allowed by law.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Consolidated actions by Julia C. Ambrose and D. W. Freeman, administrator, etc., of John J. Gunn, deceased, against Philip B. Gwinnup, H. M. Cade, and others, to foreclose a mortgage. From a judgment in favor of Julia C. Ambrose, Freeman, administrator, and Cade appeal. Affirmed.

D. W. Freeman and T. E. Cade, for appellants. Wm. Hamilton and Chas. H. Hurlbut, for respondent.

**DUNBAR, J.** The respondent brings a short record to this court, and upon such record bases her motion to dismiss the appeal herein, and to affirm the judgment and decree in the lower court, for the reason that the briefs of appellants were not filed or served within the time required by law. It is conceded that the time for filing briefs had expired prior to the serving of this notice to dismiss upon appellants by the respondent, and, under the law and the former rulings of this court, the respondent would be entitled to the dismissal of the action if no excuse were shown for the failure to file briefs within the legal time. The only showing made in extenuation is the following, which appears in the affidavit of appellants' attorneys, viz.: "That, owing to other business which demanded the attention of counsel for appellants, they had been unable to get the appellants' brief out and printed within ninety days from and after the date of serving the notice of appeal." We do not think that this is any justification at all. No facts are set forth from which the court can determine whether due diligence had been exercised by the attorneys for the appellants. There are some further assertions in the affidavit tending to show that there was an understanding between the attorneys for the appellants and the respondent that the time for filing the briefs should be extended; but, conceding the truthfulness of the statement made by the appellants, we do not think that there is suffi-

cient showing of any stipulation of that kind, even if we could consider an oral stipulation made by the attorneys. And, again, this alleged stipulation is denied by a counter affidavit of the respondent's attorney. The motion will be sustained, and the judgment affirmed, with costs to the respondent.

ANDERS. GORDON, and REAVIS, JJ., concur.

(16 Wash. 288)

CITY OF TACOMA v. TACOMA LIGHT & WATER CO.

(Supreme Court of Washington. Jan. 5, 1897.)

APPEAL—ABSTRACT OF EVIDENCE—CONTRACT OF CITY—FRAUD—EVIDENCE TO SUPPORT—NEW TRIAL.

1. An abstract of evidence, being no part of the record, and not provided for by statute or rule, will be stricken.

2. Alleged errors of which respondent complains cannot be considered in the absence of cross appeal.

3. Where a contract by a city is not induced by corruption of its officers by the other party, it can recover from the other party, on the ground of fraud, only on such proof as will authorize recovery by an individual.

4. A verdict on the ground of fraud cannot be sustained by mere strained inferences.

5. The statute providing for award of new trial by the trial court when the verdict is contrary to the evidence requires the grant of a new trial if, in its judgment, such is the fact.

Dunbar, J., dissenting, on the sufficiency of evidence.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by the city of Tacoma against the Tacoma Light & Water Company. Judgment for plaintiff. Defendant appeals. Reversed.

Parsons, Corell & Parsons, Crowley, Sullivan & Grosscup, and John H. Mitchell, for appellant. James Wickersham, for respondent.

GORDON, J. This action was brought by the respondent city to recover damages for deceit and misrepresentation of the appellant in the sale of a water and light plant, the purchase price of which was \$1,750,000. The jury found for the respondent in the sum of \$787,500, and from the judgment entered upon this verdict, and the order of the superior court denying a motion for a new trial, an appeal has been taken. Fraud is relied upon as the basis of plaintiff's cause of action. It is not based upon anything contained in the contract,—upon any covenant or warranty therein contained,—but it goes beyond the contract, and sets up false representations in regard to the character, extent, and value of the property sold, and further alleges that the appellant fraudulently and corruptly induced and employed the officers of the city and the president of the city council to forego any investigation or examination of the character, condition, and value

of the property purchased; that, by reason of such corrupt inducement and employment, the respondent was prevented from "making any investigation and examination of the sources of water supply, of the value, character, and extent of the said property so purchased from defendant." Damages were laid in the complaint at \$1,000,000. The answer was a general denial of the allegations of misrepresentation and fraud, and alleged that the city, by its proper officers and agents, made a full examination of the property embraced within the purchase, and, for the purpose of fully ascertaining the character, condition, and value thereof, employed one Rudolph Hering, a competent and experienced civil and hydraulic engineer, and that said Hering made a full report thereon to the city council, and that the members of the council had full opportunity at all times to make such examination and inspection of the property, and everything connected with it, as fully as they or any one of them might desire; alleges that the city purchased the property sold to it by appellant, relying upon the knowledge of its officers, agents, and engineers employed by it to make an examination thereof, and not in reliance upon any statement or representation of any kind made by the appellant to respondent. In its reply, the city admits that it employed the said Hering, and that he made some examination of the property, and "that he made a report thereof to the city council,—and alleges that he relied entirely upon the representations concerning all matters in the said report, made to him by the defendant, its agents, servants, and employes, and that he made no other examination, but denies that the report contained full information of the kind, character, and situation of the property, including the sources of water supply, \* \* \* and denies that plaintiff purchased the property relying upon the knowledge of its officers, agents, employes, and engineers employed by it to make an examination thereof."

A preliminary question is presented by the motion of respondent's counsel to strike a so-called "Abstract of Evidence," Exhibits, etc., being a printed book containing something over 500 pages, which the appellant has filed in this court. The so-called "Abstract" was prepared for the purpose of facilitating the labors of the court, and with a view to condensing the record; but the motion must prevail for the reason that it is no part of the record, and has no place in the proceedings under the statute and rules of this court.

The lower court, in submitting the case to the jury, restricted their consideration of it, in so far as misrepresentation is charged, to four specific questions of fact, and withdrew all others from their consideration. Those submitted were: "(1) Whether, before the sale, defendant made any representations to plaintiff relative to the quantity of water actually flowing from Thomas and Patterson

Springs; (2) as to the quantity of iron pipe then laid; (3) as to the quantity of land at Station A; (4) as to the value of the property sold." The court also submitted the question of whether "the defendant and the president of the city council of the city of Tacoma entered into collusion for the purpose of defrauding the city, and whether the defendant procured the said president of the council to act for and on its behalf, instead of on behalf of the city, as his official duty required." The court further charged: "I instruct you that all other alleged misrepresentations charged in the complaint are withdrawn from your consideration, and that, if the plaintiff recover at all, it must be on the ground of misrepresentations in these, or in some one of these, respects." Counsel for the city, in his elaborate and exhaustive brief, has presented the case in all respects as if the consideration of the jury had not been so restricted, and he has also treated certain offers of evidence made and rejected upon the trial as if the proof had actually been made and received. We have frequently held that, upon appeal from a judgment in a particular case, this court can only consider errors complained of by the appellant, and, in the absence of a cross appeal, cannot examine the record for the purpose of determining alleged errors or rulings of which the respondent complains. *Glenn v. Hill*, 11 Wash. 542, 40 Pac. 141; *Langert v. David*, 14 Wash. 389, 44 Pac. 875; *Pepperall v. Transit Co.* (Wash.) 45 Pac. 743.

A great many errors have been assigned in the brief of counsel for the appellant, but the conclusion which we have reached regarding two of them renders it unimportant that the others complained of should be considered.

At the conclusion of the evidence on the trial below, the appellant moved for a nonsuit, upon the ground that the plaintiff had failed to prove a sufficient cause for the jury. It also moved for a new trial, which motion was based upon various grounds, and, among others, "insufficiency of the evidence to justify the verdict." The ruling of the lower court denying the motion for nonsuit, and the subsequent overruling of the motion for a new trial, present a single question. Before proceeding to a discussion of the evidence, we may here observe that a municipal corporation has a right to rely on the good faith and loyalty of its officers; that such officers owe to their municipalities the utmost degree of good faith; and that it is their duty at all times to use their best judgment in protecting the interests of the municipalities whose officers they are, and a person dealing with such officers is conclusively presumed to know the extent of the power and authority which the law has conferred upon the officer with whom he deals, and is also presumed to know that the law exacts and requires of such officer the utmost good faith and loyalty to such municipality. But, subject to the limitation above

noticed, the rule applicable to the contracts of municipal corporations is, we think, the same as that applicable to the contracts of individuals; in other words, where the contract entered into is within the scope and extent of the power and authority conferred by law on the officer, and no question of power or authority is involved, the rule applicable to that contract is the rule that is common to all contracts; and, in an action by a municipal corporation founded upon fraud, there can be no recovery unless the evidence to substantiate the fraud charged is under the general rules of law as to the sufficiency of evidence sufficient to support a verdict. The rule is thus stated in *Argenti v. City of San Francisco*, 16 Cal. 256: "Contracts of corporations, whether public or private, stand on the same footing with the contracts of natural persons, and depend on the same circumstances for their validity and effect." And in *Baird v. Mayor, etc.*, 96 N. Y. 593, it is said: "No different rule prevails in respect to the contracts of corporations than that applicable to the contracts of private individuals, and we must determine the rights involved in this action by the light of the same principles which experience has shown to be salutary in other cases." The cases of *People v. Fields*, 58 N. Y. 491, and *Hume v. U. S.*, 132 U. S. 406, 10 Sup. Ct. 134, cited and most strongly relied upon by respondent's counsel, are not in conflict with the rule above stated. In the first of these cases the act of the comptroller of the city of New York which was pleaded as a payment, etc., was held by the court to be an act beyond the power of that officer. The court say: "The payment was made and received without any lawful power in the comptroller to make it. The defendant is chargeable with knowledge of this. It was a payment by an agent, who had no authority as such to make it." In *Hume v. U. S.*, supra, the court was dealing with a contract which it decided that "no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other"; and the principles governing that case, and those involved in the case at bar, are not analogous. Nor was there anything decided in *Tacoma Light & Water Co. v. City of Tacoma*, 13 Wash. 115, 42 Pac. 533, which militates against the view herein expressed. The language made use of in that case, and which is cited by counsel, viz.: "The appellant knew that it was dealing with a municipal corporation, and was bound to know that a different rule obtains in such cases from that which would obtain were it between individuals, and to know that the city officers and council could only make the purchase as authorized by the electors of the city, and that they could not bind the city by agreeing to take any less property, or any other property, than that which was embraced within the terms of the ordinance as submitted and passed upon,"—relates to the power of the officers to bind the city beyond the general

scope of their authority, and was not intended to, and does not, decide that "a different rule obtains" in the case of an authorized contract made by the officers of the city and a contract made by an individual. Of course, if one who deals with such an officer colludes with him, and thereby procures him to violate his duty, such action becomes a fraud upon the corporation; but, on the other hand, persons who deal with such public corporations through the proper officers, and who observe good faith and make use of no unlawful means or corrupt practices, are not accountable for a failure or neglect of such officers to discharge their duties to the corporations whom they serve, but in such case the city or other municipal corporation must look to its own officers, and not to the parties so dealing with them. In this case the appellant had a right to fix its own price upon its property, and was not obliged to sell it for less than the price it saw fit to place upon it. A representation, to be actionable, must be made with the intention that it should be acted upon by the party to whom it is made, and it must be made under such circumstances as would justify a reasonably prudent man in relying upon it; and generally speaking, where the means of knowledge is at hand and accessible, if the purchaser does not avail himself of these means, he cannot be heard to complain in a court of law that he was deceived by the seller's misrepresentations; or, as was said in *Improvement Co. v. Newlands*, 11 Wash. 214, 39 Pac. 367: "Parties must exercise ordinary business sense, and the faculties which are given to them for the purpose of transacting business, and that they cannot call upon the law to stand in loco parentis to them in the ordinary transactions of business and their ordinary dealings with their fellow men. \* \* \* If people, having eyes, refuse to open them and look, and, having understanding, refuse to exercise it, they must not complain when they accept and act upon the representations of other people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind." So far as the facts in this case are concerned, there is little dispute and few contradictions.

In disposing of the objection that the verdict and judgment are against the evidence, we recognize the rule to be that, if the verdict has any substantial evidence in its support, it ought not to be set aside for the reason merely that, in the opinion of the appellate court, there was a greater amount of evidence on the other side. *Dillon v. Folsom*, 5 Wash. 439, 32 Pac. 216: "But we do not understand the law to be that a verdict should be set aside only in those cases where there is no testimony whatever to sustain it. \* \* \* If, on due consideration of the evidence, it appears that the verdict is not supported by any substantial proofs, it ought to be promptly and unhesitatingly set aside, and a new trial ordered." *Pederson v. Railway Co.*, 6 Wash.

202, 33 Pac. 351, and 34 Pac. 665; *Guley v. Transportation Co.*, 7 Wash. 491, 35 Pac. 372; *Comegys v. Lumber Co.*, 8 Wash. 661, 36 Pac. 1087; *Furth v. Snell*, 6 Wash. 542, 33 Pac. 830. Where an issue of fraud is involved in any case, direct and positive proof is not required to sustain it, but circumstances from which the inference of fraud is natural and irresistible need only be shown. *Millar & Co. v. Plass*, 11 Wash. 237, 39 Pac. 956. But, while the issue of fraud may be sustained by circumstantial as well as by direct and positive proof, it cannot be established by strained inferences, or rest upon conjecture merely. "Fraud will not be presumed, and must be established by proof either direct or circumstantial. If by the latter, the circumstances relied upon must be such as to reasonably consist only with the intent to defraud, and to be in some degree inconsistent with an honest intent." *Roberts v. Bank*, 11 Wash. 550, 40 Pac. 225. The court of appeals of New York, in *Baird v. Mayor*, etc., 96 N. Y. 593, say: "In the case of *Kingsley v. City of Brooklyn*, 78 N. Y. 215, it was said by Judge Miller: 'Allegations of fraud against public officials, without proof of facts establishing their guilt, are of but little avail in avoiding a contract in a court of law. To set aside a contract on any such ground, and to justify a court in holding, as matter of law, that it is void, the proof should be explicit, clear, and conclusive.' It was said by Judge Finch, in the case of *Shultz v. Hoagland*, 85 N. Y. 467: '\* \* \* It is seldom, however, that it can be directly proved, and usually is a deduction from other facts which naturally and logically indicate its existence. Such facts, nevertheless, must be of a character to warrant the inference. It is not enough that they are ambiguous and just as consistent with innocence as with guilt. That would substitute suspicion as the equivalent of proof.'"

As already noticed, the court restricted the consideration of the jury to four questions of alleged misrepresentation, namely, the quantity of water actually flowing from Thomas and Patterson Springs, the quantity of pipe then laid, the quantity of land at Station A, and the value of the property sold.

As to the first of these, it is the contention of the city that, for the purpose of inducing the plaintiff to purchase the property at the price named, the appellant, by its officers, servants, and employes, falsely and fraudulently represented to the plaintiff (city), its agents and officers, that the permanent daily flow of water from Thomas and Patterson Springs was not less than 10,000,000 gallons. These springs were one of the sources of supply on the line of projected extension of the water system, and it was expected by the city that, by reason of their location, the water from these springs would be sufficient to supply, by gravity, the upper or higher service of the city, being the most elevated portions of the city.

As to the second question submitted, it is



the contention of the city that the appellant represented to its officers and engineers that the city was to receive 66.14 miles of pipe in the distributing system, whereas in truth and in fact the city only received 53½ miles, making a loss of 12¼ miles of pipe laid.

As to the third question submitted, it is the contention of the city that the quantity of land at Station A was represented to the officers of the city as containing 8.16 acres, whereas in truth and in fact the quantity of land actually received was .816 of an acre.

The remaining question relates to representations concerning the value of the property, and can be more appropriately considered in connection with the charge of bribery and corruption of the president of the city council. The record discloses that as early as the year 1891 the question of the advisability of the city's owning its own water plant was a subject of discussion, both through the columns of the daily press of the city and otherwise. The sentiment apparently gained favor with the people, so much so that, at the spring election in the city for the year 1892 (at which time Harris A. Corell was elected to the council), it was incorporated in the platform of the political party, and made an issue during the campaign. Mr. Corell became president of the council, and was the officer and agent of the city who, it is alleged, was bribed and corrupted in office by the appellant. Prior to the time of such election a committee of citizens had been appointed under the preceding city administration for the purpose of examining and reporting to the council upon the practicability and feasibility of the city's constructing and operating an independent system, and a great deal of time and some considerable money had been expended in that connection. Some time during the spring or summer of 1892 the council of the city entered into negotiations with the appellant concerning the purchase of the plant in question. After receiving from it a schedule or list of its property purporting to show the character, condition, and extent of its plant, the council authorized its fire and water committee (to whom it had intrusted the detail involved in the transaction) to employ a competent hydraulic engineer for the purpose of making an examination of the water plant and system then owned by the appellant, and to report the result of such examination to the council; also to report as to the advisability of the city's purchasing said waterworks, or of constructing an independent system to be owned and operated by the city. In accordance with the authority conferred by the council, Rudolph Hering was employed as such engineer. In this connection it may be said that Mr. Hering is conceded by counsel to be an expert hydraulic engineer, who stands at the head of his profession in the United States; and there is nothing in the record tending to throw discredit or suspicion upon his work,

or the manner in which he discharged his duties. Mr. Hering arrived in Tacoma early in September, 1892, and proceeded at once to an examination of the appellant's plant and waterworks, and otherwise to discharge the service for which he had been employed. Having completed such examination, he reported to the mayor and council of the city on the 22d of October, 1892. Five hundred copies of this report were ordered and directed to be printed by the council. The report comprises about 40 printed pages, and treats exhaustively of the entire subject, including the condition, character, extent, and value of the system of waterworks then owned and operated by the appellant company. In said report he estimates the daily capacity of the different springs and other sources of supply. His estimate of the daily capacity of Thomas Spring is placed at 5,000,000 gallons. He states that this estimate is based upon "careful gauging, and in part upon an estimate made by Mr. George B. Sellers, chief engineer of the light and water company, and substantially verified by me during the low flow of the present year." Of Patterson Springs the report says: "From a careful study I have concluded that it will be safe to estimate upon a yield of 5,000,000 gallons from the Patterson Springs," etc. The deposition of Mr. Hering was taken, and this report was made a part of his deposition. In this connection we should say that Thomas and Patterson Springs were not at that time a part of the system as then in operation, but were available sources of supply along the line of a projected extension. In answer to a question propounded by respondent's counsel, Mr. Hering stated that he "made a personal examination of the plant so far as it was exposed to view on the surface"; that he "did not rely upon any statements made" to him by any officers or agents of the appellant company where he "had means of verifying them," but did rely to some extent on statements made to him by Hosmer, Hill, and Sellers (officers of the appellant company) "in making up estimates of actual disbursements for the cost of different parts of the work, where they were under ground or not accessible." Being asked whether, in making his examination, he was influenced by any representations of the appellant, or caused thereby to exercise a greater or less degree of care than he otherwise would have done, he answered: "I was not influenced by any such representations to modify my conclusions which the observed fact and the investigation of the engineering features indicated to me. They did not cause me to exercise either a greater or a less degree of care than I would have otherwise given the subject." And again: "I did make such examinations as I believed were entirely sufficient and safe for the purpose of the advice I was employed to give." His attention being directed to the shortage claimed in the flow of these springs, he says:

"I know of no reasons at this time why I should change my recommendations made in my report. The assertion that Patterson Springs, after gauging by the city officers, have not yielded the amount stated in my report, \* \* \* would not change my general recommendation. \* \* \* Having myself actually observed approximately the quantities of flow as stated in my report, and being aware that this flow represented practically a minimum, owing to the end of the just-passed dry season, I should now suppose that much of the water then apparent had been lost by digging up the ground, and breaking the impervious strata, which operation I saw in part going on at the time of my visit." And again he says: "The character of Thomas and Patterson Springs required for their utilization the direction and supervision of intelligent and experienced engineers. The water issued at the foot of a bluff in a formation consisting mainly of gravel, sand, or glacial drift. This material being quite porous, and allowing water to percolate through it, such springs must be handled with great care, to prevent a loss into the lower and porous strata."

We think that enough is here shown to defeat a recovery by the city upon the ground of misrepresentation in reference to the quantity of water flowing from these springs. The proof shows that, instead of the officers of the city relying upon representations made by the appellant as to the quantity of water flowing from these springs, it employed an agent of its own for the purpose of determining that and other questions connected with the purchase. The agent of their own selection was competent for that purpose. He was brought to the city of Tacoma for the express purpose of experting the proposition, and ascertaining the facts in regard thereto. Having ascertained them, he made his report to the council. He shows, in his report and in his deposition, upon what his estimates were based. This proof was all a part of plaintiff's case, and there is no reason suggested why it should not be considered binding upon the city. Instead of tending to prove the case which plaintiff has stated in its pleading, it absolutely disproves it. Among the witnesses called by the respondent in the trial below were various members of the council who took part in the proceedings which terminated in the passage of an ordinance on March 4, 1893, submitting the proposition of purchasing the plant in question, at the price of \$1,750,000, to the voters of the city. Without undertaking to give in detail their testimony upon this question, we are warranted in saying that it shows that they had read and carefully considered the report of their engineer, and, in exercising their judgment and voting upon the different propositions coming before the council involving the purchase of the plant, they did

so with full knowledge of what was contained in this report. Not only the allegation that plaintiff relied upon the representations of the defendant as to the quantity of water flowing from these springs is disproved by plaintiff's own evidence, but the same evidence disproves another theory of plaintiff's case, namely, that it (the city) was induced to forego an examination as to the character, condition, extent, and value of the system by reason of defendant's corrupting and bribing the president of the city council, instead of the record showing that the officers of the city were employed or induced to forego making an examination of the property involved in the purchase by reason of defendant's having corrupted and bribed them, it shows that they selected a competent, expert engineer, who made such examination and full report, and this report was actually acted upon.

Considering next the second question submitted, namely, as to the quantity of iron pipe then laid, the record shows that Mr. Hering's report includes a table of lengths of pipe in the distributing system, amounting in all to 66.14 miles, and it is contended that the proof shows that only 53½ miles of pipe were received. The table so referred to shows the following:

Miles of pipe laid:—	
To January 1, 1891.....	37.2
During the year 1891.....	3.5
To be laid in 1892.....	25.4
Total miles .....	66.1

The proof further shows that the table accompanying this report was furnished to Mr. Hering by the officers of the company, and it may be conceded that he placed reliance upon it in so far, at least, as it purported to contain a statement of the pipe actually laid, inasmuch as to that extent it could not well be verified; and, as shown by his deposition, he placed reliance upon the estimates made by the appellant where the works were underground, and not accessible. But the proof in this case fails to disclose that the statement contained in the table as to the amount of pipe then actually laid was false. What the proof does show, however, is that instead of the company laying 25.4 miles during the year 1892, as it had estimated in the table above referred to that it would do, it in fact laid only about 12½ miles up to the time of the delivery of the plant to the city; but this, we think, was not an actionable representation. It did not relate to a past transaction, nor was it the statement of an existing fact. It was a mere estimate of what they would do in the future, and fraud cannot be predicated upon it. *Perkins v. Lougee*, 6 Neb. 222; *Gage v. Lewis*, 68 Ill. 604; *Gordon v. Butler*, 105 U. S. 553; *Sawyer v. Prickett*, 19 Wall. 146. In this connection we may say that it sufficiently and satisfactorily appears, and indeed is conceded by counsel for the

respondent, that the water pipe involved in the controversy between these parties, reported in 13 Wash. 115, 42 Pac. 533, was the pipe embraced within the estimate contained in the table already referred to; and hence it appears that the city has actually received, not only all that the appellant represented to have been theretofore laid, but all that it estimated it would thereafter lay during the year 1892. However, as already observed, a statement or representation of the defendant as to what it would add to its system at some future time would not constitute an actionable representation. Evidently, the lower court took this view of it when it restricted the jury's consideration to the quantity of pipe "then laid," and we ought not to extend this discussion to a consideration of issues which were withdrawn from the jury. As against the respondent, at least, the rulings thereon constitute, for the purpose of this appeal, the law of the case.

We come next to consider the third question submitted, namely, as to the quantity of land at Station A. The proof in this connection shows that, in the schedule or list of the property connected with this plant which the appellant furnished to the city, it was represented that there were 8.16 acres of land as a part of the plant, being a site for a Pumping Station A, whereas in fact that land contained only .816 of an acre. The exact description contained in the schedule is as follows: "Site for Pumping Station A: In S. W. quarter of N. W. quarter of Sec. 9, Tp. 20 N., R. 3 E., 8.16 acres." Some of the councilmen examined in behalf of respondent testified that they acted upon the belief that the tract contained 8.16 acres, and they estimated that the value of the land, supposing it to contain that much, would have been \$39,000. The contention of the appellant is that it never intended to represent that it owned 8.16 acres, but that the description in the schedule was due to a clerical error in inserting the decimal point after, instead of before, the figure "8," making it read "8.16 acres" instead of ".816 acres." We are unable to discover any proof which tends in any degree to show any fraudulent intention on the part of the appellant in this connection. Not only do we think the proof wholly fails to show any intention to represent that it was the owner of 8.16 acres at the point designated as Station A, but we also think that the respondent was not misled by the description actually appearing in the schedule. This was one of the subjects embraced within the report of Mr. Hering. In that report the land is correctly stated at .816 acres. Not only that, but it further appears that the subject was actually discussed before the council prior to its acceptance of the deed from appellant to the property in question, and certain concessions were asked and obtained from the appellant by the respondent

in lieu thereof. This of itself would, we think, constitute a full and complete defense to a recovery upon the ground of shortage in the amount of land received, did the evidence tend to show that the city had theretofore been misled by the statement in the schedule; for, notwithstanding that this adjustment was reached after the vote had been taken by the electors of the city, we think it related to the matter of detail within the power of the council to adjust, and was not such a substantial part of the transaction as necessitated a resubmission to the voters. In either view, there was nothing in the evidence bearing upon this branch of the case which should have been submitted to the jury.

The question remaining to be considered is whether there was evidence sufficient to authorize the finding by the jury that the appellant colluded with Mr. Corell, the president of the council, or bribed or corrupted him. Mr. Corell was elected to the council in the spring of 1892, and became a member of that body on April 18th of that year. His term expired one year thereafter. The ordinance submitting the proposition of purchase to the voters of the city passed the council first on February 28, 1893. Later it was recalled, amended, and repassed on March 4, 1893. The election held in pursuance thereof was on April 11, 1893; but the purchase was not consummated by deed or delivery of the property or payment of the consideration until some time in July following. Mr. Corell was elected to the council pledged to the proposition that the city should own and control its own water and light plant. As president of the council, it devolved upon him to appoint the various committees of that body, and, among others, the fire and water committee. But it is not pretended that, in appointing that committee, he was influenced by improper motives. Indeed, it is not pretended that he was brought under the influence of the defendant until about January, 1893, subsequent to which time there remained of his official term some three months only. As already observed, Mr. Hering had long prior thereto examined the property, and made his report. In December, 1892, the fire and water committee rendered its report to the council, which report, among other things, states: "The committee has made long and careful investigations of the subjects referred to it, and heretofore has made reports as to the sources of water supply, etc.; and it has conducted all of the preliminary investigations that the committee was authorized to make, and has received from the Tacoma Light & Water Company its ultimate offer to sell to the city of Tacoma its entire electric light plant, its entire water plant and sources of supply as per schedule hereto attached, which ultimate offer is the gross sum of \$1,850,000. And whereas, the option is one upon which this committee must decide on or

before the 31st of December, 1892 (this being the ultimatum given by the Tacoma Light and Water Company), as to whether or not the said ultimate offer will be accepted by the city of Tacoma; and whereas, this committee is not justified in rejecting such ultimatum without first submitting it to the entire council; and whereas, your committee regard the price named as considerably above what the committee would desire it to be, to wit, about \$350,000 above what the committee think it should be, still, in view of all the circumstances, your committee consider that it would be for the best interests of the city to own its own water and light plants: Therefore your committee on fire and water would recommend to the city council that the ultimate offer of the Tacoma Light and Water Company, of \$1,850,000, be considered by the city council, and, if accepted, be submitted to the people of city at the earliest practicable moment for their decision." This report is signed by the entire committee on fire and water, consisting of five members.

It appears from the evidence that there was a subcommittee of the fire and water committee (which subcommittee was composed of councilmen Snyder and Steinbach), to which committee was intrusted the duty of reporting upon the value of the different properties embraced within the plant. This subcommittee was not appointed by Corell. In its report this subcommittee found the total value to be \$1,523,638.05. In his testimony, Councilman Snyder says that they took the list of the property as furnished by the appellant, and "valued each piece separately as well as we could, as we were situated away from the property. We formed an opinion of what we knew of the land itself." He also testified: "Mr. Steinbach had been in the real-estate business, and I thought I knew something of the value of land, and I suppose that is why we got put onto this committee." He further says, "We cooked the report,"—that is, made the value of the property appear as large as possible; but he explained that he was desirous of making the value so appear in view of the strong sentiment prevailing in favor of the purchase of the property, and his belief that the appellant could not be induced to sell for the actual value. He expressly denied, and it is not seriously contended by respondent's counsel, that he was unduly influenced or corrupted or bribed in any manner by the appellant; and there is not a particle of proof in the record tending in any wise to show that he was acting in collusion with the appellant or any of its officers. On January 10, 1893, Mayor Huson and Mr. Corell, as advisory committee, made a report to the council, from which we quote: "While the price of the light and water company's plant, namely, \$1,850,000, is \$350,000 above what the water committee has appraised it at, we as advisers of the water committee, believe

it is the best proposition for many reasons, several of which are submitted herewith." The report then goes on to show the advantages of the city purchasing the plant rather than constructing an independent system, which, from reports of previous committees, would cost as great or a greater sum than that required to purchase the plant in question, and leave the city to compete with a rival plant, etc. The report further states that the offer of \$1,850,000 is \$350,000 more than they believe to be its actual value. Thereafter, and prior to the final passage of the ordinance submitting the question to the voters of the city, various resolutions were offered in the city council to the effect that the council would not submit any proposition to the voters involving the expenditure, in one resolution of a million and a quarter dollars, in another of a million and a half, and many similar propositions, upon all of which Mr. Corell voted, "No"; and such action on his part is referred to as evidence tending to show that he was acting in disregard of his duty to his constituents, and in the interest of the appellant, but the record furnishes what we consider a full and sufficient explanation of these votes. Not only did Mr. Corell oppose these various propositions, but a large majority of the council also opposed them, and their reasons for so doing are in the record, and constitute a part of plaintiff's case. The explanation as furnished by them is that these resolutions were put forward from time to time by members who were opposed to the whole proposition; that they were not made in good faith, but for the purpose of delaying and defeating the proposition of the city owning and controlling its own plant, which proposition a greater number of the members of the council had been elected to support; that they felt it was their duty to their constituents to submit the proposition to the people during their official term; that they further considered that the so-called "ultimatum" of the appellant company was (as it professed to be) a final and ultimate offer and proposition; and that, in view of the efforts which had been made from time to time by the council to secure a reduction, it was fruitless to submit these various counter propositions involved in the resolutions opposed by them. In the light of all of the correspondence and of the entire record, we think the explanation was full, complete, and satisfactory, and that their conduct in this regard does not justify any inference that they or any of them were prompted by other than honest and commendable motives. Their acts throughout the entire transaction, in so far as the record shows, were consistent with the presumption of honesty with which the law surrounds the action of all men. Subsequent to the reports already referred to, a special committee was appointed by Mr. Corell, as president of the council, pursuant to the resolution to that effect, for the pur-

pose of further conferring with the appellant, with a view to securing a reduction in the price asked for the plant. For this committee, Mr. Corell named certain members of the council who had been most active in opposing the proposition to purchase at the price offered by the appellant. As a result of the joint efforts of this last-named committee and others, the price asked by appellant was reduced from \$1,850,000 to \$1,800,000. Thereafter a further resolution passed the council authorizing the appointment of a committee of three to go to Philadelphia, and confer with Mr. C. B. Wright, the principal owner of the plant, with a view to securing a still lower figure. Upon this committee, Mr. Corell appointed the mover of the resolution, Mr. Snyder, also Mr. Berry, chairman of the fire and water committee; and, upon motion of Mr. Snyder, Mr. Corell, as president of the council, was named as one of the committee. Mr. Berry being unable to serve, Corell, on suggestion of the council, appointed Mr. Steinbach in his stead. The record of the city clerk, which was put in evidence by the respondent, shows this to be the history of this latter committee,—and it is further supported by the testimony of Mr. Snyder and other witnesses for the plaintiff; and this evidence is not overcome by the testimony of other members of the council who sought to make it appear that Mr. Corell had appointed himself, but who, when confronted by the record and the testimony of the other witnesses, would not contend as against the record, that their memory in that respect correctly served them. In the first place, we think that plaintiff should not have been permitted to contradict the record in the manner attempted by it. In the next place, we think it was concluded by the testimony of Snyder and others, who testified substantially that the record was correct. These witnesses were neither hostile to the plaintiff, nor is their good faith called in question. There was also proof that, prior to the introduction of the resolution providing for the appointment of this last-mentioned committee, Mr. Snyder, the mover of it, suggested to the president of the council that he (Snyder) would like to go on that committee; that Corell told him "that he (Corell) would have the forming of the committee, and that he would appoint him (Snyder), and that he also desired to be one of the members, which was perfectly agreeable. \* \* \* He being on the light and water committee, and being president of the council, I thought he ought to go, and he had taken a great deal of interest in the matter." The circumstances here disclosed do not justify a suspicion, much less are they "circumstances from which the inference of fraud is natural and irresistible." *Millar & Co. v. Plass*, supra; *Pederson v. Railway Co.*, supra; *Roberts v. Bank*, supra. This committee went to Philadelphia, and, as a re-

sult of their labors, secured a still further reduction in the purchase price of \$50,000; and thereupon they recommended submission to the people of the proposition to purchase at the price of \$1,750,000, and the proposition was submitted, ten councilmen voting therefor and six against it.

The record also shows that, when the ordinance under which the proposition was submitted to the voters was before the council, the question of securing an assistant to the city attorney, with whom he might confer in the preparation of the ordinance, etc., was discussed by the council, and the names of various eminent counsel suggested as suitable assistants. Finally, the matter culminated in appellant's agreeing to employ Judge Parsons to render such assistance. The record shows that at that time, and for some time prior, and at all times subsequent, Mr. Corell was a member of the firm of Parsons & Corell. Subsequent to the purchase of the plant, namely, July, 1893, differences arose between the city and the appellant growing out of the sale, and different suits were instituted, two of which came to this court, and are reported in 13 Wash. 115, 42 Pac. 533, and 13 Wash. 124, 42 Pac. 536. In that litigation the appellant was represented by the firm of Parsons & Corell. As already noticed, that litigation was subsequent to the final consummation of the purchase and sale, and was long after Mr. Corell had retired from the council. It further appears that for the services of Mr. Parsons and of Parsons & Corell in that litigation, and in various other matters connected with the sale, including the assistance rendered the city attorney already referred to, the firm of Parsons & Corell was paid a lump sum; and it is urged that, inasmuch as Mr. Corell was at all times subsequent to the time when Ordinance No. 790 was introduced into the council (namely, on January 10, 1893) a member of such law firm, he was in the employ of the appellant, and thereby disqualified from discharging his full duty to the respondent city. With this contention we cannot agree—First. Because it fully appears from the record that the employment of Judge Parsons in the first instance was with the full knowledge and consent of the entire council; that the purpose of that employment was to aid the city attorney in the preparation of a valid city ordinance under which the proposition could be legally submitted to the judgment of the voters of the city; and that in this respect, and also in the litigation which followed immediately after the passage of the ordinance, and prior to the consummation of the purchase, the interests of the city and of the appellant were identical, namely, in having the ordinance adjudged and declared to be a legal and valid ordinance. That was the sole question submitted for determination in that litigation, and, the interests of the city and

of the appellant being thus identified, there was no impropriety in the employment of Judge Parsons, or of the firm of Parsons & Corell, in the course of that litigation. Second. The record shows that the council knew of the employment of Judge Parsons, and sanctioned it; and that each and every member of the council had full knowledge of the further fact that Judge Parsons was the law partner of the presiding officer of the council. No objection was made or urged upon that score, and fraud cannot be predicated upon it.

Upon this branch of the case we are constrained to say that we have read and carefully examined the entire record, comprising nearly 2,000 typewritten pages and numerous exhibits, and from such examination are satisfied that there was no evidence introduced at the trial which could have justified the jury in finding that Mr. Corell or any other member of the city council had been bribed or corrupted by the appellant or induced by it to forego the discharge of any duty which he or they owed to the respondent city; that all of the facts and circumstances relied upon as constituting proof of fraud are consistent with the presumption of honesty, and should be construed accordingly, and under the rule laid down in *Pederson v. Railway Co.*, 6 Wash. 207, 33 Pac. 351, and 34 Pac. 665, and the numerous other cases already cited, the motion for nonsuit in this case should have been granted.

We have felt less reluctance in reaching and announcing this conclusion in view of a further fact disclosed by the record. By direction of the lower court, the remarks of the learned trial judge in ruling upon appellant's motion for a new trial have become a part of the record herein. These remarks were in part as follows: "Owing to the fact that Mr. Corell is a member of the bar of this court, and that, if the judge of the court were convinced that he had been guilty of corruption in connection with a transaction of this kind, I think it would be the duty of the court to direct proceedings to be instituted for his disbarment, therefore I think it the duty of the court to indicate a different opinion upon the issue submitted in regard to him from that which the jury has found. And I am willing to say that, if I regarded the verdict of the jury as advisory merely, I should find upon that issue differently from what the jury found. Whether that is because I have observed the gentleman, and am personally acquainted with him, and his professional character, having been above reproach in every regard, of course I am unable to say; yet I feel that it is my duty, having heard all of the evidence, to say that much in exoneration of Mr. Corell, \* \* \* because I have thought, and I think now, that the question was one of the pivotal questions, without which the verdict could not be sustained; and, not-

withstanding the feeling that that finding is probably wrong, yet, in view of what weight I think should be given to the verdict of a jury, I think the verdict ought not to be set aside. I have almost as much doubt in regard to the amount of this verdict as I have upon the issue in regard to Mr. Corell. It is a matter that, if I regarded the verdict of the jury as advisory merely, I should be in the greatest doubt whether I would not reduce it almost one-half, if not altogether. But, for the reason that it was so difficult a matter to ascertain the value of property of this kind, I do not think that I am any better qualified to judge of the value of that property than the jury. They were twelve men, and there is only one of the court; and I am inclined not to disturb it even on that ground. It is questionable with me whether counsel for the city ought not voluntarily to offer to remit a large portion of that verdict; and yet I do not feel that I would require them to do so, or make it a condition upon which alone they would escape a new trial." We think the learned trial judge labored under a misconception of duty in overruling appellant's motion for a new trial after expressing his dissatisfaction with the verdict. Nothing can be clearer than that it was the judgment of the judge, as a result of his consideration of the case, that the verdict was opposed to the evidence on, at least, one of the material issues, or, as he correctly termed it, "one of the pivotal questions, without which the verdict could not be sustained." The statute which provides that the superior court shall award a new trial when the verdict is contrary to the evidence "means, of course, whenever, in its judgment, such is the fact; for otherwise the statute would be of no avail." *State v. Billings*, 81 Iowa, 100, 46 N. W. 867: "To a valid judgment the law requires—First, that there shall be a verdict upon evidence to satisfy the minds of the jury; \* \* \* and, second, that the judge who presides at the trial shall believe that the evidence is sufficient to justify the finding. \* \* \* From the record as made, we are led decidedly to the conviction that it was the judgment of the district court \* \* \* that the evidence was not sufficient to sustain the verdict. With this fact apparent of record, is there anything in the law to prevent our overruling a judgment based thereon, and in conflict with it? If so, it is the shadow, and not the substance, that is of controlling force; and such a conclusion must be sustained at a sacrifice of the very essence of judicial inquiry,—the truth. \* \* \* The convictions of the mind, when properly known, will override a work of the hand that merely notes an unsupported conclusion." The judge who presided below apparently thought that, if there was any evidence tending to support the material issues, the verdict was controlling on the court, notwithstanding it was the deliberate conviction of the

Judge that the evidence warranted a different verdict. Such is not the law. In this respect the functions of the trial judge differ from those of the appellate court. This difference is clearly pointed out by Mr. Justice Brewer in *Railway Co. v. Kunkel*, 17 Kan. 172: "The one has the same opportunity as the jury for forming a just estimate of the credence to be placed in the various witnesses; and, if it appears to him that the jury have found against the weight of the evidence, it is his imperative duty to set the verdict aside. We do not mean that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when his judgment tells him that it is wrong, that, whether from mistake or prejudice or other cause, the jury have erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury." "And he should be controlled by his own judgment in the case, and not by that of the jury." *Williams v. Townsend*, 15 Kan. 564. "The judge who tried the cause should not hesitate to set aside a verdict where there is a clear preponderance of evidence against it." *Nevada v. Yellow Jacket Silver Min. Co.*, 5 Nev. 422. "Where the trial court is of the opinion that the verdict is not supported by the evidence, or is against the weight of evidence, it should never hesitate in exercising the power, and giving the aggrieved party a new trial." *Reid v. Insurance Co.*, 58 Mo. 421. "If the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony." *Dickey v. Davis*, 39 Cal. 565. See, also, *Crossley v. O'Brien*, 24 Ind. 325; *Railway Co. v. Reardon* (Kan. App.) 40 Pac. 931; *Railroad Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108; *Phillipotts v. Blasdel*, 8 Nev. 61; *Lockwood v. Insurance Co.*, 47 Mo. 51. The verdict in this case can be upheld only by disregarding principles which have long been considered necessary for the protection of the rights and property of the individual, and the judgment entered upon it will be reversed.

HOYT, C. J., and ANDERS, J., concur.

DUNBAR, J. (dissenting). It will serve no good purpose to discuss the testimony in this case. I have read it all carefully, and am convinced that there was sufficient legal proof of fraud to sustain the verdict. I therefore dissent.

(16 Wash. 319)

# OGLE v. JONES.

(Supreme Court of Washington. Jan 14, 1897.)

## AMENDMENT OF PLEADING — NONSUIT — DAMAGES.

1. In an action against a master for personal injuries, amending the complaint in the course of the trial by showing plaintiff's ability to earn wages at the time of the injury is at the discretion of the court.

2. Where, in an action for personal injuries, the evidence does not clearly show contributory negligence, a refusal of a nonsuit is proper.

3. Where an employé, about 35 years of age, and in full health, is permanently crippled, and his earning capacity measurably decreased, a verdict for \$6,500 is not excessive.

4. Where a master commits to another the duty of providing safe appliances, such person becomes a vice principal, whose failure is that of the master.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by Charles R. Ogle against R. A. Jones. Judgment for plaintiff, and defendant appeals. Affirmed.

Griffitts & Nuzum, for appellant. Graves, Wolf & Graves, for respondent.

GORDON, J. In July, 1894, the appellant was engaged in erecting and constructing a system of waterworks for the city of Spokane. The respondent was working for the appellant as a shoveler in a pit which was being sunk, the dirt being hauled by means of a cable from the pit to the surface of the ground in a car running up an inclined track. Respondent's duty was to remove from the track the dirt falling thereon while the car was being hauled out of the pit with its load. While so engaged, on the 28th of July aforesaid, the cable by which the loaded cars were hauled broke, permitting the car to fall back against and upon the respondent, breaking his thigh, and otherwise severely injuring him. The present action was brought by him for the purpose of recovering damages for the injury so sustained. In his complaint he alleges that the cable was an old and weak one, and unfit for use, which fact was well known to the appellant and to his foreman, in charge of the work; that its use for that purpose, under the circumstances, was negligent and careless; and that the respondent did not know the condition of the cable, or of its unfitness for use, etc. In addition to the general denial of negligence upon his part, the appellant, in his answer, alleges that the injury sustained by respondent was due to his own negligence and want of ordinary care, or to the negligence of fellow servants of the respondent. There was a verdict for respondent in the sum of \$6,500. Appellant's motion for a new trial was denied, and judgment entered upon the verdict, from which judgment this appeal is taken.

Upon the oral argument in this court counsel for the appellant urged that the trial court erred in permitting the respondent to amend his complaint in the course of the

trial, by showing the respondent's ability to earn wages at the time of receiving the injury in question, and thereafter in denying appellant's motion for a continuance. We have been unable to discover that the rulings of the court in these respects are complained of or referred to in the printed brief. Section 15 of the act of March 8, 1893, relating to appeals to the supreme court (Laws 1893, p. 127), requires that the brief "shall clearly point out each error that the appellant relies on for a reversal." In addition to this, we think that the rulings so complained of were in regard to matters within the discretion of the trial court, and it is not apparent that this discretion was abused.

The ruling of the court in denying appellant's motion for a nonsuit is assigned as error, and we have examined the record for the purpose of determining whether there was any substantial evidence tending to show negligence upon the part of appellant. Without entering upon a discussion or analysis of the evidence in this opinion, we are content to say that it was ample; also, that it did not show such contributory negligence or want of ordinary care upon the part of the respondent as would have justified the court in withdrawing the case from the consideration of the jury; and the motion for nonsuit was properly overruled.

It is next urged that the court erred in charging the jury upon the law relative to the "master's duty" and "negligence of fellow servants." Respondent's injury was due to the breaking of the cable, already referred to. Following the rule laid down in *McDonough v. Railway Co.* (Wash.) 46 Pac. 334, we think it was the positive duty of the appellant in this case to provide reasonably safe machinery, tools, and appliances with which to prosecute the work undertaken, and thereafter to keep them reasonably safe. Where the performance of such duty is by a master intrusted to another, the latter becomes his vice principal, whose failure is the failure of the master. The instructions complained of did not go beyond this, and were correct. Whether the cable in question was a reasonably safe one for the use being made of it at the time of the injury was a question for the jury. If it was not reasonably safe, then appellant was negligent. We think the law applicable to the case was correctly and comprehensively stated to the jury, and *McDonough v. Railway Co.*, supra, is not only applicable, but controlling, here.

It is next contended that the damages awarded are excessive, but with this we cannot agree. The respondent, as shown by the evidence, was, at the time of the injury, above 35 years of age, and in full health and vigor. In addition to the severe pain and suffering which he endured as a result of the injury, he is permanently crippled, and his earning ability measurably decreas-

ed. We have discovered nothing in the record which induces a belief that the jury were actuated by prejudice or passion, or which would warrant us in concluding that the compensation which they awarded the respondent is greater than the character of his injuries justified.

The other errors assigned are of minor importance, not in any wise affecting the merits of the case, or involving any substantial right of the appellant; and a careful examination of the record has convinced us that no reversible error was committed by the trial court, and that the judgment appealed from should be affirmed.

SCOTT, C. J., and DUNBAR, J., concur.

(16 Wash. 325)

#### STATE v. HORLACHER.

(Supreme Court of Washington. Jan. 18, 1897.)

HIGHWAYS—OBSTRUCTION BY LANDOWNER—PROOF OF HIGHWAY — DEFENSES — CONSENT OF LANDOWNER—ESTABLISHMENT BY PRESCRIPTION—INSTRUCTIONS.

1. On trial for obstructing a highway, it was not error to refuse to compel the state to elect whether it would rely on prescription, user, dedication, or legal establishment to show the existence of the highway.

2. On trial for obstructing a highway, a letter from the county commissioners advising defendant and others interested that, if they could agree upon a change in the road, the board would make the proper orders, was properly excluded, in the absence of evidence that defendant had complied with the terms of the letter.

3. Testimony of the defendant that he had never formally consented to the use of the highway was properly excluded, where evidence of the state was directed solely to acts and declarations as showing consent.

4. On an issue as to the existence of a highway, where the testimony tended to show the establishment by prescription, an instruction based on Laws 1889-90, p. 733, correcting informalities of record in the establishment of roads or highways, was not prejudicial error.

5. Where there was proof of the establishment of a highway by prescription, an instruction that immaterial alterations in the travel of the highway by the public would not change the character of the road, was not reversible error.

Appeal from superior court, Whitman county; E. H. Sullivan, Judge.

George Horlacher was found guilty of obstructing a highway, and appeals. Affirmed.

Trimble & Pattison, for appellant. H. W. Canfield, for the State.

REAVIS, J. The defendant was charged with erecting, continuing, and maintaining a public nuisance by constructing a fence across a public highway in Whitman county. The information was filed under subdivision 4 of section 2893 of the act relating to nuisances, approved March 2, 1895, which declares: "It is a public nuisance to obstruct or encroach upon public highways, private ways, streets, alleys, commons, landing places, and ways to burying places." Defendant



at the trial was found guilty by the jury, and judgment of the court entered in accordance with the verdict, and the judgment also directed the removal of the obstruction by the sheriff. Defendant appeals.

The testimony introduced by the state showed the continued and uninterrupted use of a public highway between the city of Colfax and the town of Rosalia, in Whitman county, for more than 15 years, across a quarter section of land known at the trial as the "Horlacher Tract," with but a single material change on the tract. This change was made to improve the condition of the grade over a ridge or hill, and was done by the road overseer. Afterwards a fence was erected along the line of the road as made by the grade by the owner of the land. Public moneys were expended for several years on this road under supervision of the road overseer. No change was ever made in the road at the point defendant obstructed it.

The first error assigned by appellant is that the state should have been compelled to elect whether it would rely on prescription, dedication, user, or legal establishment by the county commissioners of the existence of the highway obstructed by defendant. It was not necessary to make such election. The fact of the existence of a public highway may be established by any competent evidence, and there is no distinction in the validity of either method of the establishment of a public highway in this state. An imperfect effort by the proper authorities to lay out a highway may be material and competent evidence to show right in the public by dedication or user.

It is also urged by appellant that the trial court erred in sustaining objections to the introduction of testimony by the defendant at the trial. A letter from the clerk of the board of county commissioners in answer to a letter from defendant relating to the road was not admitted in evidence. The letter was by order of the board of commissioners, and stated, among other things: "It is recommended that you and Ledbetter, together with those interested with you, agree upon the change in the route as surveyed by Whitels ('Horlacher Change'), and, when you do this, the board will make the proper orders to secure you a road. If you can all agree upon the road, as you suggest in your letter, I think you would be perfectly safe in putting your fences upon the agreed line." No offer was made by the defendant to show that he had complied with the terms of the letter, and on this ground the court excluded it from the consideration of the jury. This ruling was correct. The letter could only, in any event, be material to negative the willful obstruction of the highway by defendant, and to show his good faith. The board of commissioners did not have the authority to change the highway except in the manner directed by law.

Another error complained of was that de-

fendant was not allowed to state whether he had consented to the use of the highway. The inquiry was properly directed to the acts and declarations of defendant relating to the use by the public of the highway, and nowhere was the formal consent of defendant attempted to be shown by the state, but the proof was directed solely to acts and declarations.

The errors assigned to the court's instructions to the jury are not sufficient to reverse the case. With the exception of two, they all relate to the proof of a highway by prescription, and, upon the testimony in the cause, stated the law. The exceptions were: One, in which the jury were told that immaterial changes and alterations in the travel of the highway by the public would not change the character of the road. The other instruction was that the jury must find from seven to ten years' user. The court, in the last instruction, evidently had in view the curative statute of 1889-90 (page 733), entitled "An act correcting informalities of record in the establishment of the various public roads and highways in this state." But, in view of all the testimony in the case, it cannot be said that defendant was prejudiced by the last instruction, as it was not necessary, upon the testimony in the record, for the state to invoke the curative statute to maintain the highway. Taken together with the other instructions given, the case was fairly submitted to the jury, and the proof of a highway by prescription was clear. Upon the record here the judgment must be affirmed.

SCOTT, C. J., and DUNBAR and GORDON, JJ., concur.

(16 Wash. 329)

# GRIFFITH v. SEATTLE NAT. BANK BLDG. CO. et al.

(Supreme Court of Washington. Jan. 19, 1897.)

APPEAL—TIME OF TAKING—INDEPENDENT APPEAL.

In an action to foreclose a trust deed, the assignee of a mechanic's lien on the property intervened. A lien was established in favor of a third creditor, defendant in the foreclosure suit, and was declared prior to the trust deed. The intervener appealed, notice being served on plaintiff. Two months later, plaintiff appealed. Intervener's appeal was subsequently dismissed. *Held*, that under Act March 8, 1893, § 5, providing that any party similarly affected by any judgment appealed from may join in the appeal, but cannot independently appeal after 10 days, unless the former appeal is dismissed, plaintiff's appeal must be dismissed as not taken in time.

Appeal from superior court, King county; Alfred Battle, Judge pro tem.

Action by G. W. E. Griffith against the Seattle National Bank Building Company, the Seattle National Bank, and Maurice Lyons, intervener. From a judgment in favor of the bank, plaintiff appeals. Dismissed.

Westbrook S. Decker, Struve, Allen, Hughes & McMicken, T. J. O'Donnell, and Milton

Smith, for appellant. James B. Howe, I. D. McCutcheon, Carr & Preston, and Pratt & White, for respondents.

**PER CURIAM.** In 1890 the Seattle National Bank Building Company, of Seattle, commenced the erection and construction of a building upon certain lots in that city. In the course of its construction, various parties (respondents herein) furnished materials for use therein, and thereafter filed liens upon the lots and building for the amounts remaining unpaid for the materials so furnished. Subsequently these various parties so furnishing materials began their respective actions in the superior court of that county to foreclose said liens. After these lien claimants had begun to furnish materials, a trust deed executed by the building company to the Western Farm Mortgage Trust Company (of which company the appellant has become the successor in trust), securing 250 \$1,000 bonds, was recorded. In the various lien cases the appellant was made a party defendant. Prior to the trial of said lien cases, appellant, as trustee, commenced an action—numbered 15,260—to foreclose the trust deed, to which action he made all of the lien claimants parties defendant. There were various other defendants, mention of whom, however, is unnecessary. Among others claiming a lien upon the premises in question was the firm of P. V. Dwyer & Bros., plumbers, of the city of Seattle, and an action to foreclose its lien was pending at the time when appellant instituted the suit to foreclose said trust deed. In that suit the firm of Dwyer & Bros. was made a party defendant, and answered; setting up its claim to a lien, and asserting its priority and superiority to the lien of the trust deed. The Seattle National Bank, respondent, was plaintiff in an action pending in said court against said firm of Dwyer & Bros., and in said action had garnished the building company. It was also a party defendant in appellant's action to foreclose the trust deed. Thereafter Maurice Lyons intervened in cause No. 15,260 (being the foreclosure suit), setting up the assignment to him of the lien and claim of Dwyer & Bros., and sought to have the lien of Dwyer & Bros. established for his use and in his own right, and foreclosed, and established by decree to be prior and superior to the trust deed. By an order of the lower court, these various actions were consolidated, and on March 26, 1896, a single decree was entered. By such decree the liens of the various parties furnishing material were adjudged and decreed to be superior to that of the trust deed, and the respondents Seattle National Bank was decreed to have succeeded to the right of Dwyer & Bros. in and to their lien, and said lien was established in favor of said bank. From this decree, Maurice Lyons appealed, and on April 10, 1896, his notice of appeal was duly served upon Griffith, trustee (the present appellant). Thereafter, upon application of said Lyons, a statement of facts was

settled, and the appeal filed in this court. On the 24th of June, 1896, while the Lyons appeal was pending, appellant's notice of appeal was given and served, and subsequently thereto a statement of facts was also settled upon his application. The cause, on the appeal of Lyons, was assigned for hearing in this court at the October session, and on November 5th was dismissed because of a failure of the appellant therein to serve necessary parties.

Respondents have moved to dismiss the present appeal upon various grounds, and, among others, "because, more than ten days prior to any service of notice of his appeal, the respondent Maurice Lyons had served upon said appellant a notice of his (Lyons') appeal from the decree from which this appeal is being prosecuted. Appellant Griffith, trustee, did not join in the Lyons appeal, nor serve an independent notice of like appeal within ten days, nor has he attempted to take an independent appeal after dismissal of the Lyons appeal." Section 5 of the act of March 8th (Laws 1893, p. 121) provides: "All parties whose interests are similarly affected by any judgment or order appealed from may join in the notice of appeal whether it be given at the time when such judgment or order is rendered or made, or subsequently; and any such party who has not joined in the notice may at any time within ten days after the notice is given or served, serve an independent notice of like appeal, or join in the appeal already taken by filing with the clerk of the superior court a statement that he joins therein or in some part thereof specifying in what part. Any such party who does not so join shall not derive any benefit from the appeal unless from the necessity of the case; nor can he independently appeal from any judgment or order already appealed from, more than ten days after service upon him of written notice of the former appeal, unless such former appeal be afterwards dismissed. \* \* \* The interests of Lyons and Griffith being similarly affected by the decree from which they have severally attempted to appeal, the time in which Griffith was entitled under the statute to appeal was limited to ten days after the date of service upon him of the Lyons appeal. Upon service of this appeal of Lyons, the statute authorizes Griffith to proceed in either of two ways, viz. join in the appeal taken by Lyons, or serve an independent notice of like appeal. But the statute limited his right to take either of these steps to ten days. As already noticed, instead of proceeding within the time limited by the statute, he neglected for upwards of two months to take any action, and at the expiration of that time, and while the appeal of Lyons was pending and undismissed, appellant served his notice of appeal in the present proceeding. The motion to dismiss must prevail. The statute in question is imperative, and leaves no room for construction. It is immaterial whether the order of consolidation was or was not properly made. If improperly, it was an error which

could be reviewed upon exception. But, beyond this, the issues between Lyons and the bank were raised in the action brought by appellant to foreclose the trust deed, in which both of these parties were made defendants. So that the decree from which both Lyons and the present appellant have attempted to appeal separately was entered in the same case, and the statute prescribes the conditions and fixes the time within which independent appeals may be prosecuted therefrom. The conclusion which we have reached upon this branch of the motion is decisive, and renders it unnecessary to consider the other grounds urged. Dismissed.

(16 Wash. 335)

**BROOKS v. JAMES et al.**

(Supreme Court of Washington. Jan. 21, 1897.)

**BOND FOR COSTS—QUALIFICATIONS OF SURETY—  
DECREE—SUBMISSION TO OPPONENT—  
NOTE—PRIMA FACIE CASE.**

1. Under 2 Hill's Code, § 245, which, among other qualifications of bail, requires that they shall be residents of the state; and section 844, which requires a plaintiff nonresident of the county to give security for costs, but provides no special qualifications,—a surety for costs need not be a resident of the county.

2. Under 2 Hill's Code, § 844, which requires a plaintiff nonresident of the county to give security for costs in the sum of \$200, and provides that the court may order a new bond on proof that the original is insufficient, the sureties need not justify on the cost bond in the first instance.

3. The prevailing party need not present his decree to his opponent's counsel before presenting it to the court for signature.

4. Possession of a note duly indorsed establishes, prima facie, that the possessor is the holder and owner, and that the note is unpaid.

Appeal from superior court, Spokane county, James Z. Moore, Judge.

Action by Mary A. Brooks against Anna James, W. A. Lewis, Fannie B. Lewis, and others. From a decree in favor of plaintiff, defendants Lewis appeal. Affirmed.

W. A. Lewis, for appellants. Mark F. Mendenhall, Mendenhall & Tolman, Irving T. Cole, and Smith & Cole, for respondent.

GORDON, J. Respondent's action was to foreclose a mortgage executed by Anna James and her husband, H. D. James, to the Charles F. Emery Real-Estate Loan Company. The complaint alleges that, subsequent to the execution of the mortgage and the note secured thereby, the mortgagee, for valuable consideration, indorsed the note and assigned said mortgage to one A. E. Bachelder, trustee, and that thereafter Bachelder, as trustee, in writing duly assigned to the respondent all his interest in and to the note and mortgage. The appellants were made parties defendant, and as to them the complaint alleges that they "have or claim to have some lien or interest in said premises, which lien or interest, if any, is subsequent and inferior to that of this plaintiff." The prayer was for a money judgment

against the defendants James, and that the lien or interest of the appellants, if any exist, should be decreed subsequent and inferior to that of the respondent. Answering separately, the appellants denied all of the allegations of the complaint, save only that they admitted that they "have some interest in the premises in said complaint mentioned," and they in no wise attempted to set out the nature or character of their interest. There was a decree in accordance with the prayer of the complaint, from which this appeal was prosecuted.

The first contention of the appellants is that the court erred in denying their motion to strike the bond for security for costs, which had been furnished by the respondent pursuant to appellants' demand for security for costs. That motion was based upon two grounds: First, that the bondsmen resided out of the county of Spokane, in which county the action was brought; second, that the sureties did not justify in any separate property. The motion was properly overruled. As to the first ground of motion, there is nothing in the statute (section 844, 2 Hill's Code) which requires sureties on a cost bond to possess qualifications that are not required by sureties generally. Section 245, 2 Hill's Code, prescribes the qualifications of bail, and, in the absence of any special provision requiring additional or different qualifications from those imposed by that section, one who possesses the qualifications therein prescribed is sufficient as a surety or bondsman for all purposes. Secondly, it was not necessary that there should have been any affidavit or attempted justification upon the cost bond in the first instance. What was attempted in that regard was surplusage merely. But, independently of this, the affidavit of the sureties was in strict compliance with section 245, supra, and was sufficient in form and substance.

The second ground of alleged error is that respondent neglected to present the final decree to the appellants, and failed to give them any notice of the time and place of signing the same. This constituted no error. Laws 1893, p. 112, § 3.

Third. Nor did the court err in permitting the notes to be received in evidence over appellants' objection that the execution of their assignment was not duly proven. The note contained the following indorsement: "Pay to the order of Mary A. Brooks, without recourse. Charles F. Emery Real-Estate Loan Company, per R. M. Palmer, Treasurer." Possession of the note, coupled with the indorsement in question, was sufficient, prima facie, to establish that plaintiff was the owner and holder thereof, and that it was unpaid.

The other questions raised in appellants' brief have been duly examined, and are, we think, wholly without merit. An examination of the record has satisfied us that no substantial right of appellants was preju-

diced by any ruling of the trial court, that the decree was rightfully entered, and no valid reason exists for disturbing it. Affirmed.

SCOTT, C. J., and DUNBAR and REAVIS, JJ., concur.

(16 Wash. 343)

**MORRIS v. GRAHAM et al.**

(Supreme Court of Washington. Jan. 22, 1897.)

**PUBLIC NUISANCE — OBSTRUCTING NAVIGABLE STREAM—PRIVATE ACTION—SPECIAL DAMAGE—LICENSE TO FISH.**

1. A person engaged in the business of fishing in a navigable stream is specially damaged by the placing of an obstruction in such stream which interferes with the carrying on of his business, and may sue on behalf of himself and others similarly situated to enjoin such obstruction.

2. A license to fish, issued by the state fish commissioner, under the provisions of Laws 1893, p. 15, cannot give the licensee the exclusive right to fish at any designated place. *State v. Crawford*, 44 Pac. 876, 14 Wash. 373, followed.

3. A complaint, in an action to enjoin the obstruction of a navigable stream, which alleges that plaintiff had been engaged in fishing therein for a year prior to the action, sufficiently shows that plaintiff was entitled to fish in such water, as against the objection made at the trial.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by Daniel Morris against Fred Graham, Henry Graham, and A. T. Graham, to enjoin the placing of an obstruction in a navigable stream. Decree for plaintiff, and defendants appeal. Affirmed.

A. M. Moore, for appellants. M. P. Hurd, for respondent.

GORDON, J. Respondent, on behalf of himself and others similarly situated, instituted this action in the superior court of Skagit county to enjoin and restrain the appellants from erecting a fish trap or pound net in the channel of the North Fork of the Skagit river, where the same empties into the waters of Puget Sound. Issue of fact was formed, and the cause proceeded to trial. Upon findings and conclusions entered, the lower court rendered a decree perpetually enjoining and restraining the appellants from making or constructing said trap. The appeal is from said decree.

It is urged in the brief of appellants' counsel that the respondent has no such interest in the subject-matter of litigation as enables him to maintain the action; that the stream in question is a navigable stream, and the acts threatened by appellants would constitute a public nuisance, if unlawful at all; and that such nuisance cannot be abated through a private person, but that the suit should have been instituted on the relation of the attorney general. It appears, from the findings (which are amply supported by competent evidence), that to construct said

fish trap or pound net it would be necessary to drive into the bed of the channel piles or stakes, at intervals of about 10 feet, to which the appliances of the trap might be attached; that the pound proposed to be erected would be in dimensions about 40 feet square; that the channel in which appellants proposed to erect said trap is the only channel leading from said stream into the waters of Puget Sound; that it has for years been open to the common use of the public, and of the respondent and his fellow fishermen, plying their vocations with drift nets or gill nets, for the purpose of catching salmon. It further appears that said fishermen had kept the channel and ground in said vicinity clear and free of logs and sticks, to enable them to carry on their business; that the fishing grounds extend into the waters of the sound for a distance of about three-fourths of a mile, and the principal run of salmon is through the channel in which appellants desire to construct their trap; that the width of the channel at extreme low-water mark is only about 45 feet; that the trap, if constructed, would render it impossible to drift nets through the channel on either side of the trap; and that the plaintiff, and the other fishermen in whose behalf the suit is brought, would be deprived of the common right of fishing in the waters in that vicinity. In this connection it should be stated that there was no demurrer or other motion addressed to the complaint, and we think that it is sufficient to support the findings and decree, as against any objection made to it after issue of fact was joined.

The objection that the suit should have been brought upon the relation of the attorney general, and that the respondent has no such interest as would enable him to maintain the action, is not well taken. He brings it on behalf of himself and others whose rights are similarly affected. It is brought in behalf of a class, and the injury complained of is not common to the general public, but peculiarly affects the respondent, and those in the class to which he belongs. The acts complained of constitute a damage and special injury to him, in which the general public do not share. The fact that others would suffer in the same way, if they were similarly engaged, constitutes no bar to the maintenance of the present action. As is aptly said by Mr. Justice Beatty, in *Mill Co. v. Post*, 50 Fed. 429: "If what others might suffer under the same circumstances were made the rule, then in no case could it be said individuals ever suffer special damages from a public nuisance." In *Lansing v. Smith*, 4 Wend. 9, Chancellor Walworth says: "Every individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation." See, also, *Skinner v. Hettrick*, 73 N. C. 53.

It is further objected that the complaint does not show that the respondent is a citi-

zen of the state, and entitled to fish in its navigable waters. The complaint alleges that he has been engaged in the business of fishing at the point in question for upward of a year prior to instituting the action. This, in connection with the other allegation, was sufficient, as against the objection so unseasonably made. To permit the construction and operation of this trap would afford the appellants the sole right to fish at the point in the navigable water already referred to. The right which they seek to exercise for their exclusive benefit is a right common to all of the citizens of the state, in the absence of express prohibitory legislation.

Another contention of appellants is that they are entitled to construct and operate the trap by virtue of a license to fish granted to them by the state fish commissioner, pursuant to the act of February 10, 1893 (Laws 1893, p. 15). In *State v. Crawford*, 14 Wash. 373, 44 Pac. 876, we decided adversely to this contention of appellants, holding that the legislative act did not contemplate a license to fish at any designated point, but only what is termed a "roving" license.

We have examined the several objections raised in the able brief of appellants' counsel, but are unable to conclude that any error was committed by the lower court calling for a reversal of the decree, and it is affirmed.

SCOTT, C. J., and ANDERS, DUNBAR, and REAVIS, JJ., concur.

(16 Wash. 339)

CITY OF WALLA WALLA v. MOORE et al.  
(Supreme Court of Washington. Jan. 22, 1897.)

TAXATION—PERSONAL PROPERTY IN HANDS OF TRUSTEE.

The situs of personal property in the hands of a trustee under a will, for the purpose of taxation, is the domicile of the trustee.

Appeal from superior court, Walla Walla county; William H. Upton, Judge.

Action by the city of Walla Walla against Miles C. Moore and others, executors of the will of Dorsey S. Baker, deceased, to recover taxes. Judgment for defendants, and plaintiff appeals. Affirmed.

C. M. Rader, for appellant. B. L. & J. L. Sharpstein, for respondents.

DUNBAR, J. The appellant, the city of Walla Walla, brought this action in the superior court of Walla Walla county to collect from the defendants the sum of \$2,660.70, municipal taxes, together with interest on the same, penalty, etc. This case was tried upon a stipulation of the facts, and the pleadings. It appears from the stipulation that one Dorsey S. Baker died in the city of Walla Walla on the 5th day of July, 1888, leaving a last will and testament, which will appointed the said defendants executors.

47 P.—48

The defendants Miles C. Moore, Edwin F. Baker, and Walla Walla Willie Baker, it is conceded, do not reside within the city of Walla Walla, while it is stipulated that Henry Clay Baker, one of the executors, does reside within the city of Walla Walla. One-fourth of the amount of the taxes was tendered by Henry Clay Baker, for himself and his co-defendants, to the treasurer of Walla Walla city; also, the taxes on a small amount of furniture, which it is conceded is situated in Walla Walla city. The trial court found for the defendants, and from that judgment an appeal is taken here by the city, and it is claimed that the property should respond to an assessment in the city where the decedent died. It does not appear, strictly, from the pleadings or the facts stipulated, that the decedent, Baker, was a resident of the city of Walla Walla. The most that does appear is that he died in Walla Walla, leaving personal property in that city. The authorities are somewhat divided on the proposition as to whether the property of the decedent which is represented by the executor or administrator should be taxed at the residence of the decedent, or at the residence of the executor or administrator. In *Mayor, etc., v. Alexander*, 10 Lea, 475,—a case cited by appellant,—it was decided that the legal title in such case is in the executor, for the purposes of administration; that he holds the property as trustee, and so, having the title within himself, the situs of the property, for the purpose of taxation, is clearly the residence or domicile of the executor. In *Cameron v. City of Burlington*, 56 Iowa, 320, 9 N. W. 239, it was held that where the administrator of an estate, having personal property thereof in his possession, resided in the same county in which his decedent died, but in a different township, such property was taxable in the township of his residence. The same rule was followed in *State v. Jones*, 39 N. J. Law, 650; and in *State v. Collector of Holmdel Tp.*, Id. 79, it was held that the tax upon personal property in possession or under control of the executor should be against the person holding the office, in his representative character, and such tax could be assessed only in the township where the executor resided, for all such property, wherever situated. And such, we think, is the well-established rule in cases where the property is in the hands of an executor, although there are some cases holding to the contrary. But we see no good reason why the decedent's property should be compelled indefinitely to respond to taxes in a locality where he happened to reside when he died. If he had moved away himself, of course the situs would have changed, so far as the taxation of this character of property was concerned; and, the property having passed into the hands of representatives of the decedent, there seems to be no good reason why their domicile should not be taken into considera-

tion in the taxation of the property which they represent and control. But the will in this case, which is a part of the stipulation, convinces us that these defendants, while they are named as executors, are, by the duties which are imposed upon them, really made trustees of this estate, and under all the authorities the situs of the property is with the trustees. See 1 Desty, Tax'n, p. 337; Mayor, etc., v. Stirling, 29 Md. 48; State v. Matthews, 10 Ohio St. 431; Trustees of Academy of Richmond Co. v. City Council of Augusta, 90 Ga. 634, 17 S. E. 61; State v. Collector of Holmdel Tp., 39 N. J. Law, 79. In fact, the general current of authority is in this direction.

The appellant cites Cooley, Tax'n, p. 270 (which is page 375 of the second edition, to which we have access), to sustain the contention that all the personal property belonging to the decedent's estate has its situs at the place of residence of the decedent, but we do not think the text sustains the contention. It sustains exactly the reverse. Mr. Cooley says: "In general, personal estate in the hands of a trustee is to be assessed to him at the place of his domicile [citing some of the cases to which we have above referred, and many others]. If the fund is in charge of a court, it is taxable in the jurisdiction having control of it." But it will be noticed that in this case the estate is not in charge of the court, and no court is exercising, or can exercise, any jurisdiction over it, under the provisions of the will itself, which especially provides that the estate shall be conducted by the executors, and that they shall be relieved from supervision and control of all courts, answering only to the tribunal of their own consciences for fidelity in their special office; providing, among other things, that they should not be required to give bonds. This direction was made under the provisions of section 1443 of the Code of 1881, and, under the directions of this will and of said section, all the supervision that the court had was to admit to probate such will; and after the will was proven the estate passed untrammelled, under the conditions of the will, into the hands of the executors or trustees. The judgment will be affirmed.

SCOTT, C. J., and GORDON and REAVIS, JJ., concur.

(16 Wash. 347)

STATE ex rel. J. F. HART LUMBER CO. v.  
SUPERIOR COURT OF SNOHOMISH COUNTY.

(Supreme Court of Washington. Jan. 23,  
1897.)

PROHIBITION—VIOLATION OF WRIT.

An alternative writ of prohibition, restraining a court and judge from trying a certain case before an alleged illegal jury, is not violated by trying it before another and legal jury.

Application by the state of Washington, on the relation of the J. F. Hart Lumber Company, for a writ of prohibition restraining the superior court of Snohomish county and John C. Kenney, judge thereof, from bringing a certain action in which relator is plaintiff to trial before an alleged illegal jury. Writ denied.

W. H. Pritchard, Stiles & Stevens, Coleman & Hart, and C. W. Seymour, for relator. Crowley, Sullivan & Grosscup, for respondent.

SCOTT, C. J. In this matter, upon the ex parte application of the relator, alleging facts from which it appeared that the lower court was about to exceed its jurisdiction in bringing a certain action of the J. F. Hart Lumber Company against Wyatt J. Rucker to trial before a jury of persons who were disqualified to act, in consequence of having served as jurors at another term of court within one year preceding said time, and as there seemed to be no other adequate remedy, and being willing that the matter should be brought before us for determination, an alternative writ of prohibition was directed to issue, returnable on the 15th day of January, 1897. Service was had and a return made by the respondent, from which it appears that said objectionable jury was discharged, and a new jury called, and the cause tried before the return day of the writ. The relator moved to strike this return, on the ground that the respondent had proceeded in violation of the alternative writ in trying said cause at all before the matter complained of was finally heard in this court. There is a contention as to what relief the plaintiff is entitled to now, under such circumstances, it being contended, upon one side, that the court should order such trial set aside, and place the parties in statu quo, and, on the other, that, the trial having taken place, no relief can be given in this proceeding.

But the first point to determine is, was there a violation of the writ? It is clear that the only matter sought to be prohibited was the trying of the cause before the said illegal jury. It is true some complaint was made, in the application of the relator, that the court had set the cause for trial in violation of one of the rules of said court. But it goes without saying that this court would not interfere by the extraordinary remedy of prohibition in a mere question of practice concerning a rule of the lower court, nor did the alternative writ purport to do so. The action of the respondent in discharging the jury complained of must be regarded as a confession, in so far as this proceeding is concerned, that said jury was an illegal one, and that the trial of the cause before said jury was properly restrained. The only purpose of such an alternative writ is to cause the court or judge to forego or abandon the contemplated action or proceeding complained of, or otherwise to show cause why the same should be permitted. Consequently, two courses

were open to the respondent,—one, to refrain from the alleged illegal action; the other, to contest the question of its illegality; and the former was chosen.

However, it is contended by the relator that this writ in terms absolutely prohibited the court from trying the cause at all until the return day. But we do not so regard it. If it did so absolutely prohibit the court from trying the cause over which it had jurisdiction, it was improper in form, and not appropriate to the relief to which the relator was entitled, and would be quashed, and the proceeding set aside, upon a proper application, although this court would not permit the lower court to proceed in violation of its terms while it remained in force, as the remedy would be to apply here for a modification. But the fair construction of the writ, especially considering the ground upon which it was based, recited therein, is that it was only intended to, and only did, restrain the court from proceeding to try said cause before the alleged illegal jury aforesaid until a hearing could be had and the matter determined. The lower court saw fit to comply with the alternative writ by discharging such jury and calling another. For that reason the final writ should not issue, but, the error being confessed, the relator will recover its costs against the defendant in the principal action, he being the interested party.

REAVIS, GORDON, and DUNBAR, JJ., concur.

(16 Wash. 353)

LEAVITT et al. v. CHAMBERS.

(Supreme Court of Washington. Jan. 26, 1897.)

STATUTES—REPEAL—GRANT OF CERTIORARI.

2 Hill's Code, p. 610 et seq., c. 14 (relating to certiorari) § 1623, authorizing the clerk to issue the writ without application to the superior court or judge, was repealed by Act March 13, 1895 (Sess. Laws 1895, p. 114) § 5, providing that the application must be made on affidavit of the party interested, "and the court may require a notice of the application to be given to the adverse party," etc.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Action in attachment, by Charles Leavitt and another against Terry Chambers, commenced in justice's court, and taken by certiorari by defendant to the superior court. From a judgment denying a motion to quash the writ of certiorari, plaintiffs appeal. Reversed.

Griffiths & Hutcheson, for appellants.

GORDON, J. This appeal is from a judgment of the superior court for Chehalis county, which reversed and set aside a judgment in favor of the appellants Leavitt and Maloney rendered by a justice of the peace. The respondent herein instituted the proceedings in the superior court under the provisions of page 610 et seq., c. 14, 2 Hill's

Code, relating to certiorari. The writ was issued by the clerk conformably to section 1623, Id. Upon the return of the writ in the lower court the appellants herein moved to quash the writ, upon the ground, among others, that it was issued by the clerk without any order or authority from the court or the judge thereof. The motion to quash was denied, and exception duly taken.

The real question for decision is, does the act approved March 13, 1895, relating to special proceedings of a civil nature (Sess. Laws 1895, p. 114), repeal section 1623 of the Code, which is as follows: "Upon complying with the provisions of the preceding section, the party applying shall be entitled to such writ, which shall be issued by the clerk as of course, and no application to the superior court, or the judge thereof, shall be necessary in the premises." We think the question must be answered in the affirmative. Section 6, art. 4, of the constitution of this state, relating to the jurisdiction of the superior court, provides, "Said courts and their judges shall have power to issue writs of \* \* \* certiorari, \* \* \*" etc., which evidently contemplates that the application for the writ shall be made to the court, or the judge thereof, and the act of 1895, supra, is in harmony therewith. Section 5 of that act is as follows: "The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice." In other words, the act of 1895 provides for a different mode of procedure than that contemplated by section 1623, above set out. The later act should prevail. It furnishes in itself a full, complete mode of procedure in certiorari proceedings, from which it follows that the prior proceedings in relation thereto are abrogated, even without words of express repeal. We think that the court erred in denying the motion to quash the writ. Reversed.

SCOTT, C. J., and DUNBAR, REAVIS, and ANDERS, JJ., concur.

(16 Wash. 353)

STATE v. CONSIDINE.

(Supreme Court of Washington. Jan. 26, 1897.)

SUPERIOR AND MUNICIPAL COURTS—JURISDICTION—INDICTMENT—CONSTITUTIONAL LAW.

1. The superior court has concurrent jurisdiction with a municipal court over misdemeanors; Const. art. 4, § 6, providing that the superior court shall have original jurisdiction in all cases of misdemeanor not otherwise provided by law, and in all cases in which jurisdiction shall not have been vested exclusively in some other court, and Act Feb. 28, 1891, creating municipal courts, declaring, by section 2, subd. 3, that, where the jurisdiction hereby conferred may be exercised by other

courts under the constitution and laws, it shall be deemed concurrent with such other courts.

2. An information for violation of the law against employing females in a saloon need not give the name of the female employed.

3. A statute making it an offense to employ females in a saloon is within the police power, and does not contravene the constitutional inhibition against abridgment of liberty to contract.

Appeal from superior court, Spokane county; Norman Buck, Judge.

John W. Considine was convicted of employing a female in a saloon, and appeals. Affirmed.

John Wiley, Jones, Voorhees & Stevens, and R. W. Nazum, for appellant. J. W. Felghan, for the State.

REAVIS, J. The defendant was convicted in the superior court of Spokane county of "employing, and participating in employing, a female person in his saloon, beer hall, bar room, theater, and place of amusement, where intoxicating liquors were sold as a beverage." The information charging the crime is founded upon the act of March 19, 1895, containing one section which reads as follows: "No female person shall be employed in any capacity in any saloon, beer hall, bar room, theatre, or place of amusement, where intoxicating liquors are sold as a beverage, and any person or corporation convicted of so employing, or of participating in so employing, any such female person shall be fined not less than five hundred dollars; and any person so convicted may be imprisoned in the county jail for a period of not less than six months." The defendant appeals, and raises a number of questions for decision here. The first one for our consideration is the jurisdiction of the superior court to hear the cause. Section 8, art. 4, of the constitution vests jurisdiction in the superior court, in the following language: "The superior court shall have original jurisdiction \* \* \* in all criminal cases amounting to a felony and in all cases of misdemeanor not otherwise provided by law." And in another clause of the same section: "The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court." February 28, 1891, a law was enacted creating municipal courts in cities of the first class. Subdivision 3 of section 2 of the law declares: "Wherever the jurisdiction hereby conferred may be exercised by other courts under the constitution and laws of this state, the jurisdiction hereby conferred shall be deemed to be concurrent with such other courts." The contention of defendant is that the law enacted by the legislature divested the superior court of jurisdiction of misdemeanors in the city of Spokane, and thereafter vested it exclusively in the city municipal court. This contention cannot be maintained. We think the rule is that a grant of jurisdiction over a certain subject-matter to one court does not itself

imply that such grant of jurisdiction is to be exclusive. The language of the constitution and the law enacted by the legislature creating the city municipal court is plain, and the jurisdiction of that court and the superior court over misdemeanors is concurrent.

The defendant maintains that the information does not state a crime. A demurrer was interposed by defendant, but does not point out specifically the objection now made,—that the information is fatally defective because it does not state the name of the female employed by the defendant. We have held an information against selling liquor without a license good which omitted the name of the person to whom the sale was made, but which stated that the name was unknown to the prosecuting attorney. *State v. Bodeckar*, 11 Wash. 417, 39 Pac. 645. The gravamen of this crime is employing a female person by the defendant in the place prohibited by the statute. There would seem to be no good reason apparent why the name or names of the female persons employed should be specified.

We do not think there was error in the refusal of the instructions requested by defendant, as the jury were substantially and fairly instructed on the testimony submitted in the case. Nor were the remarks of the court to the jury, appearing on the record here, sufficient to warrant a reversal of the case.

The principal contention of the defendant is that the statute under which he was convicted is unconstitutional. These objections are made to the statute: That it violates: "First. Section 3 of article 1 of the constitution of the state of Washington, which is as follows: 'No person shall be deprived of life, liberty or property without due process of law.' Second. Section 12 of article 1 of the constitution of the state of Washington, which is as follows: 'No law shall be passed granting to any citizen or class of citizens or corporation, other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.' Third. The fourteenth amendment to the constitution of the United States, which is as follows: 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'" Defendant contends that a female is a citizen, and that her liberty to contract is abridged by the statute, and argues that, before the law, her right to a choice of vocations cannot be denied on account of sex. But that liberty to contract was always limited to lawful contracts is elementary law, and the courts have followed it from time immemorial, and contracts against public policy or good morals



cannot be enforced, and it was always competent for the legislative power to prohibit acts under them by attaching a penalty. When the lawmaking power—the legislature—has spoken, and prohibited a contract, that ends the right to enter into such contract, if the authority is vested in the legislature to enact the prohibition. The statute in question is evidently intended by the legislature for the maintenance of good morals, and in preventing a nuisance. The legislature is the supreme authority, within constitutional limitations, to determine what is and what is not an immoral business or a nuisance; and, when it has so determined, its enactment is valid, unless the legislative act is clearly partial, arbitrary, and oppressive. The prohibition of employment of a female person in the statute under which defendant was convicted uniformly applies to all persons employing, and who are engaged in a like business with defendant, and extends to all female persons employed. After the enactment of the law of March 19, 1893, it became a part of the "law of the land," and the defendant was properly convicted of its violation. The judgment is affirmed.

ANDERS and DUNBAR, JJ., concur.

(16 Wash. 350)

STATE ex rel. WOLF v. MOORE, Judge.  
(Supreme Court of Washington. Jan. 28, 1897.)

WRIT OF PROHIBITION—EFFECT.

A writ of prohibition against the entertainment of a suit to review a decree in foreclosure, so as to exclude certain land therefrom, does not prevent entertainment of a suit by one not a party, or in privity with a party, to such proceeding, or to the action to foreclose, to subject such land to his judgment, on the ground that it had been released from the lien of the mortgage before foreclosure.

Application by Charles H. Wolf for writ of mandate to James Z. Moore, judge of the superior court of Spokane county. Writ granted.

Graves, Wolf & Graves, for relator. W. S. Dawson, Forster & Wakefield and Winston & Winston, for respondent.

SCOTT, C. J. This is an application for a writ of mandate to compel the respondent to proceed with the trial of a cause in the superior court of Spokane county, in which the relator is plaintiff, and Laura Wolferman et al. are defendants. An alternative writ was directed to issue, and the matter is now before us upon the return of the respondent thereto. Upon the showing made by the relator, it appears that he is the owner of a judgment which he claims is a lien upon certain lands owned by or in which the defendants have an interest; that, at the time said judgment lien attached, said lands were subject to a mortgage, which also included other lands; but that the particular lands in controversy were afterwards released from

the lien of said mortgage, whereby it is claimed that the judgment lien of the relator became a prior lien on said lands. Thereafter the mortgage was foreclosed upon all the lands, not excepting that part claimed to have been released, but the relator was not made a party to said action, which was before this court in various ways upon several different occasions. 6 Wash. 84, 32 Pac. 1017; 7 Wash. 234, 34 Pac. 930; 8 Wash. 141, 35 Pac. 603, and 8 Wash. 591, 36 Pac. 443.

It appears from the return that the respondent refused to proceed with the trial of said cause after the joining of issue, on the ground that he was prohibited from so doing by the final writ issued in the proceeding of State v. Superior Court of Spokane Co., 8 Wash. 591, 36 Pac. 443, aforesaid. Most of the matters alleged in the return as a reason why the court should not proceed with the trial of said cause go to the merits of the action, and, of course, we would not assume to determine them in this controversy, nor to examine into them further than to determine that the plaintiff was asserting in good faith an independent claim against said lands. While the language of said writ, literally construed, might be interpreted as preventing the respondent from trying this cause, it is evident that it must be construed with reference to the matters in litigation in the mortgage foreclosure suit aforesaid, or that should have been litigated therein between the parties thereto; and the language of the writ must be limited by such matters, for certainly it could have no force as against a person not a party to the record, nor in privity with any party to those proceedings, who is seeking to maintain an independent claim against said lands, for to hold such a party so precluded would be to deprive him of his property without due process of law. We are of the opinion that the final writ should issue. The usual order will be made imposing costs herein on the defendants in the action aforesaid, they being the interested and resisting parties here.

DUNBAR and REAVIS, JJ., concur.

(16 Wash. 355)

SENGFELDER et al. v. HILL et al.  
(Supreme Court of Washington. Jan. 28, 1897.)

APPOINTMENT OF RECEIVER—INSUFFICIENT SHOWING—AMENDED PLEADING.

1. A receiver will not be appointed, in an action to recover possession, on mere allegations that plaintiffs are the owners in fee and entitled to the possession, which defendants unlawfully withhold, to plaintiff's damage.

2. Under Hill's Ann. Code, § 222, which provides that an amended pleading shall be complete in itself, where plaintiff has filed an amended complaint, he cannot rely on the original.

Appeal from superior court, Spokane county; Jesse Arthur, Judge.

Action by John Sengfelder and another against Henry Hill, S. A. Wells, John A. Peacock, and others. From an order appointing a receiver, defendants appeal. Reversed.

A. G. Avery and Blake & Post, for appellants.

GORDON, J. Plaintiffs in the court below (respondents here) brought this action to recover possession of certain real property, described in the complaint, located in the city of Spokane, and for damages, and a receiver pendente lite to take charge of the property and collect the rents, etc. Upon the property in dispute there is a large, four-story building, occupied by numerous tenants. The amended complaint alleges that the respondents are the owners in fee and entitled to the possession of the property, and that the appellants, without right or title, entered into possession of it, and unlawfully withhold possession, to plaintiffs' damage in the sum of \$25,000. Thereafter, and within the time in which the appellants were by law permitted to answer, and prior to any answer, respondents moved for the appointment of a receiver. A hearing was had, and a receiver appointed to take charge of said property. The defendants appeal.

In opposition to the motion for the appointment of a receiver, the appellants introduced numerous affidavits to the effect that appellants Breslauer, Wise, and Ostroski were the owners in fee of the property in dispute; that they derived title by deed of general warranty from respondent C. W. Carson, to whom they had paid \$110,000 as purchase price thereof; that, pursuant to such purchase, they entered into possession of the property, and had been in actual, open, and notorious possession thereof, and of the whole thereof, for upward of three years prior to the commencement of the action; that their codefendants and appellants were their tenants; that the legal title to said premises of record in the office of the auditor of said county was in said appellants Breslauer, Wise, and Ostroski; that they were solvent, and abundantly able to respond in damages, if damages should be awarded against them. No other proof of title in either party was offered or received upon the hearing. It would seem to require little argument to demonstrate that the order appointing a receiver, under the circumstances, was unwarranted. "The rule seems to be universal, in this country and in England, that whenever the contest is simply a question of disputed title to the property, the plaintiff asserting a legal title in himself against a defendant in possession and receiving the rents and profits under a claim of legal title, equity refuses to lend its extraordinary aid by interposing a receiver, just as it refuses an injunction under similar circumstances, leaving the plaintiff to assert his title in the ordinary forms of pro-

cedure at law." *Rollins v. Henry*, 77 N. C. 467. See, also, 3 Pom. Eq. Jur. (2d Ed.) § 1333; High, Rec. (3d Ed.) § 553 et seq. In *Brundage v. Association*, 11 Wash. 277, 30 Pac. 666, this court said: "Courts will not appoint a receiver, except when it is necessary, either to prevent fraud, protect property from injury, or preserve it from destruction; and mere allegations of these facts are not sufficient to authorize a court to appoint a receiver."

It appears from the transcript that, in the original complaint in the action, plaintiffs' title is set out with particularity, and it is contended that the court below based its order in part upon this original complaint. The motion for the appointment of a receiver was based upon the records and files, and it is further contended that the original complaint was a part of said record. While it is undoubtedly true that, for certain purposes, an original complaint does not cease to be a part of the record, even though an amended complaint be subsequently filed, nevertheless the plaintiff cannot avail himself of any allegations contained in the original complaint. When he elects to amend, and does amend, he must stand upon the case as stated in his amendment. Section 222, Hill's Ann. Code, provides that, when any pleading is amended, it shall be done by filing a new pleading, and "such amended pleading shall be complete in itself, without reference to the original or any preceding amended one." While in a proper case his adversary might avail himself of matter contained in an original complaint, we think it cannot be invoked by plaintiff in his own behalf. No proper case was made for the appointment of a receiver herein, and the order appealed from will be reversed.

SCOTT, C. J., and DUNBAR and REAVIS, JJ., concur.

(16 Wash. 365)

# TAYLOR v. SCHOOL DIST. NO. 7 OF CLALLAM COUNTY.

(Supreme Court of Washington. Jan. 26, 1897.)

## SCHOOL DIRECTORS—EMPLOYMENT OF TEACHER—VALIDITY OF CONTRACT.

A board of school directors can make a valid contract with a teacher for a term of school to begin in the next succeeding school year, and after the term of one of the directors has expired.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by A. M. Taylor against school district No. 7 of Clallam county for breach of contract. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Geo. C. Hatch, for appellant. W. L. Marquardt, for respondent.

REAVIS, J. On the 28th day of June, 1895, the defendant, by a majority of its

board of directors, employed plaintiff to teach in the public schools of the district for the term during the school year commencing the 1st day of July, 1895, and ending the last day of June, 1896, at the rate of \$70 per month. At the time the contract was made, the election for school officers for the ensuing year had been held. When the contract was made, the school board consisted of McGeorge, Graham, and Hatfield. At the election held on the second Monday of June, Eacrett was elected to succeed Graham. After the board was reorganized following the election, it refused to recognize the contract previously made with plaintiff, and the present action was instituted to recover damages for breach of contract. A general demurrer was interposed to the complaint, and overruled. The defendant then answered, denying the essential paragraphs of the complaint, and set up the affirmative defense that McGeorge and Graham, on the 20th of June, 1895, for the fraudulent and unlawful purpose of forcing the district to employ plaintiff to teach said school, did conspire with plaintiff to that end, and did, against the known wishes of the board, as reorganized by said election, make the contract set out in the complaint; and that, at the time the contract was made with plaintiff, Hatfield, one of the directors, opposed hiring plaintiff to teach the school; and that the newly-elected director was also opposed to engaging plaintiff. To this affirmative defense plaintiff interposed a demurrer, on the ground that sufficient facts were not stated to constitute a defense. The demurrer was sustained.

There is but one question presented in this cause: Can a board of directors of a school district make a valid contract with a teacher for a term of school to begin in the next succeeding school year, and after the term of one of the directors has expired? We think the demurrer to the affirmative defense set up in the answer was properly sustained. There was no act constituting fraud in the execution of the contract alleged, making the only question one of power of the board to make such a contract. The district school board is a corporation representing the district. It is a continuous body. While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its individual members. An essential characteristic of a valid contract is that it is mutually binding upon both the parties to it. A contract by a school board the duration of which extends beyond the term of service of one of its members is not, therefore, invalid for that reason.

The cases cited by appellant, *Stevenson v. School Directors*, 87 Ill. 255, and *Davis v. School Directors*, 92 Ill. 293, discuss the statutes of Illinois creating school boards, and lay stress upon provisions in those laws

which are not contained in the laws of Washington. The case of *Webb v. Spokane County*, 9 Wash. 103, 37 Pac. 282, may be well applied in support of the validity of the contract in this cause. The judgment is affirmed.

DUNBAR and GORDON, JJ., concur.

(16 Wash. 367)

LAURENDEAU v. FUGELLI.

(Supreme Court of Washington. Jan. 27, 1897.)

APPEAL BOND—FILING BEFORE SERVICE OF NOTICE.

An appeal will be dismissed on motion where the appeal bond was filed before service of the notice of appeal.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by P. Laurendeau against Peter Fugelli. Judgment for defendant, and plaintiff appeals. Appeal dismissed.

Edward Pruyn and L. A. Vincent, for appellant.

PER CURIAM. The motion to dismiss this appeal will have to be sustained. Passing the form of the bond, which in no manner describes or attempts to describe the judgment which is sought to be appealed from, the record shows that the judgment of nonsuit was granted on the 13th day of September, 1893, but was not entered until the 11th day of September, 1894, when, on motion of plaintiff, the judgment was entered *nunc pro tunc*. On the 8th day of September, three days before the entry of the same, the appeal bond above referred to was executed, but the notice of appeal was not given until the 12th day of September, 1894, four days after the filing of the bond. The appeal will, therefore, be dismissed.

(16 Wash. 378)

MILLS et al. v. COUNTY OF THURSTON et al.

(Supreme Court of Washington. Jan. 29, 1897.)

TAXATION—LIEN ON PERSONAL PROPERTY—INTERMINGLING GOODS—CHANGE OF TITLE AND POSSESSION—DISTRAINT FOR TAXES.

1. Under Laws 1895, p. 520, § 21, providing that taxes on personalty shall be a lien thereon if possession shall have been transferred after the 1st day of January next succeeding the levy, a lien on goods cannot be avoided on the ground that a portion of them have been sold, and other goods added, since the levy, rendering it impossible to segregate the part actually assessed.

2. Laws 1895, p. 520, § 21, providing that taxes assessed on personalty shall be a lien thereon though possession has been transferred after the 1st day of January next succeeding the levy, applies also where title has been transferred as well as possession.

3. Personalty liable to distraint for taxes under Laws 1895, p. 514, c. 176, § 15, relating to the collection of taxes, is not relieved from liability by a transfer of title and possession after the lien for taxes has attached.

Appeal from superior court, Thurston county; T. M. Reed, Jr., Judge.

Suit by George G. Mills and Harry Cowles against the county of Thurston and George Gelbach, treasurer, to enjoin a distraint for taxes. From a judgment on a demurrer to the complaint, plaintiffs appeal. Affirmed.

Haight & Owings, for appellants. Milo A. Root, for respondents.

SCOTT, C. J. This suit was brought to enjoin the defendants from distraining certain personal property for taxes levied in the year 1895. The defendants being successful in the lower court upon a demurrer to the complaint, the plaintiffs have appealed. It appears that on the 1st day of April, 1895, one Frost was conducting a retail hardware store in the city of Olympia, and that he and his wife were the owners of the stock of goods therein on which the taxes sought to be collected were assessed, and continued to be such owners until some time in the month of February, 1896, in which month said stock was purchased by the plaintiffs. The statute (section 21, p. 520, Laws 1895) provides that "the taxes assessed on personal property shall be a lien upon all of the personal property of the persons assessed, and also upon the property so assessed if the possession thereof shall have been transferred, from and after the first day of January next succeeding the date of the levy of such taxes." So that on the 1st day of January prior to the transfer the taxes in question had become a lien on the stock of hardware as it then stood. *Binkert v. Railway Co.*, 98 Ill. 205-218; *Hill v. Figley*, 23 Ill. 304; *Bridewell v. Morton*, 46 Ark. 73; *Trust Co. v. Memminger (Neb.)* 68 N. W. 1014.

But it is contended that as against these plaintiffs the lien could only be enforced, if at all, upon that part remaining of the stock as it existed when it was subject to assessment, viz. the 1st day of April, 1895, and that since that time goods had been continually sold therefrom, and other goods added to the stock and intermingled therewith, and that they could not be segregated. It was not alleged in the complaint, however, that there was not enough remaining of the original stock from which to make the amount of the tax penalties, etc. And furthermore a sufficient answer to this contention is furnished by the well-established rule that the loss in such a case, if any, shall fall upon the party who caused the goods to be mixed, and in this instance it was by Frost and his successors, the plaintiffs; consequently, any of the goods can be taken for the tax.

It is further contended that the only transfer after which the statute authorizes the lien to continue and follow the property is a transfer of "possession," not of title, as in this case. But it is evident that, if the statute is to receive such a literal construction, it would serve little or no purpose. While

there is some conflict in the authorities as to whether revenue statutes should be given a liberal or a strict construction, it seems to us that the better rule is that they should receive a fair construction to effect the end for which they were intended. *U. S. v. Hodson*, 10 Wall. 395-406; *Cluquot's Champagne*, 3 Wall. 114-144; *Cornwall v. Todd*, 38 Conn. 443-448; *State v. Taylor*, 35 N. J. Law, 184-190; *End. Interp. St.* §§ 245, 251, 258, 264, 265. It is a well-known fact that a large amount of personal property escapes taxation entirely, due to the facilities afforded by the character of the property for evading the collection of taxes thereon. We see no reason why the state should not have the same protection that would be given to an individual. Had the plaintiffs purchased this property subject to a mortgage lien, it would not be contended that they did not take it subject to the mortgage. Here was an existing lien which was a matter of record upon these goods at the time of the purchase, and the plaintiffs must be held to have had notice of the existence of such lien, and that the taxes were unpaid.

It is further contended that the right of distraint can only be exercised against the person owing the tax, and that, where the goods have been transferred and the title has passed, the remedy is lost. But, applying the same rule of a fair construction to effect the purpose of the law, it would seem that the goods not only pass subject to the lien, but also subject to the remedy given. The statute provides that: "Immediately after the first day of December the county treasurer shall proceed to collect all delinquent personal property taxes, and if such taxes are not paid on demand he shall distraint sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the same." Laws 1895, p. 514, c. 176, § 15. The lien would be of little or no consequence if it was to cease upon the sale of the property to a third party, as a transfer would be easy to make at any time, and the payment of the taxes thus evaded in many instances. Taxes are usually collected in a summary manner; and necessarily so, that there may be no harmful delay in providing the public revenue. Unreasonable restrictions should not be placed thereon. The state is not required to resort to judicial proceedings to enforce payment. *McMillen v. Anderson*, 95 U. S. 37. If the contention of the plaintiffs was true, it would destroy the object for which the lien was given, and would render that part of section 21 relating to personal property nugatory. No other means of enforcing the lien is provided. The statutes referred to must be construed together, and one part will not be given a construction that nullifies another part unless they are clearly inconsistent. It is evident that the lien was given for the purpose of insuring the collection of the tax, and to prevent a loss by reason of the transfer of the

property. There is no reason why the same remedy should not obtain against the party purchasing as against the original owner, so far as the property purchased is concerned. The legislature had in mind the subjection of the property to the payment of the tax, in giving this lien, rather than enforcing a mere personal obligation of the original owner. Section 15 aforesaid directs the distress of goods and chattels, if found within the county; and this would indicate that it was not intended that the original owner should be considered as the only person who could be "charged with such taxes," but that the property might be taken anywhere in the county, regardless of ownership or possession, where the lien had attached. **Affirmed.**

DUNBAR, GORDON, and REAVIS, JJ.,  
concur.

(16 Wash. 371)

CONNER v. SCOTT

(Supreme Court of Washington. Jan. 28,  
1897.)

GARNISHMENT AS DEFENSE—COUNTERCLAIM.

1. An answer pleading the garnishment of defendant in another action against plaintiff is insufficient to state a defense where it shows that defendant has not answered to the writ of garnishment.

2. A note cannot be pleaded as a counterclaim by the surety thereon against his principal, in an action commenced before its payment, as no cause of action in his favor existed at the time of the commencement of the action. Code Proc. § 195, subd. 2.

Appeal from superior court, Skagit county; George A. Joiner, Judge pro tem.

Action by James J. Conner against James Scott. Judgment for plaintiff, and defendant appeals. **Affirmed.**

Millon & Houser, for appellant. Moore & Pittman, for respondent.

DUNBAR, J. There are but two questions raised on this appeal. Action was brought to recover on two causes of action. At the close of the plaintiff's testimony, a motion was made for defendant for a nonsuit of the plaintiff's first cause of action, which motion was by the court sustained. The defendant answered that, if he was in any way indebted to plaintiff, the amount of such indebtedness had been garnished upon, and judgment rendered against plaintiff in favor of one Henry Quinn. Upon motion of the plaintiff, this cause of action was stricken from the answer, and the action of the court in sustaining said motion to strike is assigned as error here. The defendant also set up as a counterclaim a certain promissory note made by plaintiff to one B. D. Minklor, which defendant signed as surety, and, as such, he alleged he was compelled to pay. The testimony in support of this defense showed that the note alleged to have been taken up by defendant as surety had not

been paid or taken up until after the commencement of this action by the plaintiff. On motion, a nonsuit was granted in favor of the plaintiff for this cause of action, and the granting of said motion is also assigned as error.

So far as the count of garnishment is concerned, it is not sufficiently pleaded to become a defense to the action, the answer itself stating that no answer to said writ of garnishment had been made by the defendant. On the other point,—the sustaining of the motion for nonsuit on the ground that the note had not been paid until after the commencement of the action,—appellant admits that the general rule of law is that a demand must be enforceable at the time of the commencement of the action before it can be pleaded as a counterclaim, but that the courts will not always recognize this rule, and that the case at bar does not discover such facts as would make the reason for the rule applicable, and cites some cases on general proposition. There is no question of the applicability of the rule involved in this case. It is purely a statutory provision. Subdivision 2 of section 195 of the Code of Procedure especially provides that a cause of action which can be pleaded as a counterclaim, where it does not arise out of the contract or transaction set forth in the complaint, must exist at the commencement of the action. The statute is not susceptible of construction. **Affirmed.**

SCOTT, C. J., and ANDERS, GORDON,  
and REAVIS, JJ., concur.

(16 Wash. 368)

WRIGHT v. STINSON, Sheriff.

(Supreme Court of Washington. Jan. 28,  
1897.)

TAXATION—MIGRATORY STOCK LAW—COLLECTION OF TAXES.

1. Laws 1895, p. 105, c. 61, providing that live stock driven into the state for the purpose of grazing after the first Monday in April in any year shall be assessed for taxes as if it had been in the county at the time of the annual assessment, is not unconstitutional, as discriminating between live stock and other property.

2. The power conferred upon the sheriff, under Laws 1895, p. 105, c. 61, to collect the taxes levied on stock driven into the state for grazing purposes, without special authority from the assessor, is not a violation of the constitutional rights of the owner.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by James Wright against W. M. Stinson, sheriff. There was judgment for defendant, and plaintiff appeals. **Affirmed.**

Edward Pruyn, for appellant. Eugene E. Wager, for respondent.

DUNBAR, J. This case involves the constitutionality of chapter 61 of the Acts of

the Legislature of 1895, which is known as the "Migratory Stock Act." Appellant assigns no reasons why this act should be declared unconstitutional, but contents himself with citing four cases to sustain his claim, viz.: *Graham v. Board* (Kan. Sup.) 2 Pac. 549; *Board v. Wilson* (Colo. Sup.) 24 Pac. 563; *Farris v. Henderson* (Okla.) 33 Pac. 380; *Board v. Dunn* (Colo. Sup.) 40 Pac. 357. An examination of these cases convinces us that they are not controlling in the case at issue. In the first two cases the migratory stock law was held unconstitutional for the reason that the acts imposed a tax upon certain kinds of personal property, while certain other kinds of the same nature escaped taxation. It was specially held there that there was no general provision for taxing property brought into the state after the 1st of March; that there was no exception to this law, except in the case of live stock brought in after the assessment; that all personal property in those states, viz. Colorado and Kansas, was to be assessed on the 1st day of the particular months mentioned, and there was no provision for assessing any kind of personal property at any other time. Consequently, it followed that migratory stock could not be assessed for taxes in the manner provided by the statute without making an unconstitutional distinction in the assessment. But here this objection cannot obtain, and no discrimination is made between live stock and any other property, and the method and time of assessment are exactly the same under the provisions of the act in controversy and the general statutes. It is true that section 6 of the revenue law of 1893 provides that all personal property shall be assessed with reference to its value on the 1st day of April of each year; but it does not provide that the personal property must be situated in the county or state on the 1st day of April, in order to be assessed or taxed that year, but especially provides, in the case of personal property generally, that when it is moved into this state from another state between the 1st day of April and the 1st day of July, the property may be assessed. The other authorities cited by appellant, we think, are not in point.

As to the second point, that the sheriff had no power to collect a tax levied under said act without a written authority from the assessor, or some one who had power to give him authority, to levy upon said sheep for the purpose of collecting said tax, it is sufficient to say that the state is competent to direct the mode or method by which the taxes are collected, and no constitutional right is invaded by the method prescribed in this act. We think no constitutional right is invaded in any manner by the act, and the judgment will therefore be affirmed.

SCOTT, C. J., and ANDERS, GORDON, and REAVIS, JJ., concur.

(16 Wash. 373)

GOON GAN v. RICHARDSON et al.

(Supreme Court of Washington. Jan. 29, 1897.)

PAROL EVIDENCE—ALIENS.

1. In foreclosure of a mortgage, defendants cannot show by parol that the mortgage was in fact a deed.

2. The state alone can show that a grantee was an alien, and therefore incapable of taking title to the land conveyed, under Const. art. 2, § 33. *Dunbar and Reavis, JJ.*, dissenting.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by Goon Gan, administrator of the estate of Charles Yune, deceased, against F. J. Richardson and W. J. Reed, to foreclose a mortgage. From a decree for plaintiff, defendants appeal. Affirmed.

E. Pruyn, for appellants. White, Munday & Fulton and Eugene E. Wager, for respondent.

GORDON, J. This appeal is from a decree of the superior court of Kittitas county foreclosing a real-estate mortgage executed by appellants' grantor to plaintiff's intestate.

The first error complained of is that there was no proof of nonpayment of the mortgage debt, and that the court should have granted a motion for nonsuit. The original mortgage was not produced, but a certified copy thereof was admitted, and, under section 1685, 2 Hill's Code, such certified copy is entitled to the same weight, and is produced with the same effect, as the original. In addition thereto, we think that the testimony of the witness Fulton was sufficient, prima facie, to establish the nonpayment, when, as here, there was no plea of payment set up in the answer. The court did not err, therefore, in denying the motion for nonsuit.

It is next insisted that the court wrongfully sustained an objection to the introduction of evidence under defendants' first affirmative defense. The defense attempted was that the mortgage in suit was in fact a deed, and that the parties thereto intended thereby to convey the premises to the grantee, who was an alien, and disqualified, under the provisions of section 33, art. 2, of the constitution of this state, to take title to real property. We think the court did not err in excluding the evidence, for two reasons: First, it was incompetent for the defendants, by parol evidence, to establish that to be a deed which was in form a mortgage. No authority has been cited in support of appellants' contention in this particular, and we do not think that the case falls within any known exception to the established rule which excludes parol evidence to vary the terms of a written instrument. Second, it was not competent for the appellant to show that the mortgagee was incapable of taking title to real estate. That could only be shown in a suit by the state. *Mortgage Co. v. Carstens* (decided in this court December 11, 1890) 47 Pac. 421.

Upon the record we perceive no sufficient reason for reversing the decree. Affirmed.

SCOTT, C. J., and ANDERS, J., concur.

DUNBAR, J. I concur in the result, but dissent from the proposition that it was not competent for any one but the state to show that the mortgagee was incapable of taking title to real estate.

REAVIS, J. I join in the views of Judge DUNBAR.

(23 Nev. 359)

STATE ex rel. JONES v. MACK, District Judge. (No. 1,487.)

(Supreme Court of Nevada. Feb. 4, 1897.)

LAND CEDED BY STATE FOR FEDERAL BUILDINGS—EXCLUSIVE JURISDICTION—RESERVATION FOR ADMINISTRATION OF CRIMINAL LAWS.

1. Under Const. U. S. art. 1, § 8, providing that congress shall have power to exercise exclusive legislation over the seat of government, "and to exercise a like authority over all places purchased by consent of the legislature of the state in which the same shall be, for the erection of forts \* \* \* and other needful buildings," land so purchased ipso facto falls within the exclusive jurisdiction of the United States.

2. Within such section, post offices and federal courthouses are "needful buildings."

3. Where a state cedes to the United States exclusive jurisdiction over land purchased as a site for a public building, "for all purposes except the administration of the criminal laws of this state," the state has no jurisdiction for the punishment of crimes committed on the purchased land, but only the right to execute criminal process there for the violation of the laws of the state committed elsewhere within the state.

Original application for a writ of certiorari, on the relation of Charles A. Jones, against Charles E. Mack, judge of the district court of the state of Nevada, Ormsby county. Proceedings annulled.

Robt. M. Clarke, James F. Dennis, and William Woodburn, for petitioner. A. J. McGowan, Dist. Atty., and J. R. Judge, Atty. Gen., for respondent.

MASSEY, J. This is an original application to the supreme court for a writ of certiorari.

It appears, from the petition and affidavit filed herein, and from the records and proceedings of the district court certified to this court, that the petitioner was indicted by the grand jury of Ormsby county, on the 11th day of December, 1896, for the crime of assault with a deadly instrument, with intent to inflict upon the person of another bodily injury; that the petitioner was duly arrested for the said offense, and taken before said district court; that, when required to plead to said indictment, he interposed a special plea to the jurisdiction of the court, in which it was alleged that the offense charged in said indictment was committed upon

certain lands in Carson City, Ormsby county, state of Nevada, purchased by the United States, by the consent of the legislature of the state, for the erection of a courthouse, post office, and other needful public buildings, and upon which lands there had been erected, and same were then used by the United States, the said needful public buildings. To this plea the district attorney demurred, alleging that the facts set up in the plea did not oust the jurisdiction of the state; and the district court sustained the demurrer, and required the petitioner to plead to the merits of the indictment, and proceeded to set the action for trial for a certain day. It also appears, from the record of the district court, that the district attorney admitted that the alleged offense was committed upon lands purchased by the United States, with the consent of the legislature of the state of Nevada, and that the United States had erected a post office and courthouse thereon. Counsel for respondent concede that the special plea to the jurisdiction of the district court, and the proceedings thereon, are regular and proper, and that the proceedings in this court upon certiorari are proper and regular; therefore no opinion is given upon these questions.

From the facts above stated the petitioner contends that the said district court has no jurisdiction over the alleged offense, for the reason that the same was committed upon lands over which, under the provisions of section 8, art. 1, of the federal constitution, the United States has the right to exercise exclusive jurisdiction. Section 8, art. 1, of the federal constitution provides that "congress shall have power \* \* \* to exercise exclusive legislation, in all cases whatsoever, over such district, \* \* \* and to exercise a like authority over all places purchased by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." By act of congress, approved January 13, 1885 (23 St. 281, c. 19), the secretary of the treasury was authorized and directed "to purchase a site for, and cause to be erected thereon, at the city of Carson City, in the state of Nevada, a suitable building, \* \* \* for the accommodation of the United States courts, post office, \* \* \* provided that no money to be appropriated for said building shall be available \* \* \* until the state of Nevada shall cede to the United States exclusive jurisdiction over the same \* \* \* for all purposes except the administration of the criminal laws of said state and the service of any civil process therein." By an act of the legislature of the state of Nevada, approved February 24, 1885 (St. Nev. 1885, p. 40), the jurisdiction of the state was ceded to the United States over all lands selected or acquired by the United States, "for the purpose of erecting thereon a public building or public buildings for the accommoda-

tion of the United States courts, \* \* \* and the United States shall have exclusive jurisdiction over the same \* \* \* for all purposes except the administration of the criminal laws of this state, and the service of any civil process therein or thereon." Section 5391 of the Revised Statutes of the United States makes the offense charged in the indictment found by the state grand jury punishable under the laws of the United States when committed in any place "ceded to and under the jurisdiction of the United States." The above are the express provisions of state and federal law bearing directly upon the question to be determined in this action. It has been held that, when a purchase of land has been made by the United States, with the consent of the legislature of the state, for any of the purposes enumerated in section 8 of article 1 of the federal constitution, the land so purchased, by the very terms of the constitution, ipso facto falls within the exclusive jurisdiction of the United States. *U. S. v. Cornell*, 2 Mason, 60, Fed. Cas. No. 14,867; *Sharon v. Hill*, 26 Fed. 726; *Railroad Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995; *Story*, Const. §§ 1224-1227, inclusive; *Hare*, Const. Law, pp. 1142-1145; *Ordr. Const. Leg.* pp. 516, 517. The supreme court of the United States, in the case of *Railroad Co. v. Lowe*, supra, uses the following language: "When the title is acquired by purchase, by the consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the constitution that congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of congress, and that no other authority can be exercised over them has been the uniform opinion of federal and state tribunals and of the attorneys general."

Counsel for respondent vigorously contend that the purchase of the land in Carson City by the United States, for the purposes designated in the act of congress approved January 13, 1885, above cited, does not come within the specific purposes named in section 8 of article 1 of the federal constitution, and that the purchase of land for the erection of courthouses and post offices by the United States, with the consent of the legislature of the state, does not, ipso facto, vest exclusive jurisdiction in the United States over such lands. This contention is not tenable. The federal constitution provides for a judicial department and for the establishment of post offices and post roads, and buildings are "needful" for the administration of justice and for post offices. It is too narrow a construction of section 8, art. 1, of the constitution to limit the exercise of exclusive jurisdiction by the United States over

lands purchased for the specific purposes enumerated therein. Under such construction, the use of the words "and other needful buildings" adds nothing to that section. *Ordronaux*, in his work on Constitutional Legislation, supra, says: "The functions of the general government demanding the establishment of forts, magazines, and dockyards, and the erection of post offices, courthouses, mints, and other buildings, in various parts of the United States, the framers of the constitution made provisions accordingly for acquiring the necessary sites. It was contemplated that such places should be purchased either from states or individuals, and, as it was necessary, for their better government, that congress should have exclusive legislation over them, the clause requiring the legislature of the state making the cession was introduced, in order to avoid conflicts of jurisdiction." See, also, *Sinks v. Reese*, 19 Ohio St. 306; *Sharon v. Hill*, supra; *Foley v. Shriver*, 81 Va. 568; *People v. Collins*, 105 Cal. 504, 39 Pac. 18; *Hare*, Const. Law, pp. 1141-1143.

Counsel for respondent cite *In re Kelly*, 71 Fed. 545, as strongly supporting their position. That was a case wherein the state of Wisconsin by legislative enactment ceded to the United States jurisdiction over certain lands purchased by the United States for the purpose of locating a national asylum for disabled volunteer soldiers. The legal title to said lands was not vested in the United States, but was vested in a corporation created by an act of congress for the purpose. The court (*In re Kelly*, supra), in discussing the right of the United States to exercise exclusive jurisdiction over lands purchased by the United States, with the consent of the legislature, for the purposes enumerated in section 8, art. 1, says: "The rule thus stated, whereby legislative consent operates as a complete cession, is applicable only to objects which are specified in the above provision, and cannot be held to so operate, ipso facto, for objects not expressly included therein. Whether it rests in the discretion of congress to extend the provisions not specifically enumerated, although for national purposes, upon declaration as 'needful buildings,' and thereby secure exclusive jurisdiction, is an inquiry not presented by this legislation." The court then argues that the purchase of lands by the United States, with the consent of the legislature of the state, irrespective of its use, does not vest in the United States exclusive jurisdiction over the same, and that, in determining the question of jurisdiction under purchases not made for the specific purposes enumerated in the federal constitution, the courts must ascertain, from the enactments, whether it was intended that the United States should exercise exclusive jurisdiction over such lands because of any need or requirement of the exercise of the same. Applying this rule to the *Kelly* Case, above cited,



the court therein properly held that the United States did not have the right to exercise exclusive jurisdiction over the land purchased for the establishment of the national asylum for disabled volunteer soldiers, for the reason there was a want of affirmative showing of any congressional intention to secure exclusive jurisdiction, and the provisions of the law tended to show that such jurisdiction was neither intended nor wanted; otherwise, the legal title to the lands would have been taken in the United States. The case at bar is clearly distinguishable from the Kelly Case, *supra*. The lands purchased under the act of January 13, 1885, in Carson City, for the purposes specified therein, were so purchased for the erection of "needful buildings," within the meaning of section 8 of article 1 of the federal constitution. This is clearly manifest from the necessity of the proper exercise of the rights, powers, and duties, under the constitution, of congress to establish post offices and post roads, and to create and maintain federal courts. The legislative intention that such purchase was made under said section 8 is also clearly manifest, from the condition of the act of January 13, 1885, prohibiting the expenditure of any portion of the money appropriated thereunder until the state of Nevada had ceded to the United States "exclusive jurisdiction" over such lands, and from the act, and the title thereof, of the legislature of Nevada, approved February 24, 1885, above cited, ceding to the United States, "exclusive jurisdiction" over such lands; also, the legislature of Nevada, by an act thereof approved January 18, 1883, consenting to the purchase of lands within said state by the United States, ceded "jurisdiction" (not exclusive) to the United States over such lands, and attempted by an express proviso therein to retain "concurrent jurisdiction." St. Nev. 1883, p. 13. Considering this act with the act of congress of January 13, 1885, and with the act of the legislature of Nevada of February 24, 1885, above cited, it is also clearly manifest that the attempt, under the act of 1883, to retain concurrent jurisdiction in the state, was regarded by congress as in contravention of the provisions of section 8, art. 1, of the federal constitution, as no purchase or appropriation for the purposes of the act was made thereunder, and until after the act of February 24, 1885, became operative.

Counsel for respondent further contend that the proviso of the act of February 24, 1885, ceding exclusive jurisdiction of the state to the United States, "except the administration of the criminal laws of the state," reserves to the state all criminal jurisdiction. This, also, is not tenable. If the purchase was made, as has been held in this opinion, under the provisions of section 8, art. 1, of the federal constitution, any attempt on the part of the legislature to retain jurisdiction in the state over the lands so purchased would be in contravention of said section, and therefore void.

Considering the legislative intention manifested in the various acts, above cited, and that congress and the legislature must have had in view the provisions of section 8, art. 1, of the federal constitution in the passage of said acts, a reasonable and fair construction to be placed upon the provision reserving to the state the "administration of the criminal laws" thereof is simply the reservation to the state of the right to execute criminal process upon the lands purchased for violation of the laws of the state committed within the state and without the purchased lands. Giving the construction contended for would, in effect, destroy the purpose of the act. It is a well-settled rule of construction that, when a statute is of a doubtful meaning, the first thing is to ascertain the intention of the legislature that passed the act, and that intention must be found, if possible, within the act itself. Outside the statute, courts will consider the mischief it was intended to suppress, or, as the case may be, the objects or benefits thereby to be attained. *Maynard v. Johnson*, 2 Nev. 25. From the act itself it is clear that the legislature intended to consent to the purchase of lands within the state by the United States for the purpose of erecting "needful public buildings," and to cede "exclusive jurisdiction" over the same to the federal government, under the terms of section 8, art. 1, of the federal constitution. Going outside of the statute, what object was thereby to be attained? That the legislature intended to consent to the purchase of lands within the state by the United States for the purpose of erecting thereon "needful public buildings," and thereby vest in the United States exclusive jurisdiction over the same. No other object could be attained, for the United States has the right to acquire lands within the state for needful buildings by other methods than the one provided in the constitution. The United States may purchase lands within the state, without the consent of the legislature thereof, but, when so purchased, the possession is simply that of an ordinary proprietor, and the state retains jurisdiction over the same within the limits of its authority. *Railroad Co. v. Lowe*, *supra*; *U. S. v. Cornell*, *supra*. Therefore the act of the legislature approved February 24, 1885, considered in the light of well-established rules of construction, from the language of the act itself and from the object to be attained thereby, is simply the consent of the state to the purchase of lands within its limits, by the United States, for purposes enumerated in said section 8, art. 1, of the constitution, and such purchase vested exclusive jurisdiction over said lands in the United States. The condition in the act of cession cannot be construed to mean that the state should reserve jurisdiction for the punishment of crime committed upon the purchased land. The apparent object of the condition was to prevent these lands from becoming the sanctuary for fugitives from justice for acts done within the jurisdiction of the

state. In *Railroad Co. v. Lowe*, supra, the supreme court of the United States, in commenting upon such provisions, uses the following language: "Now, there is nothing incompatible with the exclusive sovereignty or jurisdiction of one state that it should permit another state in such cases to execute its process within its limits; and a cession of exclusive jurisdiction may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession, and as an agreement of the new sovereign to permit its free exercise as quoad hoc his own process." For these reasons, the proceedings of the district court must be, and are, annulled. No opinion is given upon the sufficiency of the indictment, as that question is not properly before this court.

BELKNAP, C. J., and BONNIFIELD, J., concur.

(9 Colo. A. 106)

**NIPPEL v. FORKER et al.**

(Court of Appeals of Colorado. Jan. 1897.)

**IRRIGATION — WATER RIGHTS ON PUBLIC LANDS — POSSESSORY RIGHTS OF SETTLERS.**

1. The act of congress of March 3, 1891, regarding irrigating reservoirs, canals, and ditches on the public domain, applies only to public land which was vacant and unoccupied at the time of its passage, and does not authorize one proceeding under its provisions to interfere with the possessory rights of settlers, though without title, acquired before its passage.

2. Rights cannot be acquired under it to the damage of the possessory rights of such settlers acquired after its passage, without making compensation for the injury.

3. The filing of a plat of a reservoir under such act with the land department of the United States, and its approval by the department, operates only as a license or quitclaim so far as the rights of the government in the land affected are concerned, and does not affect prior rights acquired by individuals.

4. The irrigation laws of the state do not authorize one person in acquiring or using water rights thereunder to injure the land of other owners without a prior purchase or condemnation, and the payment of compensation.

Appeal from district court, Garfield county.

Action by Edward Nippel against William E. Forker, George H. Forker, and Mrs. E. P. Gibson to recover damages, and to enjoin further trespass and injury to plaintiff's water reservoir. Judgment for defendants on cross complaints, and plaintiff appeals. Affirmed.

J. W. Dollison, Hayes & Prentiss, and Perkins & Thompson, for appellant. Ed. T. Taylor, for appellees.

REED, P. J. Mrs. Gibson is the widow of Eli P. Gibson. In the year 1885, Mr. Gibson and wife settled upon the unsurveyed land of the United States, on what had formerly been the Ute Indian reservation, the title to which had been obtained by treaty with the tribe. On the 22d day of April, 1885, the township within which the settlement was made was opened for settlement and occu-

pation under the pre-emption act of 1841. By the terms of the Ute treaty, title could only be acquired by pre-emption and purchase at \$1.25 per acre, the proceeds of sales to be a fund held in trust by the government for the benefit of the Ute Indians. It appears that the settlement of Eli P. Gibson was made November 5, 1884, and on the first day that the land office was open (April 22, 1885) he filed his declaratory statement in the United States land office. Owing to erroneous surveys, on the 17th of August, 1885, the land in the township was withdrawn by the government, and remained so withdrawn until June 29, 1893. Eli P. Gibson died October 28, 1887. His widow (appellee) remained upon and has continuously occupied the land filed upon by her former husband. On the day the land office opened (June 29, 1893), she filed a pre-emption claim in her own right upon the land,—and on the 7th of October, 1893, proved up upon the land, and received a receipt from the receiver of the United States land office. On the 1st day of July, 1881, William Forker settled upon the land adjoining that of Mrs. Gibson on the south. He made extensive improvements, put 100 acres under cultivation and remained in the possession and occupation of the land until October, 1888, when he sold his possessory right to William E. Graham, who entered upon and occupied the land until October 9, 1892, when he sold and delivered the possession to George H. Forker, who remained in the occupancy and possession, and on August 7, 1893, filed upon it, and on February 12, 1894, proved up, paid for it, and received a receipt from the receiver of the United States land office. Both the Gibson and Forker claims were extensively improved and cultivated after 1885, and in that year were inclosed by substantial fences on the exterior lines, but without a division fence between them. Upon the lands of Gibson and Forker was the bed of a lake or natural basin that filled with water from the melting of ice and snow. The water was retained by an elevation or natural dam at the lower end. It was in extent about 87 acres, 75 of which were on the Forker place, and 12 on the Gibson place. When not covered by water, it was swampy and unfit for cultivation. In 1885 the parties jointly cut a drain through it and the elevation at the lower end, reclaimed the land, and it became a meadow from which hay was cut annually.

Appellant's rights, as stated in the complaint, are as follows: "That since the first day of April, 1889, he was the owner of, and entitled to the possession and enjoyment of, a certain tract or parcel of land in Garfield county [description], containing 160 acres; that without irrigation no crops could be produced on said lands; without irrigation the whole of said land would be valueless; that, for said purposes of irrigation, plaintiff, on or about the 3d day of April, 1889,

constructed a reservoir on the S. E.  $\frac{1}{4}$  of section 24, Tp. 6 S., R. 89 W., and duly filed in the office of the recorder of Garfield county a plat and statement of said reservoir site, claiming said land for reservoir purposes; that a portion of the land covered by the water stored in said reservoir is in section 19, Tp. 6 S., R. 88 W.; that, at the time of the location of said reservoir site, the survey of said Tp. 6 was suspended, and has ever since remained, and now is, suspended; and, by reason of said suspension of said Tp. 6 aforesaid, that portion of said reservoir site does not appear on said plat of said reservoir site." The land claimed by appellant lay below to the west of the claims of Gibson and Forker, 80 rods, two 40-acre tracts of vacant land lying between them. The map referred to as showing the plat and statement of the reservoir and the claim of appellant, which was filed in the recorder's office, is in evidence, made by J. C. Kune, a civil engineer. The reservoir, as shown, is about 600 feet long in greatest length, and 500 feet wide in greatest width; does not extend over the line of Gibson and Forker. Its upper end is 500 feet from the lower end of the old lake bed, and is platted as being entirely upon vacant public land. In the recorded statement filed, it was said: "All of said reservoir site lies in the N. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of section 24," etc.; clearly indicating the absence of any intention of appropriating any land of Gibson and Forker which was in sections 19 and 29. The reservoir, as platted and filed, covers about five acres. On August 1, 1889, appellant filed with the county recorder a supplemental or additional statement, not verified or accompanied by a map or plat, claiming "a reservoir site not exceeding 120 acres on Sec. 19"; and on the same date (August 21, 1889) he prepared and filed in the office of the county recorder "a notice to the world," "that he was entitled to the use, occupation, enjoyment, and possession of all that portion of the unsurveyed public domain included within the bounds of what was formerly sections 19, 20, 29, 30, 32, and 33 in township 6, and section 4 in township 7," etc., which included farms in the actual occupancy of parties who had been in possession several years, among them those of Gibson and Forker. This wholesale appropriation of 4,480 acres of land was, as claimed, for the purpose of irrigating his farm. In March, 1895, six years after his alleged appropriation, he testified: "I claim to own the water by appropriation and usage. In 1890 I used a little; in 1891 and 1892 I used most of it; and in 1893 I used a little. I never used all the water, because I am not prepared and fixed yet. I intend to take up a desert land claim as soon as I can get this suit settled; so I will need all the water, and more than there is there."

This action was brought by appellant to recover damages for an alleged trespass and

injury to his reservoir by appellees. The alleged wrongs and injuries are stated as follows: "That plaintiff has had the quiet, peaceable, and undisturbed possession of said reservoir and use of water collected therein at all times since the 3d day of April, 1889, until April, 1893. That Mrs. Tillie Gibson claimed that a portion of certain land claimed by her, and covered by said reservoir site, was overflowed, and threatened that she would endeavor to defeat plaintiff's right to hold and maintain said reservoir site, built a fence across said reservoir site, and is continuing to build fences across said reservoir site; and that she forbade plaintiff the right to enter upon said land so occupied as said reservoir, to take care and protect the same; and that she (the said defendant) has conspired and is now conspiring with the said W. E. and George Forker, the other defendants herein, and others, to injure and destroy said reservoir, and to deprive said plaintiff of the use of the waters collected and stored therein, by causing a great quantity of water to be discharged into plaintiff's reservoir. That the claim of Mrs. Tillie Gibson is subsequent and subject to plaintiff's reservoir right. That on or about the 2d day of April, 1893, William E. Forker and George Forker, two defendants herein, constructed a dam above the lower part of said reservoir, with the knowledge of said Mrs. Gibson, and upon the land claimed by her, in such a poor and temporary manner as to be unsafe and insufficient to hold the water collected thereon; and that after said dam was so constructed, and was about filled with water, it gave way, and discharged a large volume of water into the lower part of said reservoir of plaintiff, causing the damage thereto. That said dam was constructed solely for the purpose of destroying plaintiff's reservoir, and depriving him of the use of the water. That neither said William E. Forker nor George Forker had any interest in or to any land embraced in said reservoir, and said dam was built by said Forkers against the protest of plaintiff. That a further trespass was committed on the 27th day of April, 1893, by the interference with the reservoir outlet, which caused a great loss of water out of said reservoir. That, by reason of the premises, plaintiff was damaged in the sum of \$200. That defendants have threatened to and will continue said acts complained of against plaintiff's reservoir. That plaintiff cannot obtain water from any other source to irrigate his land, and, without water to irrigate it, said land is valueless. That defendants are insolvent, and have no property out of which an execution could be satisfied. That plaintiff's only remedy is by injunction. Plaintiff prays judgment against defendants for the sum of \$200 damages, costs of suit and injunction." On May 24, 1893, appellant filed the following supplemental statement as an addition to his former complaint: "That

since filing complaint on the 11th day of May, 1893, and service of summons, one of the defendants, Mrs. Gibson, disregarding plaintiff's rights in his reservoir and water stored therein, did on the 23d day of May, A. D. 1893, enter upon said reservoir, dug up the ground, and interfered with the natural flow of water into said reservoir."

Mrs. Gibson filed a separate answer, which, after denying some of the allegations of the complaint, is as follows: "She admits that plaintiff did construct an embankment on unoccupied land west of the land of defendant. The defendant admits being the widow of one E. P. Gibson, deceased, who died on the 28th day of October, 1887, and then states what is hereinafter reiterated in the cross complaint, and admits that she has complained of and protested against said plaintiff's attempting to overflow a portion of said tract of land by virtue of said reservoir, and she threatened to prevent plaintiff's appropriation of said land; and she admits that she has forbidden plaintiff many times the right to enter upon said tract of land, or any portion thereof, for reservoir purposes. She alleges that she had a right to whatever she did do, or caused to be done, in regard to the flow of the water through plaintiff's reservoir down the natural channel, where the water had been wont to flow and be drawn off of defendant's premises, and that any obstructions that plaintiff has or may attempt to prevent the natural drainage and escape of water from defendant's premises are in violation of defendant's prior rights." Also a cross complaint, as follows: "That Eli P. Gibson, the husband of the defendant, settled upon the tract of land described in folio 116, as his home and pre-emption claim, which the defendant Mrs. Gibson now claims; that in the year 1885 she went on said premises to reside with her husband, said Gibson; that prior to the 22d day of April, A. D. 1885, said land was all unsurveyed public domain of the United States; that on that date the township in which said land was situated was opened for filing for the first time in the United States land office at Glenwood Springs, on which day said Gibson filed his declaratory statement in said land office for said tract of land, which was then described by the survey then in force [description of property], and being the same land upon which this defendant made her home and pre-emption claim ever since said filing, on the 29th day of June, 1893; that the survey of said township was suspended from the 17th day of August, 1885, until the 29th day of June, 1893; that defendant filed her declaration of occupancy and possession of said land; that in her declaratory statement the land is described as [description of property], and on the 7th day of October, 1893, the defendant Mrs. Gibson made final proof on said land, and obtained a receiver's receipt; that defendant has made improvements in cultivating and farming said premises, and in building ditches to irrigate said land, and fenced said land, and, if she should be de-

prived of the land claimed by this pretended reservoir site, she would be irreparably damaged; that, some time in the spring of 1889, the plaintiff herein, at a point on government land below and westerly from this defendant (Gibson's) land, commenced doing some work towards making a dam; that this defendant, fearing that this dam, if raised to any considerable height, might cause water to back upon her said land, immediately notified said plaintiff in writing not to construct any dam or locate any reservoir which might back water onto any portion of her land, and this defendant has frequently since said time notified plaintiff not to build any reservoir that would affect or in any manner back water on said premises; that, notwithstanding defendant's protests, the plaintiff, with full knowledge of the defendant's prior rights in said premises, has gone ahead from time to time, and constructed a small dam at said point; that this defendant's land naturally slopes and drains off to the westerly in a well-defined channel, and that said dam obstructs the natural channel and flow and drainage of the water off of this defendant's said lands where in the natural channel the water has immemorially flowed off of said land, and, if said dam is built or maintained in its present position, it will further dam up and obstruct the natural channel of the waste, excess, and all water from the defendant's said land, and cause said water to back up onto her land, and thereby greatly damage said land, and injure the crops of this defendant; and said dam is and will be a continuing damage, injury, menace, and nuisance to this defendant, and greatly deprecate the value of her said property. This defendant then alleges the filing of a pretended plat and statement of his reservoir by plaintiff on June 3, 1889, with the clerk and recorder of Garfield county, Colo., and afterwards, and on the 21st day of August, 1889, made and filed an alleged supplemental statement of his pretended reservoir, said statement not being accompanied by any plat, and not being sworn to; that said plat shows said reservoir as being entirely on government land, but plaintiff is trying to appropriate part of this defendant's land, without bringing any condemnation suit, or without acquiring any right in any manner to appropriate said premises, and all of said acts of plaintiff are in violation of this defendant's prior rights, and without her consent, and thereby destroying a large portion of this defendant's land, and rendering a large portion of her land valueless, to her great and irreparable injury, whereby this defendant will be damaged in the sum of nearly, if not quite, \$2,000, if plaintiff is allowed to further construct and maintain his dam; and this defendant has already been damaged by the unlawful acts of the plaintiff in the sum of \$250; that plaintiff has recently caused to be backed up water on defendant's premises overflowing her hay land, and greatly damaging the same, and threatens to continue to wrongfully overflow and flood her said land,

and destroy her hay crop, and to prevent defendant from cutting her hay this year off of said land. This defendant alleges that since the commencement of this suit, —, 1893, the plaintiff has filed other and further pretended reservoir plats and statements for his reservoir site, and attempted to embrace a portion of this defendant's land; that said filed and recorded documents are a cloud upon this defendant's title to her lands, and tend to depreciate the value thereof." The defendant Mrs. Gibson, for a second and further cause of action, alleges: "That there is a kind of basin or low portion of land running through the land of the defendant George Forker, and onto the land of this defendant. In the spring of each year the melting snow water collects in said basin, and, unless drained, would form a large pond and slough on the land of this defendant; and the defendant George Forker, with Eli P. Gibson and William Forker, made a ditch to drain between the years 1881 and 1885, said drain ditch running westerly and northwesterly down the natural channel for said water for one-third of a mile, and into a gulch or ravine sufficient to drain said slough, thus rendering the land valuable for crops. That this drain ditch continued to draw off said water until the building of the embankment by the plaintiff. That since the bringing of this suit, in October, 1893, the plaintiff filled up said drain ditch, making an impassable dyke for about 20 feet in length, so as to prevent all water except a very small amount from going through said ditch. That plaintiff's act in filling up said ditch was a trespass upon this defendant's property. That plaintiff is insolvent, and had removed his family and personal effects out of the county, and that defendant has no plain, speedy, or adequate remedy at law in the premises. That the damage done, and which will be done, by plaintiff, unless restrained by order of this court, is great, and will be very great and irreparable; and that, by reason of building said dam across said drain ditch, defendant has been damaged in the further sum of nearly, if not quite, \$250. Wherefore defendant prays judgment against the plaintiff (1) requiring plaintiff to take away said dam in said drain ditch and the dam across the natural channel which drains this defendant's land; (2) for a temporary writ of injunction enjoining plaintiff and all persons acting under him from further constructing or maintaining said dams, etc., and that said plaintiff may be compelled, at his own expense and without delay, to remove said dams or embankments, in order to permit the free flow of said surplus water off of this defendant's land, and from hindering or delaying this defendant from the free use and enjoyment of every portion of her premises, and for an order enjoining and restraining plaintiff from making any record of filing any claims of any kind to any portion of defendant's said land for a reservoir site or any other purpose, or from further beclouding the defendant's title to the

premises, and that, upon final hearing, said injunction be made perpetual; that said plats and statements, so far as they affect defendant's said land, may be canceled, etc.; for \$500 damages, and for costs of suit."

The answer of William and George H. Forker is as follows: "That they have not information sufficient upon which to base a belief as to whether or not plaintiff is entitled to the tract of land in question as a reservoir site since April 3, 1889, or whether plaintiff located said reservoir at that time, and therefore deny the same, and claim said location is absolutely void against defendants' long established rights. Defendants deny that the land embraced in the reservoir site was a part of the public domain of the United States since July, 1881; deny that the plaintiff has expended \$1,500 in the construction of his reservoir, ditches, etc., or that there is 600 acres of land lying under said reservoir site. They deny that they have no right, title, or claim to any of the land in the vicinity of said reservoir site. They deny that on the 27th day of April, 1893, or at any other time, they moved or caused to be moved the gate or outlet of said reservoir, or that plaintiff is damaged by their acts. Defendants deny that they constructed a dam for storing water so as to destroy plaintiff's reservoir and dam, or that same was poorly constructed, so as to be unsafe."

And the following cross complaint was filed by George H. Forker: "That about July 1, 1881, the defendant William Forker located and settled upon a tract of land containing 160 acres, part of the unsurveyed public domain, but since surveyed and described as lots No. 6, 7, 17, and 19 in section 29, lots Nos. 7 and 8 in section 30, in Tp. 6, S., R. 88 W., 6th P. M., in said Garfield county, Colorado, situated above and in the immediate vicinity of plaintiff's reservoir. That William Forker made said land his home, improved it, built drain ditches, and made it of great value for agricultural purposes. That a large portion of said land covers the bottom of a former lake, and is almost a natural reservoir, sufficient to store and hold the water from the melting snow in the spring, so as to thoroughly saturate and irrigate the meadow land thereof; and that, unless the surplus water is drained off of said land immediately after such thorough irrigation, it becomes worthless for agricultural purposes. That, for the purpose of draining off said surplus water, the defendant William Forker constructed a drain ditch in the years 1881 and 1882, so as to cause said water to more perfectly flow through its natural channel. That said William Forker continued to use, hold, and enjoy said land and improvements until in October, A. D. 1888, when he sold his possessory right to William E. Graham, who constantly occupied and improved the same until about the 9th day of November, 1892, when he sold all his interest in said

land to George H. Forker, who has held, occupied, and improved the same ever since. That, as soon as the survey of said land was approved, the defendant George H. Forker filed his pre-emption statement in the United States land office at Glenwood Springs, Colorado, he being a citizen of the United States, over the age of 21 years, and entitled to the pre-emption right. That the dams and dykes built by the plaintiff for his reservoir are so constructed as to obstruct the natural outflow of water from said defendant's land, and to overflow and flood about seventy-five acres of his lands, and to destroy defendant's hay crop, and did during the months of May and June, 1893, prevent the proper flow of water, and cause the same to remain on defendant's growing crop, to his damage in the sum of \$300. That between the 1st and 6th days of October, 1893, plaintiff constructed another dam across defendant's drainage canal, so as to completely obstruct and dam the overflow of any water from said lands, when the same became stored thereon, to the damage and ruin of defendant's hay crop. That the said dams are a standing and perpetual nuisance to the defendant and others interested in the drainage of said lake bottom. That by the backing up and detention of said surplus water, in May and June, 1893, defendant was further and permanently injured in the sum of \$200. That plaintiff still maintains the dams and dykes to said reservoir, and threatens to maintain them permanently. Wherefore defendant George Forker prays (1) that plaintiff be required to remove said dam; (2) that plaintiff be perpetually restrained by injunction from maintaining or further constructing or repairing said dams, dykes, reservoirs, or other obstructions that may obstruct the natural flow of water from defendant's land; (3) that defendant recover from plaintiff \$500, his damages and cost; (4) for general relief; and (5) that William Forker have judgment for costs."

On December 4, 1893, the court allowed an interlocutory injunction to appellees, restraining appellant from obstructing the drain ditch or in any way interfering with the flow of water from the land of appellees; also made an order, mandatory in character, that appellant should within 30 days open the drain ditch, and make openings through the embankment built by him; and, in case of his refusal, appellees were allowed to do the work at the expense of appellant. "On March 24, 1894, plaintiff filed his replication to the separate and amended answer and cross complaint of Mrs. E. P. Gibson, which is a denial of the matter set up in said answer and cross complaint, and denies that the defendant Mrs. E. P. Gibson, at any time prior to the 20th day of June, 1893, made her or any pre-emption claim to the land now claimed by her; and plaintiff says that on the 20th day of June, 1893, said defendant Mrs. Tillie Gibson abandoned all right and claim to said land and improvements there-

on, as the heir or successor of the said Eli P. Gibson, and then and there claimed and filed on said land in her own individual right, and denies that the defendant Gibson filed with the clerk and recorder of Garfield county her declaration of occupancy and possession until after the commencement of this action." On the same date, plaintiff replied, denying the allegations of the answer and cross complaint of the two Forkers. On the 8th day of March, 1895, the case was tried to the court, without a jury. The court found all the important issues of fact for appellees, granted the relief prayed, and decreed a perpetual injunction. From such decree an appeal was prosecuted to this court.

The judgment and decree appear to have been fully warranted by the evidence. The Forkers' title and possession ran back to 1881, and during all that time had been occupied by the elder Forker, then Graham, then the younger Forker. Mr. and Mrs. Gibson entered into the possession of the land in 1885. In 1887, Mr. Gibson died, without being able to obtain a title, by reason of the land having been withdrawn. Mrs. Gibson remained continuously in the occupation and possession until 1893, and obtained title at the earliest possible date, and George H. Forker a few months after. At the time, in 1889, that appellant entered upon and claimed the right to occupy the land below, the lands of Forker and Gibson were inclosed with a substantial fence. Each had near 100 acres under cultivation, and had jointly drained and reclaimed the old lake bed, and converted it into meadow. The first effort of appellant in the way of a reservoir was the filing a plat of one four or five acres in extent, on vacant land of the United States. His next effort was to file an amended claim to 120 acres of the land occupied by appellees, and a declaratory statement of seven sections, involving all the farms in the valley. His first practical act to make a reservoir was to fill and dam the drain ditch dug by appellees, set the water back, again submerge the old lake bed, destroy the meadow, making of it a reservoir, the water to be drawn off and used at some point below; and, although in 1895 he testified to having constructed 13 miles of ditch, it was also shown that such ditch was not constructed to irrigate his land, but to carry water by and below for some undefined purpose, presumably for the purpose of sale. It will be observed that in its inception the declared purpose was to irrigate his land without which the land was valueless; yet, after six years of alleged occupation, he had put but a few acres under cultivation, and stated in his testimony that he intended to get land under the "Desert Land Act" upon which he could use the water. From his settlement in 1889 until 1891, he appears to have attempted to proceed under the irrigation laws of the state. After the passage by congress of the act of March 3, 1891, in regard to ditches,

canals, reservoirs, etc., upon the public domain, he attempted to base his right, and construct a reservoir under its provisions. A more fatal misapprehension of the law cannot be conceived. It had frequently been held that the act only applied to vacant and unoccupied land. By the wording of the act, the rights of occupants who are in possession without title are respected and protected; the last clause of section 19 being: "Whenever any person or corporation, in the construction of any canal, ditch or reservoir injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured, for such injury or damage." The suit was brought by appellant to assert and establish certain supposed equitable rights, and also to recover damages for the alleged infraction of those rights. No offer was made to do equity,—to make compensation for injury to the possession prior to 1893. Subsequent to 1893, and for nearly two years before the trial occurred, appellees had the title,—the fee; and the effort was to dispossess them, and appropriate to his own use over one-half of the land to which they had a title from the government, without making a purchase of it or offering compensation. The whole course of appellant, from the start, was so at variance with morality and common honesty, as to subject him to severe criticism and censure, and preclude him from asserting any rights in a court of equity.

In the printed brief of counsel, considerable space is devoted to the supposed rights of appellant under the irrigating laws of the state, by appropriation, etc. I do not conceive that it has any place or bearing in this controversy. Admitting all that is said to be correct and a proper exposition of the law, yet irrigation laws are in regard to water, and they have never been construed as allowing the destruction of the land of two farms to obtain water for the use of the third. When the lands of others are indispensable, the right to them must be acquired by purchase or by condemnation, and adequate compensation made. Great stress is laid upon the fact that application was made to, and a plat and map of a proposed reservoir filed with, the department of the interior, and by it approved and accepted. I consider this matter of no controlling influence whatever. It could only operate as a license, grant, or quitclaim on land, within the expressed intention of congress. It is very doubtful whether the land ceded in trust to the government by the Utes could, under the treaty, be subjected to the subsequent law for reservoirs; but upon this question we express no opinion. It does not appear that the fact of its having been part of the reservation and the tenure by which the government held the title was brought to the attention of the land department.

Appellees filed a protest against the ap-

proval of the reservoir plat, which was overruled. Secretary Smith in October, 1894, in his decision, says in regard to this protest: "In this connection it must be remembered that the approval by the department of the map of location of a reservoir site filed upon under the provisions of the act of March 3, 1891, carries only the right of way over vacant public lands covered by such location, and in no wise affects other tracts. \* \* \* This department cannot inquire into the merits of the protests, but must refer the parties to the courts for their proper remedy, if in any wise injured in their possession, by the building and use of the proposed reservoir." In re Gibson, 19 Land Dec. Dep. Int. 304. This authoritative construction of the law under which appellant claimed was conclusive against him. The act had no retroactive effect, in no way affected those whose rights attached previous to its passage, but parties entering after the passage took subject to the reservoir act. It only applied to lands vacant and unoccupied at the time of its passage. It follows that the decree and judgment of the district court should be affirmed. Affirmed.

(116 Cal. 17)

#### PEOPLE v. WHITE. (Cr. 225.)

(Supreme Court of California. Feb. 3, 1897.)

BURGLARY—DESCRIPTION OF PREMISES—VARIANCE—ATTEMPT TO COMMIT—DISCRETION.

1. Where the indictment charged a burglarious entry of a house described by number, etc., "belonging to John Doe, whose real name is unknown," proof that the house belonged to a woman was not fatally variant.

2. An objection that the court erred in failing to give sufficient instructions will not be considered where defendant neglected to ask fuller instructions at the time.

3. On trial for burglary, it was within the discretion of the court to refuse to take the jury to examine the premises.

Department 1. Appeal from superior court, city and county of San Francisco; Edward A. Belcher, Judge.

William White was convicted of an attempt to commit burglary, and appeals. Affirmed.

Wm. Hoff Cook, for appellant. Atty. Gen. W. F. Fitzgerald and Charles H. Jackson, for the People.

BEATTY, C. J. The defendant was convicted of an attempt to commit burglary in the first degree, and appeals from the judgment, and from an order denying his motion for a new trial. His first point is that there was a variance between the proof and the indictment.

1. The indictment charged a burglarious entry of a house situate at No. 45 South Park, San Francisco, belonging to John Doe, whose real name is unknown, etc. The evidence showed—or was sufficient, at least, to sustain a verdict—that defendant attempted, in the nighttime, to enter burglariously a vacant dwelling at No. 45 South Park, but

that the house was the property of Letitia Bagnall, a woman, and the precise point is that, while the indictment charges that the house belonged to some unknown man (John Doe being the name of a man), the proof shows that it belonged to a woman. The mere statement of this point is, we think, a sufficient answer to it.

2. The court denied the request of the defendant to send the jury to view the premises. Whether a view of the premises is proper in any case is a matter resting in the sound discretion of the trial judge, and we do not find in this case the slightest ground for holding that there was any abuse of discretion.

3. It is objected that the court failed to give a sufficient instruction as to attempt to commit burglary. The court instructed the jury generally that a person who attempts to commit a crime, but is prevented or interrupted or otherwise fails to accomplish it, may be punished for the attempt, and that they might convict the defendant of an attempt to commit burglary if they were satisfied beyond a reasonable doubt that he made such attempt. If the defendant thought that these instructions were not full enough, he should have requested one more specific.

4. The court, in defining a reasonable doubt, gave the same instruction commented on in *People v. Paulsell* (Cal.) 46 Pac. 734; and, on the authority of that case, it is contended that this judgment must be reversed. But the judgment in the Paulsell Case was not reversed on account of the instruction that was given, but because an instruction often approved by this court was refused. In this case no instruction on the subject of reasonable doubt was refused; and the one given, though perhaps not so full and clear as the oft-approved definition of Chief Justice Shaw, is, nevertheless, free from error, as was held in *People v. Shaughnessy*, 110 Cal. 604, 43 Pac. 2. We find no error in the record, and the judgment and order appealed from are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

(116 Cal. 32)

OGDEN v. DAVIS et al. (L. A. 106.)  
(Supreme Court of California. Feb. 3, 1897.)  
APPEAL BOND—LIABILITY OF SURETIES—WASTE—DEFICIENCY.

1. Sureties in an appeal bond against waste on certain described land cannot be held for waste on other land, on parol evidence of a misdescription.

2. Recital in an appeal bond that the penal sum named was the amount fixed by the judge of the court is conclusive of an order fixing the amount, pursuant to Code Civ. Proc. § 945; so that it need not be averred or proved in an action on the bond.

3. The penalty in an appeal bond binding the sureties "in the sum of \$2,000 (being the amount for that purpose fixed by the judge of this court) that, during the possession of such property by the appellant, he will not commit

\* \* \* waste thereon, and that, if said judgment \* \* \* be affirmed, \* \* \* they will pay the amount of any deficiency upon said sale," applies to the deficiency, as well as to waste.

Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by Matthew B. Ogden against E. J. Davis and another. Judgment for defendants. Plaintiff appeals. Reversed.

Purington & Adair and Collier & Evans, for appellant. W. J. McIntyre, E. B. Stanton, and Caldwell & Duncan, for respondents.

HENSHAW, J. Plaintiff had obtained a judgment in the superior court against one C. E. Packard in an action to foreclose a mortgage. Packard prosecuted an appeal to this court, and gave an undertaking for damages and costs and to stay execution, with defendants for sureties. The judgment was affirmed upon appeal (35 Pac. 642), and this action is prosecuted against the sureties upon the undertaking. Plaintiff suffered nonsuit, and appeals from the judgment.

The complaint charged in two causes of action,—the one, for damages in the sum of \$2,000 for waste suffered upon the land and premises; the other, for a deficiency in the sum of \$8,584.05, remaining after sale of the mortgaged premises. So much of the undertaking as is pertinent to this consideration is in the following language: "Whereas, C. E. Packard, the defendant in the above-entitled action, has appealed to the supreme court of the state of California from a final judgment made and entered against him in the said action in the said superior court, in favor of the plaintiff in said action, on the 2d day of May, 1893, for the foreclosure of a mortgage on certain lands and premises therein described, for the sum of \$17,079.40, including costs of this suit, with personal judgment against the defendant for any deficiency upon sale under said judgment; \* \* \* and whereas the appellant is desirous of staying the execution of the said judgment so appealed from in so far as relates to the sale of the lands and premises: We do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves, further, jointly and severally bound in the further sum of two thousand dollars (being the amount for that purpose fixed by the judge of this court), that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if said judgment appealed from be affirmed, or the appeal be dismissed, they will pay the amount of any deficiency upon said sale." This undertaking, for a description of the mortgaged premises, refers to the complaint. The complaint followed the mortgage, and described the land as "lot 264 of the lands of the Riverside Land & Irrigation Company, as surveyed by Gold-



worthy & Higbie, according to the plat of said survey of record in the county recorder's office of the county of San Bernardino." Upon the trial it was made to appear that the description was erroneous, and that there was no lot 264 of the lands of the Riverside Land & Irrigation Company, but that there was a lot 264 of the lands of the Southern California Colony Association. The description, however, had never been reformed, and was followed throughout in the decree and foreclosure sale.

The defendants' grounds of motion for a nonsuit were that waste was not shown to have been committed upon the lands described in the bond; that no order of the court fixing the penalty for deficiency was shown to have been made; that the penalty therein mentioned is confined to waste; that, as to deficiency, the bond is not such as is required by the Code of Civil Procedure; and that the bond was without consideration, and void, in that it did not, in effect, stay execution upon the judgment during the pendency of the appeal.

The first ground of nonsuit urged, namely, that the waste was not shown to have been committed upon the lands described in the bond, was well taken. Sureties upon such an obligation, it is well settled, are entitled to stand upon the express terms of their agreement, and are never implicated beyond those terms. It is not permitted, as against them, to suffer anything to be done which will change or vary the known and definite risk which they assumed in entering upon their contract. It is frequently said that they are favorites of the law, and have a right to stand upon the strict terms of their obligation when such terms are ascertained. *Pierce v. Whiting*, 63 Cal. 538; *People v. Breyfogle*, 17 Cal. 508; *People v. Buster*, 11 Cal. 215; *Civ. Code*, § 2836; *Carter v. Mulrein*, 82 Cal. 169, 22 Pac. 1086; *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563; *McMicken v. Webb*, 6 How. 299. These particular defendants were sureties against waste that might be committed upon lot 264 of the lands of the Riverside Land & Irrigation Company. The effort to prove by parol evidence that a parcel of land not answering the description called for in the undertaking had suffered waste at the hands of defendants' principal was not permissible, and the evidence to that effect was properly excluded by the court. It follows, therefore, that plaintiff failed to establish a cause of action for waste under the first cause of action of his complaint, and as to that cause of action the nonsuit was properly granted.

The other grounds of nonsuit urged may be considered together. They relate more particularly to the second cause of action, by which a judgment for deficiency is sought. It is contended on behalf of respondents that, under section 945 of the Code of Civil Procedure, the penal amount of the bond to cover a deficiency should have been fixed

by order of court, and that the proofs in the case fail to disclose that any such order was made. The objection is untenable. The bond names the penal sum of \$2,000, and recites that this sum is the amount fixed by the judge of the court. The sureties, equally with the principal, are bound by such recital. It may be taken as true against them, and need not be averred in the complaint or proved upon the trial. *McMillan v. Dana*, 18 Cal. 339; *Irwin v. Backus*, 25 Cal. 214; *Hathaway v. Davis*, 33 Cal. 161; *Murdock v. Brooks*, 38 Cal. 596; *Smith v. Fargo*, 57 Cal. 157; *Herm. Estop.* § 162. In its form the undertaking strictly complies with the provisions of section 945 of the Code of Civil Procedure, as interpreted in *Boob v. Hall*, 105 Cal. 413, 38 Pac. 977. The sureties upon the undertaking bound themselves in the penal sum of \$2,000 to make good, not only any damage which might arise from waste, but any deficiency judgment which might remain after sale of the mortgaged premises. If the \$2,000 were consumed by a judgment against the sureties for waste, no recovery could be had against them for deficiency. If, upon the other hand, no damages for waste were recovered, the full amount of \$2,000 was available to make good any deficiency. Upon the trial it was shown that there was a deficiency in a sum exceeding \$8,000. It was a deficiency that arose strictly within the terms and provisions of the undertaking. The land sold under foreclosure was the land described in the complaint and mortgage, whatever piece or parcel that may have been. Upon the sale of that land this deficiency resulted. For that deficiency these sureties are responsible to the extent of \$2,000. The fact that plaintiff, by his action, asks judgment for the whole amount of the deficiency, does not deprive him of his right to recover that sum, which the sureties bound themselves to make good. The nonsuit upon the second cause of action was therefore improperly granted; and the judgment is reversed, and the cause remanded, with directions to the trial court to sustain the motion for nonsuit upon the cause of action for waste, and to deny the motion for a nonsuit upon the cause of action for deficiency.

We concur: TEMPLE, J.; McFARLAND, J.

(5 Cal. Unrep. 592)

MATTHEWS v. BULL. (S. F. 504.)

(Supreme Court of California. Feb. 1, 1897.)

INJURY TO EMPLOYE—PLEADING—INCOMPETENT FOREMAN—RETENTION—MASTER'S LIABILITY.

1. In an action for personal injuries, plaintiff need not allege that he was not negligent.

2. A verdict will not be disturbed where the evidence is conflicting.

3. Under *Civ. Code*, § 1971, providing that "an employer must in all cases indemnify his employé for losses caused by the former's want of ordinary care," the employer is responsible

for an injury caused to one employé by the negligence of another, whom he has retained with knowledge of his incompetence.

4. A master cannot divest himself of responsibility for the selection and retention of competent servants by delegating the duty to another.

5. Where an employé is injured by the dropping of a hammer of a pile driver, at a signal by the foreman, before he was signaled by the employé putting a ring on the pile, the employer is liable, if the foreman negligently gave the signal.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by William H. Matthews against John C. Bull, Jr. From a judgment in favor of plaintiff, and an order refusing a new trial, defendant appeals. Affirmed.

S. M. Bock and F. A. Cutler, for appellant. L. F. Porter and J. N. Gillett, for respondent.

BELCHER, C. This is an action to recover damages for an injury sustained by the plaintiff while he was in the employ of the defendant. By the verdict and judgment plaintiff was awarded damages in the sum of \$1,500; from which judgment, and an order refusing a new trial, the defendant has appealed.

In 1895 the defendant was engaged in constructing jetties at the entrance to Humboldt Bay. A portion of the work to be done was the driving of piles. R. T. Stone was the superintendent of the work on the south jetty, with authority to hire and discharge all the men employed on that jetty. In April he hired the plaintiff as a common laborer, and also hired Robert Astleford to act as foreman of the pile-driver crew. Plaintiff commenced at once, and thereafter continued to perform the work assigned to him, until May 7th, when he was injured. Astleford commenced at once to act as foreman of the crew, and continued to so act until May 15th, when he was discharged. On May 7th, a large pile having been put in place to be driven, Astleford directed the plaintiff to go up the driver and put a ring on the top of the pile. Plaintiff thereupon climbed up the ladder to the third staging, about 24 feet above the base, and then pulled the ring up by a rope attached to it. The ring was about 16 inches in diameter, and weighed from 40 to 45 pounds. Astleford was standing at the foot of the driver, close up to the pile, where he could not see the plaintiff, and from that point he hallooed to the plaintiff to put on the ring. Plaintiff started to put the ring on the pile, was just shoving it over with his right hand, when Astleford, having waited only from a quarter to a half of a minute after hallooing, signaled to the engineer to let the hammer fall, and he did so. The hammer struck on plaintiff's hand, and crushed it so that it had to be amputated, and this is the injury complained of. It was the custom, when a man went aloft to put the ring on a pile, for him, as soon as he had it in place, to signal to the foreman, and he then signaled to the engineer

to let the hammer fall. But on this occasion the plaintiff, as he testified, gave no signal whatever. And if Astleford had stepped aside a few feet, to the place where he usually stood when such work was being done, he could have seen the plaintiff, and seen when the ring was in place. It is alleged in the complaint that Astleford was the foreman of the pile-driver crew of which plaintiff was a member; that the work of constructing said jetty was of a dangerous character, and required skill, prudence, knowledge, and carefulness on the part of those in charge thereof, and that it was the duty of defendant to provide men possessing all these qualifications; that the said Astleford, by reason of his habitual carelessness and negligence, was incompetent to have charge of such work, of which fact defendant had due notice; that he was constantly exposing those under him to unnecessary dangers and risks, which fact defendant well knew, having almost daily notice thereof; that the defendant, well knowing said Astleford to be an incompetent, careless, and negligent man in the work in which he was employed, carelessly and negligently retained him in such employment as foreman of said crew; and that the said Astleford, on the 7th day of May, 1895, carelessly and negligently caused the hammer of the pile driver to drop upon plaintiff's right hand, crushing and bruising it to such an extent that it had to be amputated. The answer denies all the averments of the complaint as to carelessness and incompetency of Astleford, and alleges that the injury to plaintiff was wholly caused by his own fault and carelessness, and was not caused by any carelessness or negligence of said Astleford.

1. The first point made for a reversal is that the complaint was fatally defective because it contained no allegation that plaintiff did not know of the incompetency of Astleford. This point cannot be sustained. In this state the law seems to be settled that in this class of cases it is not necessary to allege in the complaint that the injury was done without fault or negligence on the part of the plaintiff. When such a defense is relied upon, the burden is on the defendant to establish it. *Robinson v. Railroad Co.*, 48 Cal. 409; *Magee v. Railroad Co.*, 78 Cal. 430, 21 Pac. 114; *Smith v. Steamship Co.*, 99 Cal. 462, 34 Pac. 84.

2. Under the issues raised by the pleadings, the principal questions to be determined were: (1) Was Robert Astleford a careless and negligent man, constantly exposing those under him to danger? (2) Did defendant have knowledge of Astleford's carelessness, and, having such knowledge, retain him in his employ? (3) Was the injury sustained by plaintiff caused by Astleford's carelessness or negligence? (4) Was the injury sustained by plaintiff caused by his own carelessness or negligence? These were all questions of fact for the jury, and were answered, as shown by the verdict, in favor of the plaintiff. Appellant contends that the evidence

was insufficient to justify the verdict, but in our opinion this contention cannot be sustained. The evidence in the case covers more than 100 pages of the printed transcript, and is largely quoted by counsel in their briefs. But to set it out, even in substance, would extend this opinion to great length, and subserve no useful purpose. It is true that in many respects the evidence is squarely conflicting, and some of it must have been untrue; but what part of it was true and what false was a matter for the jury to determine, and the settled rule in such cases, that the verdict will not be disturbed for want of evidence to justify it, must be followed.

3. The duties which an employer owes to his employes are said to be "to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provisions for the safety of employes as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by it to a servant, so as to avoid responsibility for injury caused to another servant by its omission; nor is their negligent performance one of the ordinary risks of the service impliedly assumed by the employe by his contract of employment." *Daves v. Pacific Co.*, 98 Cal. 19, 32 Pac. 708. The Civil Code provides that "an employer must in all cases indemnify his employe for losses caused by the former's want of ordinary care." Section 1971. And, speaking of this section, the court, in *Gier v. Railway Co.*, 108 Cal. 133, 41 Pac. 23, said, "Such lack of ordinary care as may well be shown by the retention of an unfit employe after knowledge of the fact, as by a failure to use due diligence at the time of his selection, and in either case the liability of the employer attaches." And see 7 Am. & Eng. Enc. Law, p. 848, where the general rule upon the subject is stated as follows: "Although an employer may have used due care and diligence in selecting his servants, if subsequently he obtains knowledge of a servant's incompetence or unfitness for his position, and retains him in his employment, he is liable to a fellow servant for any injury resulting from such unfitness," except in cases where the injured servant "knew of such incompetence, and made no complaint about it to his employer." Under the law as thus declared, and the facts as found by the jury, the plaintiff was clearly entitled to recover damages for his injuries.

4. Appellant claims that the court committed numerous errors of law in the admission and rejection of evidence. But, without taking time to discuss the several rulings complained of separately, we deem it enough to say that they all seem to have been author-

ized and proper; and, at any rate, we can see in them no such prejudicial error as would call for and justify a reversal of the judgment.

5. Appellant complains of some of the instructions given by the court to the jury, and particularly of the first one, which reads as follows: "I charge you, as law, that it is the duty of a master to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed. And, in this connection, I further charge you that the master cannot divest himself of liability by intrusting the performance of this duty to any other person. This duty the law imposes upon the master personally, for the safety and protection of his servants. If, therefore, the master delegates this duty to any other person, no matter what his rank may be, the person so selected becomes the representative of the master. If, therefore, you find from the evidence that defendant, John C. Bull, Jr., did not personally undertake to perform this duty, but that he delegated the same to one R. T. Stone, his superintendent at the south jetty, then I charge you that, as to such duty, the said Stone stood in the place of defendant, and any negligence or failure on the part of said Stone in relation to said duty would be the negligence or failure of defendant." This instruction stated the law correctly, as has been many times held by this court. And the instructions, as a whole, stated all the law applicable to the case with a commendable clearness and precision. Among other things, the court told the jury that "the act complained of here as being negligent was the giving of the signal to the engineer by Astleford to let the hammer fall before the proper signal had been communicated to Astleford," and that, "unless Astleford carelessly and negligently gave the signal to the engineer to drop the hammer, your verdict must be for defendant." There was no error in the giving or refusing instructions. The judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BRITT, O.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(116 Cal. 1)

BYRNE v. HOAG et al. (L. A. 203.)  
(Supreme Court of California. Jan. 29, 1897.)

#### JUDGMENT—AMENDMENT.

In foreclosure on default in payment of the first of several installments of interest contracted to be paid, a decree directing a sale to satisfy said installment alone, which was signed by the judge, and entered by the clerk, could not be amended on motion of plaintiff, so as to provide for further sales on subsequent defaults.

Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by Olive Byrne against Abraham Hoag and another, in which there was a judgment for plaintiff. An amended judgment was subsequently entered, from which defendants appeal. Reversed.

Chas. R. Gray, for appellants. Purlington & Adair, for respondent.

McFARLAND, J. This is an appeal by the defendants from a judgment against them, entered on the 28th day of November, 1895. The facts of the case, as they appear upon the record, are as follows: In 1893 the plaintiff commenced this action against the defendants to foreclose a mortgage given by the latter to the former to secure a promissory note for \$2,000, dated April 27, 1892, payable in three years from date, with interest at 12 per cent. per annum, payable annually. At the time of the commencement of the suit the first installment of interest was due, and it was alleged in the complaint "that no sum either on the account of the principal or interest on the said note has been paid"; and the prayer is for judgment for the said sum of \$2,000 and interest, and that the usual decree be made for the sale of the mortgaged premises, the application of the proceeds thereof to the satisfaction of the whole amount of the note, and for a deficiency judgment. In the answer the defendant denied that there was anything more due than the one year's interest, and prayed that the plaintiff have no greater relief than a decree with respect to said interest. The court rendered a judgment for the sum of \$240, with interest thereon at the rate of 7 per cent. per annum from the 27th day of April, 1893, and for an attorney's fee of \$100 and costs, and decreed that the mortgaged premises be sold to satisfy that amount. This was all that the judgment embraced. The decree was signed by the judge of the superior court in which the action was pending, and was entered on the 27th day of November, 1893. Findings were waived. On the 15th day of August, 1895, more than a year and a half after the entry of said judgment, plaintiff's attorneys served upon defendants and their attorneys a notice that on the 30th day of September, 1895, or as soon thereafter as a hearing could be had, they would move the court, "on all the papers on file in this action, and the records of said case," for leave to amend the said judgment, entered on the 28th of November, 1893, so that it should read in accordance with the form of judgment annexed to said notice, and marked "Exhibit A." This notice was accompanied by an affidavit of one of plaintiff's attorneys, the substantial part of which is as follows: "That judgment in said action was inadvertently entered, failing to comply with the decision of the court in this action in this: That said decree did not provide for the payment of

the principal or interest thereafter to become due on the note sued upon in this action; that, by inadvertence, the clerk was allowed to enter said defective judgment; that the defect in said judgment was not noticed by the plaintiff's attorneys until May, 1895"; and that the pressure of business, etc., had prevented the discovery of the defect of the judgment. This motion was opposed by the defendant; and on the hearing of the motion, against the objection of defendants, there was introduced a paper indorsed "Opinion," signed by the said judge of the court, in which it is said: "In this action plaintiff is entitled to judgment only for the interest on the mortgage note now due and unpaid. I am satisfied that under the wording of the note and mortgage, which are to be construed together, that section 723 [Code Civ. Proc.] should govern the foreclosure proceedings, and that the rule as laid down in the cases of *Bank v. Johnson*, 53 Cal. 99, and *Yokam v. White*, 97 Cal. 286, 32 Pac. 238, should apply. Attorney's fee, \$100." This paper was not marked "Filed," and there was no evidence that it ever was in the possession of the clerk of the court, and no evidence as to where it was obtained. After the hearing of the motion, the court made an order as follows: "It is ordered that the judgment entered in this action on the 28th day of November, 1893, be amended to read as set forth in said notice of motion, and that the same be entered as of date the 28th day of November, 1893." This order was dated December 17, 1895, and the judgment prepared by counsel for plaintiff, and annexed to his said notice of motion, was then entered. This judgment then so entered differed slightly from the first judgment in the amount found due, and then proceeded at length to provide that when, at any time thereafter, any installment of interest secured by the note should become due, and also whenever the principal should become due, an order be made for the sale of the residue of the mortgaged premises not theretofore sold, etc.

It is quite clear that the court had no jurisdiction to enter this second judgment. The failure to enter such a judgment as the plaintiff desired in the first instance, in 1893, was not the result of any inadvertence, or the misprision of the clerk. The case does not come within any of the authorities cited, which hold that where the clerk has failed to enter the judgment ordered by the court, or has failed to enter any judgment after a decision rendered by the court, and the record shows what judgment should have been entered, then such a judgment may be entered as will conform to the actual decision of the court. In the case at bar it is not necessary to inquire whether the paper marked "Opinion" was properly allowed in evidence or what the meaning of that paper is. The decree, as entered in 1893, was signed by the judge; and, under any view, it was

last direction to the clerk, and was the decision of the case. It has been held that it is unnecessary for a judge to sign a judgment, although it has been the almost invariable custom in this state for decrees in equity to be so signed; but, where the judge does sign the decree, his signature, as was said in *Re Cook's Estate*, 77 Cal. 227, 17 Pac. 923, and 19 Pac. 431, is intended "to give the clerk a surer means of correctly entering what has been adjudged." In this case, therefore, the judgment was entered by the clerk exactly as the court ordered it to be entered, in the surest way in which the judge could express his intention. There was, therefore, no mistake or misprision of the clerk; and, if there was any error committed in rendering the judgment, it was a judicial error, which could be remedied only by appeal or motion for a new trial. To allow a judgment to be radically changed on mere motion, a year and a half after it had been entered, for no other reason than that contended for in the case at bar, would be to destroy that certainty and stability which are the main characteristics of final judgments. The judgment appealed from is reversed.

We concur: TEMPLE, J.; HENSHAW, J.

(115 Cal. 697)

McFADDEN v. DIETZ. (L. A. 219.)

(Supreme Court of California. Jan. 29, 1897.)

APPEAL.

Where an uncontradicted affidavit shows that the appeal was taken for delay, on dismissing the appeal damages will be allowed respondent. *Duncan v. Grady*, 34 Pac. 112, 99 Cal. 552, and *Koelling v. Rutz*, 41 Pac. 781, 108 Cal. 664, followed.

Department 2. Appeal from superior court, Ventura county; B. T. Williams, Judge.

Action by A. W. McFadden against A. O. Dietz. From a judgment for plaintiff, defendant appeals. On motion to dismiss. Granted.

Shepherd & Eastin, for appellant. Thos. O. Toland, for respondent.

McFARLAND, J. This case is now before us on a motion of the respondent to dismiss the appeal for failure of the appellant to file his points and authorities within the time specified by the rules of this court, and also upon a motion that respondent be allowed damages upon the dismissal of the appeal, upon the ground that the same was taken merely for delay, etc. The motion to dismiss the appeal must clearly be granted, for the transcript was filed on the 23d day of April, 1896, and at the time the motion was submitted, which was several months afterwards, no points and authorities had been filed by the appellant. When the respondent served his notice to dismiss the ap-

peal and for damages, he made and served upon the appellant an affidavit which showed that appellant, according to his own statements and declarations, had taken the appeal for delay, and the statements of this affidavit have in no way been denied by the appellant. It has been held here that, upon a motion to dismiss the appeal and for damages, this court will not, in considering said motion, look into the record to see if the appeal be frivolous, and that damages would not be awarded upon that ground until the final disposition of the appeal; but it has also been held that, where an uncontradicted affidavit shows that the appeal was taken for delay, damages will be allowed on the dismissal of the appeal. This was expressly held in *Duncan v. Grady*, 99 Cal. 552, 34 Pac. 112, and in *Koelling v. Rutz*, 108 Cal. 664, 41 Pac. 781. The same ruling seems to have been made in *Buckley v. Stebbins*, 2 Cal. 149, and in *Pacheco v. Bernal*, Id. 150. It is not necessary to determine here how far we would look into conflicting evidence as to the delay, if there had been such evidence; for, as in the cases above cited, the statement in the affidavit filed by the respondent is not controverted. The case at bar, we think, clearly calls for the imposition of damages. The appeal is dismissed, with \$100 damages as part of his costs of appeal.

We concur: TEMPLE, J.; HENSHAW, J.

(116 Cal. 8)

N. P. PERINE CONTRACTING & PAVING CO. v. CITY OF PASADENA. (L. A. 195.)

(Supreme Court of California. Jan. 30, 1897.)

MUNICIPAL IMPROVEMENTS — BIDDER'S CERTIFIED CHECK—FORFEITURE—CONTRACT—ILLEGAL PROCEEDINGS.

1. The street law (St. 1891, p. 190, § 4), which, in reference to competitive bids for public improvements, provides that, if the bidder fails to enter into the contract, "then the certified check accompanying his bid, and the amount therein mentioned, shall be declared to be forfeited," authorizes a forfeiture only where the failure is to enter into a contract based on legal proceedings of the municipal authorities.

2. On the letting of a construction contract, the municipal authorities must determine the extent of the improvement, the items of material and work, ascertain the total expense, and definitely fix the price in the contract. *Bolton v. Gilleran*, 38 Pac. 881, 105 Cal. 244, followed.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by the N. P. Perine Contracting & Paving Company against the city of Pasadena. From a judgment in favor of plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

W. E. Arthur, for appellant. Parker & Eells and Ben. Goodrich, for respondent.

HENSHAW, J. Plaintiff submitted to the defendant a bid for the performance of certain street work, and with the bid deposited

its certified checks in the sum of \$3,000. Plaintiff was awarded the contract, but, becoming convinced that the proceedings were illegal, it refused to proceed, declined to enter into the contract, and made demand for the return of its checks. Defendant refused to comply with the demand, cashed the checks, and retained the money under a claim of forfeiture. This action was instituted for its recovery. From the judgment rendered against it, and from the order denying it a new trial, defendant appeals.

Appellant contends that its demurrer should have been sustained, and its motion for a nonsuit granted, upon the ground that plaintiff, having become a successful bidder, suffered absolute and unconditional forfeiture by its refusal to enter into the contract. The street law in terms declares that if the bidder "falls, neglects or refuses to enter into the contract, \* \* \* then the certified check accompanying his bid, and the amount therein mentioned, shall be declared to be forfeited." St. 1891, p. 100, § 4. It is upon this language that the claim above mentioned is based. The argument is not tenable. Plaintiff averred and proved facts fully establishing the illegality and invalidity of the proceedings which led up to and were to have culminated in a contract. By entering into such a contract it would have received nothing. It could have looked neither to the city nor to the property owners for recompense for its labor. The street law contemplates a forfeiture for a failure to enter into a contract based upon legal proceedings of the municipal authorities, not for a failure to enter into a contract which, so far as the contractor is concerned, is mere waste paper, and under which he would expend money and labor without the possibility of remuneration. In such a case the promise of the contractor, accompanied by his certified check, is a naked offer, met and supported by no consideration. There is no estoppel. The contractor has received no benefit. The city has sustained no injury. Upon such a total failure of consideration, a promise resting upon expected benefits which can never be received is no longer binding, and a deposit of money accompanying such a promise is recoverable at law. *Hayes v. Los Angeles Co.*, 99 Cal. 74, 33 Pac. 766; 1 Pars. Cont. (7th Ed.) p. 462.

The court in its findings specified certain particulars in which the street law had not been complied with, and concluded therefrom that the proceedings were invalid. These findings are attacked. It is not necessary to consider all or many of the points raised. One of the findings is unquestioned, and its facts are decisive of the case. The specifications contain the following: "But the contractor shall put in such extra concrete as the superintendent of streets and the city engineer may require, and in such places and in such form as they may designate. For all such extra concrete the contractor shall be paid at a pro rata of contract price for the

actual quantity laid." Here there is left to the superintendent of streets and the city engineer power to increase the cost of work to an indefinite extent. A discretion lodged in the board alone is sought to be devolved upon these officers, and all means are withheld from the property owner of determining what may to him be the ultimate cost of the finished work. The case comes squarely within the principle enunciated in *Bolton v. Gileran*, 105 Cal. 244, 38 Pac. 881. The judgment and order are affirmed.

We concur: TEMPLE, J., McFARLAND, J.

(115 Cal. 577)

VERDELLI v. GRAY'S HARBOR COMMERCIAL CO. (S. F. 492.)

(Supreme Court of California. Feb. 4, 1897.)

In bank. Petition for rehearing. For former opinion, see 47 Pac. 364. Rehearing denied.

PER OURIAM. A rehearing is denied. The opinion heretofore rendered is modified by striking therefrom the words commencing "the defendant could not have been prejudiced," down to and including the words "plaintiff was injured," and inserting in lieu thereof the following: "The defendant could not have been prejudiced by this action of the court, for the reason that the instruction given, though brief, was in effect the same as that refused."

(116 Cal. 39)

GALE v. BRADBURY. (S. F. 541.)

(Supreme Court of California. Feb. 4, 1897.)

TRIAL—SUFFICIENCY OF FINDING.

A general finding by the jury that "all the allegations of the complaint are true," and that "none of the denials contained in the answer is true," is sufficient as a finding of facts.

Department 2. Appeal from superior court, city and county of San Francisco; J. M. Sawell, Judge.

Action by John Gale against W. B. Bradbury. There was judgment for plaintiff, and defendant appeals. Affirmed.

Darwin C. Allen, for appellant. Reinstein & Eisner, for respondent.

McFARLAND, J. This is an appeal by the defendant from a money judgment, in favor of plaintiff, in the sum of \$523.82, with interest, etc. The only point made by appellant for a reversal of the judgment is that the findings are insufficient, because they merely find generally "that each and all of the allegations of the plaintiff's complaint are true, and are sustained by the evidence," and "that none of the denials contained in defendant's answer herein is true, or is sustained by the evidence." The answer contained only denials. Such findings have been held to be sufficient by this court by a long line of de-

cisions upon the subject, commencing with *McEwen v. Johnson*, 7 Cal. 260. In *Johnson v. Klein*, 70 Cal. 186, 11 Pac. 606, the court said: "It has been so often held here that a finding that all the averments of the complaint are true is a sufficient finding of facts that an appeal grounded on its alleged insufficiency must be held to have been taken for delay;" and in that case the judgment was affirmed, with damages. Since then the same rule has been frequently restated. *Gwinn v. Hamilton*, 75 Cal. 266, 17 Pac. 212; *Williams v. Hall*, 79 Cal. 607, 21 Pac. 965; *San Diego Co. v. Selfert*, 97 Cal. 594, 32 Pac. 644. In the cases cited by appellant, the finding was held to be defective, because it did not clearly state that all the averments of the complaint were true, and all of the denials in the answer untrue, but left the matter in uncertainty, as, for instance, by a finding that the "material" averments were true, or that certain allegations were untrue "except only so far as the same accord with the foregoing facts." But in the case at bar the findings are the same as those heretofore frequently held to be good. The judgment is affirmed, with \$50 damages, to be entered by the court below as part of the costs of this appeal.

We concur: HENSHAW, J.; TEMPLE, J.

(116 Cal. 20)

McHENRY et al. v. DOWNER, Tax Collector.  
(Sac. 158.)

(Supreme Court of California. Feb. 3, 1897.)  
TAXATION OF NATIONAL BANK SHARES—STATUTES  
CONSTRUED—INEQUALITY IN TAXATION.

1. Shares of stock in national banks are proper subjects of state taxation, subject to the restrictions imposed by Rev. St. U. S. § 5219.

2. Const. Cal. art. 13, § 1, providing that all property not exempt "shall be taxed in proportion to its value, to be ascertained as provided by law," is not self-executing, but leaves the machinery for ascertaining the value of all property for the purposes of taxation to be provided by the legislature.

3. A shareholder in a national bank is not taxable on his stock under Pol. Code Cal. § 3608, prescribing the method for taxing corporate property, which provides that "all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor."

4. Under the restriction contained in Rev. St. U. S. § 5219, that the shares of stock in national banks shall not be taxed by a state at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, such shares are not taxable under the statute for the taxation of personal property generally; the owner of "other moneyed capital" invested in credits, whether by a corporation in which he is a stockholder, and which is assessed under Pol. Code Cal. § 3608, or by himself individually, being entitled by Id. § 3629, to a deduction from his assessment for debts due to bona fide residents of the state, while the owner of bank stock, which is property, and not a credit, cannot obtain such deduction.

Commissioners' decision. Department 2.  
Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Controversy, submitted on agreed statement, between O. McHenry and others and W. A. Downer, tax collector, to determine the validity of a tax levied on plaintiffs, as the owners of shares of stock in a national bank. Judgment for defendant, and plaintiffs appeal. Reversed.

Lloyd & Wood, for appellants. L. W. Fulkerth, Dist. Atty., and P. H. Griffin, for respondent.

SEARLS, C. This is a controversy without action, submitted upon an agreed statement to the superior court in and for the county of Stanislaus, under the provisions of section 1138 of the Code of Civil Procedure, to determine the legality of a tax imposed upon the plaintiffs, and the right of the defendant as tax collector to enforce payment thereof. By the judgment in the case, the validity of the tax, and the right of the defendant to collect the same, were upheld. Plaintiffs appeal from the judgment, and the cause comes up on the judgment roll.

It appears from the agreed statement: (1) The First National Bank of Modesto is a banking corporation, created under and pursuant to the laws of the United States in relation to the creation and organization of national banks, with a paid-up capital stock of \$100,000, divided into 1,000 shares of \$100 each, and located and having its place of business at Modesto, in the county of Stanislaus, state of California. (2) The plaintiffs, and each of them, were at the several dates herein mentioned the holders and owners of certain of the shares of stock in said national bank. The number of shares owned and held by each of the plaintiffs is stated in the agreed statement, but is unimportant here. (3) For the years 1894 and 1895, or for either of said years, said plaintiffs, or any of them, or the corporation or its officers, did not furnish to the assessor of the county a statement showing the respective interests or property of said plaintiffs, or any of them, in or to the paid-up capital stock of said First National Bank, or in or to any of its personal property or the shares of the capital stock owned by them in said corporation, and did not furnish any statement showing the amount of any debt or debts due from them, or any of them, or from the corporation to bona fide residents of this state, or to firms or corporations doing business in this state. (4) For the years 1894 and 1895 the assessors of said Stanislaus county assessed the said First National Bank, upon its real estate and mortgage interests in real estate, and upon the furniture and fixtures of its banking office only, at the full cash value of such real estate, mortgage interests, furniture, and fixtures, said bank claiming that its other property was not subject to taxation under state authority. For the years 1894 and 1895 all the several banking corporations and other corporations located in said county, other than national

banking corporations, were assessed upon all their real and personal property at its full cash value; but the shareholders in state banks and state corporations were not assessed upon their shares of stock therein, such shares of stock being treated as exempt from assessment under the provisions of section 3608 of the Political Code of the state of California. (5) J. F. Campbell, county assessor for said Stanislaus county for the year 1895, assessed to each of the plaintiffs herein the shares of stock by them severally held in said First National Bank of Modesto. He ascertained that said shares were of the cash value of \$100 per share over and above the real estate, etc., assessed to the bank. The assessor pursued the following course in arriving at the value of the stock, viz.: He ascertained that the paid-up capital stock was \$100,000; undivided profits, \$4,140; surplus, \$20,000,—total value, \$124,140. He deducted therefrom, value real estate assessed to bank, \$6,305; value mortgage interest to bank, \$5,596; value office furniture, etc., to bank, \$800,—thus leaving a balance of \$111,439. From this sum he deducted 10 per cent. for bad debts. He further ascertained that the capital stock was divided into 1,000 shares of \$100 each, and thus determined that they were of the value of \$100 each. He also found that said shares had not been assessed for the purposes of taxation for the year 1894, and thereupon doubled the assessment of 1895, and assessed said shares at \$200 each. The state board of equalization reduced the value of all property assessed for taxation in said county for the year 1895 10 per cent., and upon the property as so reduced taxes were levied. Plaintiffs have tendered to the tax collector all sums due from them for taxes for the year 1895, save and except the tax imposed upon said shares of stock so by them held and owned, which said last-mentioned tax they claim is contrary to law, and therefore illegal and void; and said tax collector, the defendant herein, claims that the same is lawful, and therefore a good and valid claim. As before stated, the superior court adjudged that the taxes imposed upon the shares of stock are legal and valid, and that defendant has a right to collect the same. The plaintiffs appeal.

The points made by appellants for reversal are: (1) The taxes in question were not assessed in pursuance of the provisions of section 1 of article 13 of the constitution of this state. (2) The taxes in question are illegal, because the property assessed is not subject to assessment for the purposes of taxation, and is exempt therefrom by the provisions of section 3608 of the Political Code. (3) The taxes in question are illegal, because they were levied in violation of the provisions of the national bank act. For the sake of greater brevity we shall consider the propositions involved in the several contentions of appellants not in the order of their sequence, but together.

Section 1 of article 13 of the constitution of

this state is as follows: "All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership: provided, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county or municipal corporation within this state, shall be exempt from taxation. The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this state." It will appear at a glance that the foregoing constitutional provision is not, and does not pretend to be, self-executing. All property not exempt shall be taxed in proportion to its value, but that value is to be "ascertained as provided by law." The constitution fixes the liability of property to taxation, and the standard upon which it is based, viz. in proportion to its value; but the duty of prescribing the machinery by which to ascertain such value is confided to the legislature. "Taxes are the enforced proportional contribution of persons and property, levied by the authority of the state, for the support of the government, and for all public needs." Cooley, Tax'n, p. 1. The power of taxation is lodged with the legislative branch of our government. "The legislature must therefore determine all questions of state necessity, discretion, or policy involved in ordering a tax, and in apportioning it; must make all the necessary rules and regulations which are to be observed in order to produce the desired returns; and must decide upon the agencies by which collections shall be made." Cooley, Tax'n (2d Ed.) p. 43.

The question presented seems to divide itself under two heads: (1) May the legislature of the state tax the stock of national banks? And, if yea, (2) has it provided adequate means for so doing?

The first query is of easy solution. National banks are agencies of the federal government selected as a necessary or convenient means to the exercise of its functions, and are not except by its consent, subject to the taxing power of the states. Were it otherwise, it is said a state dissatisfied therewith could tax them out of existence, and thus indirectly hamper and thwart the operations of the general government. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank*, 9 Wheat. 738; *Van Allen v. Assessors*, 3 Wall. 573; *Austin v. Boston*, 14 Allen, 359; *Flint v. Boston*, 99 Mass. 141; *State v. Mayor, etc., of Newark*, 39 N. J. Law, 380. The general government has, however, consented that, subject to certain restrictions, the states may tax the stock of shares of national banks. By the act of congress of June 3, 1864, as amended February 10, 1868 (Rev. St. U. S. § 5219), it is provided



as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed." It will thus be seen that, subject to the two restrictions enumerated in the act of congress, shares of stock in national banks are proper subjects of state taxation. In the present instance the shares were taxed in the county and city or town where the bank is located, and, as none of the shareholders appear to be nonresidents of the state, no violation of the restriction as to the place of taxation appears.

This brings us to a consideration of the second question, viz.: Has the legislature of this state provided the means for the taxation of the stock in harmony with the requirement of the act of congress, which requires that the rate of taxation shall not be in excess of that imposed upon other moneyed capital in the hands of citizens of the state? Prior to 1881, section 3640 of our Political Code read as follows: "Each person, firm or corporation owning or having in his or its possession any of the shares of the capital stock of any corporation, association or joint stock company shall be assessed therefor. If the corporation, association or joint stock company has its principal place of business in this state, the assessable value of each share of its stock shall be ascertained by taking from the market value of its entire capital stock the value of all property assessed to it, and dividing the remainder by the entire number of shares into which its capital stock is divided. The owner or holder of capital stock in corporations, associations and joint stock companies whose principal place of business is not within the state must be individually assessed for such stock," etc. The section provided, further, that shareholders, in their statements to the assessor, should designate the number of shares held by them, and the name of the corporation, and that they should present a certificate as to the amount or value of property assessed to the corporation in order to secure a deduction on account thereof. Under the law as it then stood, the shares of stock held by Nancy Miller in the National Gold Bank

of D. O. Mills & Co. were assessed to her for the purposes of taxation, in the same manner substantially as in the case at bar. An agreed statement was made, involving the same facts substantially as here. The case came before this court in *Miller v. Heilbron*, 58 Cal. 133, whereupon it was held that the attempted taxation of the shares in the national bank was in violation of the permission and limitations contained in section 5219 of the Revised Statutes of the United States, and therefore void. It was held in that case that the fact that shares in the national bank were assessed the same as shares in state banks was not sufficient; that the clause in the United States statute that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital," etc., "means something more than that there should be no discrimination with respect to the percentage or any valuation which might be made; but that, taking the assessment, rate of assessment, and valuation together, the taxation on shares of national banks should not be greater than on other moneyed capital." Then, as now, under our constitution and laws, "other moneyed capital" invested in credits entitled the holder thereof to deduct therefrom all debts due by the party assessed to bona fide residents of the state. As national bank shares are property, and not credits, the assessor is not authorized to deduct from the value thereof debts due by the owner to others; hence it was held that there was a clear discrimination in favor of other moneyed capital, and against the holders of such bank shares. *People v. Weaver*, 100 U. S. 543, is referred to and relied upon in support of the conclusion reached, and, we think, supports such conclusion. So in *Van Allen v. Assessors*, 3 Wall. 573, where a statute of the state of New York provided for the taxation of national bank shares at the same rate as was imposed upon other moneyed capital in the hands of the other individuals of the state, but did not impose a tax upon the shares of state banks, although a tax was levied upon the capital of such state banks, it was held under the act of congress of 1864, which contained a provision, in addition to the present restrictions, that the rate of taxation imposed upon such shares should not exceed that imposed upon state banks; that a tax upon the capital of state banks was not the equivalent of a tax upon the shares of national banks, not exceeding their par value, for the reason that the capital of state banks may consist of the bonds of the United States which are exempt from state taxation, etc.; and that the tax was hence invalid.

After the transaction arose out of which *Miller v. Heilbron*, supra, grew, and in 1881, section 3608 of the Political Code was amended so as to read as follows: "Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for

and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor." The constitutionality of this section was drawn in question in the case of *People v. Badlam*, 57 Cal. 594, which was an application for a writ of mandate to compel Badlam, as assessor, to assess to various holders certificates of stock by them held in corporations, etc. The court upheld the section of the Code, placing its opinion upon the ground that, where all of the property of a corporation was assessed to the corporation, to again assess the shares of stock to the shareholders would be double taxation, which is inhibited by our constitution. Assuming then, as we must, that section 3608 of the Political Code is constitutional, this difference is presented in the method of valuation for the purposes of taxation between state banks and the shareholders of national banks: The shares of stock in the former are not assessed. In lieu thereof, all the property of the corporation is assessed. But this does not include government bonds or other nonassessable property, and all solvent creditors unsecured by deed of trust, mortgage, or other lien on real or personal property due or owing are to be assessed subject to a deduction for all debts (not secured as above) due and owing by the corporation to bona fide residents of the state. Pol. Code, § 3629. In the latter—that is to say, in the case of shares of national banks—the stock is assessed at its value after deducting only the property actually assessed to the corporation; that is to say, its real estate and debts secured by mortgage, trust deed, etc. As before stated, the assessor is not authorized to deduct debts owing by the owner of the shares, for the reason that shares of stock are property, and not credits, from which, under the law, debts can be deducted. The disparity in the mode of valuation becomes more apparent when we consider that one-third of the paid-up capital stock of every national bank must be invested in nonassessable property, viz. in the registered bonds of the government of the United States, which are required to be deposited with the treasurer of the United States as security for its notes, before it can be authorized to do business. No method is provided in our statute for deducting from the value of the shares anything on this account, and in the case at bar it was not done.

Waiving, then, the fact that shares in state banks are not assessed at all, and assuming that the assessment of all the property of a state bank may be the equivalent of the assessment of the shares of stock in a national bank, and the stubborn fact still remains that under our law it is not such equivalent, but militates most grievously against the owners of stock in the national banks. Ex-

act equality, from a mathematical standpoint, may not be attainable in the matter of taxation; but a system which of necessity, and not from accident or error of judgment, discriminates against the owners in national banks to a large extent, is in violation of the restriction imposed by congress upon the privilege granted to the states to tax shares in national banks. In other words, as was said in *Boyer v. Boyer*, 113 U. S. 689, 5 Sup. Ct. 706, the expression used in the United States statute, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital," etc., refers not simply to the rate of taxation, but to the whole process of assessment and valuation, and that a state law which "establishes a mode of assessment by which such shares are valued higher in proportion to their real value than is other moneyed capital," etc., is in violation of the restriction contained in the act of congress. The paramount object of the restriction by the act of congress upon the taxation of shares in the national banks by the several states is aptly stated by Mr. Justice Mathews in *Mercantile Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826, in which case, after stating the doctrine of previous cases, he added: "The main purpose, therefore, of congress, in fixing limits to state taxation on investments on shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of congress is to be read in the light of this policy."

Keeping steadily in view this policy and purpose, many of the cases which at first blush seem irreconcilable become plain, and are referable to patent sources of distinction. It is contended by counsel for respondent that the cases of *Miller v. Hellbron* and *Van Allen v. Assessors*, supra, have been virtually overruled by the later cases in the supreme court of the United States. We have examined such later cases with some care, and while it must be conceded that some of them restrict the broad reasoning of those cases, and point out numerous exceptions to the general rules therein enunciated, we see no expression of dissent from the principles decided. It has been held that savings banks and trust associations are not within the reason of the rule provided by congress, and hence that the restriction does not apply to them (*Mercantile Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. 826); also, that "It could not have been the intention of congress to exempt bank shares from taxation because some moneyed capital was exempt" (*Hepburn v. School Directors*, 23 Wall. 480; *Bank v. Ayers*, 160 U. S. 660, 16 Sup. Ct. 412); also, that "the act of congress was not intended to curtail the state power on the subject of taxation." It simply required

that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property if the legislature chose so to do. *Adams v. Nashville*, 95 U. S. 19. We think the spirit breathed in all the later cases is this: The several states may exempt certain personal property from taxation; may provide a different mode of taxation for property, the use of which produces no competition with capital invested in national banks. These exceptions, however, must not operate as an unfriendly discrimination against investments in national bank shares. In view of this doctrine and of the condition of our law, we are of opinion: (1) That, under section 3608 of our Political Code, shares of stock in national banks are not subject to assessment for the purposes of taxation. (2) If it be conceded that this section has no application to the shares of stock in national banks, and that they may be assessed as other personal property, then the machinery provided therefor works such a discrimination in favor of state banks, and against shares of national banks, that it is violative of the restrictions of the act of congress, and that the assessment and tax in the case at bar are null and void. We recommend that the judgment of the court below be reversed, and the court directed to enter judgment in favor of the plaintiffs.

We concur: HAYNES, C.; BELCHER, C.

**PER CURIAM.** For the reasons given in the foregoing opinion, the judgment of the court below is reversed, and the court directed to enter judgment in favor of the plaintiffs.

(5 Cal. Unrep. 596)

**WILLIAMS v. SUPERIOR COURT OF LASSEN COUNTY.** (S. F. 297.)

(Supreme Court of California. Feb. 6, 1897.)

**JUSTICES OF THE PEACE—NOTICE OF APPEAL—EVIDENCE OF FILING.**

The marking of the filing of a notice of appeal by a justice is not the only competent evidence of the filing of the paper, and the absence of an entry in the justice's docket is not conclusive proof of the fact that it had not been filed.

Department 1. Petition by one Williams for a writ of certiorari to the superior court of Lassen county. Writ dismissed.

Spencer & Raker and F. C. Spencer, for petitioner. Shinn & Shinn, for respondent.

**PER CURIAM.** The court is unanimously of the opinion that the writ ought to be dismissed. The fact, impliedly found by the court in exercising jurisdiction, that the notice of appeal had been filed, was, under the circumstances, entirely justified. The marking of the filing is not the exclusively competent evidence of the filing of the paper,

and the absence of an entry in the justice's docket is not conclusive proof of the fact that it had not been filed. Writ dismissed.

(116 Cal. 9)

**BANK OF BRITISH COLUMBIA v. FRESE et al.** (S. F. 377.)

(Supreme Court of California. Feb. 1, 1897.)

**RIGHTS OF PLEDGER—EXPENSES—EVIDENCE.**

1. A bank authorized drafts on it to pay for goods bought by a certain firm, provided they were accompanied by invoices and bills of lading. It paid the drafts, and held the invoices, etc., as security. After the sale by the firm or part of the goods, which the bank delivered, and failure of the firm, the bank disposed of the balance through brokers. *Held*, that the bank was entitled to add to the amount paid on the drafts the reasonable charges for storage, insurance, cartage, brokerage, etc.

2. The bank was also entitled to an allowance of discounts for cash on sales made by it, where the discounts were not more than the interest on time sales, or unusual, or more than equaled the risk of loss if the sales had been on credit.

3. It was entitled to any sum paid for "customhouse drayage to warehouse."

4. The bank, as against a surety of the firm, was not entitled to commissions which the firm agreed to pay on the amount of the drafts.

5. Where an account of one party is put in evidence by the adverse party, the latter must call for any required explanation of an item of the account, and the item will not be disallowed because it does not indicate what it was for.

6. Where an objection was sustained to a question asking a witness if he had learned a certain fact, and no offer was made to show that the witness had learned it, prejudicial error did not appear.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the Bank of British Columbia against William Frese and others on a promissory note. From a judgment in favor of defendants, and from an order denying its motion for a new trial, plaintiff appeals. Reversed.

Sidney V. Smith, for appellant. Naphtaly, Freidenrich & Ackerman and Page, Eells & Wheeler, for respondents.

HAYNES, C. On November 3, 1891, the plaintiff made and delivered to William Frese & Co., a co-partnership doing business at San Francisco, a letter of credit directed to Bullock Bros. & Co., of Rangoon, authorizing them to draw on plaintiff, at London, drafts at six months' sight, for any sum or sums not exceeding in the aggregate £13,000 sterling, for the invoice cost of merchandise to be shipped from Rangoon to San Francisco on account of said Frese & Co., and agreed to pay said drafts at maturity, provided they were accompanied by invoices and bills of lading purporting to be of the required value and shipped as above stated. Under said letter of credit, Bullock Bros. & Co. drew drafts upon the plaintiff at London amounting in all to \$61,892.91, and the same were accompanied by invoices and bills of

lading as required by the letter of credit. On March 28, 1892, none of said drafts having matured or been paid, the defendants Roth, Blum & Co., at the request of William Frese & Co., executed with said last-named firm a promissory note of that date, at one day, for the sum of \$10,000, and delivered the same to the plaintiff as collateral security for the payment of drafts to be drawn under said letter of credit, said note to be canceled and returned to Roth, Blum & Co. as soon as the drafts under said letter of credit should be paid. The cargo of rice purchased under said letter of credit arrived at San Francisco September 17, 1892. Frese & Co. failed in business some time between June 20th and August 21, 1893. Up to the time of their failure they made sales of portions of the rice, and the bank delivered the rice so sold. After their failure the bank disposed of the rice through brokers. Plaintiff's account, as rendered, shows a balance due the bank of \$7,981.85. This action is upon said promissory note. Frese & Co. pleaded their discharge in insolvency. Roth, Blum & Co. set out in their answer the circumstances under which the note was made, and alleged that the aggregate amount of drafts drawn was \$61,892.91; that plaintiff held, as security for the payment of said drafts, the invoices and bills of lading of said merchandise, and had received on account of said drafts a sum largely in excess of their aggregate amount. The court found that plaintiff had received the proceeds of said cargo, and that "said cargo realized a sum in excess of the aggregate amount of all the drafts drawn under said letter of credit, to wit, in excess of the sum of \$61,892.91." Judgment was entered for the defendants, and the plaintiff appeals therefrom, and from an order denying its motion for a new trial.

Appellant contends that said finding is not justified by the evidence. Upon the trial the discharge in insolvency of Frese & Co. was admitted by the plaintiff, and Roth & Blum admitted the incorporation of the plaintiff, and the making and delivery of the note set out in the complaint, and then put in evidence said letter of credit, and plaintiff's acknowledgment in writing that said note was held by it as collateral security for the payment of said drafts. It was also admitted by all parties that drafts were drawn under said letter of credit to the amount of \$61,892.91, all of which were paid by the plaintiff. Defendants then called as a witness Walter Powell, manager of the Bank of British Columbia, in San Francisco, by whom said letter of credit was issued, who testified that the total amount received by the bank for the rice was \$74,689. Two accounts were made by the bank,—the first from the arrival of the cargo down to the failure of Frese & Co., during which time the sales were made by them and the deliveries by the bank, and the second covered

the remainder of the sales, which were made by the bank through brokers; and these accounts were put in evidence by the defendants, from the face of which it appears that the sales were closed July 31, 1894, and at that date there was a balance due the bank of \$7,981.85. The sole controversy is as to whether the bank was entitled to charge against the proceeds of sales freight, insurance, customs duties, drayage, broker's commissions, discounts, interest, etc. Of course it was only necessary for the defendants in the court below to establish improper debit items, in the account as rendered, to equal the balance shown by the account to be due to the bank, in order to defeat the plaintiff. It is said by counsel for appellant, in his brief, that the court below adopted the defendants' view, that the expenses of the cargo, consisting of freight, duty, weigher's fees, drayage, and storage, amounting to \$15,602.79, could not be charged by the bank, and deducted from the proceeds, as against Roth, Blum & Co., who are sureties to the extent of \$10,000, the amount of their note. If such holding is correct, the judgment must be affirmed, as a matter of course, though if it be wrong, and it be shown that other items appearing on the debit side of the account, equaling the balance claimed by the bank, were improper, an affirmance must follow, notwithstanding the error.

It should first be observed that the burden of proof to establish their defense that the bank had been repaid by the proceeds of the cargo rested upon the defendants. A full and detailed account had been rendered by the bank to the defendants Roth, Blum & Co., and they called as their witness the manager of the bank, and examined him as to various items of the account, and put the entire account in evidence without reservation or qualification, except such as may be inferred from his examination as to particular items; and therefore all other items, unless they appear on the face of the account to be improper, should be allowed. Their answer alleged, and the court found, that plaintiff held, as security for the payment of said drafts, the invoices and bills of lading of the cargo; and if the plaintiff had refused or neglected to obtain possession of the cargo, so that its proceeds were lost to the bank, there can be no question that Roth, Blum & Co. would have been released from liability as sureties, unless upon the clearest showing that the cargo, if received and properly disposed of by the bank, would have been insufficient to reimburse it. It is not shown that the bank could have obtained possession of the cargo, and thus availed itself of that security, without the payment of the freight and other charges above mentioned. It held the invoices and bills of lading, and was the apparent owner, holding the legal title, and prima facie liable for these charges. It is true, the manager of the bank, upon his examination by the defend-

ants. testified that Frese & Co. drew checks payable to John Livingston for freight charges amounting to \$11,603.40, and which, when presented, were paid by the bank, and charged in the books to the ordinary account of Frese & Co., but the error was discovered the next morning, and corrected by charging them to the rice account. He further testified, however, that prior to that time Frese & Co. had an account at the bank, but that they did not at the date of the arrival of the cargo, or at any time afterwards, have any moneys to their credit in said bank. The correction of the charge was therefore proper. The first item of the account is a charge of \$1,573 for marine insurance upon the cargo, paid by plaintiff upon the arrival of the vessel, September 17, 1892; and this charge, appellant concedes, is improper, and should be deducted from the balance of \$7,891.85. It may be further said, without entering into details, that reasonable charges for storage, insurance upon the rice while stored, cartage, brokerage, etc., properly incurred in caring for, preserving, and selling the rice, are properly deducted from the gross receipts. No question is made as to the necessity or propriety of any of these acts, or as to the prices for which the rice was sold, or the manner of sale; but some special objections are made to particular items, which remain to be noticed.

It is contended by defendants that various charges of interest on overdrafts at different dates from September 30, 1892, to June 19, 1893, are improper. Prior to and including September 30, 1892, plaintiff had paid for freight and customs duties \$12,306.40, and on October 11th it had paid on the draft drawn under the letter of credit \$35,157.74, and on October 14th, balance of draft, \$26,735.17; in all, \$74,199.31,—a sum exceeding the receipts by over \$24,000. It is not questioned that, as between the bank and Frese & Co., the interest charged had not been earned or properly charged; and, if so, we fail to see upon what ground the defendants Röth, Blum & Co. can object. The account shows, however, that nearly if not the whole of the interest so charged was in fact paid by Frese & Co., and these charges of interest are balanced by the credits of money paid by them; and therefore, so far as the charges and credits balance each other, the account as to Röth, Blum & Co. is not affected, even if it be conceded that they are not liable for the interest so charged.

In the account certain entries appear on a given quantity of rice sold at a price stated, amounting to a given sum, "less discount" of a stated amount, the balance being carried out as the amount received from the sale. These items of discount amount to \$226.14, and respondents contend that these should be deducted. It is said that these discounts were made for cash, and that the bank should have waited for its pay. It does not appear, however, that the discounts were

more than the interest on time sales, or were unusual, or more than equaled the risk of loss if the sales had been made on credit. Respondents' contention upon this point cannot be sustained.

On the debit side of the account is an item, "To Pac. M. S. S. Co., \$758.35"; and this entry, it is said, does not indicate what it was for, and should be disallowed. But it was part of the account put in evidence by defendants, and, if it required explanation, they should have called for it.

It is further objected by respondents that in the sums charged on October 11 and 14, 1892,—which were in payment of the drafts,—there was included a commission of 1 per cent., amounting to \$618.92, and that they are not chargeable therefor, and that that amount should be deducted. Said sums so charged were the precise amounts of the drafts drawn at Rangoon by Bullock Bros. & Co., under the letter of credit, "for the invoice cost of merchandise," and did not include any commission. The answer of defendants Röth, Blum & Co. alleged that the drafts were so drawn, and were for the sum of \$61,892.91 (and the court so found), and said charges above mentioned only equaled the said sum. The contract between the bank and Frese & Co. did provide that a commission of 1 per cent. should be paid the bank upon the amount of drafts drawn under said letter of credit, but it is not included in said items, nor anywhere in the account. If it did, it should be excluded, as defendants are not liable under their contract for profits made by the bank, but only for the liability it incurred.

On the record before us, we find but two items which should be deducted from the balance claimed by the plaintiff. One of these—the item for marine insurance upon the cargo, \$1,573—is conceded by appellant. The other is a charge dated "October 6th. To Popper (customhouse drayage to warehouse), \$470.75,"—concerning which Mr. Powell testified that it "was paid by the check of W. Frese & Co. on the bank," from which we infer that it was paid with the funds of Frese & Co., and not out of the proceeds of the rice. If it was not paid by Frese & Co., it should stand.

We have not verified the footing of the accounts, but have taken the balance as stated; and deducting the above charges, which, as the evidence now stands, should be disallowed, there would appear to remain due to the plaintiff from respondents \$5,938.10. It follows that the finding that "said cargo realized a sum in excess of the aggregate amount of the drafts drawn under said letter of credit" is not justified by the evidence.

But one exception to ruling upon evidence is specified. Mr. Powell was asked the following question: "Did you ever learn from Mr. Blum whether his firm was interested with Frese & Co. in this cargo of rice?" The objection that the question was incom-

petent and irrelevant was sustained. No offer was made to show that the witness had been so informed, and hence it does not appear that plaintiff was prejudiced, even if it be conceded that the ruling was erroneous.

We are asked by appellant to enter judgment for the plaintiff for such amount as appears to be due it, the facts being before us. But the findings would not support such a judgment; and this court cannot make findings of fact. The judgment and order appealed from should be reversed, and a new trial granted.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial granted.

(30 Or. 301)

PATTERSON v. BOARD of PILOT COM'RS.  
(Supreme Court of Oregon. Feb. 8, 1897.)

PILOTS—RENEWAL OF LICENSE—POWERS OF BOARD OF PILOT COMMISSIONERS.

Hill's Ann. Laws, § 3904, provides for the granting of licenses to pilots by the pilot commissioners, on the pilot grounds of the Columbia and Willamette rivers, and, as amended by Laws 1893, p. 11, authorizes the board to limit the number of such pilots. Section 3907 provides that licenses granted shall be annually renewed, unless for good cause, to be determined by the board, in which case the holder of a license shall be notified 10 days before the expiration of his license, and shall be entitled to a hearing. *Held* that, without such notice, the board has no power to withhold a renewal, on the ground that it has determined to reduce the number of pilots.

Appeal from circuit court, Clatsop county; T. A. McBride, Judge.

Mandamus by W. H. Patterson against the board of pilot commissioners to compel the renewal of a license as a pilot. Judgment for plaintiff, and defendant appeals. Affirmed.

C. W. Fulton, for appellant. J. M. Long, for respondent.

BEAN, J. This is a proceeding by mandamus to compel the board of pilot commissioners to renew a license issued to the petitioner as a river pilot in July, 1893, and comes here on an appeal from a judgment in his favor. The act creating the board of pilot commissioners, and prescribing its powers and duties (Laws 1882, p. 15; Hill's Ann. Laws, c. 66, tit. 1), defines the bar and river pilot grounds of the Columbia and Willamette rivers, and prohibits any person from acting as a pilot thereon unless duly licensed so to do by the board. Section 13 thereof, being section 3904 of Hill's Ann. Laws, provides that "the board has the power, and it is its duty, under this act, to maintain a sufficient number of capable pilots upon the bar and river pilot grounds, and to exercise a general supervision over the subject of pilot-

age upon said grounds, and to that end may do and provide as follows: Examine and license pilots for said pilot grounds, and limit the number of pilots and pilot boats allowed thereon." Section 14 requires the board to report annually to the governor; section 15 provides that licenses shall be issued for the term of one year; and section 16 is as follows: "A license granted to a pilot under this act shall, as a matter of course, be annually renewed, unless the board determines that there is good cause for withholding such renewal, in which case it shall direct the secretary to notify such pilot in writing, at least ten days before the expiration of his license, of such determination and the cause thereof, and such pilot may thereupon apply within ten days for a hearing in regard to such cause for withholding the license, which shall be granted; and if upon such hearing it appears to the satisfaction of the board that there is no sufficient cause for withholding the license, it shall be renewed of course, and not otherwise." In 1889 the legislature amended section 13, by eliminating therefrom that portion authorizing the board to limit the number of pilots and pilot boats allowed on the pilot grounds (Laws 1889, p. 12); but in 1893 that provision was again restored (Laws 1893, p. 11), so that, at the time this controversy arose, the law in this respect was the same as originally enacted.

The facts in the case are that in July, 1889, the petitioner was duly licensed as a river pilot for the term of one year, and such license was thereafter annually renewed until 1894, when the board, without any previous notice to him whatever, declined to renew the same, on the ground that in its judgment there was a sufficient number of pilots to meet the demands of commerce, and directed that the petitioner be so notified. No question was made, either in the court below or here, as to the competency of the petitioner to act as a river pilot, so that the only question to be determined in this proceeding is whether the board of pilot commissioners may, without notice, lawfully refuse to renew a license on the ground above stated. The contention for the defendant is that the power to limit the number of pilots, given by section 3904, *supra*, includes the power to withhold from licensed pilots renewals of their annual licenses without notice; while the petitioner contends that a license duly issued must be annually renewed, unless such renewal is withheld for cause, to be determined in the manner and after the notice required by section 3907, and in this position we think he is correct. The several provisions of the statute on this question must be construed together, and effect given to all. Now, by section 3904, the board is clearly authorized and empowered to limit the number of pilots, but this power must be exercised in conformity with the provisions of section 3907, which plainly protects the holder of a

license by requiring that it shall be annually renewed, as a matter of course, unless, after notice, and a hearing if desired, the board shall determine that there is good cause for withholding such renewal. In other words, the effect of the statute is that the board may, in the first instance, refuse to license an applicant because the number of pilots allowed by it is complete, but, after having issued a license, it must renew the same, as a matter of course, unless it proceed in the manner pointed out. In short, after a license is once issued, a right to the renewal thereof becomes, under the statute, a vested and valuable right, of which the holder cannot be deprived without notice. This, it seems to us, is the plain interpretation of the statute, and any other would be contrary to the expressed legislative will.

It was argued, however, for the defendant, that the provisions of section 3907 have reference only to a case where the refusal is to be based upon some reason personal to the particular pilot; but this is giving to the statute a construction unwarranted by its language. It clearly declares that a license granted to a pilot shall be renewed, as a matter of course, unless he is notified of a determination not to renew it, and the cause thereof, and thus given an opportunity to be heard on the matter. The statute makes no distinction as to the method of procedure in a case where the pilot commissioners desire to withhold the renewal of a license because of the alleged incompetency or unfitness of a particular pilot, and one where they desire to withhold such renewal on the ground that the interests of commerce require the number of pilots to be reduced. In either case, the pilot to be affected is entitled to notice, and an opportunity to present such reasons as he may have why the contemplated order should not be made. It may be within the official judgment and discretion of the board to reduce the number of pilots as their several licenses shall expire; but, if so, the law has provided that it shall not be done without notice.

It was also urged at the argument that the board was justified in refusing to renew the license of the petitioner because he had not been engaged in the active pilot service during the previous year. But that question is not here. No notice was ever given him of the intention to withhold his license on that account. Judgment affirmed.

(30 Or. 305)

**FOWLE v. HOUSE.**

(Supreme Court of Oregon. Feb. 8, 1897.)

**APPEAL FROM DECREE SUSTAINING DEMURRER — DISPOSITION OF CAUSE ON AFFIRMANCE.**

Where a decree sustaining a demurrer to a complaint on the ground that it does not state a cause of action is affirmed, final judgment will not be entered, but the cause will be remanded for such further proceedings as may be deemed proper.

Motion to recall mandate. Denied.  
For former report, see 44 Pac. 692.

**PER CURIAM.** The motion to recall the mandate is denied. The decree of the court below, sustaining a demurrer to the complaint because it does not state facts sufficient to constitute a cause of suit, was affirmed in this court (29 Or. 114, 44 Pac. 692); but no final disposition of the cause was made, it being remanded to the court below "for such further proceedings as may be deemed proper, not inconsistent with the opinion herein." Under the mandate sent down, the court was at liberty to determine, in the first instance, whether the plaintiff should be allowed to amend his complaint, and with the exercise of that discretion we cannot interfere by directing what course it shall pursue in the matter. This is the rule of practice in cases of this character, announced in *Powell v. Railroad Co.*, 14 Or. 22, 12 Pac. 83, and which has been followed ever since that decision. It was said, at the argument of the motion, that the court below had refused to permit an amendment, on the ground that, under the mandate, it had no authority so to do; but we cannot inquire into that question at this time. The motion is denied.

(30 Or. 306)

**DUFFY v. MacMAHON et al.<sup>1</sup>**

(Supreme Court of Oregon. Feb. 8, 1897.)

**APPEAL — SUFFICIENCY OF NOTICE — DESCRIPTION OF JUDGMENT.**

A notice of appeal describing the judgment as rendered March 2, 1896, for "the sum of \$250 and interest from May 8, 1894, amounting to the sum of ——— dollars," is insufficient to support an appeal from a judgment rendered March 3, 1896, for \$293 and interest thereon from that date at the rate of 10 per cent. per annum.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by John F. Duffy against M. J. MacMahon and others. There was judgment for plaintiff, and defendants appeal. Dismissed.

L. R. Webster, for the motion. E. Mendenhall, opposed.

**PER CURIAM.** This is a motion to dismiss an appeal. The plaintiff, on March 3, 1896, obtained a judgment in the circuit court for Multnomah county against the defendants, for \$293.43 and interest thereon from that date at the rate of 10 per cent. per annum, \$50 attorney's fees, and the costs and disbursements of the action, from which the defendants attempted to appeal, but in the notice thereof they describe a judgment as having been given March 2, 1896, for "the sum of two hundred and fifty dollars and interest from the 8th day of May, 1894, amounting to the sum of \$——, for the sum of fifty dollars attorney's fees, and for his costs and disbursements." The plaintiff,

<sup>1</sup> Rehearing pending.

contending that the notice fails to identify the judgment complained of, moves to dismiss the appeal. The judgment rendered by the court on March 3d provides for interest at the rate of 10 per cent. per annum; and as the statute declares that "judgments and decrees for money upon contracts bearing more than six per centum interest, and not exceeding ten per centum per annum, shall bear the same interest borne by such contracts" (section 3591, Hill's Ann. Laws Or.), it must be presumed that the judgment complained of was rendered upon a contract bearing 10 per cent. interest. The legal rate in this state is 8 per cent. per annum on money due or to become due where there is a contract to pay interest and no rate specified (section 3587, Id.); and as the defendants, in their notice of appeal, described a judgment for \$250, with interest from May 8, 1894, amounting to \$286.33, it is evident there is a variance between the judgment given by the court and the one described in the notice, in the following particulars: (1) In the date of its rendition; (2) in the amount for which the judgment was given; and (3) in the rate of interest. This court, in *Crawford v. Wist*, 26 Or. 596, 39 Pac. 218, in discussing the sufficiency of a notice of appeal, says: "The tendency of the court, as indicated by recent decisions, is to construe notices of appeal liberally, and hold them sufficient if, by fair construction or reasonable intendment, the court can say that the appeal is taken from the judgment in a particular case." Even with this very liberal rule as a guide, we are unable to say, from an inspection of the notice in the case at bar, that the appeal was taken from the judgment complained of; and, this being so, the appeal will have to be dismissed, and it is so ordered.

(30 Or. 464)

**NICKUM v. BURCKHARDT et al.<sup>1</sup>**

(Supreme Court of Oregon. Feb. 8, 1897.)

**CORPORATIONS—SUBSCRIPTIONS TO STOCK—WHAT CONSTITUTES ORGANIZATION—NOTICE TO SUBSCRIBERS—VALIDITY OF ORGANIZATION—PURPOSES OF CORPORATIONS—ESTOPPEL.**

1. On a preliminary agreement to form a corporation, the capital stock to consist of 150 shares, 73 shares were subscribed, and the articles were duly acknowledged and filed. Afterwards a second subscription was signed by the original subscribers, except A., B., and two others, 69 shares being taken. These, with A. and B., who had subscribed for 6 shares on the original agreement, united in calling a stockholders' meeting. At the meeting which followed, A. and B. participated. *Held*, that A. and B. were subscribers, within Hill's Ann. Laws, § 3222, declaring that a corporation may elect directors when half the stock has been subscribed.

2. Where subscribers representing 50 per cent. of the capital stock of a proposed corporation unite in calling and holding the first meeting for organization, the fact that other subscribers were not notified of the meeting does not afford grounds for those present and participating to object to the validity of the organization.

3. A judgment determining that one of those signing the original agreement, but not the second, and participating in the organization, was not liable as a subscriber for the amount of his subscription, is not such a determination of the invalidity of the organization as will bar an action by the receiver to recover from the other subscribers the amount unpaid on their subscriptions.

4. One who participates in the organization of a company, under the articles, cannot afterwards escape liability for his stock subscription on the ground that the purposes of the company, as expressed therein, differed from those stated in the original agreement for organization.

5. Facts relied on to show estoppel must be pleaded to be available.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by J. M. Nickum, receiver of the Oregon Fertilizing Company, against Charles A. Burckhardt and F. Otto Burckhardt. From a judgment for defendants, plaintiff appeals. Reversed.

This is an action to recover for assessments levied upon unpaid capital stock of a private corporation. About June 18, 1893, some 13 persons, among whom were Guy Posson, who signed for 2 shares; J. E. Juston, for 4; F. C. Barnes, for 10; and H. Pease, for 3,—subscribed the following agreement, each placing opposite his name the number of shares presumably intended to be taken: "We, the undersigned, each in consideration of the promise of the other, agree to subscribe for and take the number of shares of the capital stock set opposite our respective names of a company to be incorporated for the purpose of operating a fertilizer, feeding and fattening stock and poultry, and, if obtainable, collecting and disposing of swill, and other purposes of like nature. Said company to be incorporated, in accordance with the laws of the state of Oregon, with a capital stock of fifteen thousand dollars, divided into one hundred and fifty shares, of the value of one hundred dollars each." There were 74 shares subscribed for upon this paper, representing \$7,800. On the 7th day of October, 1893, three of the subscribers executed duly acknowledged, and caused to be filed and recorded in the proper offices, articles of incorporation, incorporating the Oregon Fertilizing Company, specifying the object and business thereof to be "to transport wood, produce, and garbage, and to cremate such garbage, or to use the same for feed or fertilizing purposes." A little later, all the subscribers to said instrument, except the four above named, signed, with others, the following writing, which is contained in a minute book kept for the purpose of recording the proceedings of the corporation, to wit: "We, the undersigned, hereby subscribe for the number of shares of capital stock of the Oregon Fertilizing Company set opposite our respective names, and agree to pay for the same at such time or times as may be ordered by the board of directors hereafter to be elected." Only 69 shares of

<sup>1</sup> Rehearing pending.



the capital stock were subscribed for upon this latter instrument. Subsequently all the subscribers to this instrument, together with Posson and Juston, signed an agreement to hold the first meeting of the stockholders on October 14, 1893, waiving the 30 days' notice required by law, and in pursuance thereof the meeting was held; all said signers being present, either in person or by proxy, but no others, and participating in the election of directors and other business. The corporations having certified to the result of the election, the directors elected took the oath of office, and at once organized by electing the officers of the board. To abate the action, the defendants plead that the plaintiff company is not an incorporation.

C. J. Schnabel and R. W. Wilbur, for appellant. J. B. Thompson, for respondents.

WOLVERTON, J. (after stating the facts). It was urged at the hearing that the defendants ought to be estopped from alleging that the Oregon Fertilizing Company is not a corporation duly incorporated and organized in all respects as contemplated by law, inasmuch as they are subscribers or purchasers of stock subsequent to the alleged completed organization of the company; that, having dealt with the company in its corporate capacity, and having entered into contractual relations with it, they have recognized its existence as a body corporate; and that now, when sued upon their obligation to it as such a body, they should not be permitted to deny its legal existence. The doctrine here contended for is undoubtedly well grounded in the law, but it cannot be invoked in this case because not pleaded: The opportunity was afforded for setting up the supposed estoppel in the reply, but it was not done, and it is now too late to assert it. It is said that "if a party who has an opportunity to plead an estoppel upon which he relies fails to do so, but goes to issue on the fact, he thereby waives the estoppel, puts the matter at large, and the jury may disregard the estoppel, and are at liberty to find the truth." Note to *Tyler v. Hall* (Mo. Sup.) 27 Am. St. Rep. 337, 346; s. c. 17 S. W. 319. To the same effect are *Bruce v. Insurance Co.*, 24 Or. 486, 34 Pac. 16, and *Bays v. Trulson*, 25 Or. 109, 35 Pac. 26.

This question disposed of, we come to another, more complex in its nature, and that is whether there has been an organization of the plaintiff corporation under and in pursuance of the general statutes providing therefor. The regularity of the execution and filing of the articles of incorporation is conceded. The persons subscribing the articles are known as the incorporators, and their powers and duties are purely statutory. They may open books and receive subscriptions to the capital stock. "They shall give notice to the subscribers to meet" at such time and place as they may designate for the purpose of electing directors. They shall act

as inspectors at the first meeting for that purpose, certify who are elected, and appoint the time and place of their first meeting. This enumeration comprises the substance of their powers. See section 3222. These are all acts necessary to and in furtherance of the completion of the organization. The organization is completed only when directors have been elected, and they have elected a president and secretary, which it is contemplated they shall do at their first meeting. From the time of the first meeting of the directors—that is to say, from the time of the organization of the board—"the powers vested in the corporation are exercised by them, or by their officers or agents under their direction" (Hill's Ann. Laws Or. § 3225), thus relieving the incorporators of further duty or power in the premises, or, rather, their functions then cease because their duties have been fulfilled and their powers executed. From the date of its completed organization the incorporation may begin the prosecution of its enterprise or business. It may then sue and be sued, contract and be contracted with, and exercise any of the other statutory powers incident to its organization and the enterprise, business, pursuit, or occupation adopted. The corporation may elect its board of directors when one-half of the capital stock has been subscribed. Hill's Ann. Laws Or. § 3222; *Railroad Co. v. Spillman*, 23 Or. 587, 32 Pac. 688. And one question here is whether one-half of the capital stock had been subscribed when the board was elected. It seems to be supposed that, in order to constitute a person a subscriber to the capital stock of a corporation, he must have subscribed to the stock books of the concern after its articles of incorporation have been perfected and filed; and *Mining Co. v. Ruble*, 8 Or. 284, is cited as authority. *Boise, J.*, at page 294, says, in effect, that to put a person in the position of a subscriber to the capital stock it must be shown by the stock book signed by him, or evidence equivalent to such signing. This would seem to support the proposition, but at another place (page 298) he says: "It is necessary for the corporation to prove the subscription by producing the subscription signed by Ruble, either by himself or by another for him with his authority, or by some acts of his which are equivalent to a subscription." So that the case does not decide either that the primary subscription must be made upon the stock book, or that it shall have been made subsequent to the execution of the articles of incorporation. In a late case (*Balfour v. Gas Co.*, 27 Or. 307, 41 Pac. 165) *Bean, C. J.*, speaking for this court, says: "From an extended examination of the authorities we take the law to be that, when the proposed corporation is formed as contemplated in the preliminary subscription, and within a reasonable time thereafter, the subscription, unless revoked in the manner authorized by law, becomes

Irrevocable, and the subscriber becomes a shareholder, and liable as such, without any further act on his part." And this seems to be so, although the statute may provide for the opening of stock books by designated persons after the articles are filed. *Id.*; 1 *Thomp. Corp.* §§ 1152-1166; *Railroad Co. v. Gifford*, 87 N. Y. 294. Nor is the distinction, taken in some of the cases, between a present subscription and an agreement to subscribe to the stock of a corporation thereafter to be created, thought to be sound. 1 *Cook, Stock, Stockh. & Corp. Law*, § 75; *Knox v. Land Co.*, 86 Ala. 180, 183, 184, 5 South. 578; *Hall Co. v. Carey*, 116 Mass. 471. Now, it appears that by the preliminary subscription 78 shares of the capital stock were signed for,—3 more than was necessary for the completion of the organization by the election of directors. Four of the individuals signing this paper, representing 19 shares, did not sign the later agreement, to which 69 shares only were subscribed. All those subscribing the latter paper, together with Guy Posson and J. E. Juston, who signed the preliminary subscription, signed the consent agreement for holding the first meeting, and participated therein, and Juston was elected a director. So it will be seen that, if the 2 shares of Posson and the 4 of Juston are added to the 69 shares signed to the second paper, one-half of the capital stock was represented at such meeting. But the question arises, were they subscribers to the capital stock? We think that, having signed the preliminary subscription and the consent agreement for the first meeting, and having participated therein, they became bound in that capacity, and must be so considered. They certainly are estopped by their acts from denying that they are subscribers, and, this being so, the law requiring a subscription of one-half of the capital stock before organization was substantially complied with. Incidental to this question, it is argued that the purposes designated in the articles of incorporation do not correspond with those set forth in the preliminary subscription, and, therefore, that Posson and Juston cannot be held to be subscribers. We presume that, ordinarily, a material departure in this respect will avoid the original agreement; but in this case the persons named have construed the purposes to be one and the same by participation in the organization under the articles of incorporation, or, rather, to speak more concisely, they have assented to the departure, if such it may be termed. *Knox v. Land Co.*, *supra*.

Again, it is urged that, if the primary subscription is sufficient to bind the subscribers to the capital stock of the concern, then that Barnes and Pease not being present, and having no notice of the first meeting, and not having waived the same by writing or otherwise, the election of directors was irregular and void. We are not to be understood as passing upon the sufficiency of this paper

within itself, but that, considering the subscription thereto of Posson and Juston in connection with their subsequent acts, they were properly recognized as stockholders, and hence that one-half of the capital stock was represented at the organization of the company. The fact that Barnes and Pease had not been notified of the meeting could not furnish grounds for objection by those subscribers present and participating therein. They have not suffered by the omission, and are not in a position to object as to others. *Railroad Co. v. Thatcher*, 11 N. Y. 102. See, also, *Handley v. Stutz*, 139 U. S. 422, 11 Sup. Ct. 530; *Mor. Priv. Corp.* § 399. Thus we have an organization perfected by persons bound as subscribers, and representing fully one-half of the capital stock as fixed by the articles of incorporation, and all bound by its proceedings. We think the organization valid, although Barnes and Pease were not notified. As to how they would be affected by want of notice it is not for us to determine at this time. It is sufficient to say that those subscribers participating cannot object on that account. The defendants, if subscribers to the capital stock, became such after the organization, and the want of notice to Barnes and Pease could not affect them; so that they are in no better position to object to the regularity of the organization on that account than those participating in the first meeting. The result is that, in so far as they are concerned, the company was duly incorporated; and this result is reached, not because they are estopped by having dealt with it, but because it was legally organized prior to their subscription to the capital stock.

For the purpose of estopping the plaintiff from asserting its due and legal organization, it is alleged in the answer, in abatement, that plaintiff had theretofore instituted an action in a justice's court against Guy Posson for assessments made by the company upon his alleged subscription to the capital stock; that a trial was had upon the sole issue whether Posson was a subscriber at the date of the attempted organization; and that it was determined by the judgment that he was not. It is claimed that, as the same question is necessarily involved in determining, in this action, whether the plaintiff was duly organized, the plaintiff is estopped to assert its truth, the judgment having gone against it in the justice's court. The plea is argumentative, and avers in effect that, as the judgment in the justice's court estops the plaintiff to now assert that Posson is a subscriber, therefore it cannot affirm that it is a corporation duly organized. That this is an action upon a different cause from the one against Posson cannot be gainsaid. The inquiry, therefore, to which the estoppel is pertinent must be confined to the point or question actually determined in the Posson case. *Cromwell v. Sac Co.*, 94 U. S. 353. Thus far the plea is apparently within the

rule. But a very important essential to the estoppel is wanting, in that this cause and the one adjudicated in the justice's court are not between the same parties, in the same right or capacity, or their privies claiming under them. This objection is fatal to the plea. 1 Freem. Judgm. § 252.

The judgment of the court below must therefore be reversed, and the cause remanded for such further proceedings as may be deemed proper, not inconsistent with this opinion.

(19 Mont. 163)

SWEENEY v. MONTANA CENT. RY. CO.  
(Supreme Court of Montana. Feb. 1, 1897.)

RELEASE—SUFFICIENCY OF DENIAL—INJURIES TO  
REAL ESTATE—MEASURE OF DAMAGES—IN-  
STRUCTIONS—DIMINUTION OF DAMAGES.

1. In trespass to realty, where defendant pleaded settlement and a release, as contained in a certain deed conveying a portion of the premises to defendant, a reply denying that the agreement in the deed covered the injuries complained of, or that the consideration therein included payment for the damages alleged in the complaint, is sufficient to raise the issue as to such settlement and release.

2. Where plaintiff claimed damages for the cutting of a new channel for a stream through the premises, and the jury were instructed that, in determining the market value of the land after the injury, they might take into consideration the result of the alteration of the channel, in causing overflows during the two years following the trespass, it was error to refuse to charge, further, that plaintiff could not recover damages for the injuries caused by such overflows.

3. It was error to exclude evidence to show that, at a small expense for riprap, the injury could have been avoided or materially diminished.

Appeal from district court, Cascade county;  
C. H. Benton, Judge.

Action by Patrick Sweeney against the Montana Central Railway Company. There was judgment for plaintiff, and defendant appeals. Reversed.

This is an action to recover damages to real estate. The plaintiff in his complaint alleges that in the year 1891 he was the owner of a certain mining claim called the "Nellie L. Quartz Lode," at Nelhart, Meagher county, through which claim Belt creek ran at that time; that on or about the 1st day of November of that year, it is alleged, the defendant wrongfully entered upon said mining claim, and excavated a new channel across the same, into which it diverted the entire waters and current of Belt creek; that such water has since flowed entirely in the new channel; that said new channel was excavated across a valuable part of said mining claim, which part of said claim, it is alleged, was particularly valuable for town lots or building purposes, and also for dumping ground in the working of said mining claim. It is further alleged in the complaint that said Belt creek, being thus caused to run in said new channel excavated by the defendant across said mining claim, over-

flowed the banks of said channel on the side next to the bluff,—on the southeastern side of said claim,—and destroyed and washed away a large area of land of the plaintiff, to wit, 1.87 acres of said mining claim, and that said part of said mining claim was rendered wholly valueless to the plaintiff by such overflowing and washing away of the soil thereof. The plaintiff asked judgment for damages against the defendant. The answer of the defendant admits that the plaintiff was the owner of the tract of land in question, and that defendant entered upon the same, and dug a new channel, into which it diverted the waters of Belt creek, but alleges that said action on its part was with the consent of plaintiff, and denies that any damage resulted therefrom. In addition to this, defendant pleads the statute of limitations as a bar to the action, and further pleads a settlement and discharge of any liability for any damages growing out of the alleged trespass. The replication denies the new matter set up in the answer. The case was tried by the court with a jury, and a verdict rendered for \$1,850, upon which judgment was entered. A bill of exceptions was filed and settled, and appeal taken from the judgment by defendant company.

A. J. Shores, for appellant. McConnell, Clayberg & Gunn, for respondent.

PEMBERTON, C. J. (after stating the facts). There are a great many errors assigned in the record. We will treat those only which counsel for appellant considered sufficiently important and material as to deserve special mention and notice in his oral argument of the case. Counsel for appellant contends that there was no denial in the replication of the settlement and release pleaded in the answer, and that there was, consequently, no issue to submit to the jury, and that the court erred in admitting any evidence in the case, and in submitting the question of damages to the jury. This contention is raised in the record by objection to the introduction of evidence, as well as by the motion of appellant for a nonsuit at the close of plaintiff's testimony. The allegation of settlement and release contained in appellant's answer is as follows: "That in the month of March, 1892, the said Daniel Condon and this defendant entered into an agreement whereby the said Condon, in consideration of \$1,500, to be paid, agreed to convey to this defendant a certain tract of land, particularly described in a deed hereinafter referred to, and release all damages theretofore caused on the Nellie L. lode claim, or any part thereof, by any acts theretofore committed by the defendant, or any of its agents or employés, as well as all damages that might thereafter be occasioned to any part of the said tract of land on account of the use of the tract so to be conveyed to this defendant on its line of rail-

way for railway purposes." The language of the reply to this allegation is as follows: "Admits that a deed was executed by Daniel Condon, who then held the legal title to the Nellie L. lode claim, on the 24th day of March, 1892, to the strip of ground therein described, to the defendant, and he supposes that the copy of the deed set out in the defendant's answer is correct; but denies that there was any other, further, or different agreement or contract in relation to the said tract of land, except what is set out in said deed." This is not a specific denial of the allegation of the answer as to the settlement and release, and, if there were no other denials in the replication to this allegation of the answer, the contention of the appellant would have greater force. But in the replication we find, immediately following the language quoted above, this denial: "Plaintiff denies that under and by virtue of said contract contained in said deed, or any other contract, that he agreed to and did release the defendant from damages caused by the acts complained of in his complaint." Paragraph 5 of the replication is as follows: "Plaintiff admits that the defendant paid to said Condon the sum of \$1,500 for the land conveyed and the ordinary incidental damages to the adjacent lands, but not the damages for the taking of other portions of plaintiff's land for a new channel into and through which to flow the waters of Belt creek." We think, construing the several paragraphs and denials of the replication together, that they fairly and sufficiently constitute a denial of the settlement and release pleaded in the answer, and that, consequently, appellant's assignment of error in this respect is not supported.

The court permitted evidence to be introduced as to the difference in the market value of the land alleged to be damaged before and after the trespass complained of. Evidence was also permitted to be introduced, on the part of plaintiff, as to the result of overflows and washing away of the soil after the channel was cut through the land, or the trespass committed, in November, 1891, down to October, 1893. With this evidence admitted over the objection of the appellant, the court instructed the jury as follows: "The measure of damages is the difference in the market value of said premises, the Nellie L. lode, as they were before they were injured, if injured at all, and the market value of said premises in their damaged condition, if damaged at all." Instruction No. 5. The court further instructed the jury as follows: "The court further instructs you that, in estimating the market value of the premises alleged to have been injured or damaged, you will take into consideration, not only the trespass committed by the cutting of the channel and the turning in of the water, but also the overflow of the water, and the washing away of the south bank

of the channel, and of the soil and ground, if you find that to be true, situated between said channel and the bluff, as described in the complaint. You will not be confined to the mere damage done by the cutting of the channel, and the turning in of the water, but you will also embrace in your consideration the consequential injuries or damage by the overflow of the waters, if any such occurred." Instruction No. 9. For the purpose of fixing the measure of damages, and confining the inquiry of the jury to the difference between the market value of the land before and after the trespass complained of, the appellant requested the court to instruct the jury as follows: "There has been some evidence in the case tending to show damages done to the strip of ground between the new channel and the bluff between the years 1892 and 1893. I instruct you that the plaintiff is not entitled to recover on account of any damages done to that strip of land either in the year 1892 or 1893." This instruction the court refused to give. The appellant contends that the action of the court in this respect was error. It is conceded that the trespass complained of was a completed trespass, and not a continuous one; that is, that the sole liability of the defendant company was determined and fixed by the trespass which wrought the difference in the market value of the land before and after its commission, in November, 1891. Instruction No. 5, quoted above, was given upon this theory. The appellant contends that, by giving instruction No. 9 at the instance of plaintiff, and refusing the instruction asked by appellant as shown above, the court permitted the jury to render a verdict, not only for the difference in the market value of the land before and after the trespass complained of, but also for injuries to the land caused by overflows up to October, 1893. While we think it was not error to permit evidence to be introduced as to the overflows and washing away of the land after the date of the trespass complained of, for the purpose of showing the difference in the market value of the land before and after the trespass, it was error in the court not to limit the evidence to that purpose, as requested by the instruction which the court refused. Instruction No. 9, we think, was misleading to the jury, and prejudicial to the appellant, without the limitation sought to be given to the evidence by appellant's instruction, which was refused by the court.

At the trial the appellant offered evidence to show that the plaintiff, by the expenditure of \$100 in riprapping the bank of the new channel next to the bluff on the land in question, could have avoided entirely, or materially diminished, the damages to the mining claim. Appellant also offered instructions upon this theory of the law. The court excluded this evidence, and refused to give the instructions requested by appellant. Appellant assigns this action of the court as

error. Counsel for the plaintiff in his brief says: "We recognize the principle of law that, where a trespass has been committed, it is the duty of the party complaining of the trespass to do what he reasonably can to prevent an increase of injury, and that this must, under ordinary circumstances, be taken into consideration in estimating the damages." But counsel for respondent says that the respondent could not, by riprapping the bank of the new channel next to the bluff on his own claim, prevent the overflow thereof and damages thereto, for the reason, as they contend, that the channel began to overflow the bottom land before it reached the line of respondent's claim, and that he could not riprap the channel on the land adjoining his, through which the channel ran, without being a trespasser. If the evidence offered by the appellant had been admitted, it might have been proper for respondent to support this theory by proper evidence in rebuttal. But we think it hardly sound to say the appellant ought not to be heard to complain because he could not have proved his contention if the court had not excluded his evidence. We think the court erred in excluding the evidence offered by the appellant, and in refusing the instructions, as contended by appellant under this assignment. The following authorities fully discuss, and, we think, determine, this question in accordance with the views expressed above. 1 Sedg. Meas. Dam. (7th Ed.) top page 164, and authorities cited in notes; 1 Suth. Dam. pp. 414-416, and authorities cited; Loker v. Damon, 17 Pick. 284.

Appellant contends that the court erred in not permitting it to amend its answer during the trial to conform to the proof, which, it contends, showed Condon to be a real party plaintiff in interest. As the case must go back for new trial, the amendment can there be made, if appellant so desires, and we are thus relieved of the necessity of treating this assignment. The plea of the statute of limitations set up in the answer was abandoned on the trial. We have considered and treated all the errors assigned which we consider material. The judgment appealed from is reversed, and the cause remanded for new trial.

HUNT and BUCK, JJ., concur.

(19 Mont. 141)

DAVIS v. MORGAN, Constable.

(Supreme Court of Montana. Feb. 1, 1897.)

FRAUDULENT CONVEYANCE—INSTRUCTION—PROVING FRAUD AS DEFENSE—PRIVILEGED COMMUNICATION TO ATTORNEY.

1. In an action for conversion of property by its sale under an execution against the person from whom plaintiff claimed to have purchased it, where defendant alleged that the sale was fraudulent as against creditors of the seller, it was error to refuse an instruction that, if the sale was made to hinder creditors, plaintiff could not recover, and the error was not cured by an instruction that plaintiff could not recover if he

was not the owner of the property when it was seized and taken from his possession.

2. A defense of fraud and conspiracy is an affirmative one, which defendant is not entitled to establish on cross-examination of plaintiff's witnesses.

3. Where a person consults an attorney at law in reference to the transfer of property, in order to escape a levy by attachment of a judgment creditor, and the object of such consultation was to secure professional advice, and the attorney consulted does advise the person so consulting, the relationship of attorney and client exists, even though no reference was had to the payment of a fee, and the relationship between the parties is such as to entitle communications made to the attorney to protection as privileged.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by W. H. Davis against W. M. Morgan, as constable, for conversion of property. Judgment for plaintiff, from which, and from an order denying a motion for a new trial, defendant appeals. Reversed. .

Conversion charged against the defendant by the plaintiff because of the wrongful acts of the defendant in taking a stallion from the possession of plaintiff. The defendant denied plaintiff's ownership and interest in the horse, and pleaded a justification by virtue of a sale of the horse made pursuant to judgment and execution in a suit against Della May Meyers by Rhubottom & Gilchrist. The defendant also pleaded that plaintiff, who was a brother of Della May Meyers, and A. D. Meyers, the husband of Della May Meyers, conspired with Della May Meyers to prevent the said Rhubottom & Gilchrist from collecting their debt, and that plaintiff's claim to the horse was fraudulent, and was made with intent to hinder and delay the creditors of said Della May Meyers, and especially the firm of Rhubottom & Gilchrist, and that plaintiff has no right, title, or interest in the horse. The case was tried to a jury, and a verdict and judgment rendered for plaintiff. The defendant moved for a new trial, which motion was denied. The appeal is from the judgment and the order denying the motion for a new trial.

Largent & Huntoon, for appellant. W. G. Downing, for respondent.

HUNT, J. (after stating the facts). There was testimony introduced on the trial to the effect that W. H. Davis, plaintiff herein, and Della May Meyers were brother and sister, and that on October 16, 1894, Mrs. Meyers sold to plaintiff, in consideration of \$300, the horse in question. At the time of this alleged sale, Mrs. Meyers executed a written bill of sale to plaintiff. The horse appears to have been delivered to plaintiff, Davis. Upon January 8, 1895, Rhubottom & Gilchrist sued Della May Meyers in a justice's court to recover the sum of \$55 for some work and labor done by them for her in April, 1893, and recovered judgment therefor on January 12, 1895. Under an execution issued from the justice's court, Morgan, the defendant, as constable, levied upon the stallion, as the property of Mrs. Meyers, and sold him for

the sum of \$90. Upon January 30, 1895, Della May Meyers executed to the plaintiff, W. H. Davis, a second bill of sale of the horse. No property was included in this last bill of sale except the horse in question; the only difference between the two being that the second one was more formal in its recitals, and contained a more complete description of the animal. The testimony of plaintiff, Davis, was substantially that he had bought the horse from Mrs. Meyers, and that the reason for the execution of the second bill of sale was to cure any possible defects in the legal form of the first, but that he had owned and been in possession of the horse from the time of the execution of the first bill of sale. The defendant, on the other hand, offered testimony tending to prove that in the latter part of December, 1894, the plaintiff, Davis, had stated, in response to a question put to him by a person who wished to buy the horse for a man at Cascade, that he did not own the horse; that his sister, Mrs. Meyers, owned him, but that he thought he could be bought cheap. The purpose of this testimony was plainly to sustain the allegations of defendant's answer that the plaintiff's claim to the horse was made with intent to hinder, delay, and defraud the creditors of Della May Meyers, and for such purpose it was clearly admissible, and properly went to the jury. In accordance with this theory of the defense, the court was asked by defendant to instruct the jury, among other things, as follows: "If you believe from the testimony that the alleged sale of the horse in question to the plaintiff by Mrs. Meyers was not made in good faith, but was made for the purpose of hindering, delaying, and defrauding creditors of the said Mrs. Meyers, then your verdict should be for the defendant." The court refused to give this instruction, and this refusal is assigned as error. The assignment is well founded. In the charge of the court the jury were told that if they believed that, at the time the defendant levied upon the horse, plaintiff was not the owner, then their verdict should be for the defendant, while, if they found that plaintiff was the owner, their verdict should be accordingly. But, aside from this general charge upon the question of the ownership of the horse, there was no reference anywhere throughout the instructions made by the court upon the issue of the bona fides of the transaction between the plaintiff and his sister, Mrs. Meyers. It is easy to see how the jury may have been misled by this omission of the court, because they may have believed that the delivery of the horse, of itself, and possession by plaintiff, constituted ownership, regardless of whether or not such a transfer was fraudulent, and made solely with a view to defeat the collection of the judgment held by Rhubottom & Gilchrist.

As the case must be tried again, we will very briefly indicate our views upon several other errors assigned by the appellant.

Upon the cross-examination of several witnesses, the defendant asked several ques-

tions for the purpose of making out the conspiracy alleged in his answer. Objections to all such questions were sustained by the court for the reason that they were not proper cross-examination. We think the court ruled properly in this matter. Fraud and conspiracy were affirmative defenses, and it was incumbent upon the defendant to introduce testimony of his own to sustain these allegations, and it was improper for him to attempt to prove his affirmative averments in these respects by cross-examination of plaintiff's witnesses.

Testimony was introduced by defendant tending to show that Mr. Meyers, the husband of Mrs. Meyers, consulted Samuel Stephenson, Esq., an attorney at law at Great Falls, in relation to how the horse could be transferred in order to escape a levy by attachment by Rhubottom & Gilchrist, who had a judgment against Mrs. Meyers. Mr. Stephenson himself says that he advised Meyers, but that he did not consider this consultation and advice such as to constitute the relation of attorney and client, that nothing was said about a fee, and that he did not regard himself as Mr. Meyers' attorney when he did advise him in relation to the matter. Meyers says, however, that he did consult him as a lawyer, and for the purpose of securing his professional opinion of how to transfer another and entirely different horse. The court struck out the testimony of Stephenson on the motion of plaintiff, based upon the ground that the relation of attorney and client existed between Stephenson and Meyers at the time the communications testified to were made. In this action of the court we find no error, for we think it sufficiently appears from the testimony of Mr. Stephenson himself that the communications made by Meyers to him, and his advice thereon, were had and given in the course of professional employment, and that, therefore, he could not be examined as to any such communications or advice without the consent of his client Meyers. Code Civ. Proc. § 3163, subd. 2. There can be no question that Meyers communicated with Stephenson so as to obtain from him the advice of one possessed of knowledge of the law. He wanted the opinion of a lawyer, and of how to legally protect the horse in question, or some other horse, from attachment. He therefore naturally went to one whose profession qualified him to give the proper advice, and Mr. Stephenson gave him his opinion. It is true that Mr. Stephenson disclaims having acted in a professional capacity, but, from the undisputed facts, the court correctly decided that the relation of counsel and client existed. The omission to pay a fee is not the only test of whether such a relation may have existed. As said by the court of appeals in *New York in Bacon v. Frisbie*, 80 N. Y. 394: "It matters not that he paid no immediate fee; nor that suit was then pending, or then contemplated. Communications made to an attorney in the

course of any personal employment, relating to the subject thereof, and which may be supposed to be drawn out in consequence of the relation in which the parties stand to each other, are under the seal of confidence, and entitled to protection as privileged communications. *Williams v. Fitch*, 18 N. Y. 551. All communications made by a client to his counsel for the purpose of professional advice or assistance are privileged, whether they relate to a suit pending or contemplated, or to any other matter proper for such advice or aid. *Britton v. Lorenz*, 45 N. Y. 51. And, whenever the communication made relates to a matter so connected with the employment as attorney or counsel as to afford presumption that it was the ground of the address by the client, then it is privileged from disclosure. *Turquand v. Knight*, 2 Mees. & W. 98." The judgment and order appealed from are reversed, and the cause is remanded for a new trial. Reversed.

PEMBERTON, C. J., and BUCK, J., concur.

(19 Mont. 147)

BECKSTEAD v. MONTANA UNION RY. CO.

(Supreme Court of Montana. Feb. 1, 1897.)  
CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RAILROAD FENCES.

Acts 1891 (2d Leg. Assem.), p. 267, requiring railroad companies to build fences sufficient to prevent live stock from getting upon their tracks, or else respond in damages for animals killed or injured, and allowing double damages when not paid within 30 days after notice, is constitutional.

Appeal from district court, Deer Lodge county; Theo. Brantley, Judge.

Action by A. Beckstead against the Montana Union Railway Company to recover damages for the killing of plaintiff's stock. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Affirmed.

This action was instituted under the law of 1891 (Acts 2d Leg. Assem. p. 267), requiring railroad companies to fence their roads by fences "suitable and amply sufficient to prevent live stock from getting thereon," or else to respond in damages for animals killed or injured, except when "occasioned by the willful act of the owner or his agent." Said law also allows double the damages when not paid within 30 days after notice thereof. The complaint alleged that four head of cattle belonging to plaintiff (respondent) had strayed upon defendant's (appellant's) track, by reason of an insufficient fence, and been killed by a moving train; also, that defendant had not paid the damages sustained within 30 days after written notice. The answer contained an admission of the nonpayment of damages, certain denials, and alleged affirmatively that the cattle had strayed upon its

track through a gate left open by plaintiff. The replication denied the contributory negligence. The trial resulted in a verdict for plaintiff, and from the order denying the motion for a new trial, and the judgment, defendant appeals.

Geo. Haldorn, for appellant. Napton & Napton, for respondent.

BUCK, J. (after stating the facts). This appeal was submitted on briefs. Appellant asks for a reversal only on the grounds that the act of 1891 is unconstitutional, and that the evidence shows plaintiff was guilty of contributory negligence, as alleged in the complaint. The brief filed in its behalf is silent as to any error committed by the lower court in instructing the jury or ruling on the evidence. From the record it clearly appears that there was a conflict as to whether the fence was a sufficient one under the statute, and as to whether the cattle had broken through the fence, or gone upon the track through an open or insufficient gate. It does not appear that the gate was left open by the owner of the cattle or any one else. The court instructed the jury that if the gate had been left open by any one other than defendant, and from such negligence the cattle were killed, plaintiff could not recover. The jury evidently found that the cattle had broken through the fence. There was ample evidence to support the verdict on the ground of the insufficiency of the fence. There was also evidence to show that the gate was an insufficient one. Under these circumstances, the rule as to a conflict in the evidence must control, and the authorities cited by appellant as to contributory negligence are inapplicable. We hold the law constitutional. It is substantially the Iowa statute on the same subject. Its constitutionality has been upheld in the following cases: *Railway Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207; *Bennett v. Railway Co.*, 61 Iowa, 355, 16 N. W. 210. The judgment is affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(19 Mont. 135)

MULLIGAN v. MONTANA UNION RY. CO.

FEATHERKILE v. SAME.

(Supreme Court of Montana. Feb. 1, 1897.)

APPEAL — RULING ON MOTION FOR NEW TRIAL — CONTRIBUTORY NEGLIGENCE — MASTER AND SERVANT — APPLIANCES — FELLOW SERVANTS — LATENT DEFECTS — INSTRUCTIONS.

1. In determining whether a new trial was properly granted for alleged errors in instructions, the court cannot consider the testimony.

2. One whose own negligence directly contributed to his injury cannot recover.

3. An instruction that defendant railroad company was not bound to furnish its engineer with the latest improvements on the engine, but merely with appliances reasonably safe, and that, if the boiler was a good one of its kind, and in good repair, the engineer assumed the risk, is not erroneous, when the jury

are also instructed that the master must use ordinary care to furnish safe machinery in good repair, and make all necessary inspection.

4. The engineer and fireman are fellow servants.

5. A master is not liable for latent defects in the machinery which ordinary inspection and care would not detect.

6. An instruction that a fireman could not recover if his injury was caused by any "latent defect" in the boiler is not cause for reversal, where the jury were instructed that, if the explosion was occasioned by any of the defects named in the complaint, which defendant knew of, or by ordinary care could have known of, plaintiff could recover.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Actions by H. B. Mulligan and J. F. Featherkile against the Montana Union Railway Company. From an order in the Mulligan case sustaining plaintiff's motion for a new trial, defendant appeals. Reversed.

These cases were both for the recovery of damages for personal injuries. The plaintiff (respondent) Mulligan was a fireman upon the defendant (appellant) railroad company's road. The plaintiff Featherkile was an engineer. Both were injured at the same time, and by stipulation of counsel for all parties the causes were tried together before the same jury, with the agreement that the jury should render separate verdicts. The plaintiff Mulligan's case is brought before the supreme court by appeal. The allegations of the complaint are that, on March 18, 1893, plaintiff was a fireman in the employ of the defendant company; that, at about 4 o'clock a. m. of said day, while the engine upon which he was firing was about three-fourths of a mile from the point to which said engine was going, the engineer in charge stopped the engine to pack the piston upon the right side to prevent steam from escaping from the piston, owing to the defective condition thereof and to the want of packing in said piston; that, while the engine was standing still as aforesaid, it exploded, very seriously injuring him. It was alleged that the engine, at the time of the injury and for a long time prior, was in a dangerous and defective condition; that the engine had no crown bars, and that, if there ever had been any, they had been removed by defendant; that the flue sheet was cracked in several places; that many of the stay bolts in the crown sheet were broken, and drawn out, and in a defective condition, and had been so for a long time prior to the accident, leaving the crown sheet without a sufficient support to withstand the strain and heat thereon; that the crown sheet had no safety plug, and that the engine was generally defective, and had not been put or kept in proper repair, all of which defects and defective condition were and had been known to defendant company for a long time prior to the accident; that the explosion and the injuries to the plaintiff were caused solely by reason of the defective condition of said engine and boiler, and by reason of careless-

ness and negligence of the company in permitting the engine and boiler to become defective, and in carelessly and negligently using the engine and boiler in such defective condition with full knowledge and notice of the condition thereof, and in causing this plaintiff to work thereon without giving him any warning. The plaintiff alleged that he had no knowledge or notice, before the injury, of the dangerous and defective condition of the engine. The answer denied every material allegation of the complaint pertaining to negligence or to the defective condition of the locomotive. The defendant then pleaded that plaintiff and the engineer were fellow servants, and that the accident was caused by the engineer's permitting the water in the boiler to become so low that the crown sheet became hot and dry, and that the plaintiff and the engineer carelessly injected water into the boiler while the crown sheet was so heated, and that this water was converted into steam, thereby causing the explosion. Defendant company denied that it had any knowledge of any defect in the engine, and alleged that, if it was defective, it was the duty of the plaintiff to report the defects, but that plaintiff never made any report of the defects in the said engine; that plaintiff was employed to work on the engine, and, if it was defective in the respects alleged, or in any respect, the said defects were apparent and known to the plaintiff, and that plaintiff continued to work on said engine without complaint; and defendant averred that it was not aware and did not know of any defects in said engine. The replication denied the new matter in the answer. The plaintiff also denied that the defects were apparent and known to him, and further alleged that, during the short time he was employed upon said engine, there was no way by which he could have detected such defects and made complaint to the defendant and declined to work thereon. The cause was tried to a jury, and a verdict rendered for the defendant. Judgment was entered on the verdict for the defendant for costs. The plaintiff moved for a new trial, and the court sustained this motion. The defendant appeals to this court from the order of the district court sustaining the motion for a new trial.

Geo. Haldorn, for appellant.

HUNT, J. (after stating the facts). The plaintiffs (respondents) have not seen fit to appear by counsel or by brief in this court. We have, nevertheless, examined all the errors specified by respondent Mulligan in his motion for a new trial, to determine whether any of them were well taken, and justified the lower court in granting the motion. In this examination, however, we have been precluded from considering the testimony, because the plaintiff did not base his motion for a new trial upon the insufficiency of the



evidence to sustain the verdict in favor of the railroad company, or upon any other possible errors based upon rulings on the evidence, but relied entirely upon alleged errors committed in the court's instructions to the jury. *Raymond v. Thexton*, 7 Mont. 299, 17 Pac. 258.

The first instruction assigned as erroneous substantially told the jury that, if plaintiffs directly contributed to their own injuries by their own negligence, they could not recover, even if the defendant was negligent. This is the general elementary doctrine of contributory negligence, laid down by text writers and sustained by the decisions of this court. *Beach, Contrib. Neg.* § 14; *Hamilton v. Railway Co.*, 17 Mont. 334, 42 Pac. 800, and 43 Pac. 713. We see nothing of record to take this case out of the general rule.

The next error assigned is that the court instructed the jury that defendant was not obliged to furnish the plaintiffs with the newest or latest improvements in construction upon the engine, but that all the law required was that defendant furnish plaintiffs with reasonably safe machinery and appliances, and that, if the jury believed from the evidence that the boiler of the locomotive was a good boiler of the kind, and in good repair, then plaintiffs assumed the risks incident to their employment, notwithstanding the jury's belief that a boiler of different construction would have been safer. This instruction must be considered with reference to several others, wherein the court expressly told the jury that the duty of the master is to use ordinary care to furnish suitable and safe machinery and appliances, and to keep the same in good repair, and to make all needed inspection and examination of the machinery and appliances, with a view of keeping the same in repair, and that a failure to do so would render him liable to the servant injured by reason of the omission of the master to properly perform these duties. The instructions on this point were in accord with our recent decision in *Johnson v. Mining Co.*, 16 Mont. 164, 40 Pac. 298, where, in discussing the meaning of the words "ordinary care," we said: "And so we find the opinions, in discussing the definition of 'ordinary care,' recognize that no fixed, arbitrary rule can be laid down, but that the degree of care and vigilance required varies according to the exigencies which require attention and vigilance, conforming in amount and degree to the particular circumstances under which they are to be exercised. The care and attention necessary on an employer's part in furnishing a steam boiler is relative to the work to be done by the boiler, and the capacity of such an instrument for harm as well as good. \* \* \* The employer is in duty bound to see that the machinery is fit and safe for the work only so far as due and reasonable care and diligence and prudence will go towards having it and keeping it safe and fit. He is not a warrantor of

the safety of the machinery, and, when he has exercised the degree of care hereinbefore discussed as ordinary or reasonable, his duty is done. *Whart. Neg.* § 211."

Error is also assigned because the court charged that the engineer and fireman were fellow servants, and, if the fireman was injured by reason of the engineer's negligence, plaintiff could not recover. This is the law generally, as laid down by the supreme court of the United States, cited and followed by this court in the following cases, by which we feel bound: *Goodwell v. Railway Co.*, 18 Mont. 293, 45 Pac. 210; *Hastings v. Railway Co.*, 18 Mont. —, 46 Pac. 264.

The remaining error assigned by respondents is predicated upon the following instruction: "The jury are instructed that a servant, when he engages in a particular employment, is presumed to do so with a knowledge of its ordinary hazards, whether from the carelessness of fellow servants in the same line of employment, or from latent defects in the machinery and appliances used in the business, or the ordinary dangers of the use of the same, and the law presumes that, when he enters into such employment, he assumes all such risks; and if, in this case, you believe, from the evidence, that the accident in question was occasioned by any latent defect in the machinery, or that it was occasioned by the negligence of the plaintiff or his fellow servant, then you are instructed that the plaintiff cannot recover in this case, and you should find for the defendant." The appellant's brief advises us that the last foregoing assignment of error was the only one pressed upon the consideration of the court below, when the motion for a new trial was argued. We further infer, from appellant's brief, that the particular objection urged was that the jury were misled by not having before them some explanation of the meaning of the words "latent defects" in the machinery. But, when the instructions are considered as a whole, the force of this objection is lost, because they were told elsewhere as follows: "I further instruct you that if you find, from the evidence in this case, that the boiler in question in this case exploded without any fault on the part of the plaintiffs, or either of them, and that such explosion was caused by defects in the boiler, as alleged in plaintiffs' complaint, which the agents of the defendant, charged with the duty of keeping it in repair, knew of, or by the use of ordinary care ought to have known of, and that plaintiffs were injured by such explosion, then I instruct you that each of the plaintiffs will be entitled to recover of the defendant such damages as will compensate him for such injury, not exceeding the amount claimed in his complaint." Examining these two instructions, we find that by one the jury were told that, if the explosion was not caused by any fault on the part of plaintiffs, but was caused by reason of any of the defects named in the complaint, and which the defendant knew of, or

by exercise of ordinary care and prudence ought to have known of, the plaintiffs could recover, while by the other they were told that the defendant was not liable for accidents arising by reason of latent defects in the machinery and appliances used. We take it to be the law that, if the master can only be held to the use of ordinary care and prudence in furnishing safe machinery to the servant, and keeping the same in proper repair, but that he cannot be held as a warrantor of the safety of the machinery, it reasonably follows that the master is not liable to the servant for latent defects in the machinery or tools furnished which ordinary inspection and exercise of ordinary care would not or has not detected. Now, when this doctrine is applied to the two instructions quoted above, we find the one practically explanatory of the term "latent" used in the other, and that the doctrine and significance of patent and latent defects and dangers, incidental to the plaintiff's employment, was sufficiently laid before the jury. The respondents did not ask the court to instruct the jury more fully, or at all, so far as the record advises us, upon "latent defects," and they cannot now complain because the instructions that were given did not more fully state the law.

Our judgment is that the respondents' rights were not prejudiced by the instruction of the court, and that, upon review of all the assignments of error, the charge conformed to the material issues raised by the pleadings. It follows that we discover no sufficient ground upon which to sustain the action of the district court in granting a new trial to plaintiff. It is therefore ordered that the order granting a new trial be reversed.

PEMBERTON, C. J., and BUCK, J., concur.

(19 Mont. 149)

# STATE ex rel. GIROUX v. GIROUX.

(Supreme Court of Montana. Feb. 1, 1897.)

DIVORCE IN FOREIGN STATE—VALIDITY—DOMICILE OF WIFE—SEPARATION—CUSTODY OF CHILD.

1. Where the judgment roll in an action for divorce in a foreign state shows nothing on its face indicating that the decree was void, and there is evidence from the clerk who issued the summons, and the sheriff who served it, that there was no fraud in the service of such summons upon defendant, there is no evidence on which to base a finding that the divorce was void.

2. Where a married woman living with her husband in Arizona goes to Montana to spend the summer, and, on hearing that her husband has commenced action for a divorce, returns to Arizona, and is there served with summons, and thereafter, before decree rendered, returns to Montana, there is no evidence to establish the fact that she was a nonresident of Arizona.

3. An agreement by a husband and wife for separation is not rendered invalid because it contains a provision for the custody of the children of the parties.

4. Where, under the terms of an agreement for separation, a husband pays to his wife a certain sum, and the agreement provides that

the son shall remain in the custody of his father, in proceedings by the father to obtain the custody of the son the wife cannot be allowed to assert financial responsibility acquired by the sum paid her under the agreement, and at the same time repudiate the agreement so far as it affects the custody of the son.

5. Where a father is fitted in character and ability to retain the custody of his son, seven years of age, and such custody is awarded him by the decree of divorce rendered against his wife, in a foreign state, for misconduct, the son will be given over to the father, in accordance with the decree.

6. In an application by the father to obtain the custody of his son from his divorced wife, questions to witnesses as to which of the two parties they consider better qualified to have the care of said children are properly excluded as asking for conclusions of the witnesses.

Appeal from district court, Flathead county; Charles W. Pomeroy, Judge.

Application by the state, on the relation of Joseph L. Giroux, for a writ of habeas corpus against Rebecca Giroux. From a judgment for defendant, plaintiff appeals. Reversed.

This appeal is the result of a habeas corpus proceeding in the district court of Flathead county for the custody of a minor child withheld by its mother from the father. The facts are substantially as follows:

Joseph L. Giroux and the respondent, Rebecca Giroux, were married in Montana in 1884, and soon thereafter removed to Arizona, of which territory Joseph L. Giroux is now, and was at all times hereinafter mentioned, a resident. On June 11, 1893, the respondent, Rebecca Giroux, left Arizona to spend the summer with relatives in Montana, taking with her the issue of said marriage, —a boy, George L. Giroux, aged at the time six years, and a girl, Virginia Giroux, aged five years. On June 19, 1893, Joseph L. Giroux, in a district court of Arizona, commenced an action against the said Rebecca Giroux for a divorce, alleging as grounds therefor drunkenness, improper intimacy with another man, and cruel treatment on her part. In the complaint he prayed the court for the care and custody of the minor children aforesaid. Receiving intelligence of the institution of the said suit, Mrs. Giroux at once returned to Arizona from Montana, and was personally served with the summons in said suit. The validity of the service of said summons she questions, as will hereinafter appear. On the 8th day of July, 1893, an agreement of separation was entered into between the husband and wife. The said agreement recites that: "Whereas, the said parties have separated, and are now living separate and apart, and a suit for divorce has been instituted by the said party of the first part (Joseph L. Giroux) against the said party of the second part (Rebecca Giroux), which said suit is now pending in the district court of the Fourth judicial district of the territory of Arizona, in and for the county of Yavapai; and whereas, the said parties are desirous of arranging their

property rights without litigation, and of providing for the custody, care, maintenance, and support of their children: Now, therefore, in consideration of the premises, and the sum of one dollar to each by the other paid, it is hereby mutually agreed by and between said parties as follows, to wit: First. That the said first party shall and will pay to the second party the sum of \$4,300 in cash, the same to be paid on the 8th day of July, 1893, and that the said second party shall and does hereby accept said sum of \$4,300 in full of all her right, title, share, and interest in and to the community property belonging to said parties, in full alimony, and in full of all her right, title, and interest in and to any and all property owned by said first party. Second. The said first party is to have the custody, care, and control of their infant son, George L. Giroux, and the second party is to have the custody, care, and control of their infant daughter, Mossie Virginia Giroux." This agreement was duly acknowledged before a notary public, whose certificate is attached thereto. Immediately after the agreement was entered into, Mrs. Giroux returned to Montana, where, on July 26, 1893, she wrote the following letter to a Mrs. Murry: "Kalispell, Mont., July 26, 1893. Mrs. Murry, Jerome, Arizona—Dear Friend: I hope you will excuse me for not writing to you sooner, but I have been so very busy since I have come back. I am getting George ready to go back and live with his father, while I have the custody of Virgie. I got a third of what Joe had, and can live very comfortably on that. My conscience is perfectly free from guilt. Clara has caused me a very great deal of trouble. I never would have another girl around me. She says that Barton promised to marry her if she would tell Joseph all those horrible things, and help to separate Joseph and I. They have accomplished what they wanted, and I hope they are happy. I would like to know what their object was in doing so. I have sent Clara away to Spokane, I don't want to ever see her again. I will close for this time, and please write and tell me all the news. From your friend, Rebecca Giroux."

On July 17, 1893, after the departure of Mrs. Giroux for Montana, the Arizona court granted Joseph L. Giroux a decree of divorce on the grounds relied on in the complaint. It awarded the custody of the minor child George L. Giroux to the father. In his petition for a writ of habeas corpus, Joseph L. Giroux sets forth the agreement for separation, and the Arizona decree of divorce aforesaid. In her amended return to the writ, Mrs. Giroux denies that any decree of divorce was ever obtained against her; denies that she ever appeared in the divorce suit, and alleges that, if she ever was served with summons therein, it was through fraud and deceit practiced upon her by her husband and others acting in his behalf. The details of said fraud are alleged substantially as follows:

Mrs. Giroux's first knowledge of the decree of divorce was obtained when proceedings in habeas corpus were instituted for the custody of the boy. Her husband persuaded her to make a visit to Montana for the purpose of spending the summer there. Shortly after her arrival she received intelligence that a divorce suit had been instituted against her, and thereupon at once returned to Arizona. Arriving there, she immediately proceeded to the office of the clerk of the court, and demanded copies of all the files in the divorce action. These were not furnished to her at the time of the demand, but on July 5th she was handed a package of papers by an unknown person, who informed her that they were the papers she had requested of the clerk. If any summons or copy of summons was ever delivered to her, it was in this package of papers. She did not examine the contents of said package at the time, but proceeded at once with it to her husband. When she showed and handed him the papers, he expressed regret for his action, and a desire for reconciliation, burned the papers, and told her he either had or would dismiss the divorce suit. Shortly afterwards, through misrepresentations as to its contents and the necessity for it, he induced her to sign the agreement for separation (heretofore set forth), and then induced her to return to Montana; alleging as a reason therefor that she and the children should remain away from Arizona until the scandal of the divorce action had blown over; telling her, also, that, when it had, he would come and bring them back. She also set forth in her return or answer "that, at the time of the rendition of the pretended decree of divorce, she and the boy, George L. Giroux, were absent, and without the jurisdiction of the territory of Arizona, and residing within the state of Montana, and were so residing therein at the time of the institution of the divorce proceedings, and at all times subsequent thereto; that she is the natural guardian of George L. Giroux; that he and his sister, who are greatly attached to each other, should not be separated during their earlier life; that she is amply able to care for and educate said George L. Giroux; and that she is a fit and proper person to have the care and custody of him." She alleges "that the said Joseph L. Giroux is wholly unfitted for the care and custody of the said George L. Giroux, on account of his surroundings, business, and habits of life, inasmuch as he must rely wholly upon strangers to care for the said child, as his duties demand his presence away from home during the greater part of his time, and that the said Joseph L. Giroux on or about the 8th day of October, 1893, remarried with one Phoebe Marcutt, and that, if the custody should be awarded to the father, the boy would be placed in charge of a stepmother, whom the respondent is informed and believes has no experience in the care and custody of children, and who is unable to speak the

English language, and who is entirely unfit, both by nature and education, for the care of said George L. Giroux." Joseph L. Giroux, in his replication to the return or answer of the respondent, specifically denies all charges of fraud and deceit; admits his marriage to Phœbe Marcutt, but denies that, if awarded the custody of the child, he would place him in the care of a stepmother; denies that his second wife has no experience in the care and custody of children, and that she is unable to speak the English language, but avers, on the contrary, that she is an educated American lady, who speaks the English language, and has had experience and is familiar with children, is of a kind and affectionate disposition, and fond of the society of children; denies any unfitness on his part for the care or custody of said child, but avers that he is well fitted for such custody, and is abundantly able and willing to rear and educate said child in a manner fitting his station in life. He admits that, at the time of the institution of the suit and the rendition of the decree of divorce set up in his petition, the child George L. Giroux was temporarily within the state of Montana, and that he has remained there since that time. The trial of the issues resulted in a judgment awarding the custody of the child George L. Giroux to his mother until the further order of the court, and defendant relator, Joseph L. Giroux, appeals.

W. N. Noffsinger and F. H. Nash, for appellant. Henry W. Heideman and G. H. Grubb, for respondent.

BUCK, J. (after stating the facts). The record in this proceeding is unnecessarily voluminous, and bristles with exceptions to the admission or refusal to admit testimony. Many of these exceptions, also, are of so frivolous a nature that they have been ignored, not only in the arguments and briefs of counsel, but in the specification of errors itself. A proceeding in habeas corpus is summary in its character, and we feel it our duty to vigorously condemn any unnecessary impeding of this, its essential function, by technical and hypercritical criticism in reference to the admission of any evidence tending to enlighten the trial court. This is true despite any distinction of procedure or testimony to be observed in the case of a writ obtained by a parent to test the right to the custody of his child, and one issued to decide whether the petitioner is illegally deprived of his liberty. Mr. Church, in his work on Habeas Corpus (section 177), says: "It has been heretofore observed that proceedings by habeas corpus are summary in their character, and that great discretion is given to and exercised by courts and judges in such proceedings. Where the statute provides that courts and judges may ventilate the whole matter brought before them by habeas corpus, the general principles of evi-

dence are doubtless their rule and guide; but, they are not bound to so strict an adherence to them as govern them in trials by jury, because, in the words of that great judge, Tilghman, 'it is presumed that their knowledge of the law prevents their being carried away by the weight of testimony not strictly legal.' "

Upon the objection that it was incompetent and immaterial, the lower court at first excluded the decree and judgment roll of the divorce granted in Arizona, and then, at a later stage of the trial, admitted them for the purpose of showing that a divorce had been granted between Joseph L. Giroux and Rebecca Giroux. The consistency of these rulings is not apparent to us, but respondent's counsel contend that this decree of divorce is void, and that the lower court found it to be so. An inspection of the judgment roll satisfies us that there is nothing on its face to indicate that the decree of divorce was void, and, the existence of the decree itself being denied,—even if it could be attacked on jurisdictional grounds by extrinsic evidence,—the exclusion was erroneous. But any error in this respect seems to have been cured by the subsequent admission of the decree and judgment roll, even though this admission was limited to merely showing that a divorce had been granted. The gist of the inquiry as to this decree is whether it is void, or only voidable. Mr. Freeman, in his work on Judgments (sections 562-564, 588-590), lays it down as a general proposition that, where an action is based on the judgment of a court of another state, the jurisdiction of that court to pronounce the judgment is always open to question, and that a defendant can controvert jurisdictional statements and recitals by any competent evidence, extrinsic or otherwise. Still, the scope of this jurisdictional inquiry is clearly limited, and Mr. Freeman, in the latter part of section 564, *supra*, clearly points this out. He says: "And ought not the defendant to be always permitted to prove that he was a nonresident, and that he did not submit himself to the jurisdiction of the state whence the record is taken? On the other hand, if the defendant were a resident within the state when and where the record was made, the fact of his subsequent removal ought neither to impair nor to strengthen the obligation of the judgment. To whatsoever state he immigrated, the record, when produced against him, should have the effect which would be given it in like circumstances if he still resided in the state whence it was taken; and this, too, independent of the question whether it is positive, doubtful, or silent in reference to jurisdictional facts. It seems to us, then, that the only issue which ought to be tried in any state in regard to the jurisdiction of a court which has rendered a personal judgment in another state is, was the defendant, when the suit was instituted, within the state whose court

assumed to exercise authority over him? or, if without the state, did he submit himself to its authority? If the issue should be answered in the negative, then the judgment ought to be disregarded, no matter how positively the record enumerates all needful jurisdictional facts. If, on the other hand, the issue be determined in the affirmative, then the record ought, upon jurisdictional as upon other questions, to have precisely 'the same faith and credit given it as it had by law or usage in the courts of the state whence it was taken.' "

The evidence in the record before us in no wise establishes the fact that this divorce was void. The Arizona clerk who issued the summons, the deputy sheriff who served it, and the relator, Joseph L. Giroux, all state most positively that there was no fraud in the service of the summons upon Mrs. Giroux. She herself, in her own testimony, virtually concedes that a summons was served on her personally while she was in Arizona. The evidence in the record, moreover, conclusively shows that at the time of this service she was a resident of Arizona. Nor does the fact that she departed from Arizona a few days prior to the rendition of the decree in any wise tend to establish the fact that she was a nonresident of that territory. Construing her testimony most favorably to herself, when she left Arizona she did so with no intent whatsoever to change her domicile and begin a permanent residence in Montana. Even then, if her husband did perpetrate a fraud in respect to the obtaining of this divorce, nevertheless the jurisdiction of the Arizona court pronouncing the decree against her had clearly attached, by reason of this personal service of its process upon her, and she was as much under the control of that court as if she had remained in Arizona until the decree had been pronounced. Without passing upon the question of whether or not the general rule as to collateral attack is more stringent in a habeas corpus proceeding of this character than in a suit on the judgment itself sought to be assailed, we are of the opinion that, even allowing the widest latitude to the doctrine that a judgment rendered in one state may be attacked when sued upon in another in reference to its jurisdictional statements and recitals by any competent evidence, extrinsic or otherwise, this decree of divorce was voidable only, and not void. In the case of *Edgerton v. Edgerton*, 12 Mont. 122, 29 Pac. 966, the facts alleged in respect to the fraud claimed to have been perpetrated by the husband in reference to the appearance of the wife are closely analogous to the alleged facts relied upon by Mrs. Giroux in the present suit. It is true, the decree sought to be collaterally attacked in *Edgerton v. Edgerton* was a domestic judgment, and the present subject of attack is a judgment of another state; but the latter is voidable only, like the former, and, neither being subject to collateral attack on the ground of fraud alleged to have been perpe-

trated by the plaintiff in each in preventing his wife from appearing at the trial, there is no distinction in the status of the two decrees. They stand on the same plane, and the law as laid down in *Edgerton v. Edgerton* is clearly applicable to this Arizona decree. See, also, 2 Bish. Mar., Div. & Sep. § 1568.

It is claimed by counsel for respondent that the court below found the agreement for separation invalid. It was admitted in evidence over the objection of the respondent. But just what view the court took of this agreement the record does not disclose. In a case decided at the present term (*Stebbins v. Morris*, 47 Pac. 642), we stated generally our views of the law applicable to agreements for separation between a husband and wife, considered with reference to the common law. To the agreement before us is added a feature which did not appear in the agreement for separation under consideration in *Stebbins v. Morris*, namely, a provision for the custody of the issue of the marriage. This new feature does not materially affect the principles laid down in *Stebbins v. Morris*, however. The matter of the custodianship of children is as proper a subject for provision in an agreement for separation between the parents as the wife's maintenance, or the division of property. If the agreement for the separation itself is not per se void, neither are its naturally incidental provisions. We can readily understand that, in a direct proceeding to set aside the decree of divorce itself, such an agreement might be considered void, from an evidentiary standpoint, on the ground that it was collusively entered into for the purpose of facilitating the divorce, or that, in a direct action exclusively for its enforcement, a court of equity, fully apprised of latent fraud connected with it, might declare it contrary to public policy. But in the case before us the validity of this particular agreement should stand or fall with this decree it preceded, and from which it would be difficult to separate it.

The record shows that the relator, Giroux, has paid over to Rebecca Giroux the \$4,300 he agreed to pay her, and that, even in the decree of divorce he obtained, a provision for the custody of his son alone was inserted, in strict compliance with the terms of the agreement. It inferentially appears, also, that Mrs. Giroux now relies upon this money for the maintenance of herself and the children. Should she be allowed, then, to assert a condition of financial responsibility so acquired, to establish her right to the boy, George, and at the same time object to any consideration of this very agreement which she repudiates, in so far as her own covenants therein are concerned? We think not. As shedding light upon the right to the custody of this child, the lower court properly admitted the agreement in evidence; and, if it was subsequently ignored, error was committed.

Excluding from consideration any evidence as to the alleged fraud in obtaining the divorce from his wife, the charge against Jo-

seph L. Giroux, that he is not a fit person for the custody of the boy, is wholly unsubstantiated. It appears from Rebecca Giroux's own testimony that he is a man of means, and has always been a kind father. The charge, too, that his second wife is not a proper person to aid him in the rearing of the boy, is also without apparent foundation. Even the somewhat strained objection that she cannot speak the English language disappears in the light of the evidence. In this view, all the evidence concerning respondent's good character since she has lived in Montana is immaterial. She is before us in this record in the attitude of a justly-discarded wife,—of one divorced for a violation of her marital obligations. Conceding that a father recreant to his paternal duties will not be upheld in any merely arbitrary assertion of his right to the custody of his child, as against a good and conscientious mother; conceding that a child is not a mere chattel, subject to the whim or caprice of either of its parents, and that even at common law, as construed at the present time, it has an identity of its own, which courts of justice recognize and protect whenever a necessity for such protection arises,—conceding all this, and how does it avail the respondent? It must be borne in mind that the tie between parent and child is one of the most binding in human life,—one which the law of nature itself has established. No legislation, no judicial interpretation of legislation, should lightly disregard the reciprocal duties of this relationship. Conflicts between parents themselves as to the custody of their offspring are always necessarily painful. But, in the adjustment of these conflicts, mere sentiment and involuntary sympathy have no place. The law, however stern it may seem to the losing party, must govern. In these cases the elementary principles of the sturdy old common law still apply, however modified they may be by legislation and judicial interpretation, and probably will until a higher development of our present civilization supersedes them. A father is the head of the family. Upon him primarily devolves the responsibility for the support—physical, moral, and social—of his wife and children. If he is true to this duty, and qualified to discharge it, he is entitled to the reciprocal allegiance of those whom he so sustains, and whom it is his duty to so sustain. Where a father and mother are equally fitted in character and ability for the custody of their children, and an unhappy conflict arises between them as to who shall have such custody, in the eye of the law the father's right is superior to the mother's, and the courts must maintain it. The bond between a mother and her babies may seem closer, from a mere instinctively emotional standpoint; but under the natural compact of our society and civilization, as at present developed, and from which this legal principle has been evolved,

the relation of the father to his children is the higher, sociologically considered.

The greater part of the material evidence and testimony in this record is contained in depositions and written instruments. Consequently, in considering its weight and effect we are not seriously hampered by that element of verity imported to the verdict of a jury, and the findings of a court corresponding thereto, when the witnesses have testified viva voce at the trial. The oral testimony of the respondent herself was manifestly elusive, vague, and contradictory. There was hardly any corroboration of it. Opposed to her statement were clear and straightforward denials in the depositions of several witnesses whose credibility was in no wise impugned, and who presumptively told the truth. The letter which Mrs. Giroux wrote to Mrs. Murry (see statement) in reference to the separation almost of itself contradicts her allegations as to fraud and deceit practiced upon her. The deposition of the notary public who took her acknowledgment to the agreement of separation states that, without the hearing of her husband, he made her acquainted with its contents, and in this agreement is a clear and unequivocal reference to the pending divorce suit. In this view of the law and the evidence, we do not think the lower court was justified in rendering the judgment it did. We do not wish to be understood as holding that this decree of divorce awarding the custody of the child to the father was of itself absolutely binding upon the lower court. Had proof been introduced showing that the father, since the decree, had become an unfit person for the custody of the boy, and that, as between the two parents, for the child's protection it would have been better to award the custody to the mother, the conditions would have been different. But no such condition of affairs was before the lower court. Had proper weight been attached to the decree of divorce, no doubt, a different judgment would have been entered. The evidence shows conclusively that there is nothing in the contention of respondent's counsel that the wife and child were domiciled in Montana at the time the decree of divorce was obtained. We have clearly expressed our view as to the wife's domicile. The child's domicile was that of his father. If the pleadings had conceded the contrary, an amendment should have been allowed as of course to conform them to the proof.

Two other alleged errors are presented for our consideration. The following interrogatory was propounded to several witnesses whose depositions were taken, namely: "Which do you consider the better qualified to have the care and custody of their said minor child, George L. Giroux, now about seven years of age,—relator or respondent?" It was objected to as incompetent on the ground that it asked for a conclusion of the witnesses. We think the court was right in sustaining the objection. The question

manifestly asked for a conclusion, and was therefore clearly incompetent. The following interrogatory was also propounded: "State whether you consider respondent a fit and proper person have the care and custody of the said minor child, George L. Giroux, and give reason for your opinion." While this last interrogatory is less objectionable than the former, still the objection to it, that it asked for a conclusion, was properly sustained. The judgment is reversed, with costs. The cause is remanded, with directions to the lower court to render judgment in favor of the appellant for the custody of the child George L. Giroux. Reversed.

PEMBERTON, C. J., and HUNT, J., concur.

(19 Mont. 177)

LAUBENHEIMER v. BACH, CORY & CO.,  
Limited, et al.

(Supreme Court of Montana. Feb. 8, 1897.)

EVIDENCE—WHAT IS PROPER REBUTTAL—CONVERSION—PRESUMPTION OF CONTINUED OWNERSHIP.

1. Where, in an action for conversion, plaintiff alleges his ownership of the property, and defendant denies it, and pleads a purchase of the property from another with plaintiff's knowledge, and without objection by him, testimony to prove notice to defendant of plaintiff's claim and rights before the purchase is proper evidence in rebuttal.

2. When plaintiff in an action for conversion has proved his ownership and present right of possession, they are presumed to continue until he is shown to have parted with them.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Action by Valentine Laubenhelmer against Bach, Cory & Co., Limited, and others, for conversion. Judgment for defendants, and plaintiff appeals. Reversed.

Suit to recover \$9,750, with interest, the value of 325 head of cattle belonging to plaintiff, and alleged to have been converted by the defendants. The answer denied the allegations of the complaint, and alleged that on or about February 22, 1892, the defendant Bach, Cory & Co., Limited, purchased of one J. H. Brand 250 head of stock cattle, branded with the Four Bar brand, and thereafter, while being such owner under such purchase, sold the cattle to the other defendants, and alleged that said cattle are the same referred to in plaintiff's complaint; that prior to the purchase by Bach, Cory & Co. of the cattle from Brand, the plaintiff, Laubenhelmer, was the owner of said cattle, and while being such owner sold the same to the said Brand and one Nelson, who were then co-partners; and afterwards the said Brand became the owner of said 250 head of cattle, and was the owner thereof continuously until his sale to Bach, Cory & Co. The defendants also alleged that at the time that Bach, Cory & Co. were negotiating with Brand for the purchase of the cattle sued for in the plaintiff's complaint, plaintiff, Laubenhelmer,

er, was present at all times, and was fully cognizant of all that was being done relative to the sale and delivery of said cattle, and was aiding and assisting Bach, Cory & Co. in consummating the purchase of said cattle. The replication denied the purchase by Bach, Cory & Co. from Brand, or that Brand ever owned the cattle described in the complaint, or that he (plaintiff) ever was cognizant of the alleged purchase and negotiation of Bach, Cory & Co. and Brand, or that he ever aided Bach, Cory & Co. in consummating the alleged purchase. On the trial of the case before a jury, plaintiff's testimony was that in January, 1890, he purchased the cattle described in the complaint, which then numbered 250 head, from H. W. Child; that at the time of the purchase the cattle were at Ming Coulee, Cascade county; that he had never parted with the title to the cattle, and was the owner of them in March, 1892, and when this suit was instituted; that he never authorized the defendants or their agents to take possession of the cattle; that at the time that Brand made an assignment to Bach, Cory & Co., to wit, February, 1892, by which Brand transferred the cattle to Bach, Cory & Co., plaintiff notified the defendants that they were his cattle, and that he wanted them; that he never knew that Bach, Cory & Co. would attempt to take the cattle from him; and that he told them that if they did attempt so to do they would take them at their peril. On cross-examination the plaintiff testified that in 1890 the cattle had been transferred from Ming Coulee, where they were when he purchased them, to the ranch known as the "Brand & Nelson Ranch"; that the reason for the transfer was that plaintiff permitted Brand to take the cattle into his charge, with the further right that if at any time he could pay the purchase price plaintiff would transfer the Four Bar brand to him. In accordance with this arrangement, the cattle were removed to the Brand & Nelson ranch. The price which Brand was to pay for the cattle was \$7,500, with interest; but it is alleged that no part of it had ever been paid. The evidence of the defendants was, in effect, that Brand & Nelson, in 1891, bought the cattle with the Four Bar brand from H. W. Child, and that the cattle were delivered to them by Child from Ming Coulee at their ranch, and that Brand & Nelson were to pay for the cattle when they could; that plaintiff never attempted to exercise any control over the cattle, and that the sale was an unconditional one by Child to Brand & Nelson; that long subsequent to the purchase of the cattle by Brand & Nelson, Laubenhelmer stated that he had retained the title to the cattle in question, but that he was told by Nelson that this was not so; that Laubenhelmer admitted that the sale had been unconditional, but that, six months after the sale and delivery of the cattle to Brand & Nelson, he then made an arrangement by which he was to re-



tain the title by a kind of a verbal chattel mortgage. The defendants introduced several witnesses, among others D. A. Cory, an officer of Bach, Cory & Co., who testified that at several meetings held in the office of Bach, Cory & Co., at Great Falls, Mont., Laubenheimer was present, but that he never made a claim to the cattle in question until November, 1892; that at that time Laubenheimer did assert some right to the cattle, but stated that he had sold and delivered the cattle to Brand & Nelson, and retained the title by some kind of a verbal chattel mortgage, obtained six months after the sale to Brand & Nelson. It was admitted that in March, 1892, and at the time of the alleged sale by Brand to Bach, Cory & Co., a witness by the name of Willard represented the defendant Bach, Cory & Co. in the matter of the cattle negotiations had between that corporation and Brand. There was testimony also introduced by the defendants tending to show that when Bach, Cory & Co. took possession of the cattle, Laubenheimer was at the ranch of Brand & Nelson, and knew of the directions to the man in charge of the cattle to hold them for the defendants. On rebuttal the plaintiff testified that he had never admitted that Brand & Nelson had purchased the cattle. Willard, the witness referred to as the manager for Bach, Cory & Co., was asked on rebuttal whether he had had any conversations with Brand relative to the ownership of the cattle at the time of the purchase of the cattle made by Bach, Cory & Co. from Brand & Nelson. The defendants objected to the question on the ground that it was not proper evidence in rebuttal. The court sustained the objection, and plaintiff duly excepted. Thereupon the plaintiff offered to prove that Willard acted in behalf of Bach, Cory & Co. in the purchase of the cattle, and "at the store of Bach, Cory & Co., Mr. Brand, a short time previous to the attempted sale by him of the cattle in question, told Mr. Willard that he (Brand) did not own these cattle; that Mr. Willard stated that he (Brand) must have some right to those cattle, because he had been keeping them; that Mr. Brand refused to make any transfer of the cattle in controversy because of the fact that he (Brand) had no right or title to the same; that at the request of Mr. Willard, Brand included the cattle in controversy in a transfer by Brand to Bach, Cory & Co.; that Willard was the general manager of Bach, Cory & Co. at that time, and at the time of the completion of the sale of the cattle in controversy by Brand to Bach, Cory & Co.; that Mr. Willard notified Mr. Cory of this conversation, and repeated the same in substance to Mr. Cory, about the time of the sale to Bach, Cory & Co." This offer was rejected by the court, because not proper evidence in rebuttal, and hearsay. Plaintiff then made a similar offer of the statements made by Brand to Willard, and the communication of such

statements by Willard to E. W. Bach, another of the defendants' officers, and the manager of a pool arrangement between Bach, Cory & Co. and the other defendants in this suit. This evidence was also rejected by the court, because not rebuttal, and hearsay. Plaintiff then asked the witness Willard whether Laubenheimer, the plaintiff, at any time while Bach, Cory & Co. were seeking to acquire title to the cattle through Brand & Nelson, notified him as to whom the cattle belonged. This question was objected to on the ground that it was immaterial and improper on rebuttal, and the objection was sustained. Witness was then asked if Mr. Laubenheimer ever told him, in the presence of E. W. Bach or D. A. Cory, of his claim to the cattle. This was objected to, and the objection sustained. The court also refused to permit plaintiff to ask the witness if Laubenheimer had not in the fall of 1891 in his presence notified Bach of his claim to the cattle. The jury found a verdict for the defendants. Before they retired, the plaintiff asked the court to instruct, among other things, that where a person is proved to be the owner of personal property with the present right of possession, the presumption is that he continues to be the owner with the right of possession until there is evidence that he has parted with that ownership or right of possession. The court refused to so charge. Judgment was entered on the verdict for the defendants, and a motion for a new trial was thereafter made and overruled. The plaintiff appeals from the order denying the motion for a new trial and from the judgment.

Thomas C. Bach and Wm. T. Pigott, for appellant. W. G. Downing and Carpenter & Carpenter, for respondents.

HUNT, J. (after stating the facts). We think the court properly concluded to submit the case to the jury upon the ground that the testimony of Nelson and the admissions of the plaintiff testified to by the defendants' witnesses raised an issue of fact as to the ownership of the cattle in controversy, which was right for the jury to pass on. But we are unable to uphold the rulings of the district court in rejecting the offer of proof made by plaintiff in rebuttal testimony. The complaint alleged ownership, possession, and right of possession of the cattle in controversy, their value, and a wrongful taking by defendants, and defendants' refusal to give them up, although demand was made. As to these matters the answer may be treated as substantially a denial; but for an affirmative defense the answer set up a purchase on February 22, 1892, from a third party, J. H. Brand, who, with one Nelson, had originally purchased the cattle from plaintiff, and who was the sole owner when he sold to defendants, and that by reason of plaintiff's knowledge of the sale to defendants, and his st-



lence about the time of such sale, he was estopped from claiming title. At the trial, plaintiff introduced evidence to prove his purchase and right of possession, the taking by defendants, value of the cattle, and other matters necessary to sustain prima facie the averments of his complaint. Defendants were then allowed to introduce evidence to prove that one H. W. Child sold the cattle to Brand & Nelson, and also that plaintiff admitted that he had sold the cattle to Brand & Nelson, and never claimed any interest therein until a long time thereafter, in November, 1892, and then only said that he had a claim by virtue of a verbal chattel mortgage, which it is conceded would amount to no claim as against the rights of third parties. The defendants also offered evidence in support of their plea of estoppel. When defendants rested, the plaintiff offered (as recited more fully in the statement of facts) to disprove the statements made by defendants' witnesses by rebutting such proofs by counter evidence of his own, but was erroneously not permitted to do so. The evidence offered was rebuttal. When plaintiff rested, he had made out his prima facie case. It was not necessary for him to go further than to show generally his own ownership and right of immediate possession. The presumption was then that plaintiff continued to be the owner with right of possession until there was evidence that he parted with that ownership or right of possession. And the court ought to have so charged. *Lawson*, Pres. Ev. pp. 163, 164; *Jones*, Ev. § 53. He was not obliged to anticipate the affirmative defenses of the answer, and to furnish evidence to negative their truth. When the defendants introduced their evidence tending to show purchase from Child and admissions by plaintiff, it was the right of plaintiff to call witnesses in relation to the statements and admissions by Brand, the alleged owner, made prior to and at the time of the sale by him to Bach, Cory & Co., concerning the title to the cattle, and of the communication of Brand's statements to members of the firm of Bach, Cory & Co., and also to explain plaintiff's alleged conduct about that time and thereafter in not claiming title to the cattle. A party has a right in rebuttal to give evidence which tends to meet the affirmative defense sought to be established by the defendants, and it is error to deny him that right. *Driscoll v. Dunwoody*, 7 Mont. 394, 16 Pac. 726; *Bancroft v. Sheehan*, 21 Hun, 551; *Thomp. Trials*, § 345. "As a general rule, he who has the opening ought to introduce all his evidence to make out his side of the issue, except that which merely serves to answer the adversary's case. Then the evidence of the adversary is heard, and, finally, the party who had the opening may introduce rebutting evidence which merely serves to answer or qualify his adversary's case. Rebutting evidence, within this rule, means not all evidence whatever which con-

tradicts defendant's witnesses and corroborates plaintiff's, but evidence in denial of some affirmative case or fact which defendant has attempted to prove. Neither side ought to be permitted to give evidence by piecemeal." *Abb. Tr. Brief*, pp. 41, 42. The effect of the court's rulings was very prejudicial to plaintiff, because it denied him the right to contradict the defendants' testimony upon most material matters. Obviously, if the admissions or statements made by plaintiff to the witness Cory and others tended to prove that plaintiff sold the cattle in dispute to Brand & Nelson, it was unjust to exclude plaintiff's offer to prove to the contrary; and this he was only obliged to do on rebuttal. These errors are the principal ones relied on by the appellant, and cover the others assigned. The judgment and order are reversed, and the case is remanded for new trial. Reversed.

PEMBERTON, C. J., and BUCK, J., concur.

(19 Mont. 188)

AMES & FROST CO. et al. v. HESLET et al.  
(Supreme Court of Montana. Feb. 8, 1897.)

INSOLVENT CORPORATIONS—ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.

In the absence of statutory prohibition, an insolvent corporation may make a general assignment for the benefit of creditors, with preferences.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by the Ames & Frost Company and others against James K. Heslet and others to set aside an assignment for the benefit of creditors of the J. Chauvin Northwestern Furniture Company. From a judgment for defendants, and from an order denying a motion for new trial, plaintiffs appeal. Affirmed.

The J. Chauvin Northwestern Furniture Company, a corporation of Butte, Mont., being unable to pay its debts, and being threatened by W. A. Clark & Bro., one of its largest creditors, with an attachment suit, executed a general assignment for the benefit of its creditors, in which said W. A. Clark & Bro. and several other creditors were preferred. Plaintiffs, as judgment creditors of the corporation, instituted an action to set aside this assignment. The following stipulation was entered into between the plaintiffs and defendants in the lower court: "It is agreed between the parties hereto that the question to be tried before the court is whether an insolvent corporation, under the law, can make an assignment of its entire property and assets, and in such an assignment prefer one creditor to another, under the facts hereinbefore recited. This is the only issue to be determined in this cause." Judgment was rendered for the defendants, and plaintiffs appeal from

the judgment and the order denying a motion for a new trial.

Forbis & Forbis and Bangs, Wood & Bangs, for appellants. Corbett & Wellcome, for respondents.

BUCK, J. (after stating the facts). The determination of this appeal depends upon whether or not an insolvent corporation can make an assignment for the benefit of creditors, with preferences. Appellants' counsel insists that such an assignment is void. Their reasoning is substantially as follows: The assets of the corporation constitute a trust fund for its creditors, to which equitable liens at once attach in favor of each and every creditor upon insolvency. An insolvent corporation stands upon a different footing from an insolvent individual, because with insolvency the legal existence of the former is virtually at an end, while in the case of the latter he may subsequently accumulate property, and pay all his debts. They and the judges and text writers who support this view urge that it is most unjust and illogical to hold that such a corporation, by an assignment of its entire property,—an act which in itself prevents any resumption of business operations,—should be permitted to favor one lienholder at the expense of another. There are innumerable authorities replete with arguments for and against this contention, and it would be an act of supererogation for us in the present opinion to enter into an elaborate discussion of a subject which has been so thoroughly exhausted. For the details of the arguments pro and con, we cite the following, among the many called to our attention: 2 Mor. Priv. Corp. §§ 782, 786, 863; 5 Thomp. Corp. §§ 64, 92-96; Lyons-Thomas Hardware Co. v. Perry Stove Manuf'g Co. (Tex. Sup.) 22 Lawy. Rep. Ann. 802, note; s. c. 24 S. W. 161; Thompson v. Lumber Co. (Wash.) 30 Pac. 741; Rouse v. Bank, 46 Ohio St. 493, 22 N. E. 293; 4 Am. & Eng. Enc. Law (1st Ed.) p. 220, note; 2 Cook, Stock, Stockh. & Corp. Law, § 691. The great weight of authority is against appellants, and, in our opinion, is based on the better line of reasoning. In many of the cases cited, particularly those in federal courts, the statement is made that the assets of a corporation are a trust fund for its creditors; but it does not follow that even these courts intended by this expression to hold that creditors, by virtue of their mere attitude as such, have any lien upon the actual, tangible property of a corporation,—that property which belongs to it for its business operations, and which is primarily liable for its debts, as distinguished from any secondary liability of directors or stockholders. In our opinion, there is no such lien. The trust-fund doctrine, as invoked by appellants to sustain it, impresses us as an unsubstantial theory, constructed of judicial expressions selected without regard to their

context or the facts in reference to which they were uttered. We refer, of course, to the cases where the adoption of the doctrine only appears inferentially. All this reasoning against upholding preferences in assignments by insolvent corporations should be addressed to legislatures, rather than the courts. The policy of allowing such preferences may be pernicious, even more so than that of allowing an insolvent individual to prefer creditors; but in the one class, as in the other, it is for the legislature to decide the question of policy, not the courts. There was nothing in the statutes of Montana in force when this controversy arose forbidding such assignments; and, according to a large majority of the authorities, insolvent corporations and insolvent individuals are upon the same plane at common law in respect to them. As to any distinction between the status of a solvent and insolvent corporation in this connection, this court held in *Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18, that the fact that an insolvent corporation had transferred all its property to one of its creditors, and abandoned business, did not dissolve it. For these reasons, the order denying the motion for a new trial and the judgment of the lower court are affirmed. Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(19 Mont. 169)

HOLTER et al. v. WASSWEILER et ux.

(Supreme Court of Montana. Feb. 8, 1897.)

CONVEYANCE TO WIFE — RIGHTS OF HUSBAND'S CREDITORS.

Part of a tract pre-empted by a husband was sold, and one-half the proceeds, which had been deposited to the wife's credit, was afterwards turned over to the husband, with the understanding that he should improve the remaining portion of the land therewith, and convey to his wife when requested; but the record title remained in his name for nine years thereafter, during which period the improvements were made. Held, that a subsequent conveyance to the wife was subject to the debts incurred by the husband for materials which went into the improvements, and which were furnished on the strength of his apparent ownership.

Appeal from district court, Lewis and Clarke county; H. R. Buck, Judge.

Action by A. M. Holter and M. M. Holter, co-partners as A. M. Holter & Bro., against Ferdinand J. Wassweiler and wife, to cancel certain conveyances. From a judgment for plaintiffs, defendants appeal. Affirmed.

The plaintiffs are co-partners, and the defendants husband and wife. From the pleadings and record it appears that on the 26th day of September, 1887, the defendant Ferdinand J. Wassweiler executed to the plaintiffs his promissory note for the sum of \$338.20, with interest thereon at the rate of 1 per cent. per month from date until paid; that said note was only paid in part; that on the 11th day of January, 1893, plaintiffs com-

menced a suit in the district court in and for the county of Lewis and Clarke, against said defendant Ferdinand J. Wassweiler, to recover the balance due and unpaid on said note, and on the 18th day of February, 1893, recovered judgment in said action against said defendant for the sum of \$927.75 and costs; that an execution was thereafter issued out of said court on said judgment, and directed to the sheriff of said Lewis and Clarke county; and that thereafter said execution was returned by the sheriff wholly unsatisfied, on account of the sheriff's inability to find property belonging to said defendant in said county to satisfy the same. It appears that, at the time of the execution of said note by said Ferdinand J. Wassweiler, he was the owner of certain real estate situated in Lewis and Clarke county, and fully described in the complaint; and it is alleged that on or about the 1st day of June, 1892, Ferdinand J. Wassweiler and his wife, Caroline C. Wassweiler, for the purpose and with intent of cheating and defrauding the plaintiffs out of the money due upon the claim and judgment aforesaid, executed a certain conveyance, by which they pretended to convey to one H. S. Tullis the lands described in the complaint, for the alleged consideration of \$4,000; and that thereafter said Tullis made and executed a certain instrument or conveyance to the defendant Caroline C. Wassweiler, for the same premises, for the alleged consideration of \$4,000. It is further alleged that there was no consideration for either of said conveyances, and that the same were executed for the purpose of conveying the title to the defendant Caroline C. Wassweiler, with intent and for the purpose of hindering, delaying, cheating, and defrauding the creditors of said Ferdinand J. Wassweiler, and especially these plaintiffs. It is alleged that, notwithstanding said pretended conveyances, the said Ferdinand J. Wassweiler has always been the owner, and is now the owner, of said real estate. It is also alleged that said Ferdinand J. Wassweiler has no other property that can be reached by execution to satisfy said judgment. Plaintiffs therefore ask judgment that the said pretended conveyances from defendants to said Tullis, and from said Tullis to the defendant Caroline C. Wassweiler, be declared fraudulent and void, and that the same be canceled, and that the premises described in the complaint be sold, and the proceeds thereof applied to the payment of plaintiffs' judgment, and that it be decreed that the said Caroline C. Wassweiler acquired no title by virtue of said pretended conveyance to her from Tullis. The separate answers of defendants admit the execution of the note by said Ferdinand J. Wassweiler, the recovery of the judgment against him, as alleged in the complaint, and the issuance and return of the execution thereon. The answers deny that Ferdinand J. Wassweiler was the owner of the real estate described in the complaint at the times mentioned there-

in. The fraudulent intent with which it is charged said deeds mentioned in the complaint were executed is also denied. It is admitted that there was no consideration passed to Tullis for the conveyance of the real estate by him to Caroline C. Wassweiler. The answers set up affirmatively that the defendants have lived upon the land described in the complaint, since 1883, as a homestead. It appears from the record that the 80 acres of land described in the complaint are one half of a tract of land acquired by the defendant Ferdinand J. Wassweiler under the pre-emption laws of the United States, on which defendants located and lived since 1865. The other half of the tract of land was conveyed by the defendants to C. A. Broadwater about 1873 or 1874, for \$10,000. It further appears he paid one half cash, and the remaining half some years later. The alleged cash payment was made to the husband, Ferdinand J. Wassweiler, and he used the same. The remaining half of the purchase price of said tract of land was paid by Broadwater to Caroline C. Wassweiler, and was deposited to her credit in the First National Bank of Helena. It was to her credit there from November 3, 1882, to September, 1883, when she turned it over to her husband. The testimony shows that the defendant Caroline C. Wassweiler turned this money over to her husband, with the understanding that he was to use the same for the purpose of constructing buildings and improvements on the 80 acres of land described in the complaint. From the testimony of the defendants it appears that there was an agreement between them by which Caroline C. Wassweiler was to have one-half of the proceeds of the whole tract of land obtained by Wassweiler from the government whenever the same should be sold, and also one-half of the profits of the business which they were conducting on said premises. It appears from their testimony that, when they sold one-half of the tract of land to Broadwater, the defendant Ferdinand J. Wassweiler took and used the cash payment of one-half of the purchase price, and that the deferred payment of the purchase price was paid to the defendant Caroline C. Wassweiler; and it also appears that, when Caroline C. Wassweiler paid over the money which was paid to her as her one-half of the purchase price of the land sold to Broadwater, it was with the aforesaid understanding that her husband, Ferdinand J. Wassweiler, should use the same for improving the 80 acres mentioned in the complaint, and that he should, when demanded, deed the same to Caroline C. Wassweiler, to be held and owned by her as her own separate property. It seems from the evidence of the defendants that Ferdinand J. Wassweiler's agreement to deed said premises mentioned in the complaint was not complied with until the date of the deeds, as shown above. The case was tried to the court, without a jury. The court

found the issues in favor of plaintiffs, and rendered judgment against the defendants in accordance with the prayer of the complaint. From the judgment and order overruling defendants' motion for a new trial, this appeal is prosecuted.

T. J. Walsh, for appellants. Walsh & Newman, for respondents.

PEMBERTON, C. J. (after stating the facts). In his brief, counsel for appellants says: "It appears to have been contended at the trial that the money which Mrs. Wassweiler let Mr. Wassweiler have was his anyway, and that the alleged agreements were void by reason of the relationship between them, the transaction having occurred prior to the passage of the married woman's emancipation act. In this view the court concurred, and placed its ruling substantially on this ground. The case stands for determination on the correctness of this contention, and it is respectfully submitted that, as a legal proposition, it cannot be sustained. It is unnecessary to rely on the agreement testified to by both of the defendants, that from the first it was agreed between them that the real estate they were acquiring should be held and enjoyed jointly. When it came to a sale of the tract to Broadwater, she had valuable rights in it, which she was not obliged to surrender except on her own terms. \* \* \* She had a dower interest in it, at all events, and a homestead right. A conveyance by her husband without her concurrence would have been absolutely void. She had a perfect right to refuse to join in the conveyance unless her half were paid or secured to her. It was paid to her, and took the form of certificates of deposit,—choses in action. These were hers, absolutely. Unless they were reduced to his possession during his lifetime, they passed to her heirs, not to his. And he was powerless to obtain them except upon making her an adequate settlement out of his estate. Although the common law considered him the owner of the securities, this was a dogma so repugnant to the court of chancery that it devised a scheme of trusteeship for the wife in a third person for the manifest purpose of avoiding its effect. As the husband could not sue the wife at common law, he was powerless to get her choses unless he resorted to the court of chancery, before which the law was considered unconscionable; and that tribunal would refuse to compel the wife to surrender unless the husband created a trusteeship in her behalf, and thus made her an adequate settlement out of his own estate." In support of the above argument, counsel cites 1 Daniell, Ch. Prac. p. 90 et seq., and authorities cited in notes. Counsel also contends that, even if it be admitted that the agreements relied on between the defendants were made when the common-law rule in relation to the rights of married women was in force in this state, still, he says "the husband could not have

possessed himself of these assets except he did substantially what he did afterwards, and that of which the plaintiff complains. In view of the expressions found in the foregoing authorities and the general rules governing the action of the court of chancery, there is no doubt that, if the husband obtained the wife's choses upon an agreement to convey to her a portion of his real estate, equity would either compel him to do so, or to restore the property he got, or make some other adequate provision for her. Indeed, however he obtained them, she could maintain a bill against him to compel a settlement, even after his assignment for the benefit of creditors, or the institution of bankruptcy proceedings, or in a suit by his assignee not bona fide or for a valuable consideration,"—and cites the following authorities in support of his contention: Pom. Eq. Jur. § 1114; Beal's Ex'r v. Storm, 26 N. J. Eq. 372; Sykes v. Chadwick, 18 Wall. 141. In support of the contention of counsel for appellants that the release of her dower rights in the real estate mentioned in the complaint was a sufficient consideration to support the claim of the wife to an enforcement of the agreements between the defendants in a court of equity, he cites 1 Am. Lead. Cas. 65, 66; Hershey v. Latham, 46 Ark. 542, and authorities cited; Garner v. Bank, 151 U. S. 420, 14 Sup. Ct. 390; Lambrecht v. Patten, 15 Mont. 260, 38 Pac. 1063. In view of the foregoing authorities, counsel for appellants contends that the agreement between the husband and wife shown in the evidence is valid, and supported by a sufficient consideration, and is enforceable in equity against the husband, as well as against his creditors or assignees. Counsel for appellants also says: "It is undoubtedly true that if the wife had done anything to induce the belief that the premises in question were the absolute property of the husband, and that she had no claims against it, and the debt had been contracted upon the faith of his ownership of it, or upon a credit induced by his apparent ownership, some question might possibly arise; but it is sufficient to say that no such case is made, either by the pleadings or the proof, and the law is now well settled that a wife may be preferred upon a bona fide obligation as well as any other creditor, and is under no more obligation to publish her claims than any other creditor." Appellants' counsel also says that the equitable doctrine contended for here was entirely overlooked by the court below.

Now, then, let us admit that the agreement relied upon by the appellants is valid as between themselves, and one which a court of equity would enforce as between themselves, and, under ordinary circumstances, against the creditors and assignees of the husband; still, are the facts and circumstances of this case such as would authorize the enforcement of the agreement by a court of equity in favor of the wife, as against the rights of the plaintiffs? In the language of cour-

sel for the appellants, does the evidence show that the wife has "done anything to induce the belief that the premises in question were the absolute property of the husband, and that she had no claims against it," or that "the debt had been contracted upon the faith of his ownership of it, or upon a credit induced by his apparent ownership"? The evidence shows that the title to the whole tract of land acquired by the husband from the government remained of record in his name until the sale of one-half thereof to Broadwater, in 1873 or 1874, and that thereafter the title to the 80 acres in controversy remained in the name of the husband until 1892, when it was conveyed to Tullis, and by Tullis to the wife. This was nine years after the wife turned over the \$5,000 paid to her by Broadwater, as her part of the purchase price of the land sold to him by appellants, to her husband, for the purpose of improving the land in controversy. This was nine years after the agreement was made by the husband to deed the land in controversy to the wife. For nine years the wife permitted the land in controversy to stand on the records in the name of the husband after he had agreed to convey it to her. Who can say that the wife did not thereby "induce the belief" in the minds of the plaintiffs, as well as of the public, "that the premises in question were the absolute property of the husband, and that she had no claims against it," and that in this case the debt had not "been contracted upon the faith of his ownership, or upon credit induced by his apparent ownership"? The wife in this case also authorized her husband to use the money she let him have to improve the premises in controversy. As shown by the wife's own testimony, her husband was authorized to improve the premises in controversy. She let him have her money for that purpose. If he went in debt in making these improvements, and did not limit himself to such improvements as he could or did pay for with her money, he was still her representative. She had placed him in a position, or, at least, permitted him to occupy a position, where he could impose on those with whom he was dealing in improving the premises. We think, from the evidence, that a very considerable part of the husband's indebtedness, if not all, to the plaintiffs, was incurred for hardware and lumber which went into the buildings and improvements placed on the premises by the husband. If this be not so, it was incumbent on the appellants to show it before the wife could equitably ask to be permitted to hold the premises free from the incumbrance of plaintiffs' judgment for a debt incurred under the circumstances of this case. If the wife in this case would claim the land in controversy as her own under the agreement in relation thereto made with her husband, she should, at least, take it subject to the incumbrances which

have been placed upon it through her own negligence and laches,—negligence and laches which were calculated to mislead those dealing with her representative. If she would have equity, she must do equity.

We are unable to determine how much the value of these premises has been enhanced by the building materials for which the husband's indebtedness was incurred to plaintiffs. But, however much the value thereof has been thus increased, we do not think it equitable that the wife should, under the circumstances, take the land in controversy freed from the judgment lien of the plaintiffs, and that, until she has discharged this lien, she has no standing in a court of equity. Respondents' objections to this court hearing this appeal, involving questions of practice, become immaterial under the foregoing treatment of the case. The judgment and order appealed from are affirmed.

HUNT, J., concurs. BUCK, J., disqualified.

(19 Mont. 184)

JURGENS, Sheriff, v. HAUSER.

(Supreme Court of Montana. Feb. 8, 1897.)

SHERIFFS—COMPENSATION—FORECLOSURE SALES.

Under Pol. Code, § 4634, allowing a sheriff commissions for receiving and paying over money on execution or other sales, he is entitled to such commissions where, on foreclosure, he sells the property to the mortgagee, and simply credits the sum bid on the mortgage debt.

Appeal from district court, Lewis and Clarke county; H. N. Blake, Judge.

Action by Henry Jurgens, sheriff of Lewis and Clarke county, Mont., against Samuel T. Hauser, to recover fees for selling property on foreclosure of a mortgage. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Toole & Wallace, for appellant. C. B. Nolan, for respondent.

HUNT, J. The defendant Hauser (appellant in this court) foreclosed a mortgage upon real estate belonging to F. R. Wallace, A. M. Thornburgh, and others. An order of sale and execution was duly issued in said case to the plaintiff and respondent, Jurgens, as sheriff. Pursuant to statute, Jurgens, as sheriff, advertised and sold the lands for \$77,100, the defendant bidding them in for the satisfaction of the amount of the claim, including costs. No money was delivered to the sheriff's hands, but the sum bid was credited by the sheriff upon the mortgage indebtedness of the defendant. The agreed question for decision is: Was the sheriff entitled to receive commissions of \$420.50 upon the amount of \$77,100 bid by defendant? Under the statute (section 4634, Pol. Code 1895), the sheriff is entitled to commissions (1) for receiving and paying over money on execution or other process when

lands or other property have been levied on and sold, and (2) for receiving and paying over money on process without levy, or when lands or goods levied on are not sold. The commissions allowed him in the latter instance are less than in the former, the legislature evidently having believed that where a sheriff receives and pays over money without being put to the labor and accompanying official risks of levy, or where, if he has made the levy, still he is not obliged to take the further step and risk of selling, in such instances his services are not worth as much as where his duties have compelled him to levy and sell. This discrimination in sheriff's commissions is but a recognition of the extent of his services, and of the gradations in the liabilities which often accrue to a sheriff in the progressive steps of the discharge of his responsible duties under writs of levy and execution, and is an allowance meant to be commensurate to such services and graduated liabilities. But in both instances enumerated by the statute he is entitled to commissions for receiving and paying over money on process. This being clear, we have only to decide whether a sheriff does receive and pay over money on process when he sells mortgaged property to the judgment creditor at a foreclosure sale.

The attitudes of an ordinary purchaser at an execution sale, and of a mortgagee who has obtained a decree of foreclosure against a mortgagor, and has placed an execution and order of sale of the premises mortgaged in the sheriff's hands, are similar in respect to their respective rights to bid at the sheriff's sale of the mortgaged property. Either may become a purchaser thereat, subject always to the statutes defining the rights of purchasers. *Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. 236. Either, if he purchase, must pay over, strictly speaking, to the sheriff, if he demand it, the purchase price and costs, including the sheriff's fees; and the sheriff, in turn, must receive and pay the amount due on the mortgage, with costs; and, if there be any surplus, he may be directed to pay it over to the person entitled thereto, and in the meantime to deposit it in court. The practice of crediting the amount of the mortgagee's bid, if the mortgagee purchase, upon the sheriff's return of his execution, is thus spoken of by Gillilan, C. J., in *Sharvey v. Iron Co.* (Minn.) 58 N. W. 864: "When an execution creditor bids upon the property levied on, he bids as any one else does, except that, if it be struck off to him, to avoid circuitry of action, and as a matter of convenience, he is not required to go through the ceremony of paying the money to the sheriff, and receiving it back from him. But he is presumed, as any one else would be, to bid the property off at what he deems to be its value; and there is secured to him, by means of the execution and sale, the amount of the bid, less the

fees and expenses, by acquiring the title to the property if the sale become absolute, and by actual receipt of the money if there be redemption. Whatever he acquires by the execution and sale is to be deemed a collection, not only as between him and the judgment debtor, but as between him and the sheriff." Adapting this reasoning to our statutes, we find that the sheriff performed his whole duty in the premises, and that the judgment creditor has, by the levy and sale, acquired that which, as between him and the mortgagor, is money received and paid over on process, and must be likewise regarded as between the judgment creditor and the sheriff who has made the sale. It would be anomalous if the very statute which so explicitly gives the sheriff his commissions where he collects without a sale, and thus generally without much labor, and but slight risk of liability on his bond, should deprive him of all allowances where he performs considerable service, and does make a sale, thus perhaps incurring liability, simply because the mortgagee has voluntarily bid in the property included in the mortgage, and so accepted the realty in lieu of the money. Such a construction is less reasonable, we think, than that which regards the sale by the sheriff as upon a like footing, whether made to the mortgagee or to any other purchaser. We therefore dissent from the recent decisions in *Perry v. Wright* (Utah) 45 Pac. 46, and other cases cited by appellant, and adopt the opposite conclusion sustained by authorities, and thus expressed by the supreme court of Tennessee: "The sheriff did all he was commanded to do by law. He could not do more under his process. Every duty and responsibility enjoined by it was assumed and faithfully discharged; and we think, by a fair and just interpretation of the statute, he is entitled to compensation for his services." *Arnold v. Dinsmore*, 3 Cold. 235. See, also, *Morse v. Gibbons*, 43 Cal. 377; *Litchfield v. Ashford* (Iowa) 30 N. W. 649. The judgment is affirmed.

PEMBERTON, C. J., and BUCK, J., concur.

(19 Mont. 191)

GERRY et al. v. BISMARK BANK OF  
NORTH DAKOTA et al.

(Supreme Court of Montana. Feb. 8, 1897.)  
CORPORATIONS—OFFICERS—FRAUD—STOCKHOLDERS  
—ACTIONS—PLEADING.

1. The president and the treasurer of a mining company, who controlled nearly two-thirds of the stock, induced nonresident stockholders, one of whom was a director, not to oppose a purchase by the company from the president of a mining claim for more than double what it cost him and was worth, by false representations of its value and cost, on which the non-residents had a right to rely, and by stating that the purchase was necessary to protect the lateral rights of the company's mine, and that, if they did not consent, the purchase would be made nevertheless. The purchase was after-

wards authorized at a directors' meeting attended by such officers, the secretary, and another resident director; the president not voting. *Held*, that the purchase was void, though the two directors other than the president and the treasurer were innocent of actual fraud.

2. In an action by nonresident minority stockholders to set aside a purchase of property by the company from the president for more than double its cost to him and its value, a complaint alleging that plaintiffs were induced not to oppose the purchase by a fraudulent conspiracy to defraud the company by the president and secretary, who falsely represented to them the value and cost of the property, and the necessity for its purchase, did not present the conspiracy as one theory, and the violation of the fiduciary relationship as another.

3. Where two of the four managing directors of a corporation are conspiring to defraud it, and the other two unite in resisting the assertion of its rights, the minority stockholders need not request the directors to institute suit for relief, before doing so themselves.

4. Where the president of a corporation by fraud effects a purchase of property from him by the company at an excessive price, he cannot demand that he be put in statu quo before relief is granted the company.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by Walter S. Gerry and others against the Bismarck Bank of North Dakota and others. From a decree for plaintiffs, and an order denying a new trial, defendants appeal. Affirmed.

This action was instituted by plaintiffs, a minority of the stockholders of the Bannister Mining Company, a corporation operating in Silver Bow county, Mont., to set aside a deed conveying a certain mining claim to said corporation, and also a mortgage executed by it to a trustee to secure the purchase price of said claim. The defendants are the corporation, four of its five directors, the trustee named in the mortgage, and a stockholder. Certain allegations of the complaint are as follows: Plaintiffs are the owners of about 75,000 shares of the capital stock of the Bannister Mining Company. During the year 1891, Bannister was a trustee and the president of said company, Child was a trustee and treasurer, Anderson was a trustee and secretary, and Beattie was a trustee. In the month of October, 1891, Bannister and Child conspired to cheat and defraud the Bannister Mining Company, and particularly the plaintiffs. In that year Bannister and Child went to Boston, and represented to plaintiffs that Bannister was the owner of the Valley lode claim; that he had paid \$95,000 for it; that its value was \$110,000; that the vein of the Tecumseh claim (the mine owned and theretofore worked by the Bannister Mining Company) was dipping beneath the Valley, which lay adjacent to the Tecumseh, and that it was necessary for the company to purchase the Valley claim in order to avoid litigation; that they and the other stockholders residing in the West could purchase said Valley claim whether they (plaintiffs) would agree to it or not, but that they desired plaintiffs' consent for the

sake of harmony. That all of these allegations were false, and known at the time to be so by said Bannister and Child. That said Bannister had not paid \$95,000 for the Valley claim, but, on the contrary, had not paid over \$35,000 for the same, and that its value did not exceed \$25,000. It is further averred that plaintiffs believed and relied upon the false representations made to them, and that in pursuance of the conspiracy aforesaid, on November 3, 1891, a meeting of the board of trustees or directors of the Bannister Mining Company was held at Helena, Mont.; that there were present at said meeting said Bannister, said Child, and the defendant trustees Beattie and Anderson; that, at said meeting of the trustees, said Child, said Beattie and Anderson (the latter two well knowing of the fraud, and being parties to the conspiracy), voted to purchase the Valley claim; that on December 17, 1891, a stockholders' meeting was held, for the purpose of authorizing the execution of a mortgage on the Valley lode claim, and the Tecumseh mine as well, to secure the purchase price of said Valley claim; that the number of shares voted at said meeting, through said fraud and conspiracy, was 190,898; and that, therefore, there was no legal authorization for the execution of the said mortgage. The complaint, proceeding, states that the mortgage so illegally voted upon was executed to the defendant the Bismarck Bank, as a trustee for said conspiring trustees; and that, in furtherance of the conspiracy, subsequent to its execution the trustee defendants misappropriated funds of the Bannister Mining Company, and thereby procured a default in the sinking fund provided for in the said mortgage; and that the defendant the Bismarck Bank, as trustee, is about to foreclose and sell the mortgaged property. The prayer for relief is that the foreclosure of the mortgage be restrained; that the deed and mortgage both be declared null and void; and that the conspiring trustees be required to account for all sums due by them to the company by reason of the fraud aforesaid. The answer of the defendants denied the allegations of the complaint. The case was tried to the court, without a jury. Judgment was rendered for plaintiffs. The finding, as appears from the decree of the lower court, is "that the allegations in the plaintiffs' complaint, except as to the allegations that the defendants Bannister, Child, and Beattie had fraudulently appropriated to their own use or misapplied any funds of the Bannister Mining Company, in any sum whatever, were fully sustained and proved." The appeal is from the order denying a motion for a new trial, and from the decree.

McConnell, Clayberg & Gunn, for appellants.  
J. F. Forbis, for respondents.

BUCK, J. (after stating the facts). After a careful review of the evidence in the record,

we are satisfied that from what the lower court was justified in finding to be the truth where the testimony was conflicting, and from what is virtually conceded to be the truth by the parties to the suit, the following condition of facts is presented: E. D. Bannister was a trustee and the president of the Bannister Mining Company, and the owner of 47,501 shares of the capital stock. W. C. Child was a trustee, and its treasurer, and the owner of 1 share of the capital stock, his wife, Mary Child, being the owner of 133,395 shares. E. W. Beattie was a trustee, and the owner of 10,000 shares. J. W. Anderson was a trustee, and its secretary, and the owner of 1 share of stock. Bannister and Child were the directors and officers who superintended and directed the operations of the corporation. The Valley, an unpatented mining claim, was adjacent to the Tecumseh, the patented mine belonging to the Bannister Mining Company, which had yielded some \$66,000 in dividends. The value of the Valley claim was largely speculative, and depended chiefly upon its proximity to the Tecumseh mine. In the progress of development of the Tecumseh mine, Bannister, in his official capacity, became aware that legal complications might possibly result from the fact that the vein of the Tecumseh showed a tendency to dip into the Valley ground. There was no certainty, however, that these complications would arise. He thereupon acquired title in his own name to the Valley, paying or agreeing to pay therefor the sum of \$45,000. This was all it was ever worth. Under the pretext that the presence of himself and Child (whom he had taken into his confidence) was necessary in Boston, Mass., to manage the exchange of new for old certificates of stock held by owners residing there, the two men went to that city, at the expense of the company. Taking advantage of the trust reposed in them by virtue of their official positions, and with intent to deceive, they represented falsely to certain of the plaintiffs that Bannister had paid \$95,000 for the Valley claim; that the Valley claim was actually worth \$110,000; that it was necessary for the Bannister Mining Company to acquire it at the last-named price, for the protection of the lateral rights of the Tecumseh vein; and that, if plaintiffs refused to consent to the purchase, they held control of sufficient stock of the company to buy the Valley without their co-operation. The plaintiffs to whom these representations were made had a reasonable right to, and did, rely upon the truth of the same, and subsequently suffered their shares to be voted, and made no opposition to the transaction. One of the plaintiffs, W. S. Gerry, was a nonresident director of the company. Shortly after the return of Bannister and Child to Montana, a meeting of the board of trustees of the Bannister Mining Company was held, to make the purchase of the Valley claim. The directors present at this meeting were Bannister, Child, Anderson, and Beattie. A resolution was passed accepting a written proposition of Bannister for the sale

of the Valley claim for \$110,000. Bannister did not vote on this resolution, but Child did. The proposal for the sale recited that the purchase price, in the opinion of Bannister, was worth \$110,000. Bannister, as president, appointed Child and Beattie as a committee to investigate and report upon the proposition of sale. This committee reported in favor of the purchase at the same meeting. The proceedings of the meeting indicate that they were merely pro forma. At the same directors' meeting it was resolved that a stockholders' meeting should be called for the purpose of obtaining authority to mortgage the Tecumseh and Valley properties to secure the purchase price of the latter. Pursuant to this call, shortly afterwards a stockholders' meeting was held, and the mortgage aforesaid was authorized. At this stockholders' meeting, 268,050 of the 300,000 shares of the company's capital stock were represented, and 220,548 shares were voted in favor of the authorization. There were no shares voted against it. Bannister did not vote his 47,501 shares. Child abstained from voting the 1 share held in his name, but the shares of Child's wife (133,395 in number) were voted by J. W. Anderson, clearly at the instigation of Child himself. Child had his wife assign the stock to one Reeves, who thereupon gave a proxy to vote the same to said Anderson.

The law of Montana (section 493, Comp. St. 1887) required at least three-fourths of the entire capital stock to be represented at this meeting, and made at least two-thirds of the entire capital stock necessary to any authorization of the mortgage. Without Bannister's 47,501 shares there would not have been a three-fourths representation of the capital stock at the meeting. Under these circumstances, the deed to the Valley mine was executed to the company, and the company executed a mortgage to secure the purchase price thereof. Thereafter, under the management of Bannister and Child, a large sum of money was spent in development work on the Valley and Tecumseh mines,—a great deal more than had been expended during the period when the Tecumseh mine paid dividends. There was a default in the sinking fund provided for in the mortgage. The testimony is not sufficient to support the lower court in finding that Beattie and Anderson took part intentionally in any conspiracy with Bannister and Child. But, in the view we take of the law applicable to the facts before us, the allegations as to any fraud on the part of Beattie and Anderson become immaterial. From an evidentiary standpoint, it is well to note that Anderson was the owner of only one share of stock, and Beattie's interest was greatly disproportionate to the combined holdings of Bannister and Child's wife.

Was the purchase by the board of trustees of the Valley mine a valid one? We must answer the question in the negative. Of the four directors who were present at the meeting when the purchase was made,



two were conspirators. On the theory of the innocence of the other two, their votes should have been cast differently had they been aware of the actual condition of affairs. So, too, the authorization of the execution of the mortgage at the stockholders' meeting is vitiated by fraud. The shares of the wife of Child should not have been voted as they were. Clearly, had the plaintiffs to whom Bannister and Child made the misrepresentations known of the fraud, their shares of stock would not have been voted as they were. Add the number of shares of the actually deceived plaintiffs (even accepting appellants' estimate of them at about 20,000 only) to the disqualified 133,395 Child shares, and it appears at once that the result, 155,395, deducted from the 220,548 shares voted, leaves only 65,153 shares legally voted in favor of the mortgage. This number falls far short of the two-thirds vote necessary under the statute to have authorized it.

Appellants maintain that the lower court must have rendered its decision upon the theory that Bannister was guilty of constructive fraud,—fraud which the law would imply from any violation of his fiduciary relation as a trustee for the stockholders; and that, inasmuch as plaintiffs' complaint was wholly on the theory of actual fraud, relief cannot be afforded in the present suit for any disregard by Bannister of his fiduciary obligation as to profits. We do not disagree with the general principle that even under our form of procedure the proof must substantially correspond with the allegations relied on for relief, and that a plaintiff cannot allege one cause of action, and then, even if the proofs might justify it, obtain relief on one which is essentially different in character. See Pom. Code Rem. § 553 et seq. But does the complaint before us set forth different theories for recovery? We think not. It contains an averment of a fraudulent conspiracy, and the fiduciary relationship of Bannister and Child to the company is averred only as one of the means whereby the fraud was perpetrated. The latter averment supports the former. The two blend naturally into the gist of the action. Even if any line of demarkation could be preserved between the fraudulent conspiracy as one theory in this complaint, and the violation of the duties of the fiduciary relationship as another, still the two would not be essentially different. Fraud would be the basis of recovery in each.

But it is idle to pursue any such phase of the argument in the view we entertain of the evidence and the cause of action in the complaint. The lower court found, and with sufficient evidence to sustain it, both actual and constructive fraud,—the latter merely as incidental to the former. The determination of the appeal is not difficult. That a trustee should not be allowed to profit by his trust is a well-known fundamental doctrine of equity. No evasions, no

technical subtlety of reasoning, no empty distinctions, should be tolerated when the assertion of this principle becomes necessary. It is true that when the motives of a trustee in the neglect of his duty are not essentially bad, or are readily reconcilable with ordinary honesty of purpose, certain courts have applied this rule leniently. It is true that, when no patently willful violation of duty appears, many judges have shown a disposition to check its force. It is true that weak toleration from the bench of frail, but penitent, humanity, has often apparently robbed the principle of its very life. But such precedents serve only to increase plausible devices for evading its consequences. They encourage the natural tendency of designing selfishness to substitute the vague expression "business enterprise" for "business honesty." When, however, a case arises like the one before us, where, to an attempt to make profit through a trust relation, there is added the element of actual fraudulent representations, in order to attain the end, then, certainly, no leniency should mingle with the application of the principle. It must be administered sternly and unhesitatingly. Appellants cannot justly complain of the judgment. In his own testimony, the witness Bannister states: "I never told any person, and there is no person who ever knew exactly, what the Valley cost me until I was interrogated here in court. I gave them [plaintiffs] no figures as to the cost of the Valley. I said: 'I am not going to tell you what this cost me. That don't make any difference. This [\$110,000] is what it is worth.'" Again, the following question was put to him: "So it was not the good of the company you were looking at so much as the good of E. D. Bannister?" His answer was: "The Bannister family, yes, sir; they are first."

Appellants urge that Mr. Bannister must first be put in statu quo before relief can be granted in this suit. Having gained an advantage, wrong from its very inception, he is in no position to make any such demand.

The allegations of plaintiffs' complaint and the evidence answer the contention that, before the plaintiffs could institute this suit, it was necessary for them to have requested the board of directors to institute an action, and to prove a refusal on its part. With two of the four directors in charge of the affairs of the corporation conspiring, such a demand would have been idle. The history of the suit subsequent to the filing of the complaint shows that all four of the resident directors united in resisting the assertion of the corporation rights, and the utter futility of any such demand is thus made more manifest. See Pom. Eq. Jur. § 1095.

We cannot pass upon any rights which the American National Bank may have acquired under this mortgage, as the holder of bonds for purposes of collateral security. The said

bank is not a party to this suit, and Ban-nister's sworn answer asserts that he is the sole owner of all said bonds.

The order denying the motion for a new trial is sustained. The judgment of the lower court is affirmed, but the case is remanded, with directions to the district court to modify the findings as to Anderson and Beattie, recited in the decree, in accordance with the views herein expressed.

PEMBERTON, C. J., and HUNT, J., concur.

(5 Idaho, 185)

#### MONTANDON v. WINGERT.

(Supreme Court of Idaho. Feb. 6, 1897.)

##### FORECLOSURE OF MORTGAGE—EVIDENCE.

Plaintiff having offered in evidence a mortgage wherein the indebtedness claimed is acknowledged by mortgagor, and no evidence having been offered by defendant to disprove same, *held*, that verdict for defendant was error.

(Syllabus by the Court.)

Appeal from district court, Alturas county; C. O. Stockslager, Judge.

Action by A. F. Montandon against George Wingert. Judgment for defendant, and plaintiff appeals. Reversed.

A. F. Montandon, pro se. P. M. Bruner and M. E. Bruner, for respondent.

HUSTON, J. One Mary Le Grande, being in failing health, and desiring to consult physicians in Salt Lake City, for the purpose of procuring such money as was necessary for her expenses to Salt Lake City, procured a loan from plaintiff. It seems that there was something due and owing from Mrs. Le Grande to plaintiff for legal services theretofore performed by plaintiff for said Le Grande, and upon the advancement by plaintiff of the sum of \$50 to said Le Grande she (Le Grande) executed to plaintiff a mortgage, wherein she acknowledges an indebtedness due from her to the plaintiff of \$110, viz. \$50 for money borrowed, \$50 for services theretofore rendered to said Le Grande, and \$10 for incidental expenses paid by plaintiff for said Le Grande. The defendant is the purchaser of the mortgaged property, with notice. This action is brought to foreclose the mortgage. Defendant, by answer, denies any indebtedness thereunder except the \$50 borrowed money, which he claims has been paid, and which payment is admitted by plaintiff. Upon the trial a verdict was rendered for the defendant, upon which judgment was entered. From such judgment, and from the order of the court overruling plaintiff's motion to set aside the verdict, this appeal is taken.

The first error claimed by appellant is to the action of the court in "committing the cause for trial as a law case." There is nothing in this contention. If it were an equity case, an issue of fact having been raised by

the pleadings, the court was at liberty to invoke the interposition of a jury to try such issue.

The next error averred by appellant is the "overruling plaintiff's objection to the introduction of any evidence by defendant under his answer." This contention cannot be sustained. The answer averred payment. To say that defendant could not offer evidence in support of such averment is simply absurd.

We have carefully examined the record, and we cannot find any evidence that will warrant or support the verdict. The plaintiff offered the mortgage in evidence, which shows an indebtedness from Le Grande to plaintiff of \$110, acknowledged by Le Grande, and there is nothing in the record to controvert it except the payment of \$50 by defendant, which is acknowledged by plaintiff. This case does not come within the rule in McCarty v. Canal Co., 2 Idaho, 225, 10 Pac. 623, nor of O'Connor v. Langdon, 2 Idaho, 803, 26 Pac. 650. In this case the plaintiff proved his case, and there was no evidence to disprove it. The judgment of the district court is reversed, and cause remanded.

SULLIVAN, C. J., and QUARLES, J., concur.

(5 Idaho, 166)

#### STATE v. CRUMP.

(Supreme Court of Idaho. Feb. 8, 1897.)

##### CRIMINAL LAW—DISCHARGE OF JURY—ASSISTANT TO PROSECUTING ATTORNEY—STATEMENTS OF ACCUSED.

1. The trial court discharged the jury in the first trial, after they had been out 15½ hours, without the consent of the defendant. *Held*, that it was not error, but in the discretion of the court, under section 7905, Rev. St.

2. It was not error for the court to appoint assistant counsel for the prosecution, such counsel having been employed by the county commissioners.

3. A statement made by a defendant while under arrest and in jail, in charge of his accuser, and not connecting said defendant with the alleged crime, is not admissible in evidence. So decided by this court in *State v. Mason*, 43 Pac. 63.

(Syllabus by the Court.)

Appeal from district court, Washington county; J. H. Richards, Judge.

Matt Crump was convicted of murder, and appeals. Reversed.

Lat. L. Feltham, for appellant. R. E. McFarland, Atty. Gen., and Hawley & Puckett, for the State.

HUSTON, J. The defendant was informed against for the murder of Thomas Ronan. A trial was had on May 12, 1896, upon which trial the case was submitted to the jury at 11 o'clock p. m. on the 16th of May, and at half past 2 o'clock p. m. of the following day the jury was discharged by the court, they having failed to agree upon a verdict. On May 21, 1896, another jury was impaneled, and another trial was had, resulting in a

verdict against the defendant of guilty of murder in the second degree, with two special verdicts in favor of the state upon defendant's two special pleas of "former acquittal" and "once in jeopardy," interposed by defendant upon said second trial. The facts in regard to the homicide are briefly as follows: The deceased, Thomas Ronan, was a farmer residing in Canyon county, at Lower Boise, about 11 miles from the town of Caldwell, with his family, consisting of a wife and two children, of the respective ages of seven years and four years. On the evening of May 13, 1895, the deceased partook of his supper at half past 6 or near 7 o'clock, which consisted of a fried beefsteak, fruit, and bread. Shortly after supper, deceased went to his field, to change the water (irrigating). Returning, he lighted the lamp, and sat down to read the newspaper. At about 9 o'clock, he called to his wife, who was in another room, that he heard a noise in the wire fence, and he would go down and see if horses were in the wire. Thereupon he drew on his boots, and went out. The next morning deceased was found dead, about 250 or 300 yards from the house. There was a wound, apparently made by some blunt instrument, in his forehead, and two more of the same character upon the back of his head. There was no evidence of a struggle near where the body lay. No foot prints were visible. The clover was eight or ten inches high where the body was found. A reward of \$1,000 had been offered for the apprehension and conviction of the party or parties who committed the homicide. On the 11th day of June, 1895, the defendant was arrested at the town of Payette, in Canyon county, upon the complaint of one Charles R. Eldridge, for the murder of said Thomas Ronan. The circumstances attending the arrest of the defendant were peculiar. It seems from the evidence that the defendant and Eldridge had been on a trip to Vale, Malheur county, Or., and, returning, had stopped at Payette.

Edwards, the deputy sheriff, who arrested Crump, states as follows: "It was between the hours of six and half past six on the 11th day of June, 1895, Mr. Eldridge came to my residence in Payette, and asked me if I was the deputy sheriff. I told him I was, and he says, 'I want you to arrest a man for the murder of Ronan.' I asked him his name, and he told me it was Matt Crump. I asked him what ground he had for suspecting this man for the killing of Ronan. He said, as he was riding from Riverside to Vale, Or., that Matt Crump told him that he killed Tom Ronan. I told him I would go in and finish my supper, and come down after supper, and arrest him. He told me he would go and get his supper over at the restaurant. I told him I would see him down in front of the post office in Payette. As I went down, Eldridge and Crump came out of the restaurant. He came over to me, and gave me an introduc-

tion to him. I told him, says I: 'You look like the man I am looking for. I am going to arrest you for the murder of Thomas Ronan.' The defendant did not say nothing whatever. He did not deny it or say anything at all about it. I took my handcuffs out of my pocket, and put them on him, and, as I put them on him, he commenced to sweat. I thought the man was sick. The sweat dropped actually from his face as thick as small-sized shot. The man was sick. I asked him if he was sick, and he said he drunk a couple of glasses of beer over to Ontario, and it was very warm, and he did not feel well. I took him down to the jail, and sent Eldridge to get a bucket of water. This was C. R. Eldridge, the man who was afterwards a witness in this case. The defendant never said nothing to me in regard to the charge, or in answer to my statement that I arrested him for the Ronan murder. After Eldridge went for the bucket of water, defendant asked me if that fellow gave him away, meaning Eldridge. I asked him, 'Who?' He says, 'Eldridge.' Says I, 'What for did you commit the murder?' He says, 'No; that's for me to say.' I told Eldridge to go and swear out a complaint. Eldridge went up, and swore out a complaint, and got a warrant for Mr. Crump. I arrested Crump, and took him before Justice Allen. The justice set his trial for the next day. I took him back to the jail again. It might be half an hour after that I stopped at the jail. I went up home, and got some supper, about half past eleven. I gave Eldridge the keys of the outside door, and took the keys of the inside door of the jail. Before I went up to get my supper, Crump sung out for Eldridge, and I told Eldridge to go in and see what he wanted. I gave him the key of the right-hand cell, which Crump was in. The left-hand cell was open, and I went into the left-hand cell. Crump did not know I was in the left-hand cell. Eldridge unlocked the cell door. Crump says: 'Charley, what did you give me away for?' Eldridge said: 'I had to, Matt; such a cold-blooded crime demanded me to do it.' He says: 'I wouldn't do that to you.' I told Eldridge to come out of the cell; that was talk enough. I went out, locked the outside door, and told Crump that I was going up to get something to eat. Says he, 'For God's sake, sheriff, don't leave the jail.' Says I, 'Why?' Says he, 'Those people there on the Boise river will come over and hang me.' Says I, 'You did not kill Tom Ronan, did you?' Says he, 'No; but they told me right there, in my presence, in Boise Valley, that they would hang the man to a telegraph pole that killed Tom Ronan.' Says I, 'I am not going to leave the jail only to get a bite to eat. Mr. Eldridge will come up for me if you want anything before I come back.' When I went up to get something to eat, it was half past eleven, I judge. I was up to my place about twenty minutes when Eldridge came up. Says he, 'Crump wants

to see you down to the jail.' Eldridge said Crump wanted me to bring a pencil and paper and law book. I went; asked Crump what he wanted of me. He said, 'I want to make a statement.' Says I, 'Did you kill Tom Ronan?' Says he, 'No; but I know who did.' Says I, 'Who did?' Says he, 'Mrs. Ronan killed him.' Says, 'I want to make a statement.' 'Well,' says I, 'I will take your statement down, but you make it of your own free will.' He says, 'All right.' The deputy sheriff then took down the following statement, as the same was dictated by defendant, in the presence of said deputy and said Eldridge; and after the same had been read over to defendant, and signed by him, two persons, Banks and Dempsey, were called in, and signed it as witnesses:

"The Statement of Matt Crump.

"Payette, Canyon Co., State of Idaho. Mat Crump do solemnly swear I seen Mrs. Ronan strike Thomas Ronan with a ax on the head at half past seven o'clock at night, Monday evening, 13th day of May, 1895. Mrs. Ronan struck him three times on the back of his head and on the foured. She turned him over to hit him on the foured. I Mat Crump was standing 25 feet from the place he was murdered. Mrs. Ronan wanted me three weeks before Thomas Ronan was murdered, wanted me to kill him because they had truble. I told Mrs. Ronan I would not do it. And she said she would do it her self if she couldn't get any one to do it. Mrs. Ronan had on man clouths when she murdered Toms Ronan. Mrs. Ronan whas trying to mimick me Mat Crump when she killed him her husband. When I Mat Crump rod up to the stable to take my saddle off my horse, I seen her gooin from the shead to the house. Mrs. Ronan told him their was A horse in the wire fence. She went down to the crewell with the ax in her hand and Mr. Ronan went down after Mrs. Ronan did and I Mat Crump started down to the crewell, and when I Mat Crump got very near down to where Mr. Ronan was murdered, I seen her hit Mr. Ronan witt the ax on the back of his head and knock him down. I Mat Crump left my cloths up stairs and Mrs. Ronan got them and put them on to kill Mr. Ronan. Mrs. Ronan sad has she part me to go to the house after she kill Mr. Ronan for God Sake not to tell it. I Mat Crump told her Mrs. Ronan if I was tolled on I would tell it.

"Mat Crump.

"Subscribed and sworn to before me this 11th day of June, 1895. D. D. Campbell, Sheriff, by George William Edwards, Deputy Sheriff.

"Witness: C. R. Eldridge. J. R. Banks. W. R. Demsey."

Continuing, the witness Edwards says: "It was about twelve to fifteen minutes after 12 o'clock when the statement was signed and witnessed." Upon his cross-examination, the witness Edwards varies his testimony some-

what. It would appear from the statement made by Edwards in his deposition at the preliminary examination that Crump said to Eldridge, when the latter came into the cell after defendant's arrest: "Charley [meaning Eldridge], I see I am wrong." The deputy sheriff, upon cross-examination, admits that, after he had employed Eldridge to watch the jail and look after defendant, Eldridge, in the presence of the deputy sheriff, said to Crump, the defendant, "If you know anything about it, the best thing you can do is to tell it;" and soon thereafter the deputy went to his house to get something to eat, and in about 20 minutes the man Eldridge came for him, and he went to the jail, when the statement of defendant was taken.

Upon the preliminary examination, the man Eldridge deposes as follows:

"My name is Charles Eldridge. Reside at Lower Boise, Idaho. Am a cabinet maker by occupation. Q. Are you acquainted with the defendant, Matt Crump? A. Yes, sir. Q. Were you with the defendant, Matt Crump, in the month of June, 1895? A. Yes, sir. Q. State where and when. A. On the 11th day of June, I made a trip with Mr. Crump, Lower Boise Valley to Vale, Oregon. Q. Did you have any conversation with Mr. Crump on that trip with reference to the Ronan murder. A. Yes, sir. Q. State what he said to you in reference to the murder of Thomas Ronan. A. Matt Crump told me that he killed Tom Ronan."

Cross-examination: "Q. Where was this? A. While riding from Riverside Ferry to Vale, Oregon. Q. Were you not present at the jail in Payette, Idaho, June 11, 1895, at the time Matt Crump signed the statement relative to the Ronan murder. A. Yes, sir. Q. Were you not a witness to that signature? A. Yes, sir. Q. Did you make any protest against him signing it? A. No, sir. Q. Did he sign it at your request? A. No, sir. Q. How long have you lived in Canyon county? A. On and off for five or six years. Q. Where have you lived during that time that you were not here? A. Lived in Oregon some. Q. At what place in Oregon? (Objected to that line of procedure by the court. Defense says that 'this cross-examination is proposed for the purpose of testing the credibility of the witness, and to show that he is a man that is not entitled—whose evidence is not entitled—to consideration; that is, my information that this witness has not resided in any community in the last 7 years long enough to build or establish a reputation for the truth and veracity or otherwise, and that the only methods we have of establishing his reputation is from his own lips.' Overruled.) C. R. Eldridge.

"Subscribed and sworn to before me, this July 30, 1895. T. H. Calloway, Justice of the Peace.

"Plaintiff's Exhibit Y. Filed this 26th May, 1896. I. F. Smith, Clerk."

It is conceded by the state that, upon the

trial, Eldridge was clearly impeached. Moreover, almost immediately after making said deposition, he left the country, and has not since been seen or heard from. The testimony of the deputy sheriff and the statement of defendant, if admissible, are therefore the only evidence in the case tending to connect the defendant with the homicide.

James Alexander testifies that he resides about 9 miles from Caldwell, and about 2 miles from the Ronan place; that on the night of the 13th of May, 1895, the night of the homicide, at about 10 o'clock, and after he had gone to bed, he heard a horse go over a small bridge in the road, which he says he recognized as the horse usually ridden by defendant. Witness says his house is about 55 or 60 yards from the bridge referred to, at least not over 100 yards, and that the bridge is about 14 to 16 feet long. The wife of this witness testifies to substantially the same thing.

For the purpose of showing a motive for the homicide on the part of the defendant, the state introduced a witness, Roscoe Madden, who testified that, some time in February preceding the homicide, he was returning from a dance in company with defendant, and that, in the course of conversation relating to the neighbors, defendant stated that he had a score against Ronan for getting the best of his (Crump's) father in some deal about hay or some other produce, and that he (defendant) would fix Ronan. This was some three months prior to the homicide, and during a large portion of the intervening time defendant had been working for deceased, and Mrs. Ronan states that they were on perfectly friendly terms. Witnesses on the part of the state testify that, on the night of the homicide, defendant was at Caldwell, 11 miles from the place of the homicide, and that he left Caldwell at half past 9 o'clock. Another witness on the part of the state, a near neighbor of deceased, testifies that, on the evening of the homicide, himself and another were engaged in repairing or putting up a hay rack; that, about half past 9 o'clock on said evening, they heard deceased "hissing dogs onto his stock," at his place. The wife of deceased testifies that it was about 9 o'clock that deceased went out of the house to ascertain the cause of the disturbance, as he stated, at the wire fence.

Dr. E. E. Maxey states that he made an examination of the contents of the stomach of deceased; that such examination was made some ten days after the burial of deceased. The witness states, as a result of his examination of the stomach of deceased and its contents, that, in his opinion, it must have been at least four hours after he had eaten his supper that deceased met his death. The testimony upon this subject, when viewed in the light of the circumstances under which the examination was made, the time when it was made, and the char-

acter of the examination, and the further facts that the conclusions of the witness are scarcely in accord with the standard authorities upon the subject, is not, in our view, very satisfactory. The witness Smith, on the part of the state, states that defendant came to his house on the night of the 13th of May; that he asked defendant what time it was, and defendant replied that it was 11 o'clock. Witness did not look to see what time it was. Smith's place is about four miles from Caldwell, and about seven miles from the house of deceased.

The first error specified by appellant is as to the action of the trial court in discharging the jury upon the first trial, after they had been out but 15½ hours, without the consent of the defendant. We do not think there was an abuse of discretion by the trial court in this matter. The court is authorized to discharge the jury when, "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." Rev. St. Idaho, § 7905. The trial court must be better qualified to judge as to what is "a proper time," as well as to the probability of an agreement by the jury, than this court; and, except in a case where the record shows a palpable abuse of discretion, we think the action of the lower court should not be disturbed.

The next error charged is the action of the court in appointing assistant counsel for the state. The counsel, it appears, in this case, had been employed by the commissioners of Canyon county, and we do not think their appointment by the court, in compliance with such employment, was error.

We find no error in the action of the court upon the pleas of "former acquittal" and "once in jeopardy."

The circumstances under which the "statement," so called, of the defendant, was procured, were such as should have precluded its admission as evidence. The facts are almost identical with those in the case of *State v. Mason* (Idaho) 43 Pac. 63, decided by this court in December, 1895. As before stated, the state conceded on the argument that the witness Eldridge was clearly impeached, and the record so shows. Now, when we eliminate the statement of the defendant and the testimony of Eldridge from the case, what have we left except the desultory talk of the defendant, both before and after the homicide, and which is as consistent with his innocence as guilt? The evidence shows that the defendant was in Caldwell, 11 miles from the scene of the homicide, at half past 9 o'clock in the evening, and that he was at Mr. Smith's house at 11 o'clock. This would require, to support the theory of guilt, that defendant must have gone a distance of 18 miles between half past 9 and 11 o'clock, an hour and a half, and committed the homicide in the meantime. Very improbable, at the best. The record fails to disclose any mo-

tive whatever on the part of the defendant for the commission of the crime. Up to the very day Ronan was killed, he and defendant had been and were upon the best of terms. The theory hinted or rather squinted at in the record, that there were suspicious relations between defendant and the wife of deceased, is entirely unsupported. In fact, the whole course of conduct of defendant is averse to any such theory. Many exceptions are taken to the admission of testimony.

It was palpable error to admit testimony of the conversation between witness Peterson and deceased in regard to the ax, as it was in no possible way connected with defendant, and only served to build up the mass of suspicions and inferences upon which alone it is evident the jury acted. Every witness put upon the stand in that behalf testified to the good character of the defendant for peaceableness, quiet, and kindness. There are various theories deducible from the evidence in the case just as consistent with the innocence of the defendant as was that adopted by the jury with his guilt. The statement of Mrs. Ronan in regard to the tramp who visited their house about dark, and who, being somewhat rudely repulsed by deceased, went away grumbling, when taken with the peculiar circumstances of the killing, is a most suggestive fact.

Exception is taken by defendant to various instructions given by the court, and to others asked by defendant, and refused by the court. We shall consider those we deem important.

Defendant excepts to the court's definition of a "reasonable doubt." This objection may reasonably be anticipated in every appeal from a conviction for murder. We see no grounds for objection to the definition of the court in this case; but we are convinced from a somewhat lengthy experience that the introduction of this idea or theory of a "reasonable doubt" into the administration of the criminal law has done more to protect criminals, and enable them to escape just punishment, than even that other heresy, that "it is better that fifty guilty men should escape than that one innocent man should suffer." Take the case under consideration: If the defendant killed the deceased, he was guilty of murder in the first degree, beyond question or peradventure. Why, then, the verdict of murder in the second degree? Under the instructions of the court, if the jury found the defendant did the killing of deceased, there was but one thing for them to do, under their oaths. It is palpable that they availed themselves, as a sedative to their consciences, of that reasonable doubt which, had they followed the instructions of the court, would have wrought the acquittal of the defendant. Instruction No. 11, as given by the court, was erroneous, as the "statement" of the defendant and the testimony of the witness Eldridge, upon which the instruction is based,

should never have been admitted in evidence; and the same may be said of instructions Nos. 12 and 13.

Instruction No. 14, excepted to by defendant: We think this instruction erroneous. The rule laid down by the trial court in regard to the importance of proving motive in cases where the evidence is entirely circumstantial, as it is in this case, is not the correct rule, nor is it that stated in Rice, whom the court cites. At page 446, 3 Rice, Ev., quoting from the opinion of Church, C. J., in *People v. Bennett*, 49 N. Y. 137, he says: "It is in cases of proof by circumstantial evidence that the motive often becomes not only material, but controlling; and in such cases the fact from which it may be inferred must be proved. It cannot be imagined any more than any other circumstance in the case." It is apparent from the statement of what defendant said to the deputy sheriff, after he was arrested, that he (defendant) was in great fear of violence from a mob. The deputy sheriff testifies on his cross-examination that defendant said "that he was afraid the people of Boise Valley would find out that he was arrested, and come over and hang him." After the deputy had employed the man Eldridge to guard the jail and the prisoner, he goes away, leaving defendant under charge of Eldridge. In twenty or thirty minutes, Eldridge goes for the deputy sheriff, telling him that Crump wanted him to come down to the jail, and bring pencil and paper, etc. When the deputy sheriff came to the jail, defendant made the statement hereinbefore set forth. That statement was made in the presence of Eldridge, and, although directly contradictory of what Eldridge had previously declared defendant had stated to him, Eldridge made no comment upon it then, nor at the preliminary examination. As before said, the "statement," so called, of defendant, was made under circumstances which should have precluded its admission as evidence. As to the testimony of Eldridge, it requires no comment.

The conclusion is forced upon us, from a most careful and scrutinizing examination of the record, that there is not sufficient evidence in the record to warrant the conviction of the defendant. The judgment of the district court is reversed, and the cause remanded.

SULLIVAN, C. J., and QUARLES, J., concur.

(5 Idaho, 79, 188)

COUNTY OF ADA v. BULLEN BRIDGE  
CO. et al.

(Supreme Court of Idaho. Dec. 12, 1896.)

CANCELLATION OF COUNTY WARRANTS—ADEQUATE  
REMEDY AT LAW.

Where a board of county commissioners have issued warrants upon the treasury of the county without authority of law, and in violation of the provisions of the constitution, an action to cancel such warrants will lie.

## On Rehearing.

1. An equitable action cannot be maintained to cancel county warrants alleged to have been illegally issued when there exists an adequate remedy at law, either affirmative or defensive.

2. A court of equity will not interfere to decree the cancellation of a written instrument unless some special circumstance is shown to exist, establishing the necessity of a resort to equity to prevent irreparable injury.

3. Under the provisions of section 4928, Rev. St., the county can compel the defendants to waive their claims on the warrants sued on in this case, or to forever abandon them.

4. The action provided for by said section is an action at law, and triable in the ordinary course of law by a jury, unless a jury be waived.

5. The provisions of said section provide an adequate remedy against the delay of defendants in bringing suit to recover on said warrants.

## (Syllabus by the Court.)

Appeal from district court, Ada county; J. H. Richards, Judge.

Bill by the county of Ada against the Bullen Bridge Company and others for cancellation of county warrants. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Hawley & Puckett, for appellant. George H. Stewart and Johnson & Johnson, for respondents.

HUSTON, J. This is an appeal from an order and judgment of the district court of Ada county sustaining a demurrer to plaintiff's complaint. As the case rests upon demurrer to the complaint, we have thought best to set forth the complaint as the same appears in the record:

## "Complaint.

"The plaintiff complains and alleges:

"First. That plaintiff is a political subdivision of the state of Idaho, and a county of said state.

"Second. That the defendant the Bullen Bridge Company is either a co-partnership composed of individuals unknown to plaintiff, an association of persons whose names and residences are to plaintiff unknown, or a corporation, the members and officers of which and the place where organized being to plaintiff unknown; and plaintiff asks permission, when it is ascertained whether or not said Bullen Bridge Company is a partnership or association or corporation, to amend its complaint accordingly.

"Third. That the defendant the First National Bank of Idaho is a corporation organized and existing under the laws of the United States, and doing business in Ada county, state of Idaho.

"Fourth. That the Falk-Bloch Mercantile Company is a limited corporation, organized and existing under the laws of the state of Idaho, and doing business in Ada and Canyon counties, Idaho.

"Fifth. That the real names of the defendants John Doe and Richard Roe are unknown to plaintiff, and plaintiff asks leave to insert

the real names of said defendants in the place of said fictitious names when said real names are ascertained.

"And for a first cause of action herein the plaintiff alleges: That on the 21st day of July, 1891, at Boise City, in Ada county, state of Idaho, the board of county commissioners of said Ada county, at a special session of said board, held at said place, made and entered into a contract in writing with the defendant the Bullen Bridge Company, which said contract was signed by C. T. Bilderback, chairman of said board, in behalf of said board, and by C. A. Bullen, as agent, in behalf of said Bullen Bridge Company, which said contract was and is in words and figures following, to wit: 'This contract, made this 21st day of July, A. D. 1891, by and between the Bullen Bridge Company, of Pueblo, Colorado, party of the first part, and the board of county commissioners of Ada county, and state of Idaho, party of the second part, witnesseth: That the said party of the first part contracts and agrees to and with the party of the second part to build, paint, and make complete, and have ready for use by the first of March, 1892, for the party of the second part, the substructure, superstructure, and approaches for a wrought-iron highway bridge over the Boise river, near Boise City, county of Ada, state of Idaho. Said bridge to be built in one span 210 feet in length, with one 22-foot apron at each end, and to have one roadway 30 feet wide in the clear. Substructure to consist of iron cylinder piers as shown by plans. All the materials for said bridge, including abutments, piers, and approaches, are to be furnished by the party of the first part, and are to be of good and suitable quality; and the work is to be done in a thorough workmanlike manner in accordance with the plans, specifications, and profile on file in the auditor's office, and forming a part of this contract. And the party of the second part contracts and agrees to pay to the party of the first part the sum of twenty-two thousand (\$22,000) dollars. Payment to be made for said bridge in warrants drawn on the general bridge fund as follows, viz.: \$13,000 on the delivery of the iron material for said bridge at Boise City, \$5,500 on the completion of the substructures, and the remaining \$3,500 on the completion and acceptance of said bridge. And the party of the first part will not be held responsible for unavoidable accidents or delays in transportation, or for the elements. [Signed] The Bullen Bridge Company, by C. A. Bullen, Agent. C. T. Bilderback, Chairman Board of County Commissioners Ada County, Idaho.' That the total income and revenue provided for said Ada county for said year 1891 was the sum of \$60,697.49, and for the year 1892 was the sum of \$72,978.93. That the total amount of income and revenue provided for the general bridge fund of said Ada county for said year 1891 was the sum of \$1,538.68, and for

said year 1892 was the sum of \$8,792.84. That prior to the issuance of the first of the warrants hereinafter referred to and provided for in said contract, warrants of said Ada county upon the general bridge fund of said county had been duly and regularly allowed, order drawn and given over to the owners thereof in the aggregate sum equal to the amount in each fund for the year 1891. That the revenue and income of said Ada county for said years 1891 and 1892 raised for and appropriated to and placed in the other funds in the treasury of said county was duly and regularly appropriated and used during said year in paying the current expenses of said county, and in taking up warrants of said county drawn on such funds.

"Second. That on the 25th day of February, 1892, in accordance with the terms of said contract, warrants numbered 94 to 106, inclusive, drawn on the general bridge fund of said county, each of said warrants being for the sum of one thousand dollars, and making the aggregate sum of thirteen thousand dollars, were duly issued to the defendant the Bullen Bridge Company, and by said defendant, and through its agent, Charles A. Bullen, drawn and accepted. That on the 7th day of April, 1892, warrants numbered 109 to 113, inclusive, each in the sum of \$1,000, and warrant numbered 114, in the sum of five hundred dollars, on the general bridge fund of said Ada county, and aggregating the sum of five thousand five hundred dollars, were duly issued to the defendant the Bullen Bridge Company, by reason of and under the terms of said contract, and by said defendant accepted. That on the 18th day of April, 1892, warrants numbered 143, 144, and 145, in the sum of one thousand dollars each, and warrant numbered 146, in the sum of five hundred dollars, and aggregating the sum of three thousand five hundred dollars, were duly drawn in accordance with the terms of said contract on the general bridge fund of said county, and issued to the defendant the Bullen Bridge Company, and accepted by said defendant. That the aggregate amount of said warrants issued under said contract and accepted by said defendant was and is the sum of \$22,000.

"Third. That no question relating to the making of said contract or the issuance or delivery of said warrants, or any of them, was ever submitted to a vote of the electors of said Ada county, and no provision was ever made for the collection of an annual tax sufficient to pay the interest on said warrants, or to provide a sinking fund for the payment of the principal thereof, and no provision at said time or since has been made for the payment of either the principal or interest of said warrants; and that, as plaintiff is informed and believes, and therefore alleges, said contract was beyond the power of the said board of county commissioners to make, and was null and void; and

that said indebtedness and liability incurred against said county by reason of the issuance and delivery of said warrants, and each of them, was and is null and void; and that said warrants, and each of them, which have not heretofore been paid, were and are null and void.

"Fourth. That said warrants numbered 94, 95, 96, 97, 98, and 99, each in the sum of one thousand dollars, and aggregating the sum of six thousand dollars, have heretofore been paid out of the revenues of said Ada county for the years 1891, 1892, and 1893, but that the remainder of said warrants, numbered 100 to 106, inclusive, and 109 to 111, inclusive, and 143 to 146, inclusive, and aggregating the sum of sixteen thousand dollars, are still unpaid.

"Fifth. That the defendants the First National Bank of Idaho, the Falk-Bloch Mercantile Company, C. A. Bullen, John Doe, and Richard Roe, the names of the last two defendants being to the plaintiff unknown, as heretofore set forth, own, or claim and pretend to own, as plaintiff is informed and believes, and therefore alleges, some interest in said warrants; the exact interest being to plaintiff unknown.

"Sixth. That to allow said warrants to remain outstanding impairs the credit of plaintiff, and also prevents plaintiff from bonding its legal indebtedness, and is against the interests of plaintiff and its inhabitants.

"And for a second cause of action herein plaintiff complains and alleges:

"First. That on the 9th day of August, 1892, at Boise City, in Ada county, state of Idaho, the board of county commissioners of said Ada county, at a special session of said board, held at said place, made and entered into a contract in writing with the defendant the Bullen Bridge Company, which said contract was signed by C. T. Bilderback, chairman of said board, in behalf of said board and by C. A. Bullen, as agent, in behalf of said Bullen Bridge Company, which said contract was and is in words and figures following, to wit: 'This contract, made this 9th day of Aug., A. D. 1892, by and between the Bullen Bridge Company, of Pueblo, Colorado, party of the first part, and the board of county commissioners of Ada county, and state of Idaho, party of the second part, witnesseth: That the said party of the first part contracts and agrees to and with the party of the second part to repair the south approach to the new bridge across Boise river at Boise City, county of Ada, and state of Idaho. Said repairs to consist of a skew span of 105 feet in length, with a clear roadway of thirty feet, to be placed on the present cylinder piers at the south end of the present span, and on five-foot cylinder piers at the south end of the new span. All material for said bridge, including cylinder piers at the south end of new span, with necessary bulkhead for earth fill at south end, are to be furnished by the party of the



first part, and are to be of good and suitable quality, and the work is to be performed in a thorough workmanlike manner in accordance with the plans and specifications for same on file in the auditor's office, and which form a part of this contract. Said work to be completed on or before December 1st, 1892. And the said party of the second part contracts and agrees to pay the party of the first part the sum of thirteen thousand six hundred and ninety dollars (\$13,690), payment to be made for said bridge in warrants drawn on the general bridge fund as follows, viz.: Eight thousand nine hundred dollars on delivery of the iron material for said bridge at Boise City, three thousand four hundred dollars on completion of the substructure, and the remaining one thousand three hundred and ninety dollars on completion and acceptance of the work. And the party of the first part will not be held responsible for delays caused from labor troubles, unavoidable accidents, or delays in transportation, or from the elements. [Signed] C. T. Bilderback, Chairman Board of County Commissioners Ada County, Idaho. The Bullen Bridge Co., by C. A. Bullen, Agent. That the total income and revenue provided for said Ada county for said year 1892 was the sum of \$72,978.95, and for the year 1893 was sum of \$66,482.66. That the total amount of income and revenue provided for the general bridge fund of said Ada county for said year 1892 was the sum of \$8,792.84, and for the year 1893 was the sum of \$13,302.53. That prior to the issuance of the first of the warrants hereinafter referred to and provided for in said contract, warrants of said Ada county upon the general bridge fund of said county had been duly and regularly allowed, order drawn, and given over to the owners thereof in amount greater than the total amount of said fund provided for in said year 1892, and the year 1893 also. That the revenue and income of said Ada county for said year 1892, raised for and appropriated to and placed in the other funds in the treasury of said county, was duly and regularly appropriated and used during said year in paying the current expenses of said county, and in taking up warrants of said county drawn on such funds.

"Second. That on the 23d day of February, 1893, in accordance with the terms of said contract, warrants numbered 64 to 66, inclusive, drawn on the general bridge fund of said county, each of said warrants being for the sum of one thousand dollars, and making the aggregate sum of three thousand dollars, and warrant No. 67, for four hundred dollars, were duly issued to the defendant the Bullen Bridge Company, and by said defendant, and through its agent, C. A. Bullen, drawn and accepted. That on the 11th day of March, 1893, warrants numbered 69 to 76, inclusive, each in the sum of \$1,000, and warrant numbered 77, in the sum of nine hundred dollars, on the general bridge fund of

said Ada county, and aggregating the sum of eight thousand nine hundred dollars, were duly issued to the defendant the Bullen Bridge Company by reason of and under the terms of said contract, and by said defendant accepted. That on the 10th day of April, 1893, warrant numbered 79, in the sum of one thousand dollars, and warrant numbered 80, in the sum of three hundred and ninety dollars, and aggregating the sum of one thousand three hundred ninety dollars, were duly drawn in accordance with the terms of said contract on the general bridge fund of said county, issued to the defendant the Bullen Bridge Company, and accepted by said defendant. That the aggregate amount of said warrants issued under said contract and accepted by said defendant was and is the sum of \$13,690.

"Third. That no question in relation to the making of said contract or the issuance or delivery of said warrants, or any of them, was ever submitted to a vote of the electors of said Ada county, and no provision was ever made for the collection of an annual tax sufficient to pay the interest on said warrants, or to provide a sinking fund for the payment of the principal thereof, and no provision at said time or since has been made for the payment of either the principal or interest of said warrants; and that, as plaintiff is informed and believes, and therefore alleges, said contract was beyond the power of the said board of county commissioners to make, and was null and void; and that said indebtedness and liability incurred against said county by reason of the issuance and delivery of said warrants, and each of them, was and is null and void, and that said warrants, and each of them, which have not heretofore been paid, were and are null and void.

"Fourth. That all of said warrants, aggregating the said sum of thirteen thousand six hundred and ninety dollars, are still unpaid.

"Fifth. That the defendants the First National Bank of Idaho, the Falk-Bloch Mercantile Company, C. A. Bullen, John Doe, and Richard Roe, the names of the last two defendants being to the plaintiff unknown, as heretofore set forth, own, or claim and pretend to own, as plaintiff is informed and believes, and therefore alleges, some interest in said warrants; the exact interest being to plaintiff unknown.

"Sixth. That to allow said warrants to remain outstanding impairs the credit of plaintiff, and also prevents plaintiff from bonding its legal indebtedness, and is against the interests of plaintiff and its inhabitants.

"Wherefore plaintiff prays that said warrants mentioned in said first cause of action, and now unpaid, to wit, warrants on the general bridge fund of said county numbered one hundred to one hundred and six, inclusive, one hundred and nine to one hundred and thirteen, inclusive, and one hundred and nine to one hundred and fourteen, inclusive,

and one hundred and forty-three to one hundred and forty-five, inclusive, all of the issue of 1892, and that each and every of them, be adjudged and decreed to be null and void, and not binding or legal obligations of Ada county, and that the said warrants, and each and every of them, be ordered to be returned to the proper officers of said Ada county, and be canceled. And that said warrants in the second cause of action mentioned and described, to wit, warrants on the general bridge fund of said Ada county of the issue of the year 1893, and numbered sixty-four to sixty-seven, inclusive, and sixty-nine to seventy-seven, inclusive, and seventy-nine and eighty, and each and every of them, be adjudged and decreed to be null and void, and not binding on said Ada county, or a legal obligation thereof; and that each and every of said warrants be ordered returned by the defendants to the proper officers of said Ada county for cancellation; and plaintiff prays further for judgment for costs of this action.

"Hawley & Puckett.

"Attorneys for Plaintiff."

Duly verified. Filed July 6, 1895, at 4:35 p. m.

To this complaint, defendant the Falk-Bloch Mercantile Company filed a disclaimer. The other defendants filed general demurrers. Upon a hearing in the district court upon the complaint and demurrers, the demurrers were sustained, and, plaintiff declining to amend, judgment was entered in favor of defendant, from which this appeal is taken.

This is an action in equity, seeking and praying the cancellation of certain warrants upon the treasury of the plaintiff county upon the alleged grounds that the same were issued illegally, and in violation of constitutional provisions. By the issue raised by the demurrer the first question we are called to pass upon is, conceding the facts to be as stated in the complaint, can the plaintiff maintain this action? It is contended by defendants that an action for the cancellation of written instruments will not lie upon the state of facts set up in the complaint,—in other words, that, the plaintiff having a plain, speedy, and adequate remedy at law, equity will not intervene; and several decisions of this court are cited in support of this contention. Let us examine the cases cited. In the case of *Picotte v. Watt*, 2 Idaho, 1154, 31 Pac. 805, this court decided that "where the statute provides a plain, speedy, and adequate remedy, it must be pursued." If our statutes provide any plain, speedy, and adequate remedy at law for the county against the payment of warrants illegally or fraudulently issued by order of its board of commissioners, we have been unable to find it. It is the opinion of this court that the provisions of section 1776, Rev. St., do not apply to a case where the county is seeking to protect itself against the illegal or fraudulent acts of its board of commissioners in the issuance of warrants. And we think there will nothing be found in the other de-

cisions of this court in any way contravening this view. Touching the general jurisdiction of equity in this class of cases, Prof. Pomeroy, (2 Pom. Eq. Jur. § 910) says: "It is impossible, especially in the United States, to formulate any universal rules concerning the extent or the exercise of the equitable jurisdiction in matters of fraud, since the decisions of different states are directly at variance with respect to its existence and extent, and since its exercise must depend to a great extent upon the circumstances of particular cases, and even upon the temperaments and opinions of individual judges." When we supplement these words of the learned jurist with the admonitions of our own statutes, often repeated, that we are, in avoidance of all technicalities, to administer the law for the promotion of justice, we are unable to recognize the contention of defendants that "a municipal corporation is estopped, after a warrant upon its treasury has been issued, to set up the defense of ultra vires, or fraud, or want or failure of consideration." That it may maintain a bill in equity to cancel warrants illegally issued is, we think, conclusively established by the authorities.

Section 3 of article 8 of the constitution of Idaho provides as follows: "Sec. 3. No county, city, town, township, board of education, or school district, or other sub-division of the state, shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state." The complaint avers "that the total amount of income and revenue provided for said Ada county for the year 1891 was the sum of \$60,697.49, and for the year 1892 was the sum of \$72,978.95, and for the year 1893 was the sum of \$66,482.68"; that the income and revenue provided for the general bridge fund of said Ada county for said year 1891 was the sum of \$1,538.68, and for the year 1892 was the sum of \$8,792.84, and for the year 1893 was the sum of \$13,302.53; that prior to the issuance of the first warrants, hereinafter referred to, and provided for in said contract, warrants of said Ada county upon the general bridge fund of said county had been duly and regularly allowed, order drawn, and given over to the owners thereof in the aggregate sum equal to the amount in each fund

for the year 1891; "that the revenue and income of said Ada county for said year 1892 raised for and appropriated to and placed in other funds in the treasury of said county was duly and regularly appropriated and used during said year in paying the current expenses of said county, and in taking up warrants of said county drawn on such fund;" "that no question relating to the making of said contract, or the issuance or delivery of said warrants, or any of them, was ever submitted to a vote of the electors of said Ada county, and no provision was ever made for the collection of an annual tax sufficient to pay the interest on said warrants, or to provide a sinking fund for the payment of the principal thereof; and no provision at said time or since has been made for the payment of either the principal or interest of said warrants." And the truth of these allegations is admitted by the demurrer. It would seem that the board of county commissioners had given the usual consideration to the provisions of the constitution and the statutes which those enactments receive at their hands.

Respondents urge that the incurring of the indebtedness in question, and the issuance of the warrants in payment thereof, are authorized by section 11 of the act of March 13, 1891 (Laws 1st Sess. 193, 194), which is as follows: "Whenever it appears to the board of commissioners that the road fund is or would be unreasonably burdened by the expense of construction and maintenance, and repair of any bridge or road they may, in their discretion, cause a portion of the aggregate cost or expense to be paid out of the general fund of the county, and they may levy a special tax, not exceeding one-fourth of one per cent., on the taxable property of the county, annually, until the amount appropriated in aid is raised and paid." The recognition of respondents' claimed construction of this section of the statute would simply amount to a negation of the constitutional provision above quoted. The object and purpose of the constitutional provision is clearly set forth therein and in the other sections of the article. It was to maintain the credit of the state and the counties by keeping them upon a cash basis. Warned by a fearful experience, the makers of the constitution were desirous of protecting the people from the cupidity and rapacity which past experience admonished them sometimes influenced those who had the management and control of state and county finances, and for the accomplishment of these ends they made what they conceived to be sufficient provisions in the constitution. If it is claimed that this expenditure comes within the proviso of section 3, art. 8, of the constitution, we answer that a construction of that proviso, as well as of the entire section, was given by this court in the case of *Bannock Co. v. Bunting* (Idaho) 37 Pac. 277, and we would suggest that an improvement involving an expenditure of

nearly \$40,000, where the revenue of the county for the year was only about \$70,000, would not readily be classed as an "ordinary and necessary expense." It would be difficult, we apprehend, to name an expense under such a construction that would not be "ordinary and necessary." If a necessity existed for the bridge, there was no conceivable excuse for not complying with the plainly expressed provisions of the constitution and the statutes. If these provisions of law are to be ignored or defeated upon flimsy technicalities, it is difficult to see what protection the people will have. Again, it does not appear that any attempt was ever made by the board of commissioners to avail themselves of the provision of section 11 of the act of March 13, 1891. No warrants were ever drawn upon the general fund, nor were there to be, under the terms of the contracts. Nor was there any special or other tax levied to meet the payments stipulated for in said contracts. The appeal to section 11 of the act of March 13, 1891, seems to have been entirely an afterthought, due, we apprehend, more to the acumen of counsel than any desire on the part of the commissioners to comply with the law. It is contended by respondents that "the complaint should have contained an allegation that upon the date the warrant was drawn there was not sufficient money in the county treasury to pay the same." Without assenting to this contention, it is sufficient to say that the complaint does contain an unequivocal statement that all of the moneys in the general bridge fund, upon which all of these warrants were drawn, was exhausted. We have examined with scrutinizing care all of the cases cited by respondents, and we are unable to recognize their pertinency to the case at bar.

Stripped of all subterfuge, the plain facts in this case, as they appear from the complaint, are simply these (and for the purposes of this case we are assuming that the facts alleged in the complaint are admitted by the demurrer):

The board of county commissioners of Ada county, without authority of law, and in violation of the plain and unequivocal provisions of the constitution, caused to be issued warrants upon the general bridge fund of said county to the amount of \$35,690. Being unauthorized by law, and their issuance prohibited by the provisions of the constitution, the warrants so issued are void. This is not a case where a simple claim is presented for allowance to the board, and from the action of the board in relation thereto an appeal may be taken. The board were acting for the county. They made a contract which was unauthorized by law. The duty of the board was plain. They should have submitted the question to a vote as provided. But, without submitting this question, involving an expenditure of a sum of money equal to more than one-half the revenue of the county for the year, they as-

sumed upon their own motion to abrogate and set aside both the law and the constitution, and only obey the dictates of their own sweet will. And we are called upon as a court to indorse their action. It must have been palpable to the board of commissioners that the debt they were incurring against the county in the making of the bridge contracts vastly exceeded the income and revenue provided for that year. What excuse, then, was there for ignoring the provision of the constitution providing for such a contingency? Section 1762, Rev. St., makes provision for the letting of contracts for improvements when the expense involved will exceed \$1,000, but this section was also ignored, except in some minor particulars. The section provides that "when a petition signed by at least one-third of the tax-payers who are qualified voters of any county is presented to the board," etc., the board may proceed, under certain regulations, to make such contract. This provision of the statute, it is true, antedates the constitution, and, in so far as it conflicts with the provisions of that instrument, it is unavailable. It is mentioned here because it seems to verify the statement already made that there seems to have been no intention or desire on the part of the board to comply with either the law or the constitution. The principles we recognize in our conclusions in this case are, we think, fully supported by the decisions upon this and cognate questions. See *Buchanan v. Litchfield*, 102 U. S. 278, affirmed in *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820; *French v. City of Burlington*, 42 Iowa, 614; *Book v. Earl*, 87 Mo. 246. But, aside from other authority than our own constitution and statutes, we feel compelled to hold that this action should be sustained. Upon the question suggested in brief of counsel for the respondents as to the liability of the county upon a quantum meruit for the cost of the bridge, the county having accepted and appropriated it, we do not feel called upon to pass at this time. The judgment of the district court is reversed, and the cause remanded, with instructions to overrule the demurrer of defendants, with leave to answer; costs to appellant.

MORGAN, C. J., and SULLIVAN, J., concur.

On Rehearing.

(Feb. 6, 1897.)

SULLIVAN, C. J. A petition for rehearing was granted. The cause was first submitted to this court without oral argument, but on this hearing the case was fully presented by oral argument and printed briefs. A number of additional authorities were cited. As the facts of the case are fully stated in the former opinion, it is not necessary to repeat them here. The appeal is from the order and judgment of the district court sustaining a demurrer to the complaint.

This is a suit in equity for the cancellation of certain county warrants issued by the plaintiff county to the defendant the Bullen Bridge Company. Respondents contend that this action cannot be maintained, for the reason that the plaintiff has a plain, speedy, and adequate remedy at law, and for this reason the decision of the trial court on the demurrer should be sustained; while the appellant, the county of Ada, contends that the action of the court below in sustaining the demurrer to the complaint should be reversed. The appellant contends that sufficient facts are stated in the complaint to authorize the interposition of a court of equity, and to warrant such court to grant the cancellation of said county warrants; and cites section 921, Dill. Mun. Corp. In that section the author lays down the following rule: "A municipal corporation may, in its own name, bring suit, in proper cases, to be relieved against illegal, unauthorized, or fraudulent acts on the part of its officers." We do not dispute this principle, but indorse it. The distinguished author says such suit may be brought in a "proper case." He does not intimate that a bill in equity would lie to cancel a written contract where the party has an adequate remedy at law, where such remedy would be adequate, certain, and complete. If there is no legal remedy, adequate, certain, and complete, a municipal corporation may maintain a bill in equity to cancel warrants illegally issued. The appellant cites *Andrews v. Pratt*, 44 Cal. 309, as a case directly in point sustaining its contention. The facts in that case were very different from the facts in the case at bar. In that case the plaintiff was a resident taxpayer of Placer county, and three of the defendants composed the board of supervisors of said county, and the fourth one was the treasurer thereof. The board of supervisors were authorized by law to sell certain railroad stock owned by the county, which they did, and for services in negotiating and making said sale they each individually filed a claim against the county for \$1,500 for their services therein, which claims were allowed by said claimants acting as a board, and warrants issued to each of said officers for the sum of \$1,500. By the laws of that state the compensation and fees of members of the board of supervisors were fixed. The law also provided that no other fees or compensation than that provided by statute should be allowed to the members of such board. Under the law, the members of said board were not entitled to compensation for the sale of the stock referred to. The warrants sought to be canceled remained in their hands at the time of the commencement of said suit; while in the case at bar the record shows that the warrants referred to in the complaint are not in the hands of the parties to whom they were issued, but have passed into other hands, or at least third parties have acquired interests in them; that the county has received a bridge costing many thousand dollars, and other improvements, for

which said warrants were issued. No tender of said bridge and improvements is made by the appellant to respondents. This statement of facts is sufficient to show that the case cited is a very different one from the case at bar; and, further, no offer is made by the county to place defendants in statu quo. This was not considered on the former hearing of this case. Equity would not permit the county to retain the bridge and other improvements, and have said warrants canceled. One of the fundamental principles of equity is, "He who asks equity must do equity," even in favor of one who has entered into and executed a voidable contract. *Clity of Oakland v. Carpentier*, 21 Cal. 642. However, the decision on the case at bar is not based upon the ground that the county failed to offer to do equity, but on the ground that plaintiff has an adequate remedy at law. Other cases are cited by the appellant. Those were held to be proper cases for the intervention of a court of equity, while under our statute, in the case at bar, the county has an adequate remedy at law. Conceding that the county treasurer would not be liable in case he should pay said warrants before the final determination of their legality or illegality, in an action at law, no doubt, the court, upon a proper showing, would grant an order restraining the treasurer from paying them until final judgment was obtained in regard to their legality. The county warrants which are sought to be canceled by this action are not negotiable under the law merchant. The power to cancel a written instrument is a purely equitable remedy, and is a remedy that will not be granted, or is a power that will not be exercised, unless there is some special ground for it. The warrants, being nonnegotiable, cannot pass into the hands of bona fide holders, so as to divest the county of any defense it may have against their payment. In section 914, 2 Pom. Eq. Jur., the principle involved in this case is stated as follows: "The doctrine is settled that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, certain, and complete." The doctrine there enunciated is not changed or modified by the laws of this state. The rule is the same in states where the code practice exists as in the states where separate courts of chancery are maintained. In the state of New York, where the code practice obtains, it was held in *Insurance Co. v. Reals*, 79 N. Y. 202, as follows: "The case presented furnishes no ground for the interference of a court of equity. Such a court will not interfere to decree the cancellation of a written instrument unless some special circumstance exists establishing the necessity of a resort to equity to prevent an injury which might be irreparable, and which equity alone is able to avert. That

a defense exists is insufficient. Nor is it enough that the evidence be lost." In *Allerton v. Belder*, 49 N. Y. 373, the court says: "The right to the relief exists only where, from the form of the security, the defense cannot be made available at law, or where the instrument sought to be avoided is a cloud upon the title to land, or some other necessity for the interposition of a court of equity is shown." In *Town of Venice v. Woodruff*, 62 N. Y. 462, it is said: "A court of equity will not interfere to decree the cancellation of a written instrument unless some special circumstance exists establishing the necessity of a resort to equity to prevent an injury which might be irreparable, and which equity alone is competent to avert." To the same effect are *Town of Grand Chute v. Winegar*, 15 Wall. 373; *Edelman v. Latshaw* (Pa. Sup.) 28 Atl. 475. Where the invalidity of an instrument appears on its face, or where there is no danger of the instrument passing into the hands of an innocent holder, and where there is an adequate remedy at law, a court of equity will not take jurisdiction, and decree the cancellation of such instrument. *Story, Eq. Jur.* § 700a; *Delaine Co. v. James*, 94 U. S. 214. In *Ada Co. v. Gess* (Idaho) 43 Pac. 71 (which was an application for an injunction to restrain the payment of certain county warrants), the court holds that there was a complete and adequate remedy at law, and therefore equity could not be invoked. See, also, *Morgan v. Board* (Idaho) 39 Pac. 1118; *Rogers v. Hayes* (Idaho) 32 Pac. 259; *Clark v. Dayton*, 6 Neb. 192. In *Farmington Village Corp. v. Sandy River Nat. Bank*, 85 Me. 46, 26 Atl. 965, the doctrine applicable to the case at bar is clearly stated. That was a bill in equity, praying for a perpetual injunction against the defendants, enjoining them from negotiating or delivering certain bonds issued by said corporation. It is there held that a court of equity, in a proper case, has full power to order the cancellation of bonds or other written instruments; but that it is a power which the court, in its discretion, will exercise with care, and only in accordance with what the court believes to be proper and right under the circumstances; and that such power will not be exercised where the legal remedy, either affirmative or defensive, would be adequate, certain, and complete. To the same effect is *Delaine Co. v. James*, 94 U. S. 207, and *Town of Glastenbury v. McDonald's Adm'r*, 44 Vt. 450. In this case the county need not wait for the defendants to sue on said warrants, but it can force defendants to do so by virtue of the provisions of section 4928, Rev. St., which is as follows: "An action may be brought by one person against another for the purpose of determining an adverse claim which the latter makes against the former for money or property upon an alleged obligation." This statute provides a complete and adequate remedy against the delay of defendants in bringing suit upon said warrants, and may be invoked on behalf of the county. In

such suit any legal defense which the county has against the payment of said warrants may be interposed. Section 4928, *supra*, is the same as section 1050, Code Civ. Proc. Cal., and is a transcript of section 527 of the old practice act of California. In *Lewis v. Tobias*, 10 Cal. 578, which was a suit in equity to compel the surrender and cancellation of a promissory note, the court held that said section afforded an adequate remedy. The court says: "If the doctrine contended for by respondent be at all debatable elsewhere, it is more clear here, for we have a statute whereby a party may force his adversary to wage his claims, or else forever abandon them." Again, the court says: "While, if we recognize the principle invoked by the respondent, we must necessarily admit that in every case in which the payor of note, or bond, or other money security, has a defense to it, though purely legal, we must admit him, at his pleasure, into a court of equity, deny the holder a trial by jury, and permit the payor to take the place of the actor in a proceeding to test his liability. We see no necessity for such a principle, and we think it would produce only confusion, and that it starts with a denial of a positive right of the holder. If the holder unreasonably delays to sue, the payor may force him to do so under the statute." The case of *Lewis v. Tobias* is affirmed in *Smith v. Sparrow*, 13 Cal. 596, and in *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747. The action provided for by said section 4928 is an action at law, and triable in the ordinary course of law, and by jury, unless waived. *Taylor v. Ford*, 92 Cal. 419, 28 Pac. 441. If the county has a legal defense to the payment of said warrants, by permitting it to come into a court of equity the defendants would be deprived of a trial by jury. The defendants would thus be deprived of a positive right which the law gives them. The former decision in this case is reversed, and the order of the trial court in sustaining the demurrer and the judgment entered therein are sustained. Costs of this appeal awarded to respondents.

HUSTON and QUARLES, JJ., concur.

(39 Or. 321)

INMAN, POULSEN & CO. v. SPRAGUE  
et al.

(Supreme Court of Oregon. Feb. 15, 1897.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.

Mortgages executed by a failing debtor to particular creditors immediately prior to a general assignment, which the debtor did not then contemplate, and accepted in good faith, to secure a bona fide debt, are not parts of the assignment, so as to invalidate the same, under Hill's Ann. Laws, § 3173, declaring that no general assignment shall be valid, unless made for the benefit of all the creditors.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Action by Inman, Poulsen & Co. against Edwin J. Sprague and others to cancel cer-

tain instruments as in fraud of creditors. From a decree for defendants, plaintiff appeals. Affirmed.

On January 23, 1894, the plaintiff commenced an action at law against the defendants E. J. Sprague and wife, and caused all their property, consisting of certain real estate in the city of Portland, to be attached. Thereafter, and on the 25th of the same month, the Spragues mortgaged the attached property to the defendant bank, to secure the payment of a promissory note for \$400, then long overdue, and which they had repeatedly promised to secure. On the 30th of January, they gave another mortgage to the defendant the Portland Lumbering & Manufacturing Company, to secure an indebtedness of \$105 due the company and \$400 due their son Charles S. Sprague, and on the 31st of January made a general assignment for the benefit of creditors to the defendant John Myers. Both the mortgages referred to were accepted by the mortgagees in good faith, to secure a bona fide existing debt, and without any knowledge of plaintiff's attachment, or of any intention on the part of the Spragues to make a general assignment for the benefit of creditors. The assignee immediately qualified, and, having entered upon the discharge of his duties, the plaintiff, on May 3, 1894, presented to him, for allowance as a claim against the estate of his assignors, a duly-certified copy of its judgment recovered in the action at law referred to. Thereafter the assignee made his report of the claims filed against the estate, including that of plaintiff, and applied for and obtained an order authorizing him to pay certain expenses incurred in the management of the estate, and continued to discharge the duties of his office until November 1, 1894, when the plaintiff commenced this suit to have the mortgages and assignment set aside, on the ground that the same were fraudulent and void as to creditors. The debtors Sprague, the assignee, Myers, and the mortgagees, the bank and the lumbering company, were all made parties to the suit. Answers were filed, and, on the proof taken, the court held that, although no fraud was proven, the mortgages and assignment must, in law, be deemed parts of the same transaction, and, construed as one instrument, the assignment is void, as creating a preference, but that plaintiff is estopped by its conduct from maintaining this suit. From this decree, it has appealed.

R. R. Duniway, for appellant. S. H. Gruber, for respondents.

BEAN, J. (after stating the facts). From the statement of facts it will be observed that the questions presented by the record are whether the assignment from the Spragues to the defendant Myers is void, as creating an illegal preference, and, if so, whether the plaintiff is estopped by its con-

duct from insisting upon such invalidity. It is claimed that the assignment is void under section 3173, Hill's Ann. Laws, which provides that "no general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid unless made for the benefit of all his creditors in proportion to the amount of their respective claims." Standing by itself, the assignment is unobjectionable. It is in the usual form, purports to transfer all the property of the assignors for the benefit of all their creditors, in proportion to their respective claims.

But the contention for the plaintiff is that the assignment and mortgages to the bank and lumbering company were but parts of one and the same transaction, and, in law, form but one instrument, and are therefore, taken together, in effect, a general assignment, with preferences and within the denunciation of the statute. Unless this position can be sustained from the evidence, the plaintiff's case must fail, for there is nothing in the statute which prohibits a debtor in failing circumstances from preferring one creditor to another, unless it is done in contemplation of and as part of a general assignment. At common law, a debtor could lawfully make an assignment with preferences in favor of certain creditors, and it was to cut this doctrine up by the roots that the statute was passed. But it does not undertake to limit or affect the right of an insolvent debtor to sell or mortgage his property to one or more of his general creditors, even to the exclusion of all the others. Its operation is limited to the matter of general assignments, and the preferences against which it is directed must be contained either in the assignment itself or in some other instrument forming in law a part thereof. *Burrill*, Assignm. § 167. As said by the supreme court of Iowa in construing a similar statute, it "does not limit or affect the right of an insolvent debtor, or one contemplating insolvency, or, indeed, any other, to sell or mortgage a part or all of his property to one or more of his many creditors, in payment or security of a particular debt or debts. And this is true, although such sale or mortgage may, practically, defeat all other creditors than the grantee from collecting their demands. Nor does the statute prohibit or interfere with the right of any debtor, as it existed prior to the statute, to make a partial assignment. In other words, the statute does not expressly or by implication extend any further, or apply to any instrument or conveyance, other than to a general assignment. And therefore it is still competent for any debtor to pay a part of his creditors in full; to secure another part, by mortgage or deed of trust, upon a part of his property; to make a partial assignment of still other property, for the benefit of certain other creditors, with or without preference; and afterwards to make a gen-

eral assignment. The statute simply provides that such general assignment shall not be valid, unless it is made for the benefit of all the creditors pro rata." *Lampson v. Arnold*, 19 Iowa, 479, 486. The rule, however, is well established, that several instruments, executed at or about the same time, and forming part of the same transaction, will be considered together and as one instrument, and if, when so construed, they have the effect of a general assignment with preferences, they come within the terms of the statute, and are void. *Burrows v. Lehn-dorff*, 8 Iowa, 96; *Cole v. Dealham*, 13 Iowa, 551; *Van Patten v. Burr*, 52 Iowa, 518, 3 N. W. 524. But, although several instruments may in fact be executed at or about the same time, they do not necessarily form one transaction, nor must they necessarily be construed as one instrument. Whether they do or not depends upon the character of the instruments, the circumstances of the case, and the intent of the parties. In other words, it is a question of fact to be determined from the evidence, like any other fact in the case. Upon this point the case of *Van Patten v. Burr* is peculiarly instructive. In that case an insolvent debtor executed two chattel mortgages and an assignment, all bearing the same date. A suit by an attaching creditor to set the mortgages and assignment aside first came before the supreme court on a demurrer to the petition, which alleged that the debtor, "in contemplation of insolvency, and being then insolvent, made, executed, and delivered, in writing, a general assignment of his property for the benefit of his creditors contained in three instruments executed by him," and "that said instruments were intended and do constitute, as a whole, a general assignment of his property for the benefit of creditors." And it was held that, under such allegations, the three instruments constituted but one transaction, and together made a general assignment for the benefit of creditors with preferences, and was void under the statute. *Van Patten v. Burr*, supra. The case was remanded for trial, and again came before the court on the merits, when it was held that one of the mortgages was good, because it appeared that it had been taken and accepted by the mortgagee without knowledge of the contemplated assignment. *Van Patten v. Burr*, 55 Iowa, 224, 7 N. W. 522. And in *Perry v. Vezina*, 63 Iowa, 25, 18 N. W. 657, a chattel mortgage executed three hours before a general assignment, was held not to invalidate the assignment, it appearing that the debtor did not contemplate making it when the mortgage was made. Indeed, in all cases of this character the true guiding principle of the decision is the intention of the parties. If the instrument giving a preference is executed and received in good faith, with the intention of paying or securing a bona fide debt, and not as a part of a general assignment under the stat-

ute, it is valid, however near its execution may be in point of time to a subsequently executed assignment. But when an insolvent debtor has formed the determination to voluntarily dispose of all his property for the benefit of his creditors, and has entered upon the performance of that determination, the number or character of the instruments used by him to accomplish his purpose is wholly immaterial. The law will regard all his acts having for their object the accomplishment of this purpose as parts of one single transaction, and will read into the assignment, when executed, all prior acts of the debtor having reference to the disposition of his property, and, if any preferences are shown to have been given by him to one creditor over another, the assignment will be declared void under the statute. *Nelson v. Garey*, 15 Neb. 531, 19 N. W. 630; *Preston v. Spaulding*, 120 Ill. 208, 10 N. E. 903; *Benham v. Ham*, 5 Wash. 128, 31 Pac. 459; *Root v. Potter*, 59 Mich. 506, 28 N. W. 682; *Root & Co. v. Harl*, 62 Mich. 420, 29 N. W. 29; *Burnham v. Haskins*, 79 Mich. 35, 44 N. W. 341; *Lumber Co. v. Ott*, 142 U. S. 622, 12 Sup. Ct. 318; *Perry v. Holden*, 22 Pick. 269.

Within these principles of law, the solution of this case is not at all difficult. There is not a scintilla of evidence in the record to show that the Spragues contemplated making a general assignment at the time either of the mortgages referred to was executed. Indeed, the inference from the testimony is that the intention to do so was not formed until after an unsuccessful attempt, on the day of its execution, to borrow the money with which to pay the plaintiff's claim. And, further, it is stipulated that the lumbering company, at the time it accepted the mortgage, had no knowledge of any intention on the part of the Spragues to make an assignment for the benefit of creditors, if such an intention existed, and no actual knowledge of plaintiff's attachment; and the undisputed testimony in reference to the bank's mortgage is to the same effect. Both mortgages were received by the mortgagees in good faith, in the usual and ordinary course of business, to secure an existing indebtedness, and, under the testimony and the law as we understand it, cannot be taken as parts of the subsequently executed assignment. It follows that the decree of the court below must be affirmed, without considering the question of estoppel; and it is so ordered.

(30 Or. 448)

#### ROYAL v. ROYAL.<sup>1</sup>

(Supreme Court of Oregon. Feb. 15, 1897.)

TRUST—ACTION TO ENFORCE—ACCOUNTING—COSTS.

1. In a suit to enforce a trust, and to establish plaintiff's interest in land conveyed to defendant by their father (an undivided one-half thereof to be held in trust for plaintiff), in consideration of an agreement by the sons to pay

the father's outstanding debts, only those accounts are at issue which relate directly to the land, and a general accounting between the parties is improper.

2. One who has title to land, an undivided one-half of which he holds in trust for another, cannot charge the beneficiary with subsidies paid to street-railway and water companies, on his own responsibility, and as a matter of speculation.

3. A trustee who occupies the land, and receives the income therefrom, for which he renders no account, is not entitled to compensation for services.

4. On the enforcement of a trust which the trustee wrongfully attempts to repudiate, plaintiff is entitled to his costs and disbursements.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Cross bill by Osmon Royal against Ladru Royal to enjoin an action of ejectment, and to enforce a trust in the land. From a decree enforcing the trust, but charging plaintiff with certain sums, he appeals. Modified.

This is a proceeding by cross bill to enjoin an action at law, and for a decree that plaintiff is the owner of an undivided half interest in the real property which the defendant seeks to recover in the action. The facts are that on September 15, 1875, O. W. Royal, the father of the parties to this suit, conveyed the land in question to the defendant, Ladru Royal, in consideration of an agreement by him and his brother to pay and discharge his outstanding obligations, the undivided one-half thereof to be held in trust for plaintiff. To accomplish this purpose, the said parties put their earnings into a common fund, which was used in the support of themselves and parents, and in payment of such outstanding debts until August, 1878, when the plaintiff, Osmon Royal, went East to attend school and complete his professional education, where he remained until some time in 1885, when he returned to Oregon, and soon thereafter erected a sanitarium upon the land in question, and occupied the same until about the 25th of October, 1892, at which time the defendant, denying his title or interest therein, brought an action to recover possession of the property, and in such action this cross bill was filed. The defendant answered the cross bill, denying the plaintiff's alleged interest in the property, and set up title in himself, and, in addition thereto, claimed and alleged that he had paid more than his proportion of the debts of his father outstanding at the time the deed was made, in 1875; had loaned the plaintiff money to assist him in procuring an education; had put valuable and permanent improvements upon the property, and incurred divers and sundry other expenses in the management thereof, which he claimed should be charged against the plaintiff's interest therein, if it should be found that the allegations of his complaint in that regard are true. Upon a trial in open court of the issues joined, it was decreed that plaintiff is the owner of an undivided one-half of the real property in controversy, and that defendant held the title thereof in trust for him. The cause was then sent to a referee, with instructions to ascertain

<sup>1</sup> Rehearing pending.



and report to the court, from the evidence already taken—First, the amount of the indebtedness of C. W. Royal at the time of the execution of the deed to Ladru Royal, in 1875; second, how, when, and by whom these debts were paid, and from what source the money was derived; third, what expenditures have been made by either party on account of the land justly chargeable thereto, or for which the party making such expenditures is entitled to credit; fourth, whether the property has been incumbered, by mortgage or otherwise, prior to the commencement of this suit, and, if incumbered and money borrowed, when and by whom, in what amount or amounts, and to what use applied, and by whom; fifth, what sum or sums of money was or were advanced by either party to the other from the 8th day of August, 1878, the day when plaintiff left Oregon to attend school, until his return, in 1885. After the case had been argued and submitted to the referee, the court, on motion of defendant, directed him to include, in his report, an answer to the following additional questions: (1) What sum or sums of money were advanced to either by the other after plaintiff's return from school, in 1885, up to the commencement of this suit; (2) what, if any, sums of money Ladru Royal paid out for the care and maintenance of his father and mother since the conveyance of the land to him; and (3) a general statement of all the accounts between the parties. In due time, the referee reported that the indebtedness of C. W. Royal, at the time of the execution of the deed by him to the defendant, amounted to \$1,682.90; second, that these debts had been paid, but it was impossible to determine from the evidence when they were settled, except that prior to August 8, 1878, there had been paid on account thereof \$1,080.99, principal and interest, and on that date there remained unpaid \$838.75, making the total amount, paid and unpaid, \$1,917.74. The referee also finds that the business was generally done by the defendant directly, or through the agency of others; and that, to enable him to make payments on said indebtedness, the plaintiff, as well as Mr. and Mrs. C. W. Royal, turned into his possession and control their resources and earnings; and that these, together with his own earnings, constituted the source from which the debts were paid. He then undertakes to estimate the amount of money so received by the defendant from the plaintiff and Mr. and Mrs. C. W. Royal, and applied by him in payment and discharge of these debts, and arrives at the conclusion that on August 8, 1878, there was due from the plaintiff to the defendant, on account of advances by the latter in excess of his share, the sum of \$155.90. In answer to the third question, the referee finds that the cost of improvements, which were made by the defendant exclusively, less a small amount paid by Mrs. C. W. Royal, amounted in the aggregate to \$4,877, one-half of which should be charged to the plaintiff; and, in addition thereto, he finds the plaintiff should be charged with one-

half of certain subscriptions in aid of street-railway lines and money invested in water-works by the defendant, amounting, principal and interest, to \$1,567.19, and with one-half of \$1,100, taxes paid by defendant on the property, and with \$900, for defendant's services as trustee. He also finds that the defendant loaned to the plaintiff, while he was East, attending school, the sum of \$790; and that, between the time of plaintiff's return to Oregon and the commencement of this suit, he became and is indebted to the defendant on general account in the sum of \$2,800.95. The referee then summarizes the account, and finds that the plaintiff is indebted to the defendant, including interest, in the sum of \$11,772.89. This was reduced by the court to \$8,688.78, and a decree entered in favor of the defendant for that amount, from which the plaintiff appeals.

Rufus Mallory and Dell Stuart, for appellant.  
H. H. Northup, for respondent.

BEAN, J. (after stating the facts). No appeal having been taken from that part of the decree establishing plaintiff's interest in the land in controversy, the only question before us is the state of the accounts between the parties in reference to such matters as are properly chargeable to the land. The court below seems to have proceeded upon the theory that the suit is for a general accounting, and, by its decree, undertook to adjust and settle the entire account between the parties. But the sole object and purpose of the suit being, as we regard it, to enforce a trust, and establish the plaintiff's interest in a particular tract of land, no questions could be properly tried therein except such as arose out of or were directly connected with the subject-matter of the suit. And since all matters embraced in the second order of reference relate entirely to the general course of dealing between the parties after the return of plaintiff from the East, and have no connection whatever with the subject-matter of this controversy, but embrace matters wholly foreign thereto, we shall dismiss, without further consideration, the referee's findings in reference thereto, and shall eliminate all questions of general accounting between the parties concerning matters arising after the return of the plaintiff from the East, in 1885, leaving them to be considered in some proper proceeding to be instituted hereafter if deemed advisable by either of the parties.

The only questions which it seems to us can be properly considered here are (1) the amount of indebtedness of C. W. Royal, the father of the parties to this suit, paid by the defendant, and properly chargeable to the plaintiff; (2) the value of the improvements upon the property made by him; (3) the amount of money loaned by him to the plaintiff during the time the latter was East, attending school, for the payment of which the land was held as security; and (4) the

amount defendant has realized from the property, either as rents and profits, or otherwise. These are entirely questions of fact, and we shall simply state briefly the conclusions arrived at after an exhaustive examination of the record, conscious, however, of the fact that, owing to the uncertainty of the testimony, they are, at best, only approximately right.

In reference to the first question, the evidence consists of the indistinct recollection of the parties, and of their father and mother, and is very conflicting and unreliable. No list of the liabilities seems to have been made at the time of the conveyance, and no subsequent account kept of the payments thereon, or of who supplied the money to make them. The only definite landmark in the whole transaction is the fact that on August 8, 1878 (the day before the plaintiff started East), he and defendant had a partial accounting or adjustment of their financial affairs, from a written memorandum of which, made at the time, it appears that the outstanding obligations then amounted to \$1,258, and consisted of divers and sundry small unsecured debts, and a mortgage on the property for \$500. As this is the most definite and reliable fact in the whole transaction, we shall adopt it as a starting point for an accounting between the parties; and as it appears from the testimony that all payments thereafter made in liquidation of the debts then outstanding were made by the defendant, we shall allow him credit for the amount thereof. It appears, however, that the claims of Gilham for \$90, Cummings for \$100, Stinson for \$20, and Fletcher for \$108, were never paid by the defendant at any time, and that on the debt of \$100 due J. H. B. Royal he paid but \$85; so that from this sum total there should be deducted \$333, leaving the sum of \$925 as the amount of the then outstanding debts, which the defendant subsequently paid, and for which he is entitled to credit.

In the matter of improvements on the property, the testimony shows them to consist of a house, of the probable value of \$1,800; fencing, \$200; well, \$75; cistern, \$25; clearing 18 acres, at \$50 an acre, \$900,—making a total of \$3,050. From this there should be deducted the sum of \$700, expended by plaintiff in building an addition to the dwelling house after his return from the East, leaving a balance of \$2,350 to defendant's credit on this account. The matter of subsidies and subscriptions to street-railways and water companies, for which the defendant was allowed credit by the referee and court below, must be entirely eliminated from his account; the evidence very clearly showing they were made on his own responsibility, for his own benefit, and as mere matter of speculation, and in no sense proper charges against plaintiff. His claim of credit on account of taxes paid is based upon the fact that he paid taxes upon certain mort-

gages given by himself upon the property; and, the evidence in relation to the amount thereof being indefinite and uncertain, in our opinion, he should be allowed no more than \$241, the amount admitted by the reply; nor should he be allowed any compensation for his services as trustee. He, together with his father and mother, had possession and control of the property, and of the incomes derived therefrom, during the entire time, for which he has rendered no account, and is not charged in this proceeding with the use and occupation or rents and profits.

The evidence indicates, and it seems to be conceded by the plaintiff, that prior to his trip East, to attend school, it was agreed that all moneys loaned to him by defendant while thus engaged should be regarded as a charge or lien upon his interest in the land in question, and for this reason the defendant is entitled to a credit therefor. The amount of these advances was \$790. These, as we understand the record, are all the items for which defendant is entitled to credit in this proceeding. But, as an offset thereto, he should be charged with a mortgage to secure the sum of \$2,200, put upon the property by himself during the absence of plaintiff in the East, and from the proceeds of which it is probable a portion, if not all, the outstanding debts of C. W. Royal were paid and discharged. So that, at the time of plaintiff's return, he should be charged with his proportion of the amount of C. W. Royal's debts paid by defendant, \$925; the cost of improvements, \$2,350; and taxes paid, \$241.50; and was entitled to a credit of \$2,200, the amount of the mortgage upon the land,—leaving as a balance to the credit of defendant on the 1st day of January, 1886, the sum of \$1,316.50, one-half of which, together with the sum of \$790, loaned to the plaintiff while East, aggregating \$1,448.25, with legal interest from that date, is the amount due the defendant from the plaintiff on account of transactions arising out of the subject-matter of this suit. The decree of the court below is modified accordingly, and inasmuch as the litigation was caused by defendant's wrongful denial of plaintiff's title, and the repudiation of his trust, the plaintiff should recover his costs and disbursements in this court and the court below; and it is so ordered.

(57 Kan. 678)

CUNNINGHAM v. COLONIAL & UNITED STATES MORTG. CO., Limited.

(Supreme Court of Kansas. Feb. 6, 1897.)

PLEADING—CONTEMPT.

1. The petition in this case considered, and held, that it does not admit any indebtedness from the plaintiff to the defendant.

2. It is error for a district court to punish a party to an action as for a contempt, because of his failure to pay money into court, where there is no showing of fraud in the case, and es-

pecially so where, as in this case, there is no proof or admission of a liability for any sum resting on the party ordered to make the payment.

3. It is error to deny the plaintiff in an action the right to be heard because he has failed to comply with an unwarranted and erroneous order to pay money into court, and has been wrongly adjudged guilty of a contempt for failing to do so.

(Syllabus by the Court.)

Error from district court, Barber county; G. W. McKay, Judge.

Action by D. K. Cunningham against the Colonial & United States Mortgage Company, Limited. From a judgment for defendant, plaintiff brings error. Reversed.

D. K. Cunningham, pro se. C. N. Sterry and Edwin A. Austin, for defendant in error.

ALLEN, J. The plaintiff in error brought suit against the mortgage company, alleging in his petition that he had been employed by the defendant as an agent to effect loans in Barber and other counties of this state; setting up circumstantially the terms of the agreement, and the violation thereof by the defendant, and asking damages in the sum of \$50,000. For a second cause of action the petition alleges that the defendant was indebted to the plaintiff in the sum of \$3,534.62 for attorney's fees, the items of which were set out in an exhibit attached to the petition, and also in the further sum of \$3,865.16 for unpaid commissions, as set forth in Exhibit B; "that upon the 24th day of February, 1890, when the plaintiff ceased doing business for the defendant as aforesaid, there remained in his hands, of the moneys of the defendant, which had come to him from various sources for the purpose of investing in loans for the defendant, paying his expenses and commissions and other charges, the sum of \$3,854.09, which, under and by the terms of said contract and agreement, he retained and applied to the payment of unpaid commissions due him as herein aforesaid, and for legal services and other charges, for which said amount of \$3,854.09 defendant is entitled to a credit upon the items of unpaid commissions due plaintiff from defendant, as set forth and stated in Exhibit B, hereinbefore referred to." The defendant filed a very long answer, the averments of which have no bearing on the questions presented here, concluding with a prayer for judgment for \$3,854.09, and the further sum of \$100,000, and for an accounting and other relief. After this answer was filed the defendant filed a motion which reads as follows: "Comes now the defendant, and respectfully moves the court that the plaintiff be required to pay into court the sum of \$3,854.00, the same being the money mentioned in the pleadings, on behalf of the plaintiff in the within action, the title to which, on the plaintiff's own showing, is in the defendant." This motion was sustained,

and the plaintiff was required to pay the amount into court within 10 days. Having failed to comply with the order, the plaintiff was cited to appear before the court to answer as for a contempt, and at the time fixed he was adjudged to be guilty of contempt of court, and ordered to be committed to the jail of Barber county until he should comply with the order to pay said money into court. The case then came on for trial. The plaintiff's attorneys demanded a jury. The defendant objected to the plaintiff appearing further in the action, for the reason that he was in contempt of court, because of his failure to comply with the order to pay the money into court. The plaintiff was denied all right to participate in the trial, and a judgment was rendered against him for \$3,854.09 and costs. Complaint is made of all these rulings of the court. The order requiring the plaintiff to pay money into court was not warranted by the statements in the petition. There was no admission that any balance was due from him to the defendant. On the contrary, the facts stated by him showed a balance of over \$3,500 still owing from the defendant to the plaintiff after application of the moneys he admitted having received to the payment of his charges. It was error to hold that his refusal to pay was a contempt of the court. Orders for the payment of money, except in cases of fraud, cannot be enforced by committing the person of the debtor to jail, and the order of the court punishing the defendant as for a contempt was altogether unwarranted and erroneous. It was also manifest error to refuse the plaintiff a right to be heard at the trial. The judgment and all the orders of the court above mentioned are reversed, and the case remanded for further proceedings. All the justices concurring.

(57 Kan. 681)

SOUTHERN KANSAS RY. CO. et al. v.  
SHOWALTER.

(Supreme Court of Kansas. Feb. 6, 1897.)

STREETS—ABUTTERS—VERDICT—INTEREST.

1. In order to entitle the owner of the lots on one side of a public street to more than one-half of the street on its vacation, it must appear that the street, or some part thereof, was at some time taken from such lots, and appropriated to public use. Where a street designated on the original plat of a town site located on public lands of the United States, and entered and platted by the probate judge for the benefit of the occupants (so that the title to the streets passed from the government of the United States, through the probate judge, to the county), is afterwards vacated, the title to the land included in the street vests in the lot owners on each side in equal parts; and this in a case where the vacated street is all included within the original town site, and the lots on one side are in a different quarter section of land afterwards platted as an addition.

2. It is error for the court to compute interest on the amount of a verdict for a period prior to the date of its rendition, and render judgment therefor, when the verdict neither includes such

interest nor affords definite data for its computation.

(Syllabus by the Court.)

Error from district court, Sumner county; James A. Ray, Judge.

Action by Florence M. Showalter against the Southern Kansas Railway Company and others. There was a judgment for plaintiff, and defendants bring error. Modified.

A. A. Hurd, W. Littlefield, and O. J. Wood, for plaintiffs in error. A. E. Parker and W. W. Schwinn, for defendant in error.

ALLEN, J. This action was instituted by Florence M. Showalter against the Southern Kansas Railway Company and the Wichita & Western Railway Company to recover damages for the appropriation of a strip of ground 20 feet wide and 150 feet long, lying immediately south of the center line of what had been First street, in the city of Wellington. The plaintiff owned the west half of block No. 2 in Myer's addition to the city of Wellington, which was bounded on the north by First street. The Southern Kansas Railway Company owned the lots in block 95 in the original town site of Wellington, fronting on First street, immediately north from the plaintiff's lots. The town site of Wellington was laid off on public land, and conveyed to the probate judge of Sumner county as a town site, under the laws of the United States; the south line of First street being the south line of the town site. Myer's addition, in which the plaintiff's property was included, was afterwards platted with the south line of First street, as the northern boundary thereof. Subsequently, First street was vacated by an ordinance of the city, the validity of which is not questioned by either party. The principal contention in the case is as to the title to the vacated street. The plaintiff claims that one-half of it accrued and attached to her lots. The defendant claims that the title to the whole of it vested in it by reason of its ownership of the adjacent lots on the north, and because the whole street was taken from the original town site of Wellington. The first trial of the case resulted in a judgment for the defendant. On proceedings in error, the judgment was reversed by the court, and the case remanded for a new trial. *Showalter v. Railway Co.*, 49 Kan. 421, 32 Pac. 42. It was then held that under the proviso in paragraph 811 of the General Statutes of 1889, which reads "that whenever any street, avenue, alley or lane shall be vacated, the same shall revert to the owners of real estate thereto adjacent on each side, in proportion to the frontage of such real estate, except in cases where such street, avenue, alley or lane shall have been taken or appropriated to public use in a different proportion, in which case it shall revert to adjacent lots of real estate in proportion as it was taken from them," each of the adjacent lot owners took

one-half of the vacated street, and that the plaintiff became the owner of the strip of ground in controversy. Counsel for the plaintiffs in error challenge the correctness of this decision, and earnestly insist on a re-examination of the question. The opinion in the case was prepared by Simpson, C., and contains the following language: "The view we take is strengthened by the language of the provision that seems to require that a street or alley, to fall within its operation, must have been taken and appropriated to public use. These words convey to the mind the idea that the street or alley must have been the product of the exercise of the right of eminent domain, rather than the ordinary act of dedication of streets or alleys by the original town-site proprietors."

The view that there can be an unequal division of the vacated street only when it has been taken by the exercise of the right of eminent domain is vigorously combated by counsel, and, if this case turned on the correctness of this expression in the former opinion, it may be that we should find great difficulty in adhering to that position, for it is very difficult to understand why an owner who has voluntarily dedicated a part of a lot to public use should not be as well entitled to a reversion of it when the public use is renounced as one who has been forced to yield a similar part of his property by the exercise of the right of eminent domain, and the payment to him of damages therefor. This is not the pivotal question in this case, however, nor are we sure that it had controlling influence with the court in rendering its former decision. The language of the proviso relied on by the plaintiffs in error is that the vacated street "shall revert to adjacent lots of real estate in proportion as it was taken from them." First street was never taken from the defendant's lots. Lots 12 and 13, which are bounded on First street, never extended across or included any part of First street until after the vacation. First street was never taken from any lots. In platting the original town site, First street was taken from the south side of the whole quarter section, and the defendant's lots were taken from the land adjoining. It would be as apt an expression to say that lots 12 and 13 were taken from First street as that First street was taken from the lots. Each was included within the original tract covered by the town site. The title to the street, by virtue of its dedication to public use, passed from the United States to the county. The title to the lots passed from the same source of title to the railway company. The title to the land covered by Myer's addition must also have been derived from the common source of title,—the government of the United States; though at what date the title of the government was divested we are not informed, nor do we deem it material. While First street was taken from the half section covered by the town site, it cannot

fairly be said that it was taken from any lot, nor was any one lot as originally platted diminished in size by reason of the streets more than another; nor, indeed, can it be said that any lot was of less size than it would have been if First street had never been laid off, for more lots might have been made from it. This case is, then, one where a street not taken from any particular adjacent tract, but the full title to which passed directly from the government of the United States to the county for public use, has been vacated, and the owners of adjacent lots have been by such vacation deprived of the advantages of a street. The mere fact that a section line chanced to correspond with the south side of the street has little bearing on the question under consideration. People buying and improving city property usually buy with reference to streets and alleys which are visible, and directly affect the value of the property, and pay little or no heed to section lines. First street, before its vacation, was open and available to the plaintiff for use in connection with her property. On its vacation, the title to one-half of it vested in the plaintiff, and the other half in the defendant, as the owners of the adjacent lots on each side; the land not having been taken and appropriated to public use from the lots on either side.

Various questions on the admission of testimony, the instructions to the jury, and the measure of damages, are discussed in the brief. We have examined all of them, but find no substantial error in any of these particulars, nor any question requiring discussion in the opinion.

One other matter remains to be considered. The jury rendered the following verdict: "We, the jury impaneled and sworn in the above-entitled case, do, upon our oaths, find for the plaintiff, and assess the value of that part of the plaintiff's property taken and appropriated by the defendants at the time it was taken, and the damage resulting to her remaining property, described in her petition, by reason of the appropriation thereof, exclusive of interest, at the aggregate sum of \$3,100." On this verdict the court rendered judgment for \$4,374, having added \$1,274 for interest. This was erroneous. Section 288 of the Code of Civil Procedure provides: "When, by the verdict, either party is entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery." Under this it has been held that interest must be computed by the jury, and included in the verdict (*Association v. Hitchcock*, 4 Kan. 36; *Wilson v. Means*, 25 Kan. 83); or, as held in the cases of *Bank v. Bowen*, 25 Kan. 117, and *Mills v. Mills*, 30 Kan. 455, 18 Pac. 521, such data must be given in the verdict as will enable the court to make the computation from the verdict alone; otherwise no interest can be included in the judgment. The judgment will be modified by striking out the interest,

and the district court is directed to enter judgment on the verdict as of the day of its rendition for \$3,100, to bear interest at the rate of 6 per cent. from that time. The judgment, so modified, will stand affirmed. All the justices concurring.

(57 Kan. 719)

STATE ex rel. COUNTY ATTORNEY v.  
CITY OF EMPORIA et al.

(Supreme Court of Kansas. Feb. 6, 1897.)

## CITIES—DIVERSION OF FUNDS.

Funds derived from a tax levy made by a city of the second class, under a statute and a city ordinance, for the erection of a permanent public building, cannot be transferred by the city council to the general fund for current expenses, or diverted to any purpose other than that for which the tax was levied. Const. art. 11, § 4.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

Action by the state, on the relation of the county attorney, against the city of Emporia and others. From an order refusing a temporary injunction, plaintiff brings error. Reversed.

Graves & Dickson, L. B. & J. M. Kellogg, and W. C. Simpson, for plaintiff in error. Buck & Spencer, for defendants in error.

JOHNSTON, J. This is an action brought by the state of Kansas, on the relation of the county attorney, against the city of Emporia, its mayor, city clerk, city treasurer, and the councilmen of said city, to restrain them from transferring a certain fund raised by taxation for the erection of a city building to the general fund, and the disbursement of the same for purposes other than the erection of a city building. On August 19, 1895, an ordinance was duly enacted levying a tax of 2½ mills upon the dollar on all property within the city, for the purpose of raising a building fund, which it was provided should be "used only for the erection of a city building." In pursuance of the ordinance, the tax was levied and extended on the tax roll, and the amount collected was \$5,900, which has since been carried on the treasurer's books and known as the "Building Fund." No steps were taken by the mayor and council for erecting a building, although it is conceded that the city of Emporia has no adequate city building, and is compelled to rent rooms for its officers. In July, 1896, the mayor and council undertook to transfer the money derived from the levy to the general fund, and, to that end, submitted the question to the electors of the city whether such transfer should be made. At the election 287 votes were cast in favor of the proposition, and 223 votes against it. Emporia is a city of the second class, and has a population of about 9,000, and the usual vote in the city is about 2,000. When the action was begun, a temporary restrain-

ing order was issued, requiring the defendants to refrain from transferring the fund, or from paying out any portion of it for any purpose other than the erection of a city building. At a hearing subsequently had, a temporary injunction was denied, and of this ruling the plaintiff complains.

We think the transfer would have been an improper diversion of the public moneys. The city exists under a general law of the state, and the tax for the erection of a city building was levied under an ordinance passed in pursuance of a general law. The authority for the erection of city buildings, and to provide a fund for that purpose, is explicit and unquestioned. Gen. St. 1889, par. 813. The transfer of the building fund derived from the levy to the general fund, with or without a vote of the electors, would be a direct violation of section 4, art. 11, of the state constitution, which provides that "no tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same; to which object only such tax shall be applied." *Graham v. Horton*, 6 Kan. 343; *State v. Commissioners of Marion Co.*, 21 Kan. 419; *Bauk v. Barber*, 24 Kan. 534. The tax was levied in pursuance of a state law, supplemented by a local law of the city, and for a specific object, and even the ordinance making the levy provided that the fund derived from the tax should "be used only for the erection of a city building." The transfer of the building fund to the general fund would be a clear misapplication,—a diversion to a wholly different object. The general fund is provided to meet the current expenses of the city, while the erection of a permanent building is an extraordinary and exceptional expense, and is not intended to be covered by the general fund. *State v. Commissioners of Marion Co.*, supra. The levy for the public building was independent of, and additional to, that made for general purposes, and as to the latter there is an express limitation. Gen. St. 1889, par. 796. A transfer of the building fund to the general fund by the city officers, if permitted, would make it possible for them to wholly defeat the limitation of the statute. If that were allowed, the officers, after levying up to the full limit of the law for general purposes, could transfer a fund levied and provided for another purpose into the general fund, and thus destroy the limitation and thwart the legislative will. No reason is seen why funds derived from municipal taxation are not protected to the same extent as any other by the constitutional limitation prohibiting the application of such funds to purposes other than those for which they were levied. They are raised by legislative authority, and constitute a large part of the taxes levied and collected within the state. The constitutional provision was designed to prevent the misapplication of all taxes levied in pursuance of law, and it is easy to understand that taxes levied by city councils need the same protection, and as many safeguards, as other taxes levied by county commissioners or

other officers. We think the injunction should have been granted, and therefore the judgment of the district court will be reversed, and the cause remanded for further proceedings. All the justices concurring.

(57 Kan. 687.)

#### CHICAGO, R. I. & P. RY. CO. v. MILLS.

(Supreme Court of Kansas. Feb. 6, 1897.)

#### DEATH BY WRONGFUL ACT — ACTION BY WIDOW.

The widow of a deceased nonresident, whose death was caused in this state by the wrongful act or omission of another, and who sues in this state for damages therefor, and who describes herself in her petition as such widow, and also as administratrix of the estate of her deceased husband by appointment under the laws of a sister state, and against whom an issue upon the question of her widowhood has been raised by the defendant's answer, and in whose favor such issue has been found, may recover in her right as such widow, although not entitled to maintain such action in her capacity of administratrix.

(Syllabus by the Court.)

Error from district court, Doniphan county; J. F. Thompson, Judge.

Action by Laura A. Mills against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

M. A. Low and W. F. Evans, for plaintiff in error. John Doniphan and A. Perry, for defendant in error.

DOSTER, C. J. Laura A. Mills sued the Chicago, Rock Island & Pacific Railway Company, under section 422 of the Civil Code, for damages resulting from the death of Edward R. Mills, in Doniphan county, this state, caused by the negligent operation of the defendant's trains. She entitled the case in her name as "Administratrix of the Estate of Edward R. Mills," but in the body of her petition she described herself as the widow of said Mills, and also as administratrix of his estate, under letters of administration issued by the probate court of Buchanan county, Mo.; and she averred also that "by virtue of such letters she claims the right to recover for the death of her late husband, Edward R. Mills"; and, after setting forth the facts constituting her claim of negligence, concluded with the averment that "by reason of all which she was greatly injured and damaged in the loss of her husband, and of his services, which were her only means of support." The defendant, in its answer, among other matters of defense, denied that plaintiff was the widow of the deceased, Edward R. Mills, but upon the trial of the case, as evidence upon plaintiff's behalf, admitted that she was his widow; and the jury, in answer to a special interrogatory submitted to it, found such to be the fact. Upon the trial of the case it was proved that the residence of the deceased, Edward R. Mills, was, at the time of his death, in the state of Missouri, and that the plaintiff was likewise a resident of such state. The statutes of Mis-

souri which were offered and received in evidence showed upon inspection that in such state actions for damages resulting from death caused by the negligence of railroad officers or employes are limited in the first instance to the husband or wife of the deceased, where such relation exists; wherefore it is argued, following the decision of this court in Limekiller v. Railroad Co., 33 Kan. 83, 5 Pac. 401, that Mrs. Mills, being the administratrix of her deceased husband's estate, holding appointment as such under the laws of another state, cannot maintain this action in her capacity as administratrix, the law of the state whence she derives her authority giving such right of action to her in her capacity as widow only, and not in her capacity as administratrix. To this the defendant in error, as a principal argument, replies that it was incumbent on plaintiff in error (defendant below) to specially plead the Missouri statutes showing the right of action to be in the widow as such, and not in the administratrix, and, failing to do so, the courts here must presume such statutes to be the same as ours, which give a right of action to the administratrix; and the reply brief of plaintiff in error is wholly devoted to an argument in denial of these positions. The defendant in error makes the additional point that the widow, Mrs. Mills, is entitled to recover as such, notwithstanding she appears in her petition to limit her right of action to her representative character of administratrix. This view appears to us to be sound. It is true, she entitles the case in her capacity as administratrix, but she likewise alleges herself to be the widow of the deceased, and the defendant below makes such allegation an issuable point in the case by filing a special denial thereto. Evidence in support of the allegation was offered, and received without objection. The truth of the claim of widowhood was admitted on the trial by the defendant below, and the jury, in answer to a special interrogatory, found the plaintiff below to be the widow of the deceased. It is true, the plaintiff, after reciting the fact of her appointment as administratrix, and the issuance to her of letters of administration, declares that "by virtue of such letters she claims the right to recover for the death of her late husband"; but she is not to be concluded by such declaration, and limited because thereof to a recovery in her representative capacity, where the other allegations of her petition so plainly show a right to recover in her character of widow, and where the defendant has not been misled or taken by surprise as to the claim of widowhood, but, on the contrary, has treated such claim as raising a meritorious issue in the case. Under such circumstances, the averment by the plaintiff of her appointment as administratrix, and her right to recover as such, will be treated as surplusage, and judgment will be accorded to her in her individual capacity. To this effect are the authorities. *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58; *Waldsmith's Heirs v. Waldsmith's Adm'rs*, 2 Ohio, 156. Besides,

the plaintiff, in another part of her petition, really seemed to intend to claim as widow, and not as administratrix, because, after averring the facts of the defendant's negligence, she declared that: "By reason of all which she was greatly injured and damaged in the loss of her husband, and his services, which were her only means of support." The case of *Limekiller v. Railroad Co.*, supra, which constitutes the basis of the contention of plaintiff in error, is in no wise at variance with the views herein expressed. There was nothing in that case, as there is in this, to give countenance to a claim of recovery as widow or next of kin to deceased. The claim of recovery in that case was as administratrix, under appointment by the probate court of a county in Missouri. It being shown that the action could not be maintained in the courts of that state in such representative capacity, it was held that it could not be maintained here in such capacity. The judgment of the court below is affirmed. All the justices concurring.

(57 Kan. 697)

# KANSAS CITY, FT. S. & M. R. CO. v. MURRAY.

(Supreme Court of Kansas. Feb. 6, 1897.)

## APPEAL—WAIVER OF RIGHT.

A party against whom a money judgment has been recovered, and who procures an order of court for the partial satisfaction of the same by setting off against it a like judgment in his own favor for a smaller amount, will be held to have thereby recognized the validity and justice of such judgment against himself, and to have waived his right to prosecute error therefrom. (Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

Action by James C. Murray against the Kansas City, Ft. Scott & Memphis Railroad Company. Judgment for plaintiff. Defendant brings error. Dismissed.

Wallace Pratt and Charles W. Blair, for plaintiff in error. I. O. Pickering, for defendant in error.

DOSTER, C. J. This is the second time this case has been brought to this court by the plaintiff in error. In both instances the proceeding was based upon a judgment for damages for bodily injuries. Upon the hearing of the first case the judgment was reversed, and a new trial ordered. *Railroad Co. v. Murray*, 55 Kan. 336, 40 Pac. 646. The order of reversal included a judgment against the defendant in error and in favor of the plaintiff in error for \$54.40, the costs of this court. The judgment, though nominally in favor of the plaintiff in error, was one in which the officers of the court were beneficially interested, and the amount of the same was therefore paid to them by the plaintiff in error. Upon a second trial of the case a verdict was again returned against plaintiff in error (defendant below), and after the

overruling of its motion for a new trial, and the rendition against it of the judgment which is now in question, it moved the court below for an offset against such judgment of the judgment for costs which it had formerly recovered in this court against the plaintiff, now defendant in error. To this the defendant in error consented. The credit or offset was thereupon allowed, and the judgment satisfied pro tanto. The defendant in error now moves for a dismissal of the case from this court upon the ground that such demand for credit on the judgment, the allowance of the same, and the consequent partial satisfaction of such judgment, was such a recognition of its validity and justice as to constitute a waiver of the right to prosecute error therefrom. The plaintiff in error contends against this motion, because, as it says, the rule of estoppel applies only in cases where the complaining party has accepted some benefit under the judgment against him, and constituting a part of the same; that, inasmuch as the judgment it asked to offset, and for which it received credit on the judgment below, was in no wise connected therewith, but evidenced a right counter to such judgment, and not a right under the same, it should not be held to have waived its right to prosecute error from the unpaid residue; and it also contends that, in the event of a reversal of the case in this court, the judgment complained of would be vacated, and, per consequence, the order to offset and partial satisfaction, which would fully restore to the parties their former rights; and, furthermore, that the defendant in error, having consented to the offset and partial satisfaction, should not now be heard to urge that which he agreed to as a reason for denying the claim of error. None of these reasons in resistance to the motion to dismiss appear sound. If the motion for offset and partial satisfaction, and the order allowing the same, would of themselves constitute a waiver of the errors complained of, their effect could not be neutralized by the plaintiff's consent thereto. So far as the compensation pro tanto of one judgment by the other is concerned, the law required the same, and the plaintiff was compelled to submit thereto, whether he consented or not. His consent to the order of offset and satisfaction is no estoppel upon his right to urge a dismissal of the case, because the law imposed the obligation upon him without his consent. *Turner v. Crawford*, 14 Kan. 499; *Read v. Jeffries*, 16 Kan. 534; *Herman v. Miller*, 17 Kan. 323. It may be granted that the effect of a reversal of the case by this court would be to vacate the judgment complained of, and to restore the other one to its condition as a valid subsisting claim; but the question does not relate to the effect of its reversal as an erroneous or unjust judgment, but to the effect of its recognition by plaintiff in error as a just and valid judgment. It may also be admitted that to ask

and obtain the credit or the offset against the judgment was not the acceptance of a benefit under such judgment, and which formed a constituent part of the same. It was, however, an admission of its validity and justice, an acceptance of the same as right and proper, an abandonment of further contest over the dispute. No one can make payment upon a demand against him, entire and indivisible in character as this judgment, without being taken to admit it as a just and indisputable claim. Upon no other ground can the doctrine of waiver by voluntary payment be rested. The credit or offset was, in legal contemplation, a payment on the judgment, as much so as if it had been made in money. It was the parting by the plaintiff with a thing of value, and its application towards the satisfaction of a legal demand. The fact, if it be such, that the plaintiff below (the defendant in error here), was and is insolvent, as suggested by counsel, does not alter the legal rule. We cannot frame an issue in this case to determine the charge of insolvency. Except in cases where that can be properly done, the law will esteem the judgment as valuable.

The counsel for plaintiff in error have supplemented their printed and oral arguments made on the hearing of the motion to dismiss with an additional brief set out in their petition for rehearing, to which we have given careful attention. It is strenuously insisted that the foundation of the principle supporting the motion to dismiss is the doctrine of estoppel. We grant it. But estoppel because of what? Not necessarily because of benefits received under the judgment, which it would be inequitable to hold to while repudiating the disadvantages of such judgment, but estoppel because of conduct inconsistent with a claim of invalidity and injustice in such judgment. No one in a legal controversy can be heard to say to his adversary: "Your judgment against me is erroneous and unjust, and my purpose is to demonstrate such to be the case to the appellate courts; but nevertheless I will pay off a portion of it;" or will be heard to say: "I demand that you accept from me, as a credit on your erroneous and unjust judgment, what you owe me in respect of another account." Every case cited by counsel in which it was held that the conduct of the appealing party did not constitute a waiver of the right of appeal is a case in which such conduct was entirely consistent with a claim of error in the judgment appealed from. Thus *Embry v. Palmer*, 107 U. S. 3, 2 Sup. Ct. 25, largely relied upon by them, is a case in which a party was enjoined from suing on a judgment, on condition that the judgment debtor pay into court a portion of the sum admitted by him to be due. The payment was made, and accepted by the appealing party, and the court quite properly said: "The amount awarded, paid, and accepted constitutes no part of what is in controversy.



Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous." In the case at bar the sum of \$54.40, the portion of the plaintiff's judgment which the defendant demanded should be satisfied by the offset of its claim to that amount, was in controversy. The defendant denied throughout the trial that it owed that sum, or any sum whatever. The sum was an inseparable portion of the entire judgment; and a recognition of the validity and binding force of that portion of such judgment cannot in law be regarded otherwise than as a recognition of the validity and binding force of the whole. Whosoever litigates a claim, and, being defeated, pays the judgment, or surrenders the subject-matter of the controversy, waives his right to prosecute error therefrom. *State v. Conkling*, 54 Kan. 108, 37 Pac. 992; *Fenlon v. Goodwin*, 35 Kan. 123, 10 Pac. 553. It is no answer to say that in these cases the entire judgment was paid, or the whole subject of controversy surrendered. There is no difference in principle between paying all or a part, or surrendering all or a part, of a legally entire and indivisible thing. Counsel likewise claim that the orders of offset and partial satisfaction were necessary precautions to save themselves from loss. Why necessary at the time such orders were made? The right of offset and satisfaction would have been as available after the decision of the case in this court, should it have been affirmed, as before.

We are quite clear the petition in error should be dismissed, and it is so ordered. All the justices concurring.

(57 Kan. 691)

#### BERRY v. BERRY et al.

(Supreme Court of Kansas. Feb. 6, 1897.)

##### DURESS OF WIFE.

The defense of duress is available to the wife in an action to foreclose a mortgage upon the homestead which she was compelled to sign through fear of bodily harm and abandonment by her husband, although it was given to secure the payment of a negotiable promissory note that had been transferred to an innocent holder before maturity.

(Syllabus by the Court.)

Error from district court, Nemaha county; J. F. Thompson, Judge.

Action by the Mutual Benefit Life Insurance Company against Rebecca Berry, Joseph Berry, her husband, and others. Judgment for plaintiff, and defendant Rebecca Berry brings error. Reversed.

S. K. Woodworth, for plaintiff in error. F. E. Lane and Wells & Wells, for defendant in error.

JOHNSTON, J. On December 2, 1889, Joseph and Rebecca Berry, husband and wife, united in giving to the Guaranty Investment Company a promissory note for \$1,800, payable five years after date, and a mortgage se-

curing the payment of the note was signed by them. The mortgage was upon a quarter section of land occupied by them as a homestead, and it was subject and subordinate to another mortgage previously given by them to the Mutual Benefit Life Insurance Company to secure an indebtedness of \$1,200. On February 2, 1890, and before the maturity of the note, the Guaranty Investment Company indorsed and transferred the same to the executors of the estate of Charlemagne Tower, deceased, and the mortgage was assigned and delivered with the note. Default was made in the interest payments, and afterwards the insurance company began a foreclosure proceeding, in which the executors of the Tower estate were made parties defendant, who, on July 16, 1892, filed an answer and cross petition, setting up their note and mortgage and asking for judgment against the Berrys, and also that it be declared a lien on the mortgaged premises, subject only to the lien of the insurance company. Joseph Berry did not appear or defend, but Rebecca Berry contested the validity of the mortgage given to the Guaranty Investment Company, alleging that it was signed under duress. She averred that her husband, who was a strong, powerful man of violent temper, threatened to abandon her to her own resources, and also to kill her; and, believing that he was a dangerous man, who would carry out his threats, she was induced to sign the mortgage. She alleged that the land on which the mortgage was given was purchased by her husband as a homestead, and that it was occupied as a homestead before the execution of the mortgage, and had been continuously ever since that time. She did not question her liability upon the note, nor deny that the note and mortgage were assigned as alleged; neither did she make any defense other than that of duress in the execution of the mortgage. On the latter ground she asks that the mortgage be canceled, and held for naught. A demurrer to her answer was sustained, and, she electing to stand on her answer, judgment was rendered against her for \$2,625, and for foreclosure of the mortgage, and declaring the judgment a lien on the homestead premises.

Was the mortgage valid and enforceable? If the averments as to duress are true, there was no free will or consent by Rebecca Berry in the execution of the mortgage. As the case stands, we must accept these averments as facts, and, if so regarded, it would seem that Mrs. Berry was induced to sign the mortgage by threats of bodily harm such as might overcome the will of a person of ordinary firmness and courage. In addition to the threats of personal violence, there were threats of separation and abandonment. The property described in the mortgage was a homestead, and could only be alienated by the joint consent of husband and wife. If Mrs. Berry was compelled by force and fear

to sign the mortgage, if there was actual duress, she gave no consent, and the mortgage is a nullity. *Anderson v. Anderson*, 9 Kan. 112; *Helm v. Helm*, 11 Kan. 19; *Howell v. McCrie*, 36 Kan. 636, 14 Pac. 237; *Jenkins v. Simmons*, 37 Kan. 496, 15 Pac. 522; *Gabbey v. Forgeus*, 38 Kan. 62, 15 Pac. 866; *Warden v. Reser*, 38 Kan. 87, 16 Pac. 60. This position would be conceded by the defendant in error if the mortgage stood alone, but as it accompanied and was security for a negotiable promissory note, which was transferred to a bona fide indorsee before maturity, it is contended that the defense of duress is not available. An assignee who obtains a promissory note before maturity for value, and without notice, takes it free from equities. A mortgage executed concurrently with a note, and to secure its payment, is generally held to be an incident of the note, and to partake of its negotiable character. It appears to be well settled by the courts that a bona fide indorsee before maturity of a note secured by a mortgage upon property other than a homestead, and without notice of infirmities, takes the mortgage as he takes the note, unaffected by any equities arising between the mortgagor and mortgagee. *Burhans v. Hutcheson*, 25 Kan. 625; *Lewis v. Kirk*, 28 Kan. 497; *Carpenter v. Longan*, 16 Wall. 271; *Jones, Mortg.* § 834, and cases cited; 15 Am. & Eng. Enc. Law, 855, and cases cited. This rule is not prescribed by any statute, but is based upon the equitable principle that the debt, being the main thing, imparts its character to the mortgage, and that when the note is assigned the security follows it, and takes the same character. It is conceded that this rule is controlling where the property mortgaged is not a homestead, but it is contended that it can never apply where the mortgage is upon a homestead, and where the wife or husband has not joined in or consented to its execution. The rule goes upon the theory that a mortgage has actually been executed, and is in existence; but in this state, if the wife or husband does not give consent or join in the execution, the instrument does not rise to the rank of a mortgage. It is absolutely void, and not even binding upon the one who does consent. Would it be contended that a mortgage to which the wife's signature was forged, or which had never been signed by her, would follow the note, and be enforceable as a security? It is unlike a case where joint consent was actually given, though obtained by fraud; while here, where the consent of the wife is lacking, there is no mortgage. It would be carrying the doctrine of negotiability beyond reason to make a mortgage which is against the statute, and prohibited by the constitution, binding and enforceable merely because it accompanied and purported to secure a negotiable promissory note. It is not negotiable in form, and of itself has no negotiable qualities; but a rule has been

established by the courts that because of its relation to negotiable paper it is invested with a negotiable character. A rule so made, applying to mortgages the principles which pertain to negotiable paper, cannot prevail over the specific provisions of the constitution and statute. The constitution provides that a homestead "shall not be alienated without the joint consent of husband and wife, when that relation exists" (article 15, § 9), and the same prohibition is repeated by the legislature in one of the statutes (Gen. St. 1889, par. 2906). These positive and solemn declarations cannot be overcome by a mere rule of commercial law, or by any judicial dogma. In *Anderson v. Anderson*, supra, where a conveyance of a homestead was obtained by duress of the wife, it was urged that a purchaser in good faith and for a valuable consideration, without notice of the duress, should be protected. In deciding the case, however, it was held that: "If a wife sign the deed of the homestead under duress, she does not give that consent to the alienation which the statute requires; and in such case the 'good faith' of the purchaser cannot be considered in determining the validity of the deed." Much reliance is placed on *Beals v. Neddo*, 2 Fed. 41, which is contrary to the ruling in *Anderson v. Anderson*, supra, but it appears to be wholly founded upon cases in which the homestead question was not involved or considered. The court, in its opinion, recognizes that under the constitution duress is available as a defense, within the decisions of the supreme court of this state, but did not incline to follow them. The supreme court of Iowa, in a case where a note and mortgage were obtained by duress, and the mortgage was upon a homestead, held that the innocent holder of the note and mortgage might recover upon the note, but was not entitled to a foreclosure of the mortgage. The doctrine is there recognized that in an ordinary case a mortgage given to secure a negotiable note partakes of the negotiable character; but in that state there is a statute which requires a concurrence of both husband and wife to a conveyance or the incumbrance of the homestead. In the case mentioned the signature of the wife was secured by duress, and it was held that she did not legally concur in the conveyance. The court added: "Mortgages are not intended to circulate as commercial paper, and we do not think that the interests of commerce require that the principles applicable to negotiable paper shall be extended to a mortgage executed under such circumstances as the mortgage in question. *Bank v. Bryan*, 62 Iowa, 42, 17 N. W. 165. We think the answer alleged a defense, and the demurrer thereto should have been overruled.

As the case is presented, the question of estoppel is not before us for consideration. While considerable time elapsed between the execution of the mortgage and the setting up of the defense, there is nothing to show

knowledge on her part of the transfer of the note and the subsequent ownership of the same, nor are there any averments showing her acts or declarations in respect to the note and mortgage. The judgment of the district court will be reversed, and the cause remanded for a new trial. All the justices concurring.

(57 Kan. 702)

STATE v. WALTERS.

(Supreme Court of Kansas. Feb. 6, 1897.)

INTOXICATING LIQUORS—INDICTMENT.

In an indictment, under the prohibitory liquor law, for maintaining a nuisance, the location of the nuisance was described as follows: "Said place being kept and maintained on lots 10 and 12, block 63, city of Fort Scott, Kansas, and said place being a common nuisance." Held, upon a motion to quash, that the indictment is not fatally defective because of indefiniteness in describing the place.

(Syllabus by the Court.)

Appeal from district court, Bourbon county; Walter L. Simons, Judge.

Edna Walters was indicted for selling liquor. From an order quashing the indictment, the state appeals. Reversed.

F. B. Dawes, Atty. Gen., and C. E. Cory, for the State. Biddle, Boyle & Sheppard, for appellee.

JOHNSTON, J. This is an appeal from a ruling quashing an indictment in which it was alleged that Edna Walters kept and maintained a place where intoxicating liquors were sold, bartered, and given away, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and where such liquors were kept for sale, barter, and delivery, in violation of the statutes, "said place being kept and maintained on lots 10 and 12, block 63, city of Fort Scott, Kansas, and said place being a common nuisance." The ground upon which the indictment was quashed was that it did not specifically describe the place where the nuisance existed. In prosecutions under the prohibitory liquor law, it is necessary to describe the place kept and maintained as a common nuisance (Crimes Act, § 399); and the question for decision in the present case is whether the description is sufficient, as against the motion to quash. The description should be sufficiently definite to advise the defendant as to the charge he is called upon to meet, and also to enable the sheriff to identify the place in the event that an abatement of a nuisance is adjudged. Here the premises are described so that no difficulty can be experienced in finding them. Such a description would be sufficient in an instrument conveying or mortgaging the premises, and it would meet the requirements of the law in notices of tax or attachment proceedings. It is true that no building or other structure is mentioned, and it appears, from like cases which have been be-

fore the court, that such traffic is usually conducted in buildings, but the court cannot say that there are any buildings on the lot described. It is possible to maintain a nuisance of the character described upon the open ground, and the whole of the ground might be so used. In such a case the description we have here would be complete, and the indictment sufficient. The indictment does describe a place, and, upon the motion to quash, the court cannot speculate as to the size of the lots, whether there is one or more buildings thereon, or that they are improved in any way. Of course, if there were structures on the ground, only a part of which were devoted to the illegal use, such part should be described in the indictment. If it is developed on the trial that such a condition exists, specifications or a bill of particulars may be required from the state; but if it appears that the place, as described, may be readily understood by the defendant, and may be identified by the sheriff, and, if it is declared to be a nuisance, he can abate in the manner provided by statute,—that is, "by taking possession thereof, and by taking possession of all such intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining such nuisance" (Crimes Act, § 399), the description will be deemed to be sufficient. As the question arose, we cannot say that greater particularity of description was necessary, nor that the indictment did not state an offense. Reference has been made to the following cases that have some bearing upon the question: *State v. Muntz*, 3 Kan. 383; *Hagan v. State*, 4 Kan. 90; *West v. City of Columbus*, 20 Kan. 633; *State v. Sterns*, 28 Kan. 154; *State v. Crawford*, Id. 726; *State v. Nickerson*, 30 Kan. 545, 2 Pac. 654; *State v. Allphin*, 2 Kan. App. 28, 42 Pac. 55. The judgment of the district court will be reversed, and the cause remanded for further proceedings. All the justices concurring.

(9 Colo. A. 220)

WILLIAMS et al. v. KYES.<sup>1</sup>

(Court of Appeals of Colorado. Dec. 14, 1896.)

MALICIOUS PROSECUTION—MALICE—PROBABLE CAUSE.

1. The fact that the ulterior purpose of a creditor in prosecuting the debtor for fraud was the collection of the debt does not conclusively show malice, where another reason for instituting the prosecution was a bona fide desire to bring the debtor to justice, and to make an example of him.

2. When the evidence as to the existence of probable cause for a prosecution is conflicting, it is reversible error for the court to fail to collate the evidence, and instruct what facts, if found, constitute probable cause.

Appeal from district court, Arapahoe county. Action by Chitty C. Kyes against Thomas E. Williams and Henry N. Wood. From a judgment for plaintiff, defendants appeal. Reversed.

<sup>1</sup> Rehearing denied February 8, 1897.

Henry C. Van Schaack, for appellants.  
Laws & Prescott, for appellee.

BISSELL, J. Most suits for malicious prosecution ultimately find their way into the appellate courts. The principles by which the rights of parties are to be measured are therefore tolerably well settled, and our own reports generally furnish adequate precedents to guide us in the examination of a record and the consideration of the judgment. The present is scarcely an exception to this general rule. The appellee, Kyes, bought out a grocery store in 1893, in Denver, and carried on a retail grocery business for a few months thereafter. During the time he was engaged in this line, he bought goods of the appellants, Williams & Wood, who were evidently wholesale dealers in that class of merchandise. His last purchase was on Saturday, the 1st of April. On the next day, Sunday, in evident continuation of a bargain commenced on Saturday, Kyes invoiced his store, and sold his stock, including the goods which he had the same day purchased of Williams & Wood, to another party, for cash, and received the consideration. He failed to pay the accounts which he had contracted with sundry merchants in the city, and it led to several meetings between them, to some acrimonious discussion, and to an ultimate criminal prosecution. When Kyes was brought to Williams & Wood's place, he was confronted with several merchants from whom he had purchased merchandise, and an attorney, and there was a strong effort made to compel a settlement between him and his creditors. He declined to make any bargain or to do anything in that direction, although he admitted that he had sold the goods, and had the money. At that interview he was shown a report alleged to have been made by R. G. Dun & Co., a well-known commercial agency, which attempts to learn all about the financial condition and history of men engaged in merchandising, and supply the information thus acquired to its various customers. The report which had been furnished by Dun & Co., and which was shown to Kyes, contained statements to the effect substantially that Kyes had purchased a stock for \$1,500 cash, had some \$1,500 in the bank, and some real property at Sterling, which was assessed at \$2,000 or \$3,000. According to the report, Kyes stated this realty belonged to him, and that his personality was of the value and description stated. On the strength of this report, the credit member of the firm of Williams & Wood, who are defendants in this action, extended some considerable credit to Kyes, and at the time of the sale he owed the house a little upward of \$300. There was considerable controversy in the case as to whether Kyes had ever made this report. Dun & Co.'s clerk testified that he made it to him personally, and that he gave it to the house, and furnished a copy of it to Williams & Wood, who testified that

they proceeded on the faith and strength of it. This was denied by Kyes and his principal clerk, who was his brother-in-law. Both of them testified that the statement on which Dun & Co. based their report was made by Weir, the clerk, and not by Kyes, and that Kyes never saw Hoagland, and never made any statement to him about the matters contained in the report. Of course, this was a matter for the determination of the jury. There was other evidence offered which tended to show the good faith of Williams & Wood in the institution of their criminal prosecution, and they offered some testimony to the effect that they had laid their case before the district attorney of the district, and, on the strength of his advice, had filed the complaint. There was also evidence tending to show the absence of express malice, and a good deal of evidence to establish a probable cause to believe that Kyes intended to commit fraud in his dealings with them.

We do not intend to go over the case, and recite the testimony, nor express our opinion about it. This would not, in our judgment, be wise, since the case must go back for a new trial, and our conclusions might possibly be put to wrong uses. What we have stated was essential to an adequate knowledge of the case, and to make our suggestions applicable, and serve as a basis for our conclusions. When the evidence was concluded, the court, by consent of parties, charged the jury orally. The charge was taken down by the stenographer, copied out, and furnished the jury, and the defendants took exceptions to the various portions of the instructions. They also asked instructions on one topic which really furnishes the only basis on which the case can be reversed. We are so clearly of the opinion the jury were not adequately instructed with reference to what constitutes probable cause that we are quite astute to find error in order that the case may be correctly presented for determination. The charge, as far as it went, was clear, satisfactory, and an accurate statement of the law. All essential matters in the case were stated, and, except in one slight particular, the legal definitions of probable cause and malice were fairly and accurately outlined. The fifth instruction relates to malice, which is correctly defined. This instruction concludes with a sentence that "a criminal prosecution begun for the purpose of collecting a debt is strong, if not conclusive, evidence of malice." We quite agree with the learned judge who tried the case. A prosecution commenced for such a purpose furnishes very strong evidence of malice. The case justified that part of the charge, because there was a good deal of evidence in the case which tended to show that the real animus of the prosecution was to force the payment of the appellants' bill. The court therefore had a right to so charge the jury; but we are inclined to the opinion that this should not be taken or stated to be conclusive evi-

dence, because, although that might have been its ultimate purpose, this purpose might have been conceived and carried out without the presence of malice, according to its general and legal definition. This prosecution may have had a double motive. The parties might desire to punish the offender for a breach of the law in order that it might serve as a lesson to other customers, as well as compel this particular party to pay what he owed. Aside from this one claim, we do not discover anything in the charge which is open to just criticism, except that the learned judge failed to adequately define or determine for the jury what facts would constitute probable cause if they should find them to be true. This is the fundamental difficulty with the charge. Probable cause is a mixed question of law and fact where the circumstances which show its existence or the want of it are matters which must be left for the determination of the jury. Whether, if the jury find these circumstances exist, they are in themselves sufficient to constitute probable cause, is a matter of law for the court; and it is the duty of the judge on the trial to collate the testimony, and tell the jury that, if they find certain facts, these facts constitute probable cause, and, being thus found, the verdict must be for the defendants. On the other hand, the jury must be instructed, if they fail to find them, then the case shows a want of probable cause; and, all other elements of the case being maintained, they must find for the plaintiff, and assess his damages accordingly. This is the general doctrine of American courts, and they are in substantial harmony on this question. The fourth instruction which the defendants asked embodied this principle, with a statement of what the case showed in a given direction; and the court was asked to instruct the jury that if the defendants had reasonable grounds to think Kyes had committed the offense charged, and that the arrest was procured in good faith, under this belief, they should find the existence of probable cause from this circumstance. The instruction is not entirely quoted, and is probably not a very apt grouping of the facts which ought to have been put before the jury in expressing the law on this subject. In other words, it lacks the fullness which an instruction on the subject of probable cause ought to exhibit in the gathering together of all the evidence tending in that direction. Notwithstanding this, we fail to find in the court's charge anything which corresponds to it, or which in any manner tended to tell the jury what facts would amount to probable cause. For this reason, we conclude it was error for the court to decline this particular instruction. The rules are very clearly stated in the following cases: *Brown v. Willoughby*, 5 Colo. 1; *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. 119; *Gurley v. Tomkins*, 17 Colo. 437, 30 Pac. 344; *Brooks v. Bradford*, 4 Colo. App. 410, 36 Pac. 303;

*Stewart v. Sonneborn*, 98 U. S. 187. This error in the charge compels us to reverse the case, and return it for a new trial. Reversed.

(9 Colo. App. 211)

HARRIS et al. v. HARRIS et al.

(Court of Appeals of Colorado. Dec. 14, 1896.)

PLEADING—MECHANICS' LIENS—SUFFICIENCY OF COMPLAINT—STATEMENT OF LIEN—PERSONAL JUDGMENT—COLLATERAL PROMISE.

1. A judgment on the pleadings is not warranted where the statement of the cause of action, though defective, might be made good by amendment.

2. Under a statute providing that a subcontractor, in stating his demand, must state the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms of "his" contract, the subcontractor need not set out the contract between the contractor and the owner.

3. A verbal promise by the owner to the subcontractors, after they had begun work under their agreement with the contractor, that if they would do said work he (the owner) would pay them, is without consideration, and will not support a personal judgment against the owner.

4. A promise by the owner to the subcontractors, before commencement of the work, that whatever sum should become due them "would be paid by him," is a valid promise to pay on the contractor's default.

5. A mechanic's lien statement, which states that the contract price was \$250, that the owner had paid \$125, "and that the sum of \$— is still due," is a sufficient compliance with the statute requiring such statement to show the "balance due."

Appeal from district court, Arapahoe county.

Action by James Harris and others against John H. Harris and others to enforce a mechanic's lien. From a judgment for defendants on the pleadings, plaintiffs appeal. Reversed.

The action was brought to enforce a mechanic's lien against certain lots and a building. At the time the contract for building was filed, also at the time of the filing of the petition for a lien, the title to the lots was in John H. Harris. The property was, it appears, conveyed to Maud N. Harris, the other appellee. On the 5th of March, 1893, John H. Harris, the record owner, made an agreement with William Miller to erect a building upon the lots. March 6, 1893, Miller made a contract with appellants by which they, for the sum of \$250, were to furnish the material and plaster the building. It is alleged that Miller completed the building according to agreement, and appellants fulfilled their contract of plastering, finishing it on September 16, 1893; that appellants had been paid \$125 upon the contract, the balance remaining unpaid; that on October 14, 1893, they filed their statement of lien. Appellants further alleged that, on or about the 10th day of July, 1893, John H. Harris personally promised to pay the contract price of \$250 on the contract made by Miller, and that, at the time of the purchasing the ma-

terial, performing the labor, and the filing the lien statement, John H. Harris was indebted to Miller in an amount greater than the sum due the appellants. Prayer for a personal judgment against John H. Harris, based on his alleged promise to pay, for \$125, for a lien and foreclosure upon the premises, and an attorney's fee of \$50.

As the judgment was upon the pleadings, it becomes necessary to set out the answer of John H. and Maud N. Harris at some length, in substance as follows: They admit record title to the lots to be as charged in complaint, but claim that defendant Maud N. Harris was at all times the real owner, and that said real estate was bought, and the building thereon erected, with her money; that, on or about May 13, 1893, the defendant John H. Harris entered into a written contract (copied in full in the answer) with one William Miller, whereby said Miller agreed to build, upon a portion of the lots described in the complaint, a brick house, to be completed by July 31, 1893, for a consideration of \$3,848, to be paid by the owner in installments upon the architects' certificate, less 20 per cent. to be retained until the final payment; that said contract provided that, should said contractor fail in the performance of any of the agreements therein on his part, then, on certificate of the architects, and three days' written notice to the contractor, the owner should be at liberty to provide such labor or materials, and to deduct the cost thereof from any money then due or to become due the contractor, and to terminate the contract, and to enter and take possession of all materials, and employ any other person to finish the work, holding the contractor liable for the expense thereof. The said contract further provided that, if there should be any lien or claim for which the owner or premises might be liable, the owner should have the right to retain, out of any payment then or thereafter due, an amount sufficient to indemnify him against the same; and if there should prove to be any such claim, after all payments are made, the contractor should refund to the owner all moneys paid to discharge such claims. That said William Miller proceeded to construct said house, and entered into various subcontracts in respect thereto, and as to whether he entered into a contract with the plaintiffs, as set forth in their complaint, or any contract whatever, defendants have no knowledge or information upon which to base a belief. That from time to time said Miller drew money from the defendant John H. Harris to apply on said contract price, until he had so drawn \$2,975, representing, and with the distinct understanding, that said Miller should apply the same upon his said subcontracts; but that, being called to account, said Miller was unable to show how said money had been applied, excepting \$1,800 thereof, and said Harris then and there charged him with having fraudulently

disposed of about \$1,100 of said money at play. That said Miller, on or about the 20th day of July, 1893, confessing his inability to replace or refund said \$1,100 so squandered, terminated said contract, and, by losing said money in gambling, he subjected said premises to various mechanics' liens, to the great injury of defendants. That at the abandonment of said contract the value of the improvements and materials upon the ground did not exceed \$1,800, and that said Miller had overdrawn about \$1,200, and, at the time plaintiffs filed their lien, said defendant Harris was not indebted to the said Miller, but the said Miller was indebted to him about \$1,200. That said Harris completed said house by making direct contract, etc., and, although the specifications were modified and the expense reduced, he paid out a total excess above the contract price of about \$2,500. Defendants admit that defendant John H. Harris paid to plaintiffs \$125 upon the order of said Miller, but deny that the said Harris, at any time, promised to pay the balance to plaintiffs, as set forth in the alleged lien claim in plaintiffs' complaint; and, for want of information, deny that said Miller is still indebted to plaintiffs \$125, or any other sum; deny that \$50 is a reasonable attorney's fee for foreclosure; deny that plaintiffs are entitled to recover any attorney's fees; deny that all of said lots are necessary for the convenient use of said building. Defendants further say that the pretended act of the legislature of the state of Colorado to repeal the act approved March 2, 1883, and incorporated in the Session Laws of 1889, beginning on page 247, and ending on page 253, is not, and never was, the law in this state, for the reason that the same was never passed (setting out in detail the history of said act through both houses, the failure to enter the yeas and nays upon the report of the conference committee upon the journal of the house, etc.). The amendment to the answer alleges that the pretended promise of John H. Harris personally to pay the claim of plaintiffs is collateral, and not evidenced by any writing whatsoever, and that plaintiffs made their contract with defendant William Miller. The replication specifically denied the allegations of the answer. The case was reached and called for trial May 22, 1895, when counsel for defendants (appellees) filed the following motion: "Let the record show that, the case being called for trial, the defendants John H. and Maud N. Harris move for judgment on the pleadings against the plaintiff and the cross complainants, for the reason that, by the allegations of the complaint and the cross complaints, it is shown that they are entitled to no relief, and that the defendants should have judgment for costs." The motion was sustained, judgment entered for the defendants upon the pleadings, an exception taken, and an appeal prosecuted to this court.

Stuart & Murray, for appellants. Clay B. Whitford and H. A. Lindsley, for appellees.

REED, P. J. (after stating the facts). The only question for determination is the correctness of the judgment of the court in finding and entering judgment for the defendants upon the pleadings. In *Rice v. Bush*, 16 Colo. 484, 27 Pac. 720, it is said: "In passing upon the motion by one party for judgment upon the pleadings after issue joined, all the material allegations of the opposite party must be taken as true; and if the pleadings of the opposite party, though defective in form, are nevertheless sufficient in substance to sustain a judgment in his favor, the motion should not be granted. In general, a motion for judgment upon the pleadings cannot properly be granted, except in cases where the pleadings are not sufficient to sustain a different judgment, notwithstanding any evidence which might be produced." In *Mulford v. Estudillo*, 32 Cal. 136, it is said: "A defendant usually demurs or proceeds for a nonsuit; but it is said that, if plaintiff admits on the pleadings facts showing that he has no cause of action against the defendant, the court may order judgment for defendant on the pleadings." It will be observed that the right or power of the court to award a judgment upon the pleadings is very limited and restricted. Unless there is an admission by the plaintiff of some fact that renders recovery impossible, or the claim is such that no legal recovery could be had if established by proof, a judgment upon the pleadings is not allowable; and it also appears that, where the cause of action is informally or defectively stated, but shows a good cause of action if properly stated, and which might be made good by amendment, judgment upon the pleadings is not warranted. The motion for judgment cannot be substituted in the place of a demurrer, and preclude amendments. "The power of amendment in pleadings is great under the Code. The real limitation seems to be that the amendment shall not bring a new cause of action." *Reeder v. Sayre*, 70 N. Y. 190; *Scovill v. Glasner*, 79 Mo. 449; *Stevens v. Brooks*, 23 Wis. 196; *Cook v. Croisan* (Or.) 36 Pac. 532; *Bliss*, Code Pl. § 429. And, by the Code, the power to amend continues until after the evidence is concluded, enabling a party to make his pleadings conform to the facts proved. No reason is given by the court for allowing the motion, and, after careful examination of the pleadings, I am at a loss to know upon what grounds the judgment was based. The objections or reasons urged by counsel in support of the judgment are those that should have been reached and pointed out upon demurrer, and, if found necessary, amendments should have been allowed.

The case made by the pleadings appears to be one of clear and well-defined issues of fact. The court may have been influenced or controlled by the case of *Warren v. Quade*

(Wash.) 29 Pac. 827, affirmed in *Heald v. Hodder* (Wash.) 32 Pac. 728. That court held the complaint fatally defective for a failure of the subcontractor to set out the contract between the owner and principal contractor. The case appears to be relied upon by counsel. It is the first time the question has been raised in this state, and called to the attention of the courts. The language of the statute is that the subcontractor, in stating his demand, must state "the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms and conditions of his contract." 1 Hill's Code Wash. § 1667. The constructions of the statute by the *Warren v. Quade* decision is directly in conflict with the decision of the same question in case of *Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860. The supreme court of New Mexico, in *Post v. Miles*, 34 Pac. 586, refused to follow the Washington decision; and, were there no counter decisions, this court would decline to follow *Warren v. Quade*. With due respect to the learned court, I must be permitted to say that it does violence to the English language and the statute. He must state "the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms and conditions of his contract." Whose contract? The statute is in the singular, only provides for the statement of one contract, while the Washington decision requires the statement of two. The subcontractor must, of necessity, state his own contract with the employer or purchaser in order to establish his right to recover. That case requires him also to state the contract between the owner and principal contractor. It is a perversion of the language, as well as the intention and sense, of the statute. The law does not require impossible or impracticable things. The subcontractor can state his own contract, under his control, and within his knowledge, and to which he was a party; but to require him to state or set out a contract between two other parties, to which he was a stranger, and in regard to which he could not, in advance, compel a disclosure or information, might preclude him from asserting his claim at all. The language of the statute can bear no such construction. The contract he is to state is the contract made by himself, and there is no statute requiring the statement of two contracts. The correct construction of the statute and the requirements of the complaint appear to me to be those stated in 2 Jones, Liens, § 1394: "If the lien is claimed directly under an original contract, the claimant must be the contractor, or he must show that he has the right of the contractor by virtue of an assignment, or some form of subrogation to the rights of such contractor. The mere fact that the claimant is a guarantor of the original contractor is insufficient to authorize him to perfect a lien. If the claim is made by the contractor, the

contract, if in writing, should be set out fully; but if the claim is by a subcontractor, or any one claiming under him, only the fact of the original contract or consent need be stated; but the claimant's own contract, if in writing, should be set out at length. The contract or consent of the owner need not be stated with the precision necessary in pleading; but facts must be stated sufficiently to connect the owner with the claim for a lien." See, also, *Keller v. Houlihan*, 32 Minn. 486, 21 N. W. 729; *McGlauffin v. Beeden*, 41 Minn. 408, 43 N. W. 86; *Pool v. Wedemeyer*, 56 Tex. 287. All that could reasonably be expected of a subcontractor, as coming within his knowledge in regard to it, would be a statement of the ownership of the real property, that a contract of some kind was made between the owner and the principal contractor for the construction of a building upon the property, so as to establish the agency of the principal contractor, and the statutory privity between the owner and the plaintiff.

The complaint contains the following allegation: "That, before the doing of any work by these plaintiffs, said John H. Harris promised these plaintiffs that whatever sum should become due them for said labor and materials would be paid by him." In the statement of the lien claim it was said "that, on or about the 10th day of July, said John H. Harris, the owner, agreed with said claimants that, if they would do said plastering, and furnish material therefor, he would pay claimants the sum of \$250." A comparison of the two shows them very variant. The facts set out in the statement would, if established, show an original contract and employment between claimants and Harris. In the complaint it can only be construed as a collateral promise on default of Miller. In the complaint it is stated that the promise was made before appellees commenced work. In the statement filed it was alleged that the promise by Harris was on the 10th of July, and that work commenced upon the 6th. If the evidence should show that the promise was made before the commencement of the work, and was the inducement, then the personal judgment might be given; but if shown to have been made after the contract was made with Miller, and that the parties were already at work under the Miller contract, not in writing, and with no consideration, the promise would be void, and could not be the basis of a judgment.

It is contended that no valid judgment could be entered because the lien statement failed to state the balance due. It is stated that the contract price was \$250; that Harris, the owner, had paid \$125; "and that the sum of \$—— is still due and owing." In the complaint it is stated that the price was \$250. "That plaintiffs have been paid \$125 on account of said work and materials, leaving \$125 due and unpaid." The objection in regard to the lien statement is too technical

to influence the decision of the case. It is true that the statute requires the statement to show "the total amount of the indebtedness, the credits thereon, if any, and the balance due such claimants." As said in *Rice v. Carmichael*, 4 Colo. App. 84, 34 Pac. 1010: "Such special statute must be strictly construed, and to create a lien the provisions must be specifically and accurately followed; not only conform to the spirit of the law, but to its every detail." It is evident that the intention and purpose of the statute is to have the statement inform any interested party of the actual condition of the account, and the amount for which a lien is claimed. In this case, although the blank was not filled, the statement of the amount of the contract at \$250, and the payment of \$125, showed at once the amount due and unpaid, and fulfilled the intention of the statute, and was such a compliance with the statute as to answer the purpose. "Id certum est quod certum reddi potest," is the old maxim of the common law, and is particularly applicable here; and while, technically, the blank should have been filled, no one who read it could be misled or misinformed. It only required a very simple and elementary mental process to fill the blank, and, if technically subject to criticism, the failure to put the figures in the blank was not of such importance as to warrant a judgment upon the pleadings. The statement was for the purpose of notice, and, as a notice, conveyed all the information necessary, while the complaint, as a pleading, was full, and not involved in the objection. The complaint appears to contain every important allegation and fact, if established, to constitute a cause of action. If not, defendants should have demurred, instead of answering. The issues made should have been tried. I can find no valid ground upon which the judgment could have been based. The judgment will be reversed, and cause remanded, with instructions to allow amendments to the pleadings, if required, and try the issues made. Reversed.

(9 Colo. App. 147)

#### VIVIAN v. ALLEN.<sup>1</sup>

(Court of Appeals of Colorado. Jan. 11, 1897.)

##### FRAUD—MEASURE OF DAMAGES.

1. Plaintiff assigned his claim to another claimant, and, as attorney, recovered judgment on both claims, sold the debtor's property on execution, and obtained a certificate of purchase, and sold his interest for less than half its value to defendant, who knowingly falsely represented that the debtor could not redeem, and obtained the full amount of the redemption from the debtor. *Held*, that defendant was liable for deceit.

2. An action to recover damages for the deceit did not involve the enforcement of a trust between plaintiff and the other claimant, not within the jurisdiction of a justice.

3. The measure of damages was the difference between the value of plaintiff's interest in

<sup>1</sup> Rehearing denied February 8, 1897.



the certificate and the amount defendant paid therefor.

Error to Arapahoe county court.

Action by Charles L. Allen against Alfred J. Vivian to recover damages for deceit. From a judgment for plaintiff, defendant brings error. Affirmed.

W. W. Anderson and L. J. Laws, for plaintiff in error. Allen & Webster and Robinson & Love, for defendant in error.

**BISSELL, J.** This suit was begun before a justice of the peace, and resulted in a judgment against Vivian, the plaintiff in error, for \$141.71, which on appeal to the county court was subsequently tried without a jury, and resulted in the same judgment. No question concerning the sufficiency of the evidence to support the action is reserved or presented by the assignments of error. They are of the most general character, and present no substantial questions which are urged in the argument or are involved in the decision. In 1893, Allen, the defendant in error, had a claim against the Spur Daisy Mining Company for \$200, and the Northwestern Coal Company likewise had a claim against the same corporation for \$61. Under an arrangement between Allen and the coal company, Allen's claim was assigned to the company for the purposes of collection, and as an attorney he thereupon brought suit against the mining company for the amount of the two claims, and got judgment. Execution was afterwards issued on this judgment, property sold, and a certificate of purchase issued, which Allen held for collection. Shortly before the period for redemption expired, Vivian went to Allen for the purpose of buying Allen's interest in the certificate. The dispute proceeds from what occurred at the interviews between Allen and Vivian, and the damages which accrued to Allen by reason of Vivian's acts. In stating the situation we shall adopt the conclusions of the trial court, and relate the facts as the court must have found them in order to render judgment for the plaintiff. At the time Vivian went to Allen to buy this certificate, the mining company had already made arrangements to redeem the property from the sale; the money had been raised and was in the bank before the completion of Vivian's purchase from Allen. Of this Vivian had knowledge and Allen none. When Vivian went to Allen to buy, he made him an offer, and obtained an option from him for 10 days for the amount of his claim of \$100, but he never exercised the option or offered the \$100 for the purposes of the purchase. After the money had been deposited in the bank to redeem the property sold under the execution sale, Vivian, with knowledge of that fact, went to Allen, and renewed negotiations, and finally offered him \$75 for his claim, which Allen took. At this time the situation was laid before Allen. The difficulties surrounding the collection and the financial embarrassments of the mining company were stated, and Allen led to believe from what Viv-

ian said that the property would not be redeemed, and that the money could not be collected except by the union of the interests of the various creditors, and an expenditure of a large sum in order to secure the collection of what was due. This, in general, is what happened, although the particulars and the details are not wholly stated. Influenced by these statements, Allen finally consented to accept \$75, and assigned to Vivian his interest in the judgment, whereupon Vivian took the certificate to the bank, got the full amount of money due on the judgment, and appropriated to his own use the difference between \$75 and the amount of Allen's interest in the judgment, which was \$200, with costs and interest. This amounted at the commencement of the suit before the justice to \$141.71. Allen subsequently learned of the situation, of the deposit in the bank to Vivian's knowledge, and brought suit for the deceit, and to recover damages, the measure of which was the difference between what Vivian paid him and the amount which he received on the certificate immediately after his purchase. The court below found the facts according to Allen's contention, found that there was actual concealment and misrepresentation on Vivian's part, and rendered judgment accordingly. It is from the judgment of the county court accepting this theory that error is prosecuted.

The oral argument was made by other counsel than the one filing the brief, and the assignments of error as laid were totally disregarded, and we are asked to reverse the case because the transaction between Allen and the Spur Daisy Mining Company created a trust which the justice of the peace had no jurisdiction to enforce, and that without a judgment both declaring and enforcing the obligation which the mining company had with Allen he could obtain no judgment and have no relief as against Vivian. Since this is the only question presented, it will be practically the only one either discussed or decided. We do not, however, say that under any other assignment of error laid in the abstract the judgment could be reversed, for we think otherwise. We do not think, however, that the position is well taken. The action is not between Allen and the coal company to enforce the obligation which the coal company entered into with Allen with reference to the judgment or its collection. The coal company did not collect the certificate and appropriate the proceeds to its own use to Allen's detriment, nor did Allen ever have any cause of action against the coal company because of the collection of the certificate. The coal company never received anything beyond their interest in the judgment, and Allen's interest went to Vivian, and was collected by him, and appropriated to his use, by virtue of the assignment to him of Allen's interest. What was done by Vivian with reference to the matter was simply a collection of Allen's interest by virtue of the authority contained in the assignment, and the appropriation was by virtue of his right thereunder. The transfer was

complete in itself, authorized him to collect and appropriate the funds, unless Allen had a right to rescind the transaction. It is insisted he could only rescind, and could not sue for the deceit. We see no reason why the transfer cannot be recognized and treated as existing, and Vivian called upon to respond for the difference because of the damage which came to Allen from the misrepresentations which Vivian made respecting the situation at the time he made the purchase. It was simply an action for deceit, and the measure of recovery was the difference between the value of the thing assigned and the price which was paid for it. The judgment was entirely warranted by the evidence, violates no legal principle which has been called to our attention, and must therefore be affirmed. Affirmed.

(9 Colo. App. 255)

**MESKEW v. CITY OF HIGHLANDS.**  
(Court of Appeals of Colorado. Jan. 11, 1897.)  
SALE OF LIQUOR—REGULATION—TOWNS AND COUNTIES.

1. One may be convicted of selling liquor within a mile of a town in violation of an ordinance thereof, though the place of sale is within a mile of other towns; at least where it is not shown that he had a license from them.

2. Towns and cities being given exclusive jurisdiction to prohibit sale of liquor within certain territory, possession of a license from the county is no defense to sale in violation of town ordinance.

Error to Arapahoe county court.

James Meskew, convicted before a magistrate of selling liquor in violation of an ordinance, on appeal to county court was again found guilty, and brings error. Affirmed.

John T. Deweese, for plaintiff in error. F. A. Williams and G. Q. Richmond, for defendant in error.

**BISSELL, J.** James Meskew was prosecuted before a magistrate for the unlawful sale of liquors against the provisions of an ordinance of the town of Highlands. He was convicted and fined. He then prosecuted an appeal to the county court, where the case was again tried, and he was found guilty, and sentenced to pay a fine of \$200. From the latter judgment he prosecutes error to this court, and seeks to reverse it on two general propositions. These are the only matters of sufficient consequence suggested by the record or in the briefs of counsel to require consideration, or on which the judgment could be reversed. The bases of these contentions are that the point at which Meskew sold the liquor, which was adjudged a crime as against the ordinance, was within the county of Jefferson, and also within a mile of other incorporated towns in the limits of Arapahoe county. We are relieved of any embarrassment or difficulty in the settlement of these errors by a decision of the supreme court rendered in 1895. People v.

Raims, 20 Colo. 489, 39 Pac. 341. In a lucid and satisfactory opinion by Mr. Justice Campbell both these questions have been resolved against the plaintiff in error. It will neither advantage the defendant nor be of benefit to the profession to restate the reasons on which that decision is based. In this case, as in that, the defendant neither pleaded nor proved as a defense the possession of a license from the other adjacent towns. It is, therefore, of no consequence that the facts happened to be as they are contended with respect to the location of the other incorporations; and since it appears from the record that he sold liquor within the limit of a mile of Highlands, contrary to an ordinance, which was proven, his guilt was established.

The other defense—of a license from the county authorities of Jefferson county—is equally unavailable. Exclusive jurisdiction is by the legislature conferred on towns and cities to prohibit the sale of liquors within their limits and a certain specific distance beyond, and when the towns or cities have acted in the premises, and passed ordinances prohibiting the sale of liquor at the place where the crime is alleged to have been committed, it is no defense to either insist or prove that the defendant possesses a license issued by the county authorities. We are unable to discover any difference in principle between the possession of a license from the county authorities of Arapahoe county, which happened to be the fact in the Raims Case, and the possession of a license from the authorities of Jefferson county. The legislature undoubtedly has the right to confer on towns the exclusive right to regulate and license the sale of liquors, and to prescribe the territory over which their jurisdiction shall extend. That that jurisdiction runs beyond the limits of a particular county seems to be entirely within the legislative power, which may, in its discretion, provide for this class of cases. This principle seems to be recognized in another case in the same volume, although it concerns a totally different question. City of Denver v. Coulehan, 20 Colo. 471, 39 Pac. 425.

These considerations dispose of the only errors urged on the argument, or of sufficient consequence to admit of discussion; and, since the judgment is fully sustained by these authorities, it must be affirmed. Affirmed.

(9 Colo. App. 257)

**DOYLE et al. v. HEROD.**  
(Court of Appeals of Colorado. Jan. 11, 1897.)  
LIEN OF EXECUTION—WHEN HELD BY DIRECTION OF PLAINTIFF.

An execution does not bind the property of the judgment defendant from its delivery to the officer where the latter is instructed to hold it until further directions; and a lien acquired by another while the execution is so held is entitled to priority.

Appeal from district court, Pueblo county.

Action of replevin by W. E. Doyle & Co. against John D. Herod for property levied on by defendant as constable. Judgment for defendant, and plaintiffs appeal. Reversed.

L. A. Crane, for appellants. Mr. McFeely and Mr. Ritter, for appellee.

THOMSON, J. Replevin by the appellants against the appellee for certain goods and chattels. The defendant was a constable, and levied an execution issued by a justice of the peace on a judgment recovered before him by Minnie A. Foss against Harriet Henry upon the goods. The plaintiffs claimed title by virtue of a chattel mortgage upon the same goods, executed to them by Harriet Henry. The execution was issued and delivered to the constable on the 25th day of August, 1894, and the mortgage was executed on the 27th and recorded on the 30th of the same month. The cause was tried by the court. The only question in the case was one of priority of lien between the mortgage and the execution. The court resolved that question in favor of the defendant, giving him judgment accordingly. The defendant testified that after the execution came into his hands the attorney of Foss directed him to hold the writ until he should receive notice of the goods to be levied upon; that he understood from what the attorney said that he was not to levy until the attorney, or the agent of Foss, should point out the goods; and that nothing further was done in relation to the matter until the 3d day of September following, when either the attorney or the agent informed him where the goods to be levied on were, and he made the levy on that day. The foregoing was substantially the defendant's testimony, and there was no other evidence on the subject.

Ordinarily, an execution binds the property of the judgment defendant for the payment of the judgment from the time when the writ comes into the hands of the officers. This execution was delivered to the constable before the chattel mortgage was executed or recorded, and its lien was therefore prior to that of the mortgage, unless, in consequence of the direction from the attorney, the right of the judgment plaintiff to assert priority of lien was lost. It seems to be settled that an execution held subject to an order of that kind does not bind the goods of the judgment debtor as against creditors who are diligent. The duty of the officer receiving the writ is to execute it without delay; and if, by any act of the judgment creditor, the writ is held for a time unexecuted, or without attempt at execution, it is, during that time, inoperative as against other creditors. *Williams v. Mellor*, 12 Colo. 1, 19 Pac. 830. It is clear that nothing was done towards levying this execution until after the chattel mortgage was recorded, and it seems equally clear that the delay was in consequence of directions re-

ceived from the attorney of the judgment plaintiff. The execution was, therefore, not a lien until the levy; but in the meantime the lien of the mortgage attached, and so took priority. Let the judgment be reversed. Reversed.

(9 Colo. App. 151)

# EDINGER v. THOMAS.

(Court of Appeals of Colorado. Jan. 11, 1897.)

## COSTS—CUSTODIAN FOR ATTACHED PROPERTY.

Under Act April 16, 1891, § 1 (Laws 1891, p. 323), providing that the court shall allow proper compensation to a custodian appointed for property levied on under attachment, to be taxed as costs, such compensation can only be recovered from a party to the litigation when so allowed and taxed as costs in the case.

Appeal from district court, Garfield county.

Action by H. C. Thomas against George Edinger to recover compensation as custodian of attached property. Judgment for plaintiff, and defendant appeals. Reversed.

J. W. Dollison and Henry T. Sale, for appellant. C. W. Darrow and Ed. T. Taylor, for appellee.

THOMSON, J. On the 23d day of October, 1893, George Edinger brought suit in the county court of Garfield county against W. T. Beans and others, and caused a writ of attachment to be issued in the suit, which was levied upon certain goods and chattels as the property of Beans. At that time T. W. Thomas was the sheriff of Garfield county, and the levy was made by him. He remained in office until January 8, 1894, when R. W. Ware became the sheriff. When the attachment was levied, J. W. Dollison, the attorney of the attachment plaintiff, requested the appointment of a custodian to take charge of the goods; and the then sheriff, T. W. Thomas, thereupon appointed H. C. Thomas as such custodian, and agreed to pay him \$2.50 per day for the time he should be in charge of the property. The goods were still in the custody of H. C. Thomas when Ware entered upon the duties of the office. The latter made no change of custodian, and H. C. Thomas remained in charge of the goods until the 24th day of January, 1894, when the property was released from the attachment, and turned over to Annie T. Beans, who had intervened, claiming the property as hers, and whose claim, upon trial, was sustained. On the 24th day of February, 1894, H. C. Thomas commenced this action in the district court of Garfield county against the attachment plaintiff, George Edinger, to recover the sum of \$135, which he alleged was the amount due him for the safe-keeping of the goods, by virtue of his contract with the sheriff. Issues were joined, and a trial had, which resulted in a verdict and judgment in the plaintiff's favor for the amount of his claim. The defendant has brought the case here by appeal.

The following is section 1 of an act of the legislature approved April 16, 1891: "Whenever it shall be the duty of any sheriff or constable to appoint a custodian to take charge of any property levied upon by virtue of a writ of attachment or execution, the court shall allow such compensation for the services of the custodian as shall be proper, not exceeding two and one half dollars per day, to be taxed as costs, and such officer shall not demand or receive any greater sum." Sess. Laws 1891, p. 323. The law charges the sheriff with the safe-keeping of property levied upon; and, if he finds that the appointment of a custodian is necessary to its preservation, he makes the appointment in his official capacity. The custodian appointed is, for the purpose of the safe-keeping of the goods, his agent, for whose default or misconduct concerning them he is responsible, and for whose services he is entitled to an allowance by the court not exceeding \$2.50 per day. The compensation of the custodian must be taxed as costs in the case, in the manner provided by the statute, or it cannot be recovered from the losing party. No contract made by the sheriff with the custodian for the payment to him of a fixed sum in consideration of his services would be binding upon the parties to the suit. The statute provides how his compensation shall be determined. It must be determined in that way, and in no other way; and when it is determined, to make it available, it must be taxed as costs. The appointment of a custodian, like the attachment of the goods, is a part of the proceedings in the case; and the court in which the case is pending has the sole jurisdiction to determine what costs are chargeable on account of the appointment. The custodian looks to the sheriff for his pay, and the sheriff protects himself by procuring an allowance and taxation of the proper amount. The sheriff cannot safely contract for the payment of any specific sum. It seems that the costs in the attachment suit were adjudged against the attachment plaintiff, the defendant in this case; and, if the sheriff expected to be reimbursed by Edinger for his outlay or liability on account of the custodian, he should have caused the amount to be determined, allowed, and taxed in his favor, in the county court. There would then have been a judgment for that amount against this defendant in the only court authorized to render such judgment. It seems there was an attempt to follow the statute in the matter, but plaintiff's counsel say that for certain reasons it was ineffectual. We shall not inquire whether it was or not, because, whatever it was, and whatever its result, it cuts no figure in this case. We do not decide that the contract between this plaintiff and the sheriff was invalid, or that the plaintiff cannot recover from the sheriff the amount which the latter agreed to pay him. We only decide that, in so far as the parties to

the litigation are concerned, the compensation of the custodian of attached goods is a matter for the determination of the court in which the attachment suit is pending, and is not recoverable from the losing party unless it is taxed as costs in that suit. Personally, the custodian had no claim against Edinger; but, even if he could make such claim in his own behalf, the district court had no jurisdiction of the controversy. Its judgment must therefore be reversed, with instruction to dismiss the case. Reversed.

(9 Colo. App. 121)

**ROCKFORD INS. CO. v. ROGERS et al.**

(Court of Appeals of Colorado. Jan. 11, 1897.)

FOREIGN INSURANCE COMPANIES—FAILURE TO FILE CERTIFICATES—VALIDITY OF CONTRACT.

1. Where a statute provides that foreign corporations shall file certain certificates with the secretary of state and the recorder of deeds in counties, under penalty, and there is no provision declaring contracts entered into without such filing illegal, contracts made by such corporations without compliance with the statute are valid.

2. Where a foreign insurance company appoints an agent to collect premiums, he is estopped, in an action on his bond for default, to claim that contracts entered into by such insurance company in the state are invalid because in violation of some specific statutes.

Appeal from district court, Arapahoe county.

Action by the Rockford Insurance Company against Merrick A. Rogers and Milton J. Stair. Judgment for defendants on the pleadings, and plaintiff appeals. Reversed.

C. J. Blakeney and Sylvester G. Williams, for appellant. Wells, Taylor & Taylor, for appellees.

BISSELL, J. The correctness of a judgment granted on a motion therefor based wholly on the pleadings is challenged by this appeal. Suit was brought by the Rockford Insurance Company against Rogers and Stair as sureties on a bond executed by Wells as principal. The complaint charged that the insurance company was a corporation organized under the laws of Illinois, and permitted to do insurance business in this state. Wells was appointed its agent, and during February, 1893, collected funds and moneys belonging to the insurance company amounting to \$938.48. He also collected in March \$687.23, and of the total sum paid about \$700, leaving \$927.62 which he had collected and failed to pay over. The bond which was set up in the complaint was in the usual form. According to its conditions, Wells had been appointed agent of the insurance company in Denver, and agreed to accept the trust, keep a regular and accurate record of accounts and moneys received, and pay them over to the company monthly, or as often as they might be demanded. In case of default the bonds-

men were to be liable. The answer admitted the plaintiff's corporate character, but denied that it was authorized to transact business in the state; admitted the agency, the execution and delivery of the undertaking, and, on information and belief, denied the receipt of the money. As a second defense it set up the foreign character of the plaintiff company, and that the moneys which Wells had received were premiums which had been paid to him for the company on account of divers policies of insurance which the company had issued in Arapahoe county, to various parties, in the ordinary course of business. The defendants then alleged a failure on the part of the insurance company to file with the secretary of state or the recorder of deeds in Arapahoe county a certificate, signed by the president or secretary, designating its principal place of business, and any agent or agents on whom process might be served. The plaintiff replied, denying that the business was carried on solely in Arapahoe county, and averred that it was done in the state; admitted that they had not filed with the secretary of state or the recorder of deeds the certificate mentioned, and then alleged affirmatively an authority to transact business, by reason of a compliance with the statutes regulating the conduct of insurance business by foreign companies in the state of Colorado, and a compliance with the regulations of the auditor, who is the superintendent of insurance, and the possession of a certificate, issued by him, authorizing them to transact the business of their company in the state. There were some immaterial amendments subsequently made that are unimportant to this discussion, and the case stood for trial in the district court on these issues. Thereupon the defendants moved for judgment on the pleadings, which was heard and granted. It is from this judgment that the appeal is prosecuted.

The appellant insists that for three reasons the judgment is erroneous. It is contended that the failure to file a certificate is not pleadable in bar to the action, and that the defense could not in any event be available, because the parties are estopped by the facts, and the relations of the agent to the company, from raising the question. It is also contended that in any event the statutes which organized and provided for an insurance department, and, in direct terms, enacted that the auditor should be the agent of the company on whom process might be served, repealed the former provisions with reference to the filing of a certificate. On at least two of these propositions the law of this state is undoubtedly with the appellant. We would be unadvised, except for the opinion printed in the record, as to the precise basis on which the trial court proceeded to enter this judgment. From this we learn that the failure to file the certificate with the secretary of state or recorder was regarded by

the trial judge as absolutely fatal to the action. It was conceded the position was in apparent conflict with the direct decision of the supreme court on the proposition, and to its intimations and evident acceptance of the contrary rule in a subsequent case which is cited. We are unable to pursue a similar course. The question has been pressed on our attention anew, with very considerable elaboration of argument and citation of authorities; and, in a forcible oral argument, counsel for the appellees insist that it is the duty of this court to reconsider the question, and, if our conclusions should be in harmony with those of the district judge, to adopt a contrary rule. This we decline. In no contingency, and under no circumstances, whether in obedience to our own convictions of what the law ought to be, or of what the weight and current of authority had declared it to be, would we attempt to overrule the supreme court, or depart from the precedents it has established. We are forced to no such position, however, by the character of the question, or our own convictions respecting it. The constitution, and the statutes which were enacted to carry out its provisions, undoubtedly command foreign corporations who seek to do business in the state to file a certificate in the office of the secretary of state, or the recorder of deeds in the county wherein their principal business is to be transacted, and designate an agent on whom process may be served, before they shall have the right to transact business within its limits to the same extent and on the same plane as domestic corporations. This is not all, however, that the statutes provide. A penalty is prescribed, and when the foreign corporation fails to observe these statutory requirements a personal liability is laid on the officers and directors of the defaulting corporation. There is no provision declaring all contracts into which they may enter illegal and void, nor is there any other than the general proviso respecting their duty in this particular. Many of the cases in which the question has been discussed simply involved the right of the corporation to enforce a single contract which they had made, and did not, in general, discuss the question of the invalidity of their contracts where the corporation was attempting to "do business," as that term is generally construed. The principle, however, on which the decisions have been put, seems to us clearly decisive of the present controversy. Where the personal liability penalty is the only one imposed by the statute, the courts assume that the legislature deemed this sufficient to insure an observance of the limitation on the power to do business. *Utley v. Mining Co.*, 4 Colo. 369; *Kindel v. Lithographing Co.*, 19 Colo. 310, 35 Pac. 538; *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739; *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93. It is quite impossible for this court, in response

to the request of counsel, to enter upon a general discussion of the proposition, and adduce all the various reasons which might be urged in support of it. The discussion would subserve no useful purpose nor would it add aught to the force and effect of what seems to us to be the settled law on this question. We are therefore contented with a general statement of the doctrine and our concurrence.

The circumstances of this case, the character of the suit, and the facts alleged as its basis, would, in our judgment, in any event, render it impossible to adjudge the plea a defense to the suit. The action is not brought on a contract which the company had entered into with another party, which involved the transaction of its insurance business, or the issuance of a policy from which the insured was attempting to escape because of its illegality or invalidity. Under any of the authorities, there can be no question respecting the right of an insurance company to appoint an agent to collect moneys due it, and to take from that agent a bond to answer for the faithful performance of the engagement into which he enters. The moneys which the agent Wells collected belonged to the insurance company. It was money which had been voluntarily paid by the policy holders in return for the protection afforded by the policies, and neither party to the contract of insurance has made or is making any question about the validity or character of the insurance contract. So far as we are advised by the record, the contract was fully executed. The policy holder voluntarily paid his money, accepted the contract, and admitted its validity. The agent simply received the premiums, which were money, under these circumstances, belonging to the insurance company, and which, by his contract, he was bound to pay over. The present appellees, by the terms of their bond, are obligated for the honest performance of these duties. Under these circumstances, we are quite unable to see how it would have been possible for the agent, if he had been sued for the moneys, to set up the invalidity of the contracts entered into by the insurance company and the insured, to escape his own liability to pay over that which he had received, and which undoubtedly belonged to the company. On well-recognized principles of good morals and fair dealing, he would be estopped to question their title to this money, and he would not have been permitted to defend on the plea that the original contract between the company and the insured was entered into in violation of some specific statute. It is oftentimes true that one party to a contract may set up in defense that it was ultra vires, and beyond the power of the corporation to execute. It has never been conceded, so far as we know, that, if a contract is not ultra vires, one party to it may set up the incapacity of the corporation, or its want of authority, to make

the contract which is the basis of the action. *Sherwood v. Alvis*, 83 Ala. 115, 3 South. 307. To adopt any other theory would work out most astonishing results. It would permit a person to accept an agency of a corporation, collect moneys which concededly belonged to it, and, when sued and asked to account, he would be permitted to defend because of the lack of corporate capacity of the foreign corporation to do business in the state. This would certainly legalize larceny, and render embezzlement both legitimate and profitable. Unless some more cogent reason can be shown than any which has been called to our attention, we must decline to bring about such results. The agent got the money, and was bound to pay it over. For the faithful performance of his duty in this regard, the sureties bound themselves. They cannot now be heard to defend on the hypothesis that the original contract between the company and the insured was invalid, or that the corporation had in any respect failed to comply with the statute which attempts to limit the power of foreign corporations to do business in this state.

We are asked by the insurance company to decide that the subsequent legislation whereby an insurance department was created, and an agent thereby designated on whom process might be served, repealed the antecedent statutes, which prohibited foreign corporations from doing business in the state without having first filed a certificate and designated an agent. There is considerable force in these suggestions, and they are not without the support of adjudications. *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 Sup. Ct. 554; *State v. Rotwitt*, 17 Mont. 41, 41 Pac. 1004. We prefer, however, to leave this question undetermined. We do not regard it as safely and completely presented by this record. The replication undoubtedly sets up the possession of a certificate, issued by the auditor, authorizing the company to do business in the state. We are not quite able, however, to accept this averment as entirely conclusive and satisfactory on this question. It is somewhat unlike an allegation in the complaint which is admitted by the answer, or one stated in the answer which is admitted by the replication, because, under our system, all affirmative averments contained in the replication are regarded as denied, without further plea. Under these circumstances, it might, perhaps, with some reason, be said that there is no admission in the pleading that the company possessed this certificate. While this contention is possible, and the case can be reversed on other grounds without indulging in any presumptions or conclusions which are not warranted by the facts which are concededly before us, we prefer to rest the decision on the other basis. When the case goes back for a new trial, if this fact is proven and established by the record, should the case be thereafter

appealed, the question would be presented in such a way that we could, without violating any principle, and without indulging in any presumption, pass on the proposition. The court erred in rendering a judgment on the pleadings, and it will therefore be reversed. Reversed.

(30 Or. 215)

**CITY OF OREGON CITY v. MOORE,**  
Treasurer.

(Supreme Court of Oregon. Feb. 23, 1897.)

**RIGHT OF CITY TO SHARE OF ROAD TAX—MANDAMUS TO COUNTY TREASURER—REMEDY BY APPEAL.**

1. The right of a city to a portion of the road tax collected from its inhabitants cannot be determined in mandamus against the county treasurer, since the law under which the tax was collected gives jurisdiction over such matters to the county court.

2. Act February 21, 1893 (Laws 1893, p. 116) §§ 6, 7, refer only to the collection and custody of taxes collected by county officers for the municipality for which they were levied, and do not authorize a city to maintain mandamus against a county treasurer for a share of the road taxes collected under a general law, in the absence of an order from the county court fixing the city's proportion of the fund, and ordering the county treasurer to pay it over.

On rehearing. Denied.

For former opinion, see 46 Pac. 1017.

BEAN, J. However willing we might be to accommodate counsel, the question as to what portion of the road taxes collected from the property and inhabitants of Oregon City shall be under the exclusive control and direction of the municipality cannot be determined in a mandamus proceeding against the county treasurer. The law under which the tax was levied and collected makes the county court the tribunal to determine that question in the first instance, and it is only on an appeal regularly brought to this court that we can review its decision. Nor do sections 6 and 7 of the act of February 21, 1893 (Laws 1893, p. 116), have any application to this case. These sections have reference only to the collection and custody of taxes collected by the county officers for the district or municipality for which they were levied. The fund in question here, however, was levied and collected by the county under the general law, and the defendant holds it as the agent and officer of the county, and cannot be compelled to pay any portion of it over to the city, without an order from the county court authorizing him to do so. A writ of mandamus can issue only to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station (Code, § 593), and, without an order of the county court determining what portion of the road taxes collected shall be apportioned to the road districts within Oregon City, it is clear the law does not specially enjoin upon the de-

fendant the payment of any portion thereof to the municipality as a duty resulting from his office. Rehearing denied.

(30 Or. 306)

**OREGON COAL & NAVIGATION CO. v.**  
**COOS COUNTY et al.**

(Supreme Court of Oregon. Feb. 23, 1897.)

**WRIT OF REVIEW—OFFICE OF—ACTION OF BOARD OF EQUALIZATION.**

1. On a writ of review the reviewing court will not consider the evidence upon which the inferior tribunal acted for the purpose of deciding a disputed question of fact, but will review a finding of fact only when the evidence is undisputed, and the conclusion to be drawn is a matter of law.

2. Where a complaint is made by a property owner to the board of equalization that his assessment is excessive, the assessment roll as returned by the assessor fixes the value *prima facie*; and, though the only testimony offered is by the complainant, such testimony cannot be considered as uncontradicted, nor can the determination of the value of the property by the board be reviewed on a writ of review.

Appeal from circuit court, Coos county; J. C. Fullerton, Judge.

Petition for writ of review by the Oregon Coal & Navigation Company against Coos county and the members of its board of commissioners to review the action of said board as a board of equalization in fixing the assessment of petitioners' property. The court set aside the assessment, and defendants appeal. Reversed.

This appeal is from the judgment of the circuit court for Coos county upon review of an order of the county court, sitting as a board of equalization, whereby it revised the assessor's appraisement of plaintiff's taxable property. The plaintiff complained before the board that the assessor had placed a valuation upon its property upon the assessment roll largely in excess of its real or actual cash value. The only evidence produced was in behalf of plaintiff, which tended to show that the real or actual cash value of a large part of the property was much less than that fixed by the assessor upon the roll. The board reduced somewhat the assessed values, but not to the extent which it is claimed was established by the uncontradicted evidence. A transcript of all the testimony is certified up with the record. Defendants appeal.

S. H. Hazard, for appellants. J. W. Hamilton and Rufus Mallory, for respondent.

WOLVERTON, J. (after stating the facts). In behalf of the defendants it is contended that the decision of the county court, acting as such board, upon a question of fact, is conclusive in a proceeding by writ of review. The doctrine of this state upon the subject may be summarized thus: Upon a writ of review under the statute the supervising court will not examine the evidence submitted to the inferior court or tribunal

for the purpose of settling or deciding a new or disputed question of fact, but will review the decision of such court or tribunal only upon the ultimate facts appearing by the record. *Smith v. City of Portland*, 25 Or. 297, 35 Pac. 635; *Douglas County Road Co. v. Douglas Co.*, 5 Or. 406; *Id.*, 6 Or. 299; *Poppleton v. Yamhill Co.*, 8 Or. 337; *Vincent v. Umatilla Co.*, 14 Or. 377, 12 Pac. 732; *Barton v. La Grande*, 17 Or. 581, 22 Pac. 111. The plaintiff, however, without conceding the point, argues that the facts are practically admitted; that the evidence offered by it remains uncontradicted by any countervailing testimony, and should control in determining the true assessable value of plaintiff's property. In *Smith v. City of Portland*, supra, the present chief justice said: "It is only when there is an entire absence of proof on some material fact found that the finding becomes erroneous as a matter of law;" citing *Hyde v. Nelson*, 11 Mich. 353. And in *Vincent v. Umatilla Co.*, supra, the converse of the proposition is stated. *Strahan, J.*, says: "When the facts are all admitted, the sole question at issue is one of law, and the writ may furnish a cheap and expeditious remedy." And the same might be said in this case if the uncontradicted evidence were such as that but one conclusion could possibly be adduced therefrom. The vice of the argument is in assuming that such is the state of the record and the evidence in this proceeding. In the first place, the testimony for plaintiff is not at all uniform on the question of values. Different judges might draw different conclusions from it. And, secondly, it does not stand uncontradicted in the light in which we view the proceeding. The powers granted the board of equalization practically constitute it a board of review also (see chapter 17, tit. 4, *Hill's Ann. Laws Or.*), and it has constantly exercised jurisdiction as such upon the application of individuals to correct assessments touching the valuation of property; but in doing so the roll comes to it with values prima facie established. *People v. Trustees of Village of Ogdensburgh*, 48 N. Y. 393. The assessor, in making up valuations, acts judicially; and, when established, they must remain fixed until revised by the board of equalization or the county court acting regularly in that capacity. *Bank v. Jordan*, 16 Or. 116, 17 Pac. 621. So that the complainant who attacks the assessor's values has the laboring oar, and must overcome the prima facie case which the roll establishes. In *People v. Davenport*, 91 N. Y. 581, the court say: "It is essential that a party assailing the validity of an assessment should make it conclusively appear that the method by which the assessors arrived at the result complained of was incorrect, and that the assessment does not represent the fair value of the property assessed." In *State v. Dodge Co.*, 20 Neb. 595, 81 N. W. 117, it was held, under a statute

analogous to ours, "that, upon a complaint being filed, the board of equalization, in reviewing the assessment of an individual, has appellate, special, and judicial powers; and, until evidence is received by it in support of the complaint, the taxpayer may rely upon the valuation made by the assessor." The converse of the proposition ought to be sound. If the assessor's valuation establishes a prima facie case against the board, there is no reason why it should not establish such a case against the complainant also. So, upon the whole, we have simply to look into a disputed question of fact,—that is, whether plaintiff has overcome the prima facie case presented by the roll; and this we are inhibited from doing, upon a writ of review, under the settled law of this state. We presume that if a case should be presented whereby it was made manifest that the board had acted arbitrarily and capriciously, and in total disregard of the record and the evidence, it would amount to legal error. *People v. Howland*, 61 Barb. 285. But such is not the case here. The judgment of the court below will be reversed, and the cause remanded, with directions to dismiss the writ.

(30 Or. 250)

#### SOUTHERN OREGON CO v. COOS COUNTY et al.

(Supreme Court of Oregon. Feb. 23, 1897.)

WRIT OF REVIEW—TIME OF TAKING—REVIEW OF ORDER FOR LEVY OF TAXES—FINALITY OF ORDER—SUFFICIENCY OF PETITION FOR REVIEW.

1. *Hill's Ann. Laws*, § 590, providing that a writ of review shall not be allowed unless application was made within six months from the decision complained of, is a conclusive limitation of the power of the supervising court to issue the writ.

2. An order of the county court directing the county clerk to issue a warrant for the levy of taxes is a final order from which a writ of review may be taken.

3. A petition for a writ of review to an order of the county court which recites that the order directed the county clerk to issue a warrant for the collection of delinquent taxes sufficiently described the order, though the date recited was not the true date of the order.

4. A petition for a writ of review to an order of the county court directing the county clerk to issue a warrant for the collection of delinquent taxes, which does not show the nature of the sheriff's return, or that any return was made, is insufficient for the review of an assignment that the court had no jurisdiction to make the order because the sheriff failed to make affidavit of his return of delinquent taxes, as required by *Hill's Ann. Laws*, § 2811.

Appeal from circuit court, Coos county; *J. O. Fullerton*, Judge.

Petition by the Southern Oregon Company against Coos county and others for a writ of review. From a judgment dismissing the proceedings, petitioner appeals. Affirmed.

On September 15, 1894, the Southern Oregon Company petitioned the court below for a writ of review, for the purpose of having certified up for review the records and pro-



ceedings of the county court of Coos county in the matter of the assessment of plaintiff's property for the year 1893, including the orders of the board of equalization respecting the same. The petition states, in substance, that plaintiff is a corporation organized and existing under the laws of Oregon; that, at the times therein mentioned, Schroeder was county judge, and Stitt and Ross commissioners of said county; that Coos county is a public corporation, and the defendant Gage its sheriff; that on September 13, 1894, said sheriff, by virtue of a tax warrant issued out of the county court of Coos county, directing him to collect the delinquent taxes for the year 1893, levied upon certain personal property of plaintiff, and threatens to sell the same and apply the proceeds thereof to the payment of \$7,046.42, the amount of plaintiff's alleged taxes for the year 1893; that the warrant so issued is based upon an order of the county court, made and entered July 13, 1894, directing the county clerk to issue the same for the collection of delinquent taxes due upon several lists, including that of 1893; that the only ground for making the order is a pretended assessment of the property within the county for the year named; that the roll was not filed until September 25, 1893, and after the expiration of any time allowed by the county court for filing the same; that the assessor failed to give notice of the meeting of the board of equalization; that no meeting of the board was ever held, as provided by law, for the equalization of such assessment; that plaintiff was afforded no opportunity by said board to apply for the correction of its assessment; and that there was no assessment of plaintiff's property for the year 1893, other than that referred to in said petition. The errors assigned are: First, the order of the county court is insufficient, in that it does not show that any taxes had been levied upon plaintiff's property for the year 1893, or that any such remained unpaid or delinquent; second, that it appears from the record that no taxes had been levied upon its property for 1893; third, that the county court was without jurisdiction to make the order of July 13, 1894; fourth, the county court did not find what sum, if any, was due from plaintiff for taxes levied upon its property for the year named; and, fifth, plaintiff was not notified of the intended proceedings. The return to the writ shows that orders were made and proceedings had as follows: On Monday, July 10, 1893, the county court, at an adjourned meeting, made an order extending the time for the return of the assessment roll to the fourth Monday in September, 1893, at which time the board of equalization for Coos county convened, and adjourned to the following day. The plaintiff appeared at the adjourned meeting by R. E. Shine, its secretary, and later on by John A. Gray, its attorney, and requested a reduction of its assessments, as did other persons. After hearing some testimony offered by the parties, it

adjourned to the following day, and then until October 16, 1893, when the hearing was resumed, and continued from day to day until October 23, 1893, at which date it made and entered an order reducing the plaintiff's assessment between five and six thousand dollars. The board again convened on the following day, and filed in the county court a certified statement of its doings and proceedings, from which it appears that it reduced the valuation of all property appearing upon the assessment roll, "except money, notes, accounts, improvements and goods, wares and merchandise, twenty-five per cent. of the value fixed by the assessor." On the 3d day of January, 1894, the plaintiff appeared, and petitioned the court, then in regular session, for a reduction of its assessment for 1893; claiming that the action of the board of equalization was irregular and illegal, as having continued its sessions beyond the week of its first meeting. The court continued the hearing from time to time until January 20, 1894, when it finally determined that the action of the board was irregular, but approved the reduction made by it of plaintiff's assessment, and reduced the same largely in addition thereto. On January 23d the county court levied a tax of 19 mills on the dollar, and on March 8, 1894, a warrant was issued to the sheriff for the collection thereof. On April 12th it made an order enlarging the time within which the taxes so levied were to become delinquent to June 20, 1894, and extending the time for the return of the delinquent list to July 5, 1894. On July 12, 1894, the sheriff made an irregular return of the same by certificate, and on the following day the county court made the order specified in the petition as made of the 13th, and the warrant was issued by the clerk, in pursuance of this order, July 17, 1894, and is the same under which it is alleged the sheriff is acting. The defendants moved the court below to quash the writ, and, the motion being allowed, it was adjudged that the proceedings be dismissed, from which judgment this appeal is prosecuted.

J. W. Hamilton and Rufus Mallory, for appellant. S. H. Hazard, for respondents.

WOLVERTON, J. (after stating the facts). The motion to quash presents two questions that go to the sufficiency of the petition for the writ, which are decisive of the case. The first is that it does not state sufficient facts to authorize the issuance of the writ, in that it does not describe with sufficient certainty the decision or determination sought to be reviewed, nor does it assign or specify the errors which it is sought to have corrected; and, second, that the decisions and determinations sought to be reviewed were all made more than six months prior to the application for the writ, except the order of the county court of July 12, 1894. We will treat of these in their inverse order.

The statute provides that in no case shall the writ be allowed unless application therefor be made within six months from the date of the decision or determination complained of. Hill's Ann. Laws Or. § 590. This limitation is conclusive of the power of the supervising court to issue it. *Rhea v. Umatilla Co.*, 2 Or. 298, approved in *Bank v. Jordan*, 16 Or. 117, 17 Pac. 621; 2 Spell. Extr. Rel. § 1902; *Cunningham v. Packet Co.*, 10 Minn. 299 (Gil. 235); *People v. Hildreth* (N. Y. App.) 27 N. E. 558; *Chamberlin v. Barclay*, 13 N. J. Law, 244. It is one of the purposes of the present writ to have reviewed the decisions and determinations of several functionaries, including the assessor, board of equalization, and the county court, of Coos county, touching the making up of the assessment roll of 1893. The assessor returned the roll September 25, 1893; and the board of equalization met on the same day, and continued its sessions from time to time until October 24th following, when it certified its proceedings to the county court, and thenceforth ceased to exercise its functions as such board. The county court, having begun its examination of the roll January 3, 1894, made its final determination concerning it on the 20th, and levied the tax on the 23d. It is now claimed that the return of the assessor was not made within the enlarged time granted by order of the county court; that the board of equalization acted without jurisdiction, by reason of an alleged failure of the assessor to give proper notice of its meeting, and by reason of having continued its examination and correction of the roll for a greater period of time than one week; and that the acts of the county court were coram non iudice, because of the alleged irregularities of the board of equalization; hence, that the assessment is void. It seems to be conceded by both sides that the tax roll, when completed, partakes of the nature of a judgment against the individual taxpayer. *Rhea v. Umatilla Co.*, supra; Hill's Ann. Laws Or. § 2792; 25 Am. & Eng. Enc. Law, 292; 1 Black, Tax Titles, § 331. The roll is completed, in so far as any judicial action is required of the several functionaries engaged in its preparation, when the tax levy is made by the county court. This is the final decision or determination against the taxpayer, and fixes the amount of taxes he is required to pay the county, and what remains to be done in extending and copying the roll is merely clerical and ministerial. Now, we have seen that the levy was made on January 23, 1894, more than six months prior to the filing of the petition; hence the writ came too late to have reviewed any action of the county court or the board of equalization or the assessor in making up and completing the assessment roll for 1893. We are not to be understood as indicating by anything we have said what determinations of either of these functionaries are so far final as to support the

writ, but that the order levying the tax is at least such a final order from which a review will lie, and, the plaintiff having failed to apply for the writ within six months from the date of such levy, its remedy by review, with a purpose of having determined whether or not the assessment and levy were regularly made, and by competent authority, is now cut off by statute.

This conclusion eliminates from our consideration all questions presented at the hearing, except the regularity and validity of the order of July 12, 1894; and, as to this, the defendants' first objection goes to the sufficiency of the assignments of error in the petition for the writ respecting it. We think the order complained of is sufficiently described. The gist of it is set out, and we know from an inspection of the petition what the decision or determination of the court was, and the error in the allegations touching the date of its entry is of no consequence. Plaintiff insisted at the argument that the court was without jurisdiction to make the order, for two reasons: One is that the sheriff had failed to make or annex to his return of delinquent taxes an affidavit to the effect that the sums therein returned as unpaid were not paid, and that he had not, upon diligent inquiry, been able to discover any goods or chattels, belonging to the persons charged with such unpaid taxes, whereon he could levy the same, as required by section 2811, Hill's Ann. Laws Or.; and the other is that there was no valid assessment for 1893 upon which to base the order. While it is true the answer to the writ shows that the sheriff certified his return, instead of making affidavit thereto, the petition is entirely silent on the subject. There is no showing therein indicating the nature thereof, or whether a return of any kind was or was not made; nor does it anywhere question the jurisdiction of the county court on the ground that the sheriff failed to verify his return by affidavit.

The third assignment of error is, in substance, that the order was made without jurisdiction; but this is a conclusion of law, and would seem to be a deduction from the two preceding assignments, which are, in effect, that no tax had been levied upon plaintiff's property for the year 1893, and that the order itself does not show such levy. The statute (Hill's Ann. Laws Or. § 584) provides that the writ shall be allowed, upon the petition of the plaintiff, describing the decision or determination sought to be reviewed with convenient certainty, and setting forth the errors alleged to have been committed. This requirement is no departure from the ordinary rules of pleading pertaining to applications for the writ. The petition should state such facts as would show, prima facie, by an inspection of it, that the inferior court or tribunal has acted without jurisdiction, or has exercised its functions erroneously; and, as in other

pleadings, a statement of a conclusion of law is bad. 2 Spell. Extr. Rel. §§ 1992, 1993. Under the Georgia Code (section 4052), whereby it is required that the petition "shall plainly and distinctly set forth the errors complained of," it has been held that the petition should set forth the ground of error. *Railroad Co. v. Jackson*, 81 Ga. 478, 8 S. E. 209. In Michigan it has become authoritatively settled that the object of a similar statute is "to require such a statement of the grounds of the allegation of error as will inform the court and opposite party of the nature of the questions intended to be raised." *Fowler v. Railroad Co.*, 7 Mich. 79. And the error must be specifically assigned. *Witherspoon v. Clegg*, 42 Mich. 484, 4 N. W. 209; *Welch v. Bagg*, 12 Mich. 42; *Rodman v. Clark*, 81 Mich. 466, 45 N. W. 1001; 4 Enc. Pl. & Prac. 149. As bearing upon, and in further support of, these propositions, we cite *Independent Pub. Co. v. American Press Ass'n* (Ala.) 15 South. 947, 950; *Wood v. Lake*, 3 Colo. App. 294, 33 Pac. 80; *Harrison v. Chipp*, 25 Ill. 575; *Chambers v. Lewis*, 9 Iowa, 583; *People v. Commissioners of Taxes and Assessments* (Sup.) 26 N. Y. Supp. 941; *People v. Board of Assessors* (Sup.) 32 N. Y. Supp. 344; *Cunningham v. Superior Court*, 60 Cal. 576. Considered in the light of these authorities, the petition is clearly insufficient to present the question insisted upon, viz. that the court was without jurisdiction to make the order of July 12, 1894, on account of the failure of the sheriff to make affidavit to his return of delinquent taxes as required by section 2811; and, this being so, we are precluded from looking into it upon the record.

Nor can we, by this proceeding, examine into the validity of the assessment roll, to determine whether or not the county court was warranted in making the order. The office of the writ is to revise the decisions and determinations of the inferior court or tribunal, and the supervising court has the power to affirm, modify, reverse, or amend the same; but, being precluded by the lapse of time from reviewing the determinations of the functionaries whose duty it was to make up the roll, we cannot revise anything these tribunals have done respecting it. So that the regularity of the assessment and levy has become a matter wholly collateral to the question whether or not the order of July 12th was properly and authoritatively made and entered. The review is a direct proceeding, and was designed to promote a revision of the decisions of inferior tribunals, and to correct errors therein; but, if used to try collateral issues of this kind, it would result in a defeat of the very purposes of the writ. Of course, if there were no assessment and levy whatever, or if the tax itself were vicious, or such as the legislature could not lawfully impose, the order would undoubtedly be void, as would any process designed for the enforcement of the payment

of the tax; but we think it a sufficient basis for such an order that there is a delinquent list regularly returned by the proper officer, and that in determining its validity it is unnecessary to inquire into the regularity of the original roll. Affirmed.

(5 Idaho, 198)

#### WINTERS et al. v. STATE.

(Supreme Court of Idaho. Feb. 11, 1897.)

##### CLAIMS AGAINST STATE.

W., P. & B., as contractors, built two sections of the state wagon road, under the act of February 16, 1893, according to the survey of the chief engineer, who, under the provisions of said act, established the lines of said road. Said contractors were compelled to do said work under the supervision of said chief engineer. Portions of the two sections so built by the contractors were located so near the Salmon river that they were washed out by high waters, prior to the acceptance of the road by the state. At the direction of the state road commission, and under the supervision of said engineer, the contractors rebuilt the portions so destroyed. The original contract price consumed the entire funds available for said two sections. *Held*, that under the circumstances the legislature is authorized to make an appropriation sufficient to pay said contractors for the value of said extra work, and that it would be equitable and just for the legislature so to do.

(Syllabus by the Court.)

Original proceeding by William Winters and others against the state to obtain a recommendatory decision touching the equity of a claim against the state. The state demurred to the complaint, which demurrer was overruled. The state then answered, denying the material averments of the complaint. By agreement of both parties, the cause was referred to the judge of the district court of the Third judicial district to take and report the evidence to the supreme court. The evidence was so reported, and the cause argued on behalf of both parties, and decision rendered in conformity to the prayer.

A. J. Pinkham, for plaintiffs. Robert E. McFarland, Atty. Gen., for the State.

QUARLES, J. This is a proceeding under section 10 of article 5 of the constitution of Idaho, brought by the plaintiffs to obtain the recommendatory decision of this court touching the equity of a claim asserted by the plaintiffs against the state of Idaho. It appears from the complaint, and from the testimony reported in this proceeding, that the plaintiffs were original contractors, and as such undertook to construct two sections of the state wagon road, constructed under the provisions of the act of the legislature approved February 16, 1893, said two sections being in the counties of Custer and Lemhi; that the plaintiffs constructed said two sections under the supervision of J. W. Birdseye, the chief engineer selected under the provisions of said act; that the line of said road was selected and

surveyed by said chief engineer; that portions of said road were located by said chief engineer along the Salmon river at an elevation too low to prevent the said road from being flooded during high water; that after said sections of the road had been completed by the plaintiffs, but before they were received, portions thereof were washed out by high waters; whereupon the board of commissioners of said state wagon road passed a resolution that the plaintiffs, under the direction of said chief engineer, change and reconstruct said portions, etc., the object being to get said road at the points where overflowed above high water, so that it could be used at all times. Under said resolution it appears that plaintiffs, on that section of the road constructed by them in Lemhi county, did extra work to the extent of \$3,757.25, and on the section constructed by them in Custer county to the extent of \$2,987. The evidence touching the value of the said extra work before us consists solely of the certificates of the chief engineer, and the vouchers accompanying the same, which are meager and unsatisfactory, but which we have treated as making a prima facie case. The original contracts let to plaintiffs by the wagon road commission, as shown by the record before us, exhausted the entire fund available for the construction of said two sections; hence the said commission by law had no authority to employ the plaintiffs to do the said extra work. But it was necessary to do said extra work, and as such work was done by the plaintiffs, and is a public benefit, in equity and good conscience the plaintiffs should be paid for such work. Under the provisions of said act, it was the duty of the chief engineer to survey and locate the lines and grade of said state wagon road, and it was the duty of the plaintiffs to construct the two sections aforesaid, contracted for by them, according to the survey and lines as located by said chief engineer. Mistakes, through negligence or otherwise, were made by the said chief engineer in locating the lines of the two sections so constructed by the plaintiffs; but it would neither be just nor equitable to permit the plaintiffs to suffer by reason of the mistakes or incompetency of the chief engineer, under whose directions they were required to act, and in whose selection they had no voice. We think that the legislature is authorized to make an appropriation sufficient to compensate the plaintiffs for the value of the extra work done by the plaintiffs as aforesaid, and that it would be equitable and right to do so; and we recommend such appropriation. If the legislature has any doubts as to the actual value of said services, it would be proper to require the plaintiffs, or some of them, or other witnesses, to come before the proper committee of the legislature, and testify as to the value of such services. It is hereby directed that

the evidence reported to this court by the district court of the Third judicial district, and plaintiffs' Exhibits A, B, C, and D, mentioned in said evidence, be attached to a certified copy of this decision, and delivered to the attorney for the plaintiffs.

SULLIVAN, C. J., and HUSTON, J., concurring.

(5 Idaho, 39)

RICE et al. v. BANK OF CAMAS PRAIRIE.  
(Supreme Court of Idaho. Nov. 20, 1896.)

**BANKS—DEPOSITS—PAYMENT.**

1. The court instructs the jury that, if the defendant bank paid the money claimed to be due the firm of Holt & Rice, depositors of said bank, to Riley Rice, a member of the firm, and who had authority to draw said money for the firm, and that no receipt, order, check, or authority of Holt & Rice was given therefor, written or oral, in the usual course of business, then the defendant is still liable for the money, the same as if payment had not been made. *Held, error.*

2. However careless and uncommon may be the payment of money by a bank to a depositor, who had authority to draw the money, without any written order or receipt, if such payment of the money of the firm was actually so made by the bank, it would be a good payment, and the bank would not be further liable.

3. The circumstances under which the payment is claimed to have been made are proper consideration for the jury in determining whether the payment has been made as claimed. (Syllabus by the Court.)

Appeal from district court, Idaho county; W. G. Piper, Judge.

Action by Riley Rice and others, partners as Holt & Rice, against the Bank of Camas Prairie, to recover the sum of \$1,526.18, balance alleged to be due on account of money deposited with the defendant. Judgment for plaintiffs, from which defendant appeals. Reversed.

James E. Babb and F. E. Fogg, for appellant. Forney, Smith & Moore and J. W. Poe, for respondents.

MORGAN, C. J. The plaintiffs were livestock dealers in the county of Idaho and its vicinity, and doing banking business with the defendant. The plaintiffs deposited with the defendant, for collection and credit, among other items, a check for \$1,000, drawn by Follett Bros., and one for \$850, drawn by the same parties, in favor of the plaintiffs, Holt & Rice. The plaintiffs were never credited with the amount of these checks on the books of the defendant. As a reason for not crediting these amounts, the cashier of the defendant bank states that he paid the \$1,000 and the \$850—the first sum, \$1,000, on or about the 24th of October, 1894; and the second sum, \$850, on or about the 3d or 4th of January, 1895—to Riley Rice, a member of the firm of Holt & Rice, at his request, and that said payment was made for the firm of Holt & Rice, taking no check or receipt, or any

memorandum whatever, from said Rice for said payment. It is also stated by the cashier, W. W. Brown, that upon paying said amounts to Rice the checks, respectively, were placed with the cash belonging to said bank, and carried along as cash, until they were forwarded for collection to the bank upon which they were drawn, and collected, and credited to the defendant. The cashier also states that he made no memorandum in the books of the defendant of this transaction with a member of the firm, and did not give the firm credit for the amounts, for the reason above stated. This payment, the cashier claims, was made before the two checks had been sent away to the bank on which they were drawn for collection. Riley Rice, a member of the firm, claims that said payment was never made in the manner stated, or at all, and this is the issue between the parties.

The court refrains from any comments upon the evidence in this case upon either side, for the reason that, on account of errors in law committed by the court during the progress of the trial, the judgment of the court below must be reversed, and the case sent back for new trial. We have only taken up the specifications of error alleged by the appellant in its brief. In commenting upon these specifications of error, we do not copy the questions objected to, nor many of the instructions which are also objected to in the transcript, for the reason that it would make this opinion altogether too long, and would serve no useful purpose whatever, as by reference to the transcript the parties in the new trial can ascertain upon what points the cause is decided.

The specifications of error Nos. 1 to 9, inclusive, relate to questions permitted to be asked witness Hillard as to the custom of bankers with reference to transactions of the kind in question in this cause. Hillard was introduced by defendant as an expert, to prove the custom of banks in paying out money and keeping accounts, and on cross-examination it was not error to permit the plaintiff to ask the questions objected to, as they related to the custom of banks in such cases, and to the opinion of witness as to method and effect of keeping certain accounts. While not error, it might be difficult to see what value some of the questions could be to either party when answered, but, as proof of custom had been produced by defendant, it was proper for plaintiffs to cross-examine as to the same subject. This disposes of specifications of error Nos. 1 to 9, inclusive.

It was entirely proper for plaintiffs to prove their manner of doing business in explanation of the fact that the alleged error in the accounts was not discovered sooner. It was also proper to prove by expert testimony the physical condition of Mr. Rice, one of the plaintiffs, in explanation of his falling in a fainting or insensible condition

when leaving the bank at the time referred to. It was also proper to prove the whereabouts of Rice on the dates on which Mr. Brown, cashier of defendant bank, stated that he paid the money to Rice, as tending to show that he could not have been at the bank of defendant on those dates; and this is proper, although the cashier afterwards stated and testified that he might be mistaken as to the date of payment, as, if such evidence was sufficient, it would prove, not only that he might be mistaken as to date of payment, but that he must be. This disposes of the specifications of error Nos. 10 to 25, inclusive.

A number of instructions are objected to. The first, and a very serious, objection which the court finds to the instructions is that there are too many, and they are much too long. They cover, with the preliminary address of the court to the jury, 24 closely-printed pages of the transcript. So many and such long instructions serve no useful purpose, and tend to confuse the jury. The issues are but few, and very simple. The parties agree as to the amount deposited with the defendant by plaintiffs for credit. The only issues are: Did the defendant pay to Riley Rice, one of the plaintiffs, the \$1,850 it claims to have paid? Was such payment properly chargeable to the firm of Holt & Rice? These are the only issues in this case. The statute, however, requires the supreme court to pass upon and determine all the questions of law involved in the case presented on the appeal, and necessary to its final determination. The specifications of error do not take up the instructions in the order they are printed in transcript, and the instructions not being numbered makes it more difficult to get at them. The first instruction objected to we shall call "No. 13," which is as follows: "The court instructs the jury that, although parol proof of the verbal admissions of a party to a suit, when it appears that the admissions were understandingly and deliberately made, often affords satisfactory evidence, yet, as a general rule, the statements of a witness as to the verbal admissions of a party should be received by the jury with great caution, as that kind of evidence is subject to much imperfection and mistake. The party himself may have been misinformed, or may not have clearly expressed his meaning, or the witness may have misunderstood him, and it frequently happens that a witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party did actually say; but it is the province of the jury to weigh such evidence, and give it the consideration to which it is entitled, in view of all the other evidence in the case." This instruction is, in substance, as follows, to wit: Parol proof of the verbal admissions of a party to a suit, when understandingly made, is proper evidence, but, as a rule, should

be received with caution. It is the duty of the jury, however, to weigh such evidence, and give it the consideration to which it seems entitled, in view of all the other evidence in the case. The rest is useless verbiage, and tends to confuse. The instruction is law, and properly applicable to the case.

Instructions numbered 2, 3, 4, and 5, given apparently by the court on its own motion, are substantially correct.

The second specification of error applies to instruction No. 7, which is: "You are instructed, gentlemen of the jury, that a bank is held to a strict accountability to its depositors for the amount of the deposits made by the depositors; and if, therefore, you find that the money was paid to Riley Rice, as claimed by the defendant, and that no order, receipt, check, or authority of the firm of Holt & Rice was given therefor, or some member of the firm, written or oral, in the usual course of business of the said firm, then I instruct you, as a matter of law, that the bank, being held to a strict accountability for deposits, is liable to the plaintiffs in the same manner it would be as if no payment was made, as claimed by the bank, to Rice, then you should return a verdict for the plaintiffs." This instruction practically instructs the jury that if they find the money was paid to Riley Rice, as claimed by defendant, and that no order, receipt, check, or authority of Holt & Rice was given therefor, written or oral, in the usual course of business of the said firm, "then I instruct you that the bank is liable to the plaintiffs, the same as if no payment had been made." This instruction is erroneous. The evidence shows that each member of the firm was authorized to draw the money of the firm from the bank, and use it. A payment, therefore, to Rice, if the jury believe from the evidence that such payment was made, on his order, of any portion of the money of Holt & Rice, would be good. However careless and uncommon may be the payment of money by a bank to a depositor without any written order or receipt, if such payment of the money of the firm was actually so made by the bank to a person authorized to draw such money, it would be a good payment, and the bank would not be further liable.

Instruction No. 8, commencing at folio 504, is substantially the same as No. 7, above commented upon, and is erroneous for the same reason.

Instruction No. 6, given by the court, objected to in specification No. 4 on instructions, is substantially correct, but too long, and sufficiently mixed to puzzle the jury.

Instruction No. 1, commencing at folio 492, and continuing to and including folio 495, given by the court, is a dissertation on the custom of merchants, traders, and others in their dealings with banks, mingled with a little law, with all of which every man in the country is familiar; is entirely useless, and simply incumbers the record.

The modification of defendant's instruction No. 11, by the court, taking into consideration the evidence in this case, is a substantially correct statement of the law relating thereto.

The refusal of the court to give instruction No. 10, which is as follows: "The court instructs the jury that if they believe from the evidence that defendant made the payment of \$1,000 to Riley Rice, on his request, for the firm, on account of the \$1,000 check, then the crediting of plaintiffs with \$1,000 only on account of the \$1,005 check, was a mistake simply, which is not material in this case,"—is assigned as error. There is no error in this refusal. If the jury believe from the evidence that defendant made the payment of the \$1,000 to Rice for the firm, then, whether the entry of the \$1,000 credit on October 24, 1894, is a mistake or not, is immaterial; but to ask the court to instruct the jury that it was a mistake would not be proper, as it would invade the province of the jury, which alone has the right to determine whether it was an error. Then it is a portion of the evidence to be considered by the jury, to determine whether, under all the facts, the evidence is sufficient to convince them that the payment to Rice was actually made in the manner stated.

The modification of instruction No. 8 was improper. It correctly stated the law. It might, however, have been refused, for the reason that the court had already given the same in his instruction No. 9, commencing in folio No. 505, and ending at folio 507.

We think instruction No. 1 requested by the defendant had been substantially given by the court, and it was not error to refuse it for that reason.

By reason of the error in giving instructions Nos. 7 and 8 given by the court upon his own motion, the judgment and verdict must be reversed, and the cause remanded to the court below for a new trial, which is directed to be had in accordance with this opinion. Cause reversed.

SULLIVAN and HUSTON, JJ., concur.

On Rehearing.

(Feb. 13, 1897.)

SULLIVAN, C. J. It is strenuously urged that the court below erred in permitting plaintiffs to prove that Riley Rice was not at the bank of defendant on the 23d or 24th of October, 1894, on one of which days Cashier Brown had stated that the \$1,000 was paid to Riley Rice; and also that the court erred in permitting plaintiffs to prove that Riley Rice was not in Grangeville on the 3d or 4th of January, 1895, the date on which Cashier Brown had stated he paid the \$850 to said Rice. The facts following appear from the record: The cause came on for trial by the court with a jury. The jury having been impaneled, the first witness

produced by the plaintiffs was C. E. Holt, one of the plaintiffs. After the examination of said witness, plaintiffs rested their case. The defendant thereupon called several witnesses, and among them its cashier, Mr. Brown, and on his cross-examination he was asked if he had not stated to plaintiffs Rhodes and Holt that he paid the \$1,000 to Rice on October 23 or 24, 1894, and that he paid the \$850 to said Rice on the 3d or 4th of January, 1895. The witness answered that he probably had so stated; that he would not say that he had not; that he had had time to look the matter up since the conversation with Holt and Rhodes; that the check for \$1,000 was sent off for collection on the 24th day of October. And on reflection he says that he remembered that the bank carried said check in the vault with the cash, and counted it as cash, for some time; and it was probably from a week to ten days, or possibly two weeks, before the check became due, that he paid Rice \$1,000. Brown thus admitted on the witness stand that he had made the statements above referred to, and also admitted that he was wrong as to the dates of payment, and no longer claimed that payment was made as he had at first stated. As those statements of the witness Brown had not been withdrawn up to the time of the trial, it was the right of plaintiffs to have the evidence ready on the trial to contradict him; but, after he had admitted on the witness stand that his first statements in regard to said payments were not correct, it was useless, and not proper, to introduce evidence to show that said payments were not, and could not have been, made on those dates. The facts were before the jury that Brown had made one statement to Holt and Rhodes as to the times of the payments of said checks, and that he testified the payments were made at different times than he had first stated. After Brown had testified and admitted just what the plaintiffs claimed on that matter, there was no need of any further evidence thereon. We think, however, the introduction of the evidence proving an alibi for Rice was not prejudicial error, and in a retrial of the case it will not be necessary to introduce evidence upon that point, as the same is no longer an issue.

The petitioner contends that evidence as to custom should be limited to the nature of the transaction involved. While that is true, we have in this case a diversity of opinions as to the nature of the transaction involved. Plaintiffs claim the transaction was one of deposit of check for collection and credit; that the amount of the check was collected, and no credit given. Defendant admits that the check was deposited for collection and credit, but contends that before the check was collected the defendant purchased said check from Rice, one of the plaintiffs, and collected it

on its own account, and for that reason the amount collected on said check was not placed to the credit of plaintiffs. The hypothetical questions propounded by the plaintiffs cover the "nature of the transaction" from their standpoint, and those propounded by the defendant cover the "nature of the transaction" from its standpoint. If the plaintiffs introduce evidence of custom in rebuttal of that introduced by defendant, it should be based on the same state of facts as that introduced by defendant. To introduce evidence of custom on a different state of facts or hypothesis would not be rebuttal. And the court, on a retrial of this suit, should not admit expert evidence of the custom of bankers in rebuttal, unless it is confined to the same state of facts as is the evidence of custom which is sought to be rebutted. The specifications of error numbered from 1 to 9, inclusive, refer to questions propounded to plaintiffs' witness Wagner, and not to witness Hillard, as, by inadvertence, stated in the former opinion. The former opinion is therefore modified as indicated in this opinion, and a rehearing is denied.

HUSTON and QUARLES, JJ., concur.

(14 Utah, 402)

HODSON v. UNION PAC. RY. CO.  
(Supreme Court of Utah. Jan. 28, 1897.)

RES JUDICATA—DAMAGES—REMISSION.

1. Plaintiff in this action assigned to H., for the purposes of a suit thereon, his claim for damages against the defendant company for the killing of his horse. H. brought suit, and, in his complaint, stated two causes of action, in two separate counts; the first count being for the value of his own horse, which was also killed by the said defendant, and the second count for the value of this plaintiff's horse, by right as assignee. A general verdict was rendered in favor of H. on both causes, and judgment rendered thereon for one entire sum. Upon the hearing of a motion for a new trial, H. remitted a sum equal in amount to that claimed for plaintiff's horse, and the defendant afterwards paid the judgment. The assignment had been made an issue, and was declared valid. There was no appeal or reversal of the judgment. The defendant herein set up that judgment as a bar to this action. *Held*, that the plaintiff must be regarded as in privity with H. in the former action, and that he is estopped from again litigating the same claim against the same defendant.

2. If, in an action, a court had jurisdiction to render a judgment, and such judgment has never been reversed or modified, it is binding on the parties and their privies, and conclusive of the questions litigated; and, if the court has misapplied the law as to any question, the judgment must nevertheless stand until corrected in some appropriate way.

3. Where a party obtains a judgment for damages, and voluntarily, without specifying any purpose, remits a part thereof, he abandons his claim to the sum so remitted, and may not afterwards bring an action to recover such sum. Such remission has the effect of crediting the defendant with the amount remitted, on the judgment.

(Syllabus by the Court.)

Appeal from district court, Second district; W. H. King, Judge.

Action by J. R. Hodson against the Union Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Williams, Van Cott & Sutherland, for appellant. Evans & Rogers, for respondent.

**BARTCH, J.** This action was brought to recover damages for the negligent killing of the plaintiff's horse by the defendant. It is averred, in substance, that on December 9, 1890, the plaintiff was the owner of a certain mare, of the value of \$70, which was negligently killed by the defendant near Layton, Davis county, Utah. After denying the allegations of the complaint, it was alleged in the answer that on or about October 15, 1891, in an action pending in the district court, wherein Thomas H. Hodson was plaintiff and this defendant was defendant, a judgment was duly rendered in favor of said Thomas H. Hodson and against the said defendant for the value of the horse sued for herein, together with damages for another horse, with interest from the time of the killing, and for costs of suit; that said Thomas H. Hodson obtained said judgment for the horse sued for herein as assignee of the plaintiff in this action; that by said judgment it was ascertained and adjudged that said Thomas H. Hodson was such assignee of the plaintiff herein; and that afterwards, in 1891, the defendant fully paid and satisfied said judgment. At the trial of this cause the defendant introduced in evidence, without objection, the record of the former trial, from which record it appears that the same subject-matter herein was in controversy therein, and that the assignment by this plaintiff of his interest in the value of the horse sued for herein to the plaintiff in that suit was made an issue both in the pleadings and proof in that suit, and was submitted to the jury, who returned a verdict in favor of the plaintiff therein, and against the defendant, for one entire sum, including damages and interest, of \$281.70, although there were two horses sued for, and there being two separate counts in the complaint,—one for the value of a horse by right of ownership, and the other (being the one in controversy herein) by right as assignee. It further appears from such record that the court entered judgment in favor of the plaintiff therein, in accordance with said verdict, and that, thereafter, upon the hearing of defendant's motion for a new trial, the plaintiff, by his counsel, in open court, remitted from the verdict the sum of \$73.05, which was the amount of the principal and interest for the second cause of action, being the cause on which this suit is founded, and on which the plaintiff has recovered judgment against the defendant for the sum

of \$91.40 and costs. It also appears that the assignment was made by the plaintiff in this case with the intention that an action should be brought for the value of the horse in question. Such are the pleadings and the material evidence on which the appellant relies to release itself from the obligation created by the judgment in this suit.

The only question which is necessary to be considered on this appeal is whether the former judgment on the second cause of action is a bar to this suit, and operates as an estoppel to another judgment for the same cause of action. We think this must be decided in the affirmative. There is no question that the court in the former suit had jurisdiction to render that judgment, and the judgment has never been reversed or modified. It is therefore binding on the parties and their privies, and conclusive of the questions litigated, even though erroneously decided. The question whether the plaintiff in this suit had assigned his interest in the subject-matter on which the second cause of action in that suit was based, to the plaintiff in that suit, was an issue therein, and the court held that he had assigned his interest. This being so, he cannot now be heard to say that he was not a party to that suit, because, having been represented therein by his assignee, the judgment is just as binding on him as if he had been a party of record. Having litigated his claim in the former suit, and obtained judgment, which has neither been reversed nor modified, he is estopped from again litigating the same claim against the same defendant. To hold otherwise would be to permit a person to assign his claim for the purpose of an action thereon by the assignee, and after final judgment, unreversed, allow him, if he should desire the experiment, to commence another suit against the same defendant on the same cause of action, to be proved by the same testimony. The law does not recognize such experiments. The plaintiff in this case must be regarded as in privity with the plaintiff in the former, because the judgment establishes the fact of the assignment, whether right or wrong, and identity of the causes of action having been established, and the judgment in the former action having been rendered in conformity with a general verdict on the whole cause, the plaintiff in this action is bound by the judgment in the former, in the absence of a reversal or modification thereof. That judgment is conclusive, not only between the same parties, but also their privies, of every question decided; and, if the court misapplied the law as to any question, the judgment must nevertheless stand until corrected in some appropriate way. *Freem. Judgm. §§ 249, 272; Herm. Estop. §§ 107, 108, 247; Black, Judgm. § 609; Ex parte Hays (decided at this term) 47 Pac. 612; Dowell v. Applegate, 152 U. S. 327, 14 Sup.*



Ct. 611; *Clafin v. Fletcher*, 7 Fed. 851; *Godding v. Colorado Springs Live-Stock Co.* (Colo. App.) 34 Pac. 942; *Elder v. Frevert* (Nev.) 5 Pac. 69.

The fact that at the hearing of the motion for a new trial in the former action the plaintiff, by his counsel, remitted from the judgment an amount equal to the sum claimed in the second cause of action, is immaterial, and does not militate against the force and effect of the judgment, in the absence of any understanding or agreement between the parties, so far as appears from the record, as to what effect such remission should have. That judgment was an entirety on the whole cause of action, and the remission of a part thereof, without specifying, by agreement or otherwise, for what purpose it was made, simply had the effect of crediting the defendant with the amount remitted, on the judgment. Where a party obtains a judgment for damages, and voluntarily, without specifying any purpose, remits a part thereof, he abandons his claim to the sum so remitted, and may not afterwards bring an action to recover such sum. This is so as to a person who has in fact assigned a claim for the purposes of an action, as well as to one who is a party of record. If, in the former action, the plaintiff and his assignor did not wish to abide by the judgment as to the second cause of action, they had the right to dispose of such cause, either by withdrawal thereof, or by submission to nonsuit, or in some other proper way, before the judgment was pronounced. Having failed to do so, this plaintiff cannot now be heard to complain. The record shows nothing which entitles him to maintain this suit. The judgment is reversed and remanded, with directions to the court below to dismiss the action.

ZANE, C. J., and HART, J., concur.

(14 Utah, 426)

JOHNSTON et al. v. MEAGHR et al.

(Supreme Court of Utah. Feb. 15, 1897.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—FALSE IMPRISONMENT—PLEADING—MISJOINDER OF CAUSES—PROVINCE OF JURY—APPEAL—REVIEW—BREACH OF PEACE—TRESPASS—TITLE—RES JUDICATA—EVIDENCE.

1. The plaintiffs alleged that defendants maliciously and without probable cause commenced a prosecution against plaintiff Annie Johnston; that they falsely charged her with threatening to assault defendant Meaghr and others with deadly weapons; that a warrant issued, upon which she was arrested; that they unlawfully, maliciously, and without probable cause, imprisoned her, without any right whatever. No demurrer was filed. *Held*, after verdict and judgment, that the facts stated should be regarded as a count for malicious prosecution.

2. Plaintiff cannot, in one count, rely upon false imprisonment and malicious prosecution. The foundation facts on which these causes rest differ. The gist of one is the malicious

institution of a suit without probable cause. The gist of the other is the illegal and forcible invasion of an individual right to liberty.

3. The plaintiff cannot, in the same count, rely upon two or more distinct matters, each of which, independently of the other, amounts to a good cause of action.

4. While section 3126, 2 Comp. Laws Utah 1888, declares that "there is in this state but one form of civil action for the enforcement or protection of private rights and the redress and prevention of private wrongs," and while all distinctions as to forms of civil actions are abolished, the distinctions as to causes of action remain.

5. In construing pleadings upon demurrer, the maxim is that everything shall be taken most strongly against the party pleading. If two meanings present themselves, the one shall be adopted most unfavorable to the pleader. But the rule applicable after trial is that, if two reasonable meanings present themselves, that shall be taken which supports the complaint or plea, not the other, which would defeat it.

6. If there was a substantial conflict in the evidence as to whether defendants, or either of them, caused the prosecution to be commenced, and as to whether the plaintiff made the threats, and as to whether they, or either of them, had a reasonable fear that the crime threatened would be committed, or if there was room for a difference of opinion among reasonable men as to the existence of those facts, it was error to instruct the jury to find for the defendants.

7. Before finding against any of the defendants, the jury were required to believe from a preponderance of the evidence that they caused the prosecution, and that they did not have reasonable cause to believe that plaintiff made the threats, or that they did not have a reasonable fear that the crime threatened would be committed. If there was room for difference among reasonable men as to the existence of those facts, the evidence should have been submitted to the jury.

8. Probable cause for a criminal prosecution is equivalent to reasonable cause, and consists of facts in the mind of the prosecutor sufficient to lead a person of ordinary caution to believe that the party to be prosecuted is guilty,—as applied to this case, that the offense was threatened by Annie Johnston as stated, and that there was just reason to fear that the crime threatened would be committed.

9. While the ninth section of article 8 of the state constitution declares, "In cases at law the appeal shall be on questions of law alone," this court will examine the evidence to which the ruling was applied so far as necessary to determine whether such ruling was right or wrong.

10. A person who attempts unlawfully to enter upon land in the lawful possession of another cannot require such person in possession to give a bond to keep the peace, because he resists and threatens to shoot if such unlawful attempt is persisted in. Sections 4796, 4798, 2 Comp. Laws Utah 1888, do not apply to threats upon such conditions. Peace warrants, and bonds to keep the peace, are not designed to protect men in doing unlawful acts against others, or against their property. Their purpose is to secure observance of law, not to encourage its violation.

11. Actual possession is prima facie evidence of title in fee simple.

12. Mere occupancy of land, however recent, is sufficient evidence of title against any one who cannot show a better claim, and is sufficient to enable him to maintain an action against a stranger.

13. A person in the lawful possession of land has a legal right to prevent an unlawful entry, by any degree of force necessary, short of taking human life.

14. Judgments of magistrates against defendants in prosecutions to bind persons to keep the

peace, and in preliminary examinations, are not conclusive. They simply furnish a prima facie presumption of probable cause.

15. The plaintiff offered to prove by a witness that defendant Rowe said "that, when plaintiff opposed his men, he directed defendant Meaghr to commence the prosecution, so that he could construct the ditch through the land, and that he also said that, if plaintiffs would promise to let the ditch be constructed peaceably through the land, he would stop the prosecution." Held, that the ruling of the court sustaining an objection of defendants to the offer was erroneous; that it was competent, relevant, and material, as against defendant Rowe.

(Syllabus by the Court.)

Appeal from district court, Box Elder county; C. H. Hart, Judge.

Action by Annie Johnston and another against William Meaghr and others. From a judgment for defendants, plaintiffs appeal. Reversed.

R. H. Jones, for appellants. Evans & Rogers, for respondents.

ZANE, C. J. This action was brought to recover damages for the alleged malicious prosecution of the plaintiff Annie Johnston. The other defendant is her husband. They allege in their complaint that William H. Rowe was receiver of the Bear Lake & Bear River Irrigation & Canal Company, and that he and the other defendants on June 28, 1894, at the county of Box Elder, in the state of Utah, maliciously and without probable cause, instituted a prosecution before a justice of the peace against the plaintiff Annie Johnston; that they falsely alleged in their complaint that she had threatened to assault defendant Meaghr and others with deadly weapons; that the justice issued a so-called warrant upon such representations; that the defendants thereupon by force compelled her to go with them to Bear River City, in that county, where they unlawfully, maliciously, and without probable cause, imprisoned her; that they then forced her to go to Brigham City; that they imprisoned her and her infant child there in a noisome jail for the space of five days; that the justice of the peace discharged her from the proceedings to keep the peace on the 7th day of July following; and that the district court, to which the case had been taken, dismissed the same on the 18th day of October of the same year. And they alleged damages, special and general, and demanded judgment in a sum named. Thus, the plaintiffs allege that the defendants maliciously and without probable cause prosecuted the plaintiff; and they characterized the warrant upon which she was arrested as a "so-called warrant," and aver that the defendants imprisoned her unlawfully, maliciously, and add that they imprisoned her without any right or authority. In view of the fact that the complaint was not demurred to, and that the Code has adopted one form for all civil actions, plaintiffs' counsel argues, in effect, that the defendants might be found

guilty of false imprisonment, or malicious prosecution; that the court might regard the complaint as stating both or either of those causes of action. In so doing, counsel, in effect, insists that the cause of action may be regarded as based on a trespass committed by defendants against the plaintiff, by unlawfully arresting and detaining her without any legal authority, or on the ground that defendants maliciously, falsely, and without probable cause, prosecuted her. There is but one count in the complaint. Two causes of action are not separately stated. If plaintiffs' position is sound, their cause of action stands on a want of probable cause, and malice, and also on a trespass. The gist of the one cause of action is the institution of the suit without probable cause, and with malice. The gist of the other cause of action is the unlawful, direct, and forcible invasion of a personal right,—of a person's right to liberty. The foundation fact of each cause of action differs essentially. One charges defendants with directly doing an unlawful act. The other charges them with maliciously and unlawfully causing the magistrate to issue the warrant which caused the constable to make the arrest. "Although any particular fact may be the gist of a party's cause, and the statement is indispensable, it is still a most important principle of the law of pleading that in alleging the fact it is unnecessary to state such circumstances as merely tend to prove the truth of it. The dry allegation of the facts, without detailing a variety of minute circumstances, the evidence of it, will suffice. \* \* \* The object of the science of pleading is the production of a single issue upon the same subject-matter of dispute. The rule relating to duplicity or doubleness tends more than any other to the attainment of this object. It precludes the parties,—plaintiff as well as defendant,—in each of their pleadings, from stating or relying upon more than one matter constituting a sufficient ground of action in respect to the same demand, or a sufficient defense to the same claim, or an adequate answer to the precedent pleading of the opponent. The plaintiff cannot, by the common-law rule, in order to sustain a single demand, rely upon two or more distinct grounds or matters, each of which, independently of the other, amounts to a good cause of action in respect of such demand." 1 Chit. Pl. 125, 126. While section 3126, 2 Comp. Laws Utah 1888, declares that "there is in this state but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs," and while all distinctions as to the forms of civil actions are abolished, distinctions as to the causes of actions remain. At the common law "the joinder of actions often depends on the form of the action, rather than on the subject-matter or cause of action." 1 Chit. Pl. p. 190. This author further says that: "The science of

special pleading may be considered under two heads: (1) The facts necessary to be stated; (2) the form of the statement." Page 214. In other words, the statement of the cause of action, and the form of the statement. The Code adopts one form for all civil actions, but the facts constituting the various causes of action for which that form is prescribed must differ, as the relationships of the persons claiming rights and the performance of duties must differ; and, as the relationship of the persons against whom such claims are made must differ, the subjects and objects to which such rights and duties must relate, and about which litigation may arise, must differ. Causes of action arising amid the complicated and varying relationships, conditions, circumstances, and situations of human affairs must differ, and each cause should be described by a statement of its appropriate facts. They should not be jumbled together, to produce confusion and error. Each contract, liability, right, or duty should be separately stated. The particular breach, violation, or negligence should be averred, for each constitutes a distinct cause of action, and each cause should be separately stated that they may be understood. As we have seen, at the common law distinct causes of action cannot be blended in one statement,—one count. And this rule the Code has adopted and declared. At common law the joinder of counts in the same complaint was ordinarily, though not always, determined by the nature of the cause of action. Such joinder must be so determined, in all cases, under the Code. In section 3220, 2 Comp. Laws Utah 1888, the causes of action that may be united in the same complaint are classified according to their subject-matter, and, after dividing them into seven classes, the section concludes: "The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to person." This rule authorizes the joinder of a count for malicious prosecution with one for false imprisonment, in the same complaint, but requires them to be separately stated; that is to say, embraced in distinct counts. We have been more careful in the consideration of the point, because the cases of *Railroad Co. v. Rice*, 36 Kan. 593, 14 Pac. 229, and *Bauer v. Clay*, 8 Kan. 580, to which we have been referred, may be understood as announcing a different rule. Those cases do not clearly distinguish the rule applicable to forms of action from the rule applicable to causes of action.

The foregoing presents the question for determination: Do the facts stated in the complaint describe a cause of action for malicious prosecution, or for false imprison-

ment? The warrant issued, and upon which the plaintiff Annie Johnston was arrested, is characterized as a "so-called warrant." It is not alleged that the warrant was void, nor do the facts alleged authorize the court to regard it as absolutely void and of no effect. In construing a pleading upon demurrer, the maxim is "that everything shall be taken most strongly against the party pleading, or, rather, that, if the meaning of the words be equivocal, and two meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading, because it is to be presumed that every person states his case as favorably to himself as possible." But no demurrer was presented to this complaint, and we are called upon to apply the rule applicable after trial, verdict, and judgment, in the light of the evidence, the action of the court, and concessions of parties. And that maxim is, as we think, "that the language of the pleading is to have a reasonable intention and construction, and, where an expression is capable of different meanings, that shall be taken which will support the declaration, etc., and not the other which would defeat it." 1 Chit. Pl. p. 237. Though the meaning of the words of the complaint under consideration may be equivocal, and one meaning supports the count as stating a cause of action for malicious prosecution, and the other does not, we must adopt the former, because that supports the complaint. We must therefore regard the count under consideration as stating a cause of action for malicious prosecution.

At the conclusion of the evidence and examination of the witnesses, the jury returned a verdict for the defendants, as the court had instructed them. And the court then entered a judgment on the verdict against the plaintiffs, and for the costs incurred in the prosecution and defense of the case. From this judgment the plaintiffs took this appeal, and they assign the instruction to return a verdict for the defendants as error.

If there was a substantial conflict in the evidence before the jury as to whether the defendants, or either of them, caused the prosecution mentioned in the complaint to be commenced, and as to whether the plaintiff Annie Johnston made the threats mentioned in the complaint upon which the warrant against her issued, and as to whether such defendants, or either of them, had a reasonable fear that the crime threatened would be committed, then the instruction excepted to was erroneous. Or, if reasonable men might differ as to the existence of those facts, the instruction was erroneous. Before finding against the defendants, or any of them, the jury were required to believe, from a preponderance of the evidence, that they caused the prosecution, and did not have reasonable cause to believe that plaintiffs made the threats, or that they did not have a reasonable fear that the crime threatened

would be committed. And, if the evidence left room for a difference of opinion among reasonable men as to the existence of those facts, the court was bound to submit the evidence to the jury. Section 4796, 2 Comp. Laws Utah 1888, authorizes an information to be laid before a magistrate, that a person has threatened to commit an offense against the person or property of another. And section 4798, Id., authorizes the magistrate to issue a warrant for the arrest of such person, if it appears from the depositions that there is just reason to fear the commission of the crime threatened. Probable cause for a criminal prosecution is equivalent to reasonable cause, and consists of facts in the mind of the prosecutor sufficient to lead a person of ordinary caution to believe that the party to be prosecuted is guilty, or, as applied to this case, that the offense was threatened by Annie Johnston, as stated, and that there was just reason to fear that the crime threatened would be committed. Inasmuch as the court, in giving the charge excepted to, must have assumed that the evidence proved the threats charged probable cause, and the absence of malice, and that there was no substantial conflict in the evidence as to the existence of these facts, we are bound to consider the evidence, in order to determine whether the court announced in its charge the rule of law applicable to the evidence before the jury. While the ninth section of article 8 of the state constitution declares that "in cases at law the appeal shall be on questions of law alone," this court will review the ruling of the court in the case, and will examine the evidence with respect to which it was made, and to which it was applied. Without understanding such evidence, this court cannot decide whether the ruling was right or wrong.

It appears from the evidence that the plaintiffs have been in the actual possession of the tract of land about which this contention arose 16 or 17 years; that plaintiff Annie Johnston claimed to own it; that the tract had been inclosed with a fence, but that it was down at the time and at the place where the defendants attempted to enter; that Meaghr, the prosecutor, and the defendant Rowe, who directed the entry and prosecution, knew that plaintiffs were in the actual possession of their claim; that Meaghr went to the plaintiffs' house on the land the day before the attempted entry was made, and sought plaintiffs' consent to construct an irrigating ditch across the same, which they refused. It also appears that on the morning of the day the defendant Meaghr, with two other men, all directed by Rowe, with a team of four horses, and a plow, attempted to enter upon plaintiffs' land to construct a lateral ditch across the same to the land of one Tarpie; that the plaintiff Annie Johnston, with a stick six or eight feet long, about the size of a broom handle, with a tack

in one end of it, met them at the boundary of her land, and forbade them to enter; that they attempted to drive on, regardless of her prohibition; that she applied the tack and stick to the horses, and turned them aside; that the other plaintiff, her husband, was on a horse about 100 feet away, and had a Winchester rifle, which both plaintiffs testified was not loaded, but was used as a bluff; that he also had a pistol, which he said was for defense in case of personal violence. It also appeared that he made some threats in case the defendants persisted in entering the land; that, after two or three attempts to enter, the defendants went away. It does not appear that the woman had any deadly weapon, and it appears that she was small. Defendant Meaghr testified that he had no fear of the woman or the man before or after the attempt; that he heard her say the land was hers, and that she would defend it. Witness Rowe testified that he gave one Jarvis orders to bring the case before the prosecuting attorney for prosecution, and in an affidavit in evidence he said that: "Provided Mr. Johnston would allow a ditch to be peaceably constructed, there would be no more objection. What we require is to have that ditch constructed, from my own standpoint."

Undoubtedly the plaintiffs were co-operating to prevent the defendants Meaghr and Rowe from taking their land for a ditch, and the husband threatened to shoot Meaghr and the men that were with him, if they persisted, and his wife, though not armed with any deadly weapon, was sanctioning such threats, and using her stick on the team as they passed onto the land; and, if the entry had been persisted in, there was probably some danger that the husband would shoot. But were such threats, made upon the condition that if defendants persisted in an unlawful purpose, and a forcible and unlawful act, such as sections 4796 and 4798, cited, contemplate? Can one who attempts to take possession of another's land, who is in actual possession, forcibly and unlawfully, when the other forbids, resists, and threatens to shoot, have him arrested and bound over to keep the peace, while he unlawfully appropriates the land to his own use? Can a party, by swearing that he fears another will commit a threatened crime against him if he persists in trespassing on his property, require the other to give a bond to keep the peace while he does the unlawful act? Peace warrants and bonds to keep the peace are not intended to protect men in doing unlawful acts against others. Their object is to secure an observance of law, not to encourage its violation. It does not appear that the defendants proposed to take plaintiffs' land for a public purpose, but this question it is not necessary to decide, because there was no attempt to take it by virtue of the right of eminent domain. No condemnation proceedings had been instituted. The plain-

tiffs were in actual possession, and that was prima facie evidence of title in fee simple. 1 Greenl. Ev. § 100. "Mere occupancy of land, however recent, gives the possessor a title against one who cannot show a better claim, and is sufficient to enable him to maintain an action against a stranger." 2 Wat. Tresp. p. 246; Look v. Norton, 55 Me. 103; Kilborn v. Rewee, 8 Gray, 415. The plaintiffs had the legal right, as against defendants, to defend their possession by any degree of force short of taking human life. 1 Bish. Cr. Law, §§ 857, 861. The plaintiff Annie Johnston did no more than defend her possession against persons who were attempting to take possession of a portion of it and appropriate it permanently to their use without any legal right whatever. It does not appear that there was any probable cause for the prosecution of the plaintiff, and it does not appear that the facts were fully and fairly stated to a competent attorney at law before the prosecution was instituted, and that the prosecution was upon such advice. It is true that the justice decided in favor of the prosecution, and held the plaintiff Annie to give a bond to keep the peace; but when the case was brought before the district court the prosecuting attorney, for the territory, said that probable cause did not exist for the prosecution, and dismissed it. Judgments of magistrates against defendants in prosecutions to bind persons to keep the peace, and in preliminary examinations, are not conclusive. They simply furnish a prima facie presumption of probable cause. Diemer v. Herber, 75 Cal. 287, 17 Pac. 205; Newell, Mal. Pros. p. 290; Bacon v. Towne, 4 Cush. 217. The order holding the plaintiff to bail should have been submitted, with all the other competent, relevant, and material evidence, to the jury, upon the issue of probable cause and malice, under proper instructions.

We are of the opinion that the court erred in instructing the jury to find the issues for the defendants William Meaghr and William H. Rowe. A case for malicious prosecution was not made against the other defendants. Whether one for false imprisonment against them was shown, it is not necessary to decide as the case stands.

Plaintiffs' counsel, on the trial of this case, offered to prove by witness Annie Johnston that defendant Rowe said at the trial that he informed plaintiff Johnston that he would make the ditch through the land; that, when Johnston opposed his men, he had instructed Meaghr to go and commence the criminal proceeding, so that he could construct the ditch through the land; and that, if Johnston would promise to let the ditch be constructed peaceably through the land, he would then stop the prosecution. The court sustained an objection by defendants' counsel to this offer, and plaintiffs excepted. This testimony was competent, relevant, and material upon the issue of

probable cause and malice. It would have tended to show the purpose of the prosecution by defendant Rowe,—that it was not to prevent the commission of a threatened crime. It was admissible as against the defendant Rowe.

The record does not clearly present the evidence, objections, exceptions taken, and the ruling of the court upon which other errors are predicated and assigned, and we will therefore not consider them. For the reasons stated, the judgment appealed from is reversed, and the court below is directed to grant a new trial, and to permit such proper amendments as may be necessary to a trial of the case on its merits.

BARTCH and MINER, JJ., concur.

(116 Cal. 41)

SUMAN v. ARCHIBALD et al. (No. 19,465.)  
(Supreme Court of California. Feb. 10, 1897.)

APPEAL—SUBSTITUTION OF PARTIES—DISMISSAL—  
WHO MAY MOVE—FAILURE TO FILE POINTS  
AND AUTHORITIES.

1. Where judgment is rendered against plaintiff in foreclosure, and one of the defendants, who recovers on a counterclaim, assigns his judgment after appeal, the assignee cannot be substituted as appellee.

2. A corporation which has purchased the interest of one of the appellees in the judgment may join the other appellee in a motion to dismiss the appeal.

3. Appellant's failure to file his points and authorities in time is not excused by the fact that one of the appellees, pending the appeal, was adjudged insolvent, and that no assignee had been appointed.

Department 2. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by John V. Suman against Melville Archibald and another to recover on a note, and to foreclose the mortgage security. Judgment for defendants, and plaintiff appeals. Dismissed.

Paris & Allison, for appellant. Curtis, Oster & Curtis, for respondents.

McFARLAND, J. There has been submitted in this case a motion on behalf of the Abstract & Title Company, a corporation, for the substitution of said corporation as defendant and respondent in the place of Melville Archibald; and also a motion by said corporation and the defendant and respondent Fannie Archibald to dismiss the appeal herein, upon the ground of a failure of appellant to file his points and authorities within the time prescribed by the rule of this court.

The motion to substitute said corporation as defendant and respondent must be denied. The action was brought to foreclose a mortgage against the defendants Melville and Fannie Archibald, executed to secure a promissory note given by said defendants to plaintiff for \$1,000. The Archibalds (defendants) set up a counterclaim; and, after

trial, the court denied any judgment for plaintiff upon the note and mortgage, and rendered judgment in favor of Melville Archibald against the plaintiff for \$155.44, with interest and costs, and also rendered judgment for both Melville and Fannie Archibald against plaintiff for their costs. It is quite apparent that if the judgment should be reversed, and the cause sent back for a new trial, the said corporation would not be a proper party defendant, and it would be entirely unjust to substitute said corporation for the said Melville Archibald, against whom alone a judgment could be rendered on the said note and mortgage. Therefore the said corporation should not be substituted as such defendant.

But it appears that the said Melville Archibald sold and assigned all his interest in said judgment to the said corporation; and we think that the motion to dismiss the appeal may be considered as a motion made by the respondent Fannie Archibald, and the said corporation, as the successor in interest of the said Melville Archibald. And as the transcript was filed in March, 1894, and no points and authorities have been filed, the motion to dismiss, under the rule, should be granted. There is an affidavit on file on behalf of the appellant that on the 8th day of December, 1894, the said Melville Archibald filed a petition in insolvency, and was adjudged insolvent, and that no assignee in insolvency has been appointed; but this fact did not excuse the appellant for not filing his points and authorities in time. *Stewart v. Spaulding*, 72 Cal. 264, 13 Pac. 661; *Merritt v. Glidden*, 39 Cal. 564; *O'Neill v. Dougherty*, 46 Cal. 576; *Hestres v. Brennan*, 37 Cal. 388. The motion for substitution is denied; and the motion to dismiss the appeal is granted, and the appeal is dismissed.

We concur: HENSHAW, J.; TEMPLE, J.

(116 Cal. 62)

TURNER v. KEARNEY. (S. F. 188.)

(Supreme Court of California. Feb. 12, 1897.)  
CONTRACTS—HARVESTING OF GRAIN—USE OF MORE  
THAN ONE MACHINE—CONSTRUCTION.

Plaintiff contracted to harvest all of defendant's grain during the "current season," of 1893, in a thorough and farmer-like manner, "without waste or unnecessary loss"; to begin harvesting as soon as any of the grain was ripe, and work continuously until the harvest was completed; and to "use one or more eighteen-foot combined harvesters." It was admitted that in that locality weeds began to grow up among the grain at harvest time, and that high winds, which shell out the overripe grain, were then frequent. *Held*, that plaintiff was bound to use more than one harvester, should the condition of the grain make this necessary for its proper preservation. *McFarland, J.*, dissenting.

In bank. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by R. M. Turner against M. Theodore Kearney. From a judgment in favor of plaintiff, defendant appeals. Modified.

Chickering, Thomas & Gregory and Gertie & Sloss, for appellant. Freeman & Bates, for respondent.

TEMPLE, J. This is an action to recover balance due on a contract for harvesting grain for the defendant. Judgment was for plaintiff, and defendant contends that there should be a deduction of \$800 from the judgment, on the ground that plaintiff did not harvest the grain in a good and farmer-like manner, as he had contracted to do, and the evidence and a stipulation made to serve in lieu of evidence show that there resulted an unnecessary loss to that amount. It was stipulated in the contract that plaintiff "will harvest, thresh, and sack all of the grain now growing on the Fruit Vale estate, in Fresno county, and belonging to the said Kearney, during the current season of 1893; that he will harvest all of said grain in a thorough and farmer-like manner, without waste or unnecessary loss; that he will begin such harvesting as soon as any of said grain is thoroughly ripe and fit for harvest, and will thereafter work continuously until the entire harvest is completed; that, for the purpose of performing said work, he will use one or more eighteen-foot combined harvesters, which shall be, and be maintained, in thoroughly good working condition." A great deal of testimony was taken at the trial on both sides upon the question as to whether the grain ought not to have been sooner harvested, and whether, in consequence of delay, there was not unnecessary loss resulting from the grain being shelled out by the wind or the growth of weeds, which prevented an efficient harvesting thereof. Many of the facts were then agreed upon by a stipulation made at the trial, as follows: "It is hereby stipulated and admitted by the parties hereto, for the purposes of the present action: That the plaintiff entered upon the performance of the contract referred to in his complaint and annexed to defendant's answer, to wit, on or about the 12th day of June, 1893, and as soon as defendant's grain was ripe and fit for harvesting; and that the plaintiff harvested the grain on defendant's land in a thorough and farmer-like manner, without waste or unnecessary loss (except such loss as may have resulted from the delay hereinafter specified); and that the plaintiff worked continuously with an eighteen-foot harvester and its appliances and crew until the work was completed, to wit, August 29, 1893; and that on August 12, 1893, he brought another harvester to work, and both harvesters and their crews and appliances were thereafter continuously engaged in the work until it was completed, and

both harvesters were maintained in a thoroughly good and working condition. That, after grain is fully ripe and fit for harvesting in the neighborhood in which defendant's grain was, it is liable to be shelled out by wind and other causes, and thereby lost. The defendant's ground was subirrigated, on which there was a tendency for weeds to grow in and among the grain; and, the longer they were permitted to grow, the greater was the probable loss in harvesting, by reason of such weeds growing as high or higher than the grain, and interfering with the threshing and cleaning of the grain while passing through the harvester. That, by reason of all the grain not being harvested within forty days after it was fit for harvesting, there was a loss through its shelling out and by reason of such weeds interfering with the harvesting and cleaning of the grain, and such loss, the parties agree, amounted to eight hundred dollars, and no more; and if, as a matter of law, under said contract, it was the duty of the plaintiff to have provided sufficient means to have threshed all the defendant's grain without waste or unnecessary loss, then it is agreed that the damages resulting from his not furnishing other machines and appliances than those hereinbefore indicated amounted to eight hundred dollars, and no more; and if, on the other hand, it is found, as a matter of law, that it was not the duty of the plaintiff to avoid waste or unnecessary loss, then that the defendant is not to be allowed any damages in this action."

The contract itself must be construed in view of the surrounding facts as shown in the stipulation. It is there expressly admitted that there were special reasons why the grain should be harvested as soon as possible after it was ripe, and that the grain was not harvested within 40 days after it was fit to be harvested, and that not to so harvest it entailed waste and unnecessary loss to the extent of \$800; and it is further stipulated that, if it was the duty of the plaintiff under the contract to harvest the grain so as to avoid waste and unnecessary loss, then defendant is entitled to the said amount as damages, otherwise not. The stipulation cannot, of course, be construed to mean by the phrase "unnecessary loss" any loss which it would be possible to avoid by the greatest possible care and diligence, and by the best possible appliances. Such interpretation would make the stipulation a farce or a trick. One party was contending that the agreement to harvest the grain in a good and farmer-like manner required that it should be harvested in time to avoid unnecessary loss,—that is, such loss as would not be suffered if it had been so harvested in proper time; and the stipulation must be held to mean also that the loss was \$800 more than would have occurred if the grain had been so harvested.

I think we may start out with the proposi-

tion that no one would be likely to contract for the harvesting of his grain in a manner which would entail unnecessary loss in that sense, and much less would he in such a contract provide that the harvest may be so gathered as to cause such loss. Plaintiff contends that two conditions in the contract do have that effect, and, in substance, he contends that they were put in the contract for the express purpose of saving plaintiff from liability for such loss, provided he commenced the harvest in due time with one harvester, and continued the work without cessation until it was finished, and, while at work, did good work. In other words, the contract provides the test of due diligence, and that, if at least one harvester is used, it shall be deemed enough. The two stipulations in the contract referred to are that plaintiff will harvest all the grain now growing during the current season of 1893, and that he will use one or more harvesters, and keep it or them in good working condition. It is difficult to give any meaning to the phrase "current season" which shall indicate a time within which the work must be done. If it means the time within which that grain should be harvested, it is favorable to defendant. If it alludes to the time of harvest generally, it is very indefinite. We all know that grain ripens at different times on different kinds of soil and in different localities. No practical meaning can be given to it other than the harvesting season for that crop. The necessity for a quick harvest must depend greatly upon the season. The contract covered 2,300 acres of growing grain. In that locality high winds are frequent at that time of the year, and it seems that early harvests are essential to good harvests in a farmer-like manner, not only because of prevailing winds which cause overripe grain to shell, but also because at that time weeds begin to grow, which interfere with harvesting and entail loss. These facts were known to the parties when the contract was made. Now, the parties could not know that the season would not be such that grain would be almost wholly lost unless unusual exertions were made for a quick harvest. On the other hand, they did not know but it would ripen slowly, so that one harvester would suffice. I think it part of the common knowledge that combined harvesters are comparatively a recent improvement. By this stipulation the parties agreed that it should be harvested with a combined harvester, and that one or more should be used as the condition of the grain should indicate, and as would be necessary, that it might be done in a good and farmer-like manner, and without waste and unnecessary loss. If there is any doubt as to the purpose of the clause in regard to the use of one or more harvesters, it must, if possible, be construed so as to effectuate the general intent manifest in the contract. The construction given by the respondent seems unreasonable, and

makes the contract such as no one in his senses could have deliberately made. See, on this subject, section 1650, Civ. Code. The case is remanded, with directions to modify the judgment by deducting \$800, with interest on that sum from August 29, 1893.

We concur: HARRISON, J.; HENSHAW, J.; VAN FLEET, J.

McFARLAND, J. I dissent. It will be observed that appellant's real contention is that respondent should have finished harvesting within 40 days after the first grain was ripe; that for this purpose he should have used more than one harvester; and that because he did not use more than one harvester, and did not complete the harvesting within the 40 days, therefore he failed to "harvest all said grain in a thorough and farmer-like manner, without waste or unnecessary loss." But respondent did not contract to harvest the grain at any particular time, except that it should be done "during the current season of 1893," and it is clear that it was done within that season. He did not contract that he would use more than one 18-foot combined harvester. He began to harvest, as soon as the grain was ripe and fit for harvest, with an 18-foot combined harvester, and thereafter worked "continuously until the entire harvest was completed." While he was so engaged, he did the work "in a thorough and farmer-like manner, without waste or unnecessary loss." He therefore complied with his contract. No doubt, it would have been to appellant's advantage if respondent had put on two or three or a dozen 18-foot combined harvesters, and had completed the work of harvesting within a week or two. But he did not contract so to do, and appellant did not require or ask any such a covenant. There is no provision in the contract that respondent should finish the work at any particular time other than during the current season; and the only other provision as to "delay" is that respondent should commence as soon as the wheat should be fit to cut, and should continuously prosecute the work until the harvesting was finished. This he did. Therefore, in my opinion, the court below properly construed the contract, and the judgment and order should be affirmed.

(5 Cal. Unrep. 601)

SYKES v. ARNE. (L. A. 123.)  
(Supreme Court of California. Feb. 12, 1897.)  
CHATTEL MORTGAGES.

When a mortgagor in default as to an installment tenders the amount due before the mortgagee elects to treat as due the entire debt, as the mortgage authorizes him to do on default, the right of election is lost.

Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.  
Action by Flora Sykes against W. H.

Arne. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

B. F. Thomas, for appellant. A. E. Putnam, for respondent.

VAN FLEET, J. We regard this action as without any foundation in merit in its inception, and as manifestly vexatious and oppressive; and the appeal which is here prosecuted as frivolous. The action was to foreclose a chattel mortgage given to secure eight several promissory notes, amounting in the aggregate to \$675, made by defendant to plaintiff, falling due at different dates; and was prosecuted upon the theory that by defendant's default in the payment of the note first due plaintiff was entitled to treat defendant as in default on all, and recover the entire debt, under a clause of the mortgage which provided: "That if the mortgagor shall fail to make any payment as in the said promissory notes provided, then the mortgagee may take possession of said property, using all necessary force so to do, and may immediately proceed to sell in the manner provided by law, and from the proceeds pay the whole amount in said notes specified." The first note, which was for \$100, fell due January 1, 1895, but allowed 10 days' grace. At the maturity of this note plaintiff placed it in the hands of an agent for collection, who, on the 10th of January, presented it for payment at defendant's office in Santa Barbara. Defendant at this time paid \$80 on the note, and asked for time to collect in some outstanding accounts before paying the balance. This request was granted. The agent called again on January 12th, when defendant paid the interest accrued on the note to that date, but asked further time to pay the balance of \$20 due on the principal. Mr. Harsh, the agent, having to return to Los Angeles the following day, told defendant he would leave the note in the hands of Mr. McNulta, a local attorney, and desired defendant to pay the balance by the following Monday. Defendant did not pay the balance on that date, and on January 21st was notified by Mr. McNulta that he must pay the balance on the next day, January 22d. On the latter date defendant went to the office of Mr. McNulta, and handed him the balance due on the note, which the latter received, and was about to receipt for, but, on the objection of one Elliott, who claimed to represent plaintiff, Mr. McNulta refused to receive the money, and, although earnestly solicited by defendant to accept the payment, returned the money to defendant. Thereafter, on January 25th, plaintiff notified defendant of plaintiff's election to declare all of said notes due, and demanded their payment. This was refused by defendant, and on January 31st this action was commenced. Defendant set up



these facts in his answer, and therein again tendered, and deposited in court, the balance due on the note for principal and interest, amounting to \$21. The court found substantially in accord with the averments of the answer, and gave judgment for plaintiff for \$21 without costs.

Plaintiff claims that the evidence does not sustain the findings; that the evidence shows that the agent had no authority to extend time to defendant in which to pay the note; that McNulta's authority to receive payment for plaintiff had been revoked before the tender was made to him on January 22d; that defendant was, therefore, in default, and plaintiff had a right to declare the entire debt due, and proceed to foreclose. None of these contentions find support in the record. The evidence shows that the action of the agent was fully within his authority, and that the tender to McNulta was at a time when he was still authorized to act for plaintiff. The clause in the mortgage gave plaintiff the election, upon defendant's default, to proceed at once for the whole debt, but plaintiff did not see fit so to do. The first default was waived by the failure of plaintiff to take advantage of the right to so proceed, and, before plaintiff elected to proceed, defendant had made a tender of all that was actually due; and plaintiff's right to sue for the unmatured notes was thereby lost. "When the entire debt may be treated as due upon any default in payment of interest or other installment, at the election of the mortgagee or trustee, the whole debt is nevertheless not due until the election has been exercised." 8 Am. & Eng. Enc. Law, 192, 193, and cases there cited. There were no errors in the rulings on evidence. The whole case would seem to indicate a disposition on the part of the plaintiff to vex and annoy defendant, as the evidence clearly shows that defendant was ready and anxiously desirous of meeting his obligation before the bringing of the action. We think that such litigation should be discouraged. The judgment and order are affirmed, with \$100 damages to defendant.

We concur: HARRISON, J.; GAROUTTE, J.

(116 Cal. 47)

STORKE v. STORKE. (L. A. 206.)

(Supreme Court of California. Feb. 12, 1897.)

DIVORCE—SETTING ASIDE DECREE.

1. Where a husband has been granted a decree of divorce, and thereafter is ordered to pay a certain sum to defray costs of transcript on application of his wife for a new trial, and is unable to do so, the court cannot, under Civ. Code, § 140, authorizing it to enforce such an order by any remedy applicable to the case, set aside the decree.

2. Under the express provisions of Code Civ. Proc. § 473, the authority of a court to vacate a judgment on motion is limited to six months.

Department 1. Appeal from superior court, Santa Barbara county; John L. Campbell, Judge.

Action by C. A. Storke against Yda A. Storke for a divorce, in which there was a decree for plaintiff. From an order setting aside the decree, plaintiff appeals. Reversed.

B. F. Thomas and A. A. Oglesby, for appellant. Grant Jackson, Thos. McNulta, and S. E. Crow, for respondent.

HARRISON, J. The superior court rendered a judgment herein, which was entered January 18, 1895, by which it was decreed "that the marriage between the said plaintiff and the said defendant be dissolved, and the same is hereby dissolved, and the said parties are, and each of them is, freed and absolutely released from the bonds of matrimony, and all obligations thereof; and it is further ordered, adjudged, and decreed that the plaintiff pay to the defendant the sum of two hundred and fifty dollars alimony, and two hundred and fifty dollars counsel fees." February 12, 1895, the court, upon the application of the defendant, setting forth that she desired to move for a new trial, and to appeal from the order denying the same, if it should be denied by the court, and that it was necessary to have the testimony written out, and that she had no means to pay for the same, ordered that the plaintiff pay to the defendant on or before the 18th day of February, 1895, the sum of \$350, to defray the cost of transcribing said testimony. The defendant gave notice of her intention to move for a new trial February 12th, and on March 28th, within the time allowed therefor by the court, presented and served upon the plaintiff her proposed statement on motion for a new trial. Amendments thereto were proposed by the plaintiff, and the judge before whom the cause was tried designated May 8th as the day on which he would settle the statement. On that day the matter came on for settlement, and the judge continued the same until July 8th, reciting in his order of continuance the previous order requiring the plaintiff to deposit with the clerk \$350, and that, "through his inability to comply with said order," the plaintiff had not deposited the same. No further proceedings appear to have been taken towards a settlement of the statement, and on November 6th the defendant presented her petition to the superior court, setting forth the foregoing facts, and stating that she has been advised by her counsel that she has substantial grounds upon which to make a motion for a new trial, but that she has not the means to defray the expense thereof, or to procure a transcription of the reporter's notes, and "that plaintiff is now, and at all times since the 18th day of February, 1895, has been, unable to pay her the money necessary to procure the said testimony," and asked that said judgment be vacated and set aside. Notice of this ap-

plication was given to the plaintiff, and, after hearing the parties thereon, the court made an order that "the said decree and judgment in favor of plaintiff, C. A. Storke, and against defendant, Yda Addis Storke, filed and entered January 18, 1895, decreeing a divorce between said plaintiff and defendant, be, and each of them are, hereby vacated and set aside." From this order the present appeal has been taken. The court, also, at the time of making its order, made certain findings of fact as the basis thereof, in which it found "that the statement on motion for a new trial prepared by defendant's attorney, and presented and served as in the preceding finding mentioned and found, represented as correctly as possible the proceedings had on the trial of said cause," but that the judge was unable to settle the said statement without having the testimony written out, and also "that the plaintiff is now, and at all times since the 18th day of February, 1895, has been, unable to pay defendant the money necessary to procure the said testimony."

The authority of the court to direct the plaintiff to pay to the defendant such money as it might deem necessary to enable her to prosecute her motion for a new trial or for an appeal is well settled. *Bohnert v. Bohnert*, 91 Cal. 428, 27 Pac. 732. And it may enforce its order by any remedy "applicable to the case." Civ. Code, § 140. After the court had rendered judgment in favor of the plaintiff upon the issues presented in the case, and such judgment had been entered in the records of the court, it could not be vacated or set aside except by such proceedings as would authorize a court to vacate or set aside a judgment in any other action. The plaintiff had thereby acquired a right of which he could be divested only in the mode provided by law. When the court had found that, by reason of acts of cruelty on the part of the defendant, the plaintiff was entitled to a judgment of divorce from her, and had caused such judgment to be entered in its records, it had no jurisdiction to vacate or set aside that judgment, unless it should determine that it had been rendered through some error, either of law or fact, or by reason of some inadvertence or excusable neglect. It could not disturb or change the rights of the parties, as thus determined, by reason of any facts or transaction occurring subsequent to the rendition of the judgment. And, while it had authority to direct the plaintiff to pay further alimony pending a motion for a new trial, an order vacating the judgment would not be a remedy "applicable" for the enforcement of such order, for the reason that the rights of the parties as fixed by the judgment could be changed only in the mode prescribed by the statute. The authority of the court to vacate a judgment on mere motion is limited by section 473, Code Civ. Proc., to six months after its entry (*Brackett v. Banegas*, 99 Cal. 623, 34 Pac. 344), whereas in the present case more than nine months had elapsed before the present mo-

tion was made. When the court found that the statement which had been prepared by defendant's counsel represented "as correctly as possible the proceedings had on the trial of said cause," its proper course was to settle the same accordingly. The motion for a new trial could then have been heard, and, if the court should have been of the opinion that its former judgment was incorrect, it could have acted accordingly. The order is reversed.

We concur: VAN FLEET, J.; GAROUTTE,

(116 Cal. 43)

UNITED STATES v. CROOKS et al. (No. 9,613.)

(Supreme Court of California. Feb. 10, 1897.)  
NEW TRIAL—NOTICE OF MOTION—APPEAL—NOTICE  
—TIME OF TAKING.

1. Under Code Civ. Proc. § 659, requiring notice of motion for new trial to be served on the "adverse party," a defendant whose land, together with that of his co-defendants, is condemned, must serve the latter with notice of such motion.

2. Where a defendant whose land, together with that of his co-defendants, is condemned, appeals, the latter are "adverse parties," on whom notice of appeal must be served.

3. An appeal taken more than one year after the entry of the judgment will be dismissed.

In bank. Appeal from superior court, Alameda county; N. Hamilton, Judge.

Action by the United States against M. Crooks, A. A. Cohen, and others to condemn land for a canal. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant Cohen appeals. Appeal from judgment dismissed, and order affirmed.

Garber, Thornton & Bishop, for appellant. Samuel G. Hilborn, Walter Van Dyke, Wm. Craig, and H. S. Foote, U. S. Dist. Atty., for respondent.

HARRISON, J. The United States brought the present action against the appellant and many other defendants for the condemnation of a strip of land lying between the San Leandro and San Antonio Estuaries, for the purpose of constructing a tidal canal by which to turn the water from San Leandro Bay or Estuary into the head of San Antonio Estuary. The complaint contains a description of the strip of land sought to be condemned, and also separate descriptions of the portions thereof belonging to each of the defendants, of which three are alleged to be claimed by the appellant. The superior court rendered a judgment in favor of the plaintiff for the condemnation of the entire strip, and awarding damages to each of the defendants for the value of their respective parcels of land so condemned. The appellant moved for a new trial, and the same was heard upon a statement of the case, and denied. From this order, and also from the judgment, he has appealed.

The appeal from the judgment was taken

more than one year after its entry, and must therefore be dismissed.

The appellant's notice of intention to move for a new trial was served upon the plaintiff alone, and his notice of appeal from the order denying a new trial was also served upon the plaintiff alone, and was not served upon any of his co-defendants. In *Herriman v. Menzies* (Cal.) 44 Pac. 660, it was held that a failure to serve the adverse party with the notice of intention to move for a new trial is attended with the same results before the superior court as attend the failure to serve the adverse party with a notice of appeal when the matter is brought before the supreme court. It was said in that case: "Section 639, Code Civ. Proc., requires that the party intending to move for a new trial shall 'serve upon the adverse party a notice of his intention.' The 'adverse party' upon whom this notice is to be served is determined by the same rules as is the 'adverse party' upon whom a notice of appeal is to be served, viz. every party whose interest in the subject-matter of the motion is adverse to or will be affected by the granting of the motion or changing the former decision of the court; and a failure to serve such adverse party with the notice of an intention to move for the new trial will be attended with the same consequences as a failure to serve an adverse party with a notice of appeal from the judgment. The superior court can have no jurisdiction to re-examine an issue of fact that it has tried, and change its decision thereon, unless all the parties to the issue and former decision are properly before it." The "adverse party" is every party to the action, whether plaintiff or defendant, whose interests may be injuriously affected by a reversal or modification of the judgment or order appealed from.

By the judgment in the present case the lands of each of the several defendants, as well as those of the appellant, were condemned for the use of a tidal canal between the two estuaries, and this judgment has become final as to all the lands condemned, and also as to the amount of damages which each defendant is entitled to receive, except as to the appellant. The effect of a reversal of the order appealed from would be to set aside the judgment against the appellant, but would leave it in force as between the plaintiff and the other defendants. This would result in rendering futile the condemnation of the lands of the other defendants, since, unless the lands of the appellant are also condemned, the public use for which the judgment of condemnation was rendered, —the construction of the tidal canal,—and the defendants' right of passage through the same, could not be made available. The judgment for the condemnation of the strip of land described in the complaint was an entirety, and each defendant is interested in maintaining it as an entirety. A reversal as to a part would impair the rights therein

which the other defendants have acquired, since, unless all the lands within this strip can be made available for a tidal canal, the plaintiff would have no right to divest any of the owners of their lands, or the defendants to receive damages therefor. Each of these defendants is therefore an adverse party, who should have been served with the notice of intention to move for a new trial. As they were not before the court at the hearing of this motion, the court had no jurisdiction to grant a new trial, and the motion therefor was properly denied. In *Butte Co. v. Boydstun*, 68 Cal. 189, 8 Pac. 835, a judgment was given for the condemnation for a public highway of a strip of land belonging to several defendants. Boydstun appealed therefrom, but did not serve his notice of appeal upon his co-defendants. This was held to be fatal to his appeal, since, by a reversal of the judgment, his co-defendants might be injuriously affected, and they were therefore to be considered as adverse parties. The appeal from the judgment is dismissed. The order denying a new trial is affirmed.

We concur: VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

(5 Cal. Unrep. 598)

DE WITT v. SUPERIOR COURT OF FRESNO COUNTY. (S. F. 556.)

(Supreme Court of California. Feb. 10, 1897.)

CONTEMPT OF COURT—WHAT CONSTITUTES.

An attorney for defendant, in an action in which judgment is rendered that defendant restore possession of premises, who thereupon notifies the sheriff that he is the owner, and in exclusive possession, of the premises, and that defendant is not in possession, and that he will, by all lawful ways, resist any attempt to take possession from him, is not thereby guilty of contempt, though his notice deters the sheriff from serving the writ.

Department 1. Certiorari by H. G. De Witt to review judgment of the superior court of Fresno county. Judgment annulled.

L. L. Cory, for petitioner. Geo. B. Graham, for respondent.

BEATTY, C. J. This is certiorari to review the judgment of the superior court of Fresno county adjudging the petitioner guilty of contempt of court. The affidavit upon which the petitioner was cited was as follows: "[Title, Court, and Cause.] State of California, County of Fresno—ss.: [Affidavit of Graham.] Geo. B. Graham, being duly sworn, deposes and says: That he is now, and at all times since the commencement of the above-entitled action has been, the attorney of the plaintiffs in said action. Affiant now gives this honorable court knowledge and information that said defendant, H. G. De Witt, has committed and is guilty of contempt of this court in the

unlawful interference with the process of this court in defying the judgment, process, and officer of this court, and by attempted intimidation of such officer, committed as follows, to wit: On the 18th day of April, 1896, said court rendered its decision in said action, and on the 21st day of April, 1896, in writing, made, signed, and filed its findings and judgment in said action. That, among other things, said court in said action found as follows: 'That on the 23d day of November, 1895, the plaintiff, Sarah I. Foulke (H. A. Foulke, her husband, joining her therein), made a lease, and leased, demised, and let to Stephen Arthur, the said defendant, the premises situate, lying, and being in the county of Fresno, state of California, described as follows, to wit: Lots 15 and 16 in block 21 in the town of Clovis, as the same appears on the map or plat of said town now on file and of record in the office of the county recorder of the said county of Fresno, for the term of one year from the first day of December, 1895, for the total rent or sum of six hundred dollars, payable fifty dollars in advance on the first day of each and every month during said term. That said defendant, Arthur, was let into and took possession of said premises under said lease, and still continues to hold and occupy the same, as tenant thereof, by virtue of said lease.' Also the further finding, to wit: 'That said defendant, Arthur, holds over and continues in possession of said premises after default in the payment of rent, as aforesaid, without plaintiff's permission, and against her will and consent, and after three days' notice in writing to surrender possession of the same.' That thereupon said court ordered and adjudged that the said defendant, Stephen Arthur, restore to plaintiff, Sarah I. Foulke, the possession of said premises within five days from the date thereof, and that a writ of restitution be, and the same was, awarded. That after the rendition of said judgment, and after the making and filing of said findings and judgment, on, to wit, April 22, 1896, said H. G. De Witt served on Jay Scott, sheriff of the said county, whose duty it was to execute any and all writs in said action, a certain written document signed by him, the same being in the words and figures as follows, to wit: 'To Jay Scott, Sheriff of Fresno County: You will please take notice that I, the undersigned, am the owner of, and in the sole and exclusive possession of, all that certain real property, with the improvements thereon, situated in the town of Clovis, in the said county of Fresno, particularly described as follows: Lots 15 and 16 in block 21 in the town of Clovis, according to the map of said town of Clovis on file and of record in the office of the county recorder of said county of Fresno. That Stephen Arthur is not, nor has he been for some time past, in any manner in the occupancy or possession of said prop-

erty, or any part thereof, and that in the event, in any manner, you attempt to take possession of said property, or any portion thereof, under or in pursuance of any writ in any judgment rendered in the superior court of the county of Fresno, state of California, in an action therein pending by S. I. Foulke and H. A. Foulke against the said Stephen Arthur, that I will resist any such attempt to take possession thereof, and will treat you as a trespasser, and will hold you responsible on your bond for any invasion of my rights, if you attempt to take possession of said property, or any portion thereof, under or in pursuance of such writ, or otherwise. And that I will resist by all lawful ways and means, and by all reasonable force, any attempt on your part to take the possession of said property from me, or any attempt on your part to place the said H. A. Foulke and Sarah I. Foulke, or either of them, in possession of said property, or any part thereof. Dated April 21, 1896. Yours, etc., H. G. De Witt. Due service by a copy of the foregoing notice is hereby admitted this 22nd day of April, 1896. Jay Scott, Sheriff, by L. A. Spencer, Under Sheriff.' That by reason of the false statements and threats contained in said notice, said Jay Scott, sheriff, as aforesaid, has been obstructed, deterred, and intimidated in the execution of said writ of restitution issued upon said judgment in said action by the clerk of said court under his hand and the seal of said court on April 28, 1896, and delivered on the same day to said sheriff to execute, and by reason of said threats said sheriff has not and will not execute the same. Wherefore, affiant prays this honorable court to take cognizance thereof, to the end that said H. G. De Witt may be justly dealt with and adequately punished for said contempt. [Signed] Geo. B. Graham. [Properly subscribed and sworn to.]"

Every court in matters of contempt is a court of special and limited jurisdiction. It has power only to punish those acts which are contempts of its authority, and the question whether the facts alleged amount to a contempt is always jurisdictional.

The facts alleged in the affidavit above quoted do not constitute a contempt of court, and the judgment founded upon it is necessarily void. Said judgment is hereby annulled.

We concur: HARRISON, J.; VAN FLEET, J.

(116 Cal. 71)

GRANT v. LOS ANGELES & P. RY. CO.  
et al. (L. A. 194.)

(Supreme Court of California. Feb. 13, 1897.)

APPEALABLE ORDERS—RECEIVERS—ESTOPPEL.

1. An order substituting parties is not appealable under Code Civ. Proc. §§ 939, 963.

2. An order fixing the compensation of a receiver, and taxing it as costs as against all

parties, and directing the receiver to appropriate in payment a fund in his hands as receiver, is appealable, "as a final judgment upon a collateral matter arising out of the action." *Grant v. Superior Court*, 39 Pac. 604, 106 Cal. 324, followed.

3. A receiver having been appointed by consent of plaintiff creditor and defendant debtor, other creditors intervened, and obtained the appointment of a different receiver. *Held*, that one who subsequently purchased plaintiff's interest in the action, and was substituted as plaintiff, was not estopped to deny the validity of the latter appointment.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the California Bank against the Los Angeles & Pacific Railway Company. From an order fixing the compensation of a receiver, and an order refusing to vacate an order substituting L. A. Grant as plaintiff, said Grant appeals. Dismissed as to the order of substitution, and reversed as to the order fixing compensation.

White & Monroe and John S. Chapman, for appellant. A. W. Hutton and Anderson & Anderson, for respondents.

VAN FLEET, J. The record embraces appeals from two orders of the superior court,—the first, an order fixing the compensation of one Silver as receiver in the action; and the other, an order denying an application of the appellant, Grant, to vacate a former order substituting him as plaintiff in the action in place of the California Bank, the original party plaintiff. Respondents object that the orders are not appealable, and that both appeals should be dismissed, and ask that such disposition be made. As to the order of substitution, this objection is well taken. The statute gives no appeal from such an order, and it is subject to review only on appeal from a final judgment. Code Civ. Proc. §§ 939, 956, 963; *Welsh v. Allen*, 54 Cal. 211. As to the order fixing the receiver's compensation, while not nominally one from which the statute authorizes a direct appeal, and while it sufficiently appears that it is not a special order made after final judgment, it is, nevertheless, an adjudication from which an appeal will lie. The order not only fixes the compensation of the receiver, but taxes such compensation as costs in the action, as against all the parties, and directs and authorizes the receiver to apply towards its payment the balance of a fund remaining in his hands as such receiver. Such an order, however it may be designated, is, in legal effect, "a final judgment upon a collateral matter arising out of the action," and is "appealable by any party interested in the fund." *Grant v. Superior Court*, 106 Cal. 324, 39 Pac. 604, and cases there cited. The appellant has such an interest.

Appellant contends that the order appointing the receiver in the action was absolutely void upon its face, for want of jurisdiction in the court to make it; and that the order fixing the compensation of the receiver, being

founded thereon, is equally void. That the order appointing the receiver was void is not denied by defendant, and has been so held by this court in two cases in which that particular order was under review (*Smith v. Superior Court*, 97 Cal. 348, 32 Pac. 322; *Smith v. Railroad Co.* [Cal.] 34 Pac. 242), where it was held that the action was not one in which a receiver could be competently appointed. Respondents contend, however, that, notwithstanding the absolute nullity of the order appointing the receiver, the appellant is not at liberty to urge that objection, nor to plead the invalidity of the present order; that the receiver was appointed at the request of the California Bank, the original plaintiff in the action, thereby estopping said bank from questioning the regularity of said appointment; and that appellant, having been substituted for said bank as plaintiff, is likewise estopped. But, assuming that the bank would be estopped (which is not to be here determined), we do not think that appellant can be held to rest under any such incapacity. The record discloses that on the commencement of the action, on the application of the then plaintiff, the California Bank, and by the consent of the defendant, the Los Angeles & Pacific Railway Company, one Spillman was appointed receiver. A few days subsequently, certain other creditors of said defendant intervened in the action, and at once interposed objections to the continuance of Spillman as receiver; that thereupon the latter resigned, and the present receiver was appointed at the request of said interveners. Appellant was not then a party to the action, and did not become such until some considerable time thereafter. He had nothing to do with such appointment, and has not, so far as appears, ever done anything looking to an affirmation or ratification of the action of the court in appointing said receiver, other than the mere fact of taking an assignment of the notes sued on by the bank, and thus making himself a party to the action. This of itself is not sufficient to estop or preclude him from making the objection now urged. *Smith v. Railroad Co.*, *supra*. In that case it appeared that Smith had made himself a party to the present action in the court below, by intervening as a judgment creditor of the defendant, the Los Angeles & Pacific Railway Company, and asking that his claim be allowed and paid, with those of other creditors, from the sale of certain of defendant's property. Subsequently, he moved the superior court to be allowed to issue execution on his judgment against the property in the hands of the receiver, on the ground that the appointment of the receiver was void and of no effect. The application was denied, and Smith appealed. It was objected that making himself a party to the action was a ratification of the appointment of the receiver therein, and estopped him from attacking the order. It was held that his acts

did not have such effect, and that he was not thereby estopped. "It is doubtless true," say the court, "that one may so conduct himself as to be estopped from repudiating the action of a receiver, although the order by which the receiver was appointed is void. But in this case mutuality, which is one of the essential elements of estoppel, is wanting. The plaintiff herein could not, by simply intervening in the other case, receive any benefit; and no one, certainly, was prejudiced by his action therein. The receiver was not appointed upon his suggestion. If there be any act tending to validate the order appointing the receiver, such act is the act of the court, and not of this plaintiff; but, as we shall see, the order was void." The same want of mutuality exists here. The appellant did not procure the appointment of the receiver, nor has he reaped any benefit therefrom; while it would seem from the record that his attitude towards said order has been one of hostility from the first.

In purchasing the interest of the bank in the litigation, appellant did not assume the liability of the bank to the receiver, if any such rested upon it, nor can he be presumed to have so intended. The order appointing the receiver being void, the presumption would be that appellant took the assignment of the notes with knowledge and in view of that fact. Indeed, that order had, by the judgment of this court, been declared void more than three months prior to the date when appellant was substituted as a party to the action. That order being void, the present order must, of necessity, be held, as to appellant, likewise void.

It is urged by respondent that the receiver should be paid for his services by some one; but, if so, that obligation should rest upon those who sought and procured his appointment. The appeal from the order of substitution is dismissed. The order fixing the compensation of the receiver is reversed.

We concur: HARRISON, J.; McFARLAND, J.

120 Cal. 156)

PIERCE v. SOUTHERN PAC. CO. (L. A. 184.)<sup>1</sup>

(Supreme Court of California. Feb. 17, 1897.)

LIMITATIONS—CARRIERS OF GOODS—NEGLIGENCE—DAMAGES—CONTRACTS—VALIDITY.

1. The burden on a foreign corporation urging the statute of limitations to show the bar (Code Civ. Proc. § 458) is not sustained without proof that it has designated one on whom process against it may be served (St. 1871-72, p. 826), on its doing which the right to avail itself of the statute is made to depend.

2. When from point of shipment to destination there are two customary routes, one through a cold country and one through a warm one, and the latter route becomes obstructed, the carrier is negligent in sending over the cold route, without notice to shipper or consignee, goods which it is bound to know are destructible by frost.

<sup>1</sup> Rehearing granted.

3. A stipulation in a bill of lading releasing the carrier from liability for its negligence is void as against public policy.

4. A stipulation freely entered into, in consideration of a lower freightage, fixing the measure of damages in case of loss at a certain sum, is valid, though loss be caused by the carrier's negligence. *Hart v. Railroad Co.*, 5 Sup. Ct. 151, 112 U. S. 331, approved.

5. Where trees cultivated by the shipper were delivered to the carrier on the agreement that the "actual invoice cost" should be the measure of damages in case of loss, "invoice cost" meant "value."

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by R. W. Pierce against the Southern Pacific Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

A. B. Hotchkiss, for appellant. Chapman & Hendricks and Curtis, Oster & Curtis, for respondent.

SEARLS, C. Appeal by defendant, the Southern Pacific Company, a corporation, from a judgment in favor of plaintiff for \$8,065, interest and costs, and from an order denying its motion for a new trial. In February, 1891, the plaintiff, R. W. Pierce, shipped from Apopka, county of Orange, Fla., by the Florida Midland Railway, two car loads of orange trees, consigned to Gulick Bros., Riverside, Cal. The first car load of trees was shipped February 19, 1891, and was received at New Orleans by the Southern Pacific Company February 25, 1891. The other car load was shipped February 24, 1891, and was received by the Southern Pacific Company at New Orleans, March 1, 1891. Each car load was shipped under a bill of lading signed by plaintiff, R. W. Pierce, and by the agent of the Florida Midland Railway. A copy of the bills of lading was given to plaintiff. They were upon printed forms, with blanks, filled in with the names of the consignors, etc., in substance as follows: "Marked and consigned to Gulick Bros., Riverside, California, one car load of orange trees, via Southern Pacific, 20,000 weight, car initialed, N. & L. No. —," etc. In the printed form it was provided that "the articles and packages" (contents unknown) were in "their nature perishable, fragile, or otherwise susceptible to damage," were shipped at a rate "lower than the regular tariff charges of said railway company and connections," and it was agreed that the shippers should "insure said Florida Midland Railway Company and all lines over which said shipment may pass, between points of shipment and destination, against claims by loss or damage incurred by reason of delay in transportation, or any other cause arising out of responsibility as master over its agents or servants (gross negligence excepted), incident to the shipment, and that the actual invoice cost at point of shipment will be taken as measure

of damages to govern settlement of any damages for which the carriers may be liable,' and that 'claims for loss, damage, or overcharge arising out of this shipment shall be presented to agents of delivery lines within one week after arrival of the property at its destination.'" The rate of freightage on the trees was \$1.97½ per 100 pounds. The Southern Pacific had a direct through line of railroad, owned or operated by it, and by others in connection with it, from New Orleans, across Texas, New Mexico, and Arizona, via El Paso and Yuma, to Colton, Cal. When the freight reached New Orleans this line was broken by severe storms and washouts in Arizona, and was not likely to be available for the transportation of freight for some time. Under these circumstances, by order of its general agent, the trees in question were sent north through Texas to Denver, Colo., thence to Ogden, Utah, thence over its Central Pacific road, etc., to Colton, Cal., where the cars were delivered to the Southern California Railway, and by it hauled to Riverside, a distance of some six or eight miles, arriving at the latter point March 12 and March 16, respectively, 1891. While in transit by the northern route, the trees were entirely destroyed by freezing.

Plaintiff avers in his complaint, among other things, in substance: (1) That there was no invoice of the cost of the trees; that they had been grown by him in Florida, and were shipped to California for sale. (2) That they were delivered to defendant at New Orleans, to be shipped to Riverside by its direct and usual route. (3) That the defendant violated the contract by shipping through a northern climate, where, at that season of the year, intensely cold weather was common, and hence that defendant was guilty of gross negligence, etc., whereby the trees were frozen and destroyed. These allegations are substantially denied by the answer. Defendant also set up the provisions of subdivision 1 of section 339 of the Code of Civil Procedure (two years) in bar of the action.

1. The contention of appellant is that the evidence showed without contradiction that more than two years elapsed between the negligence complained of and the bringing of the suit, and hence that the finding of the court against defendant's plea of the statute is contrary to the evidence. We think this contention cannot be maintained. Under our Code of Civil Procedure (section 458) the statute of limitations is sufficiently pleaded by alleging the bar and referring to the section and subdivision thereof (if so divided) relied upon. But the section continues: "If such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred." The allegations of the answer are to be deemed controverted. Code Civ. Proc. § 462. It therefore devolved upon the defendant to es-

tablish the facts necessary to support the plea. The complaint avers, and the answer admits, that defendant "is a corporation organized under the laws of the state of Kentucky, and engaged in the business of operating a railroad as a common carrier of freight and passengers in the state of California and elsewhere, and was so engaged in the said business during all the time hereinafter mentioned." A statute of this state approved April 1, 1872, entitled "An act in relation to foreign corporations" (St. 1871-72, p. 826), requires all corporations created by the laws of any other state to designate some person residing in the county in which its principal place of business in this state is, upon whom process issued by authority of or under any law of this state may be served, and must file such designation in the office of the secretary of state, and a copy of such designation, duly certified, shall be evidence of such appointment. The second section of the act provides that a failure to comply with such requirement shall preclude such corporation from "the benefit of the statutes of this state limiting the time for the commencement of civil actions." Section 3 of the act confers the right of corporations organized under the laws of other states which have complied with the foregoing requirement to avail themselves of the benefits of our statutes of limitation. It being admitted that defendant was a corporation organized under the laws of another state, compliance with the foregoing statute became a necessary fact to be proven as a predicate to its right to avail itself of the benefit of the statute of limitation. This it failed to do, and hence the court did not err in its finding against its defense of the statute of limitations. We may observe that the general rule is that foreign corporations, although having agents and transacting business in a state, come within the provisions of statutes limiting the time for the commencement of actions and making a saving as against absent debtors. It is only by comity that they are permitted to transact business in another state than that of their creation. They are citizens, so to speak, of the state of their creation, and are, in contemplation of law, absent from all other states than the one of their situs. Wood, Lim. p. 599. The statute, then, is not a limitation upon the right of foreign corporations to avail themselves of our statutes of limitations, but it confers that right, subject only to the condition prescribed.

2. Appellant contends that its general demurrer to the complaint upon the ground "that said complaint does not state facts sufficient to constitute a cause of action against this defendant" should have been sustained. The complaint, as we think, in giving, as it does, a history of the whole transaction, including the contract made with the Florida Midland Company to ship the orange trees to Riverside, Cal., via the Southern Pacific Company; the transportation of the trees to New Orleans, and delivery to defendant under the

contract; its failure to forward them by its usual route, with a statement of the route by which defendant shipped the goods; the objections to such route, and the result of the deviation, etc.,—sets out a cause of action, either sufficient to hold defendant as for a breach of the contract, or, failing in that, under its common-law liability as a common carrier. It may well be that a demurrer to the complaint upon the ground of ambiguity or uncertainty would have been good; but no such objection was presented.

3. The contention of defendant that it cannot be held liable for the reasons (a) that the bill of lading described the packages as "contents unknown"; (b) that it was not furnished with the bill of lading, or with an opportunity to inspect the property, so as to inform itself of the character thereof, or its liability to injury,—cannot be maintained. It is true, the printed portion of the bills of lading uses the following expression: "The following articles and packages (contents unknown), marked and consigned as below, to wit [then follows the description in each bill of lading in writing, which is in part as follows]: 1 car orange trees." Again, the evidence shows without contradiction that the cars were marked on the outside with the names and residence of the consignees, and "orange trees," marked in big plain letters. In addition to this, the cars had open ventilators at each end, affording an opportunity to see and examine the contents. Defendant must, therefore, be held to have known the contents of the cars, or, at least, to have had the means of knowledge at hand. "It is the duty of the carrier to transport the goods by the usual direct route, and for any loss which a departure from such route may occasion to them he is liable." Hutch. Carr. § 312. It is said, however, that where there are two or more customary routes, and the carrier is left free to choose between them, he may take his choice without incurring increased liability, if there are no special reasons which make the route chosen unsafe. *Express Co. v. Kountze*, 8 Wall. 342; *Maghee v. Transportation Co.*, 45 N. Y. 514. Judging from the testimony, it can hardly be said that the route by which defendant shipped the goods in this case was one of its customary routes. With a through route of its own through Texas, New Mexico, and Arizona, it sent the goods many hundred miles to the north, over roads operated by other companies, to meet its Central Pacific road at Ogden, in the state of Utah. Conceding, however, that the route was a usual one, there were special reasons for not sending goods which were liable to destruction by frost over this northern route in winter, where defendant might reasonably have expected the result which followed. When, therefore, defendant's through route via Ft. Yuma was obstructed by stress of weather, it became its duty to hold the goods until that or some other safe avenue was

opened, or to notify the consignees or consignor, and take their directions in the premises. The evidence shows that they did this with another car of like orange trees at a date a little earlier, and by direction of the consignees shipped them safely through by the Atlantic & Pacific Railroad. Where goods are marked in such a way as to indicate their character, or as to give notice to the carrier that their safety requires that they must be carried in a particular manner, such marks must not be disregarded. Hutch. Carr. § 310. In view of all the surrounding circumstances, we are of opinion that the defendant, by a failure to adopt one or the other of the foregoing courses, erred in judgment, and became liable to plaintiff for the results which followed. The evidence fails to establish a case of gross or wanton negligence; but still does, we think, show a want of that extraordinary care imposed upon common carriers of goods.

4. A carrier is not relieved from responsibility under a contract that he shall not be responsible if he has been guilty of negligence. *Railroad Co. v. Pratt*, 22 Wall. 123. It is contrary to public policy to permit the carrier to stipulate for exemption from the effects of the negligence of himself or his servants. Hutch. Carr. § 260, and cases there cited; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool & G. W. Steam. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469.

5. As to the measure of damages. The court below awarded damages up to the full value of the goods at the point of destination, although the uncontradicted evidence tended to show that the value at the shipping point was about one-half of that given. It will be observed that the contract between the plaintiff and the Florida Midland Railway was for a through shipment of the goods to Riverside. We repeat that portion essential to the matter in hand: "Whereas, said railway company has agreed that the cost of transportation \* \* \* shall not exceed \* \* \* \$1.97½ per 100 lbs., said rates being lower than the regular tariff charges of said railway company and connections: Now, therefore, said shippers, for themselves and consignees, do hereby insure said Florida Midland Railway Company and all lines over which said shipments may pass between points of shipment and destination. \* \* \* It is further agreed that the actual invoice cost at point of shipment will be taken as measure of damages to govern settlement of any damages for which the carriers may be liable." There is a wide distinction between a contract for exemption from liability in case of negligence which is usually held in derogation of public policy because tending to encourage negligence, and a contract fairly made, whereby, in consideration of a lower freightage, the parties agree upon a fixed or determinate value to be placed upon the article to be shipped in case of its loss. *Hutchinson*, at section 250,



after discussing the question of total exemption in case of negligence, adds: "To be distinguished from these cases, however,—though the distinction is not always observed,—are those cases, obviously different, in which, for the purpose of determining the shipper's liability for freight and the carrier's responsibility for damages, the value of the property is agreed upon. When such is the case, the supreme court of the United States and many of the state courts hold, to use the language of Mr. Justice Blatchford in *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151: "That where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation." In the same case the learned justice further said: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purpose of the contract of transportation between the parties to that contract. \* \* \* There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." We understand full well that there are many cases holding a contrary doctrine to that enunciated in *Hart v. Railroad Co.*, supra, but we think that case, which is cited as a leading one, is founded upon reason and justice, and that the trend of judicial opinion is to the doctrine there enunciated. See cases cited in *Hart v. Railroad Co.*, 112 U. S., at page 342, 5 Sup. Ct. 156. Respondent objects, and urges that, as the trees in question were cultivated by the plaintiff, there was not and could not be any "invoice price." The evident answer is that by the term "invoice price" was meant the cost or value of the property at the shipping point. That it had a fixed value at that point was attested by the evidence. One of the definitions of an invoice is: "A writing made on behalf of an importer, specifying the merchandise imported, and its cost or value." Black, Law Dict. Plaintiff sued upon his

special contract, and averred that defendant received the goods thereunder. Defendant averred in its answer "that it duly performed its duty under the contract set out in the complaint." We think the demand for damages from defendant was in due time, and sufficiently specific, in the absence of any demand by defendant of an invoice, to comply with the contract. We think the court erred in overruling the objection of defendant to proof of the market value of the trees at Riverside, instead of confining the inquiry to the cost or value of the trees at the point of shipment in Florida, as per contract, which, with the freight paid, was the true measure of damages. For this error we recommend that the judgment and order appealed from be reversed, and a new trial ordered.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

(116 Cal. 56)

WILLIAMS et al. v. BERGIN. (S. F. 487.)  
(Supreme Court of California. Feb. 12, 1897.)

STREET ASSESSMENT—SUPERVISORS—JURISDICTION  
— LIMITATIONS—DEMURRER—PRELIMINARY ACT  
— PERFORMANCE BY PLAINTIFF—REASONABLE TIME.

1. An order "that granite curbs be laid on F. street, between M. and T. streets, where not already laid, and that the roadway thereof be paved with basalt blocks, where not already so paved," sufficiently describes the work, since nothing is left to the discretion of the superintendent of streets.

2. Code Civ. Proc. § 458, providing that, if the plea of limitations is controverted, the party relying on it "must establish, on the trial, the facts showing that the cause of action is so barred," does not apply to a demurrer to a complaint on the ground that the facts alleged therein show that the cause of action is barred.

3. A demurrer to a complaint on the ground of limitations can be sustained only where it affirmatively appears from the complaint that plaintiff's cause of action is barred.

4. Where a statute in reference to municipal public improvements does not prescribe any particular time after the acceptance of the work within which the superintendent of streets shall issue the assessment and warrant therefor, the mere lapse of time for more than the period fixed as the duration of the lien is not a bar to their issuance.

5. When plaintiff's right of action depends upon some preliminary act which he has to perform, and the time within which such act must be performed is indefinite, a reasonable time will be allowed therefor, after which limitations will begin to run.

6. What is a reasonable time will depend upon the circumstances in each case.

7. Where a right of action depends upon an official act to be performed by a public officer, there is no presumption that any delay in the performance was unreasonable.

8. In an action, commenced February 26, 1896, on a street assessment, where the complaint shows that the work was completed May 1, 1892, and that the superintendent made and issued the assessment October 21, 1895, and

the averments are as consistent with holding that the delay in issuing the assessment was owing to the superintendent as to plaintiff, the complaint is not demurrable on the ground that it is barred by limitations.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by one Williams and others against one Bergin. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

J. C. Bates, for appellants. Thos. I. Bergin, in pro. per.

**HARRISON, J.** Action upon a street assessment. The board of supervisors of San Francisco ordered "that granite curbs be laid on Francisco street between Mason and Taylor streets, where not already laid, and that the roadway thereof be paved with basalt blocks, where not already so paved"; and a contract therefor, awarded to the plaintiffs, was on March 1, 1892, entered into between them and the superintendent of streets. The time fixed for the completion of the contract was 60 days from its date. It is alleged in the complaint that the work was completed according to the terms of the contract within this time, and was accepted by the superintendent, "who thereupon, on the 21st day of October, 1893, made and issued an assessment therefor," and on the same day issued a warrant for its collection. The present action was commenced February 26, 1896. The defendant demurred to the complaint upon the grounds that it does not state facts sufficient to constitute a cause of action, and that it appears upon its face that the supposed cause of action alleged therein is barred by the statute of limitations. The demurrer was sustained, and the plaintiffs have appealed.

1. The description of the work was sufficient to give to the board jurisdiction to order the improvement. Whether granite curbs had been laid on any part of the street, or any part of the roadway had been paved with basalt blocks, as well as the extent thereof, was capable of exact ascertainment, and did not depend on the arbitrament or discretion of the superintendent of streets. If the assessment should include any expense for paving or for curbs that were laid at the date of the order, it should be corrected on an appeal therefrom. Assessments in which the work has been similarly described have been frequently sustained. *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71; *Perline v. Erzgraber*, 102 Cal. 234, 36 Pac. 585.

2. The demurrer sufficiently presented the defense of the statute of limitations. *Brennan v. Ford*, 46 Cal. 7. The provisions of section 458, Code Civ. Proc., have reference to cases in which the statute is pleaded in the answer as an affirmative defense. It is in an answer, and not in a demurrer, that "facts showing the defense" would be proper, and the provision that "the party plead-

ing must establish on the trial the facts showing that the cause of action is so barred" clearly indicates that the section has no reference to a demurrer to a complaint upon the ground that the facts alleged therein show that the cause of action is barred. In such a case it is sufficient to specify the statute as one of the grounds of the demurrer. A demurrer upon this ground can be sustained, however, only when it affirmatively appears from the complaint that the plaintiff's cause of action is barred. The defendant cannot, in support of the demurrer, invoke other facts which might be introduced in his defense.

3. The grounds urged by the defendant in support of the demurrer are that, inasmuch as the statute provides that the superintendent shall make the assessment and issue the warrant thereon "after the contractor has fulfilled his contract" to his satisfaction, a delay in making the same of more than three years after his acceptance of the work is unauthorized, and the assessment and warrant issued by him are incapable of enforcement. As the statute does not prescribe any particular time after the acceptance of the work within which the superintendent shall issue the assessment and warrant, the mere lapse of time for more than the period fixed as the duration of the lien is not of itself a bar to their issuance, since the issuance may have been delayed by circumstances sufficient to justify the delay. Whether they were sufficient therefor was to be considered by the officer before making the assessment, and, as he is presumed to have regularly performed his official duty, his act in making the assessment is entitled, *prima facie*, to be considered valid, if there could have been any circumstances under which an assessment would, after such lapse of time, have been authorized. If there are any facts or reasons why the lapse of time was such as to deprive him of the right to make the assessment, they should be presented as affirmative matter in defense thereto.

4. It is further contended by the defendant that, inasmuch as the plaintiffs were entitled to demand the assessment and warrant from the superintendent immediately upon his acceptance of the work, they could not, by their delay in making such demand, suspend the running of the statute in favor of the property owner. The rule is well settled that when the plaintiff's right of action depends upon some act which he has to perform preliminarily to commencing suit, and he is under no restraint or disability in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by a delay in performing such preliminary act, and that, if the time within which such act is to be performed is indefinite or not specified, a reasonable time will be allowed therefor, and the statute will begin to run after the lapse of such reason-

able time. What is a reasonable time will depend upon the circumstances of each case. A party cannot by his own negligence, or for his own convenience, stop the running of the statute. *Palmer v. Palmer*, 36 Mich. 487; *Railroad Co. v. Burlingame*, 36 Kan. 628, 14 Pac. 271; *Ball v. Railroad Co.*, 62 Iowa, 751, 16 N. W. 592; *Hugh v. Commissioners*, 92 Ind. 580; *Bills v. Mining Co.*, 106 Cal. 21, 39 Pac. 43; *Thomas v. Beach Co.* (Cal.) 46 Pac. 899. The rule rests upon the principle that the plaintiff has it in his power at all times to do the act which fixes his right of action. The reason of the rule, however, ceases when the right of action is not under his control, but depends upon the act of another; and when the act upon which his right to maintain an action depends is an official act, to be performed by a public officer in the line of his official duty, there is no presumption that any delay in its performance was unreasonable. In the present case the plaintiff had no right of action until after the issuance and return of the warrant, and there is nothing in the complaint from which it can be inferred that there was an unreasonable delay in the issuance of these documents. If it had appeared therein that the plaintiffs had neglected to make a demand therefor for an unreasonable time, or greater than the period during which the assessment would have been a lien upon the property, there might have been ground for holding them barred from enforcing the assessment; but, since the averments in the complaint are quite as consistent with holding that the delay in issuing the assessment was owing to the superintendent as to the plaintiffs, it must be held that it does not appear therefrom that the plaintiffs' cause of action is barred by the statute. If in fact the delay resulted from such neglect or other conduct of the plaintiffs as should deprive them of the right to enforce the assessment, such defense can be fully set forth in the answer. The judgment is reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

(116 Cal. 75)

PEOPLE v. BOSQUET. (Cr. 191.)

(Supreme Court of California. Feb. 15, 1897.)

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — PROSTITUTION — INSTRUCTIONS — IMPEACHING WITNESS — SUFFICIENCY OF FOUNDATION.

1. Act March 31, 1891 (St. 1891, p. 285), providing that a husband who "connives at, consents to, or permits" the placing or leaving of his wife in a house of prostitution, shall be convicted for felony, does not deprive him of his liberty without due process of law, on the ground that it makes criminal a mere operation of the mind.

2. In a prosecution under Act March 31, 1891 (St. 1891, p. 285), making it a felony for a husband to place or leave, or to consent to the placing or leaving of, his wife in a house of prostitution, an instruction that defendant's consent could be shown by some "omission," as well as by his act or declaration, is correct.

3. Asking a witness whether he remembers "telling A., at one time, in a conversation on L street, in this city, about three months ago,—within the last five months,—that," etc., sufficiently identifies time, place, and person, as required by Code Civ. Proc. § 2052, to lay a foundation for impeaching the witness.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county; A. C. Hinkson, Judge.

Eugene Bosquet was convicted of a felony, and appeals. Affirmed.

E. C. Hart and C. T. Jones, for appellant. W. F. Fitzgerald, Atty. Gen., C. N. Post, Dep. Atty. Gen., and Frank D. Ryan, Dist. Atty., for the People.

SEARLS, C. Defendant was informed against in the county of Sacramento, under a statute approved March 31, 1891, entitled "An act to prevent the placing or keeping or leaving of married women in houses of prostitution, and to punish persons therefor." St. 1891, p. 285. He pleaded not guilty, and, upon a trial, was convicted. He thereupon moved in arrest of judgment, and also for a new trial, both of which motions were denied, and defendant was sentenced to five years' imprisonment in the state prison. Defendant appeals from the judgment, and from the orders above specified.

The statute above referred to, and upon which the prosecution is based, reads as follows:

"Section 1. Any man who by force, fraud, intimidation, threats, persuasion, promises or any other means, places or leaves, or procures any other person or persons to place or leave, his wife in a house of prostitution, or connives at, consents to or permits the placing or leaving of his wife in a house of prostitution, or allows or permits his wife to remain therein, shall be guilty of a felony, and on conviction thereof shall be imprisoned in the state prison for not less than three years nor more than ten years.

"Sec. 2. In all prosecutions under this act the wife shall be a competent witness against the husband."

The first point made by appellant for reversal is that that portion of the statute of March 31, 1891, which permits a conviction of a husband for felony "for conniving at, permitting, or consenting to the placing or leaving of his wife in a house of prostitution," is, in violation of section 13 of article 1 of the constitution, "in that it deprives a man of his liberty without due process of law; it makes criminal a mere conviction, act, or operation of the mind." Section 20 of our Penal Code only enunciated a familiar principle of law when it declared that "in every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence." The "connivance," "consent," "permission," of the husband, spoken of in the statute, are used to characterize the substantive act of the wife in being, remaining, or living in a house of prostitution. The fact

of the wife being in a place of that character is the central and essential fact or predicate, just as, in murder, the death of the person charged to have been murdered is an essential fact. This being admitted or proven, the consent, permission, or connivance of the defendant is to be proven by such declarations, acts, or omissions as outwardly manifest the intention. We fail to appreciate the force of appellant's objection, or to see any violation of the constitutional provision referred to, in the information against, trial and conviction of, the defendant.

It is next urged that the court erred in adding the words inclosed in parentheses to the following instruction asked by defendant, and given with such addition by the court: "Even though the testimony should show that the defendant was married to Lucy Bosquet, his wife, and that she is a prostitute and lived in a house of prostitution, that is not enough of itself to warrant his conviction on this charge, but you must be satisfied by the evidence, beyond all reasonable doubt, that he allowed or permitted her to be placed in or to remain in a house of prostitution by some act or declaration (or omission) of his; that is, that she was in a house of prostitution by his consent." The pith of the instruction is contained in the last sentence, viz.: "That is, that she was in a house of prostitution by his consent." Now, consent may be evinced in a variety of ways. A failure to object to a transaction, with a full knowledge of all the facts and circumstances, and where it becomes the duty of one to dissent, although an omission, is evidence from which consent may properly be inferred. There was ample evidence in the case to give point to the instruction as modified, and hence we think it was proper. The instructions on the part of the defendant are too lengthy to be repeated here. They were full, explicit, and quite as favorable to the defendant as the facts warranted.

It is further urged by appellant that "the trial court erred in permitting the prosecution to impeach the testimony of Lucy Bosquet, under an insufficient foundation." Lucy Bosquet was the wife of the defendant, and was a witness in his behalf. She testified that she lived in a house of prostitution at 229½ L street, Sacramento, which she rented, and in which she plied her vocation as a prostitute; that she had followed that business prior to her marriage to the defendant; that she had promised to reform, but preferred to follow her former calling; that her husband always objected to her doing so,—never in any way consented thereto; that he expostulated with her as to her meretricious conduct; and much more to the same effect. Upon cross-examination, counsel for the prosecution put to her the following question: "You remember of telling her [Amelle De Longe, of whom she had spoken], at one time, in a conversation on L street, in this city [Sacramento], about three months ago,—

within the last five months,—that Eugene was very good to you; that he wanted you to live in the crib six or seven months more, or six or seven months longer, in order that you could earn money enough for he and you to go to Paris?" To this question she answered, "No; I never said that to anybody." In rebuttal, Amelle De Longe was called, and, in answer to the question put to Lucy Bosquet, answered that the latter did so state to her (the said Amelle) at the time and place mentioned. Was the foundation sufficient? Section 2052 of our Code of Civil Procedure enunciates the rule as it previously existed in this state and most of the states of the Union. It is in part as follows: "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and, if so, allowed to explain them." The time and place of the conversation, and the person with whom had, should be specified with sufficient definiteness to enable the witness clearly to identify it. The identification of the occasion and the person to whom the statement is made are of prime importance in directing the attention of the witness to the subject-matter. *Oil Co. v. Van Etten*, 107 U. S. 325, 1 Sup. Ct. 178; *Koehler v. Buhl*, 94 Mich. 406, 54 N. W. 157; *People v. Devine*, 44 Cal. 452; *Birch v. Hale*, 99 Cal. 290, 33 Pac. 1088. In *People v. Turner*, 65 Cal. 540, 4 Pac. 553, the question was: "Did you not state, in the month of September, in the presence of William Knowles and James Robinson, on the way between town here and the race track, that you would go into court?" etc.; and it was held that the question was sufficiently definite to lay the foundation for an impeachment of the witness. If the circumstances stated in the question are such as to describe the occasion with reasonable certainty, a variance as to the time has been held unnecessary. *Jones, Ev. § 849*. In *Nelson v. Iverson*, 24 Ala. 9, where the time was designated as in the spring of a given year, when it was in fact February, it was held sufficient. In *Lawler v. McPheeters*, 73 Ind. 577, it was held that, where the impeaching witness could not recollect the date, it was sufficient that he was about to speak of the declaration or conversation to which the attention of the principal witness had been called. In the present case the question put to the principal witness was accurate and explicit as to the statement made, the person to whom made, the place where made, and, we think, sufficiently explicit as to time, to entitle the prosecution to contradict the statement by the witness. The evidence was conflicting. Both defendant and his wife, while admitting that the latter lived in a house of prostitution, denied that it was by the procurement or consent of the former. On the other hand, there

was sufficient testimony on the part of the prosecution, if credited by the jury, as it must have been, to warrant the verdict as rendered. Finding no reversible error in the record, we recommend that the judgment and orders appealed from be affirmed.

I concur: BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

(57 Kan. 705)

# STATE v. NEWMAN.

(Supreme Court of Kansas. Feb. 6, 1897.)

HOMICIDE — INSANITY — EVIDENCE — PROVINCE OF JURY.

1. Where the defense of insanity is interposed in a prosecution for murder, the important question is the mental capacity or incapacity of the defendant at the time of the homicide; but testimony as to his state of mind shortly before and after the homicide may be received as tending to show his mental condition at the time of the homicide.

2. Where testimony is received tending to show that the defendant was mentally incapable of committing a crime, it is the duty of the court to charge the jury upon the law applicable to that defense.

3. Although the testimony may be weak as compared with other testimony tending to show sanity, the duty of weighing the same is for the determination of the jury; and in such case a refusal to submit the question to the jury, with proper instructions as to the law governing the same, is error.

(Syllabus by the Court.)

Appeal from district court, Jackson county; Louis A. Myers, Judge.

Samuel F. Newman was convicted of manslaughter, and appeals. Reversed.

Samuel F. Newman was charged with the murder of Charles Hoover on the evening of October 17, 1895. At the trial he was found guilty of manslaughter in the second degree, and the punishment adjudged was imprisonment at hard labor for a term of three years. The following is a summary of the evidence as shown by the record: "The testimony tended to show and prove that Charles Hoover, an unmarried man, of about thirty years of age, on the evening of October 17, 1895, went from his home in Holton to the house of defendant, Samuel F. Newman, situated on a farm about seven miles from Holton, going in a buggy drawn by one horse. That at the home of the defendant on that evening was the wife of the defendant and his three little children. That the neighbors of defendant were notified by the brother of defendant, one James Newman, that Charles Hoover had been shot and killed by the defendant in this action. That the neighbors got to the home of defendant between 1 and 2 o'clock of the morning of October 18, 1895, and found Charles Hoover dead in the yard, his body lying on his face, his head being about twelve feet east of the porch, and his feet ly-

ing the length of his body nearer the porch. There were three places where there were pools of blood, about the same distance from the porch. A bullet hole shot by a ball from a Winchester rifle entered his head at the back, and came out over his left eye and the forehead, and of which wound he died. The body was quite cold when first found by the neighbors. The place where he was found was in the county of Jackson, in the state of Kansas. The window curtains were drawn down. The door of the kitchen had the appearance of being bursted in from the outside. Two pistol shots were fired into the west wall from the east or from the direction of the east kitchen door, which had been broken open. There was an appearance of a scuffle having taken place in the kitchen and near the east door. That on the wooden ceiling of the kitchen there were marks of some sort of a pistol or gun barrel having been scraped along the ceiling in two places, having the appearance of there having been a struggle to obtain it. On the dead body of Hoover were found two letters from the wife of the defendant to Hoover, one inviting him to meet her in Holton on the night of October 16, 1895, and the other upbraiding him for not meeting her as requested in preceding letter, and inviting him to come out to her home on the evening of October 17, 1895, as her husband would be gone from home to Dennison. It was admitted that Hoover went to the home of the defendant for the purpose of having sexual intercourse with the wife of the defendant. Hoover was found unarmed, with the exception of a small rock in his coat pocket. He was fully dressed. There was no bed in the kitchen where the shots were fired. The defendant was found by the neighbors on the kitchen floor, lying upon his back, moaning and apparently in great agony. The body of Hoover showed a cut on the forehead, and a bruise or two on the head, and a cut in his hat. The inside of his hat was stained with blood, which was found in the kitchen. There was blood on the west door casing about five feet eight inches from the floor. The top hinge was bloody and bent. A Winchester rifle, the property of James Newman, brother of defendant, and a pistol, bent and partly broken, which defendant had bought on October 15, 1895, were found in the kitchen. James Newman lived about half a mile north of defendant, on the same farm. And that James Newman had that afternoon taken his wife to Holton, and left her for the night. That as late as 8 p. m. of October 17, 1895, the defendant and James Newman were seen in Circleville, about four miles away from defendant's home. That they stopped at James Newman's house, and took with them his Winchester gun, on defendant's return home that night. It was testified to that defendant had said that Hoover did not fight him back. That he had shot Hoover with a Winchester rifle while Hoover was running

away. It is also shown that no evidence of cuts or bruises were found on person of defendant. The defendant put upon the stand witnesses who testified as to his good character; and one witness, Alexander Newman, testified that the defendant was found by him at about 1 o'clock of the morning after the killing in a dazed condition, as if he did not know what he was doing; and also one witness, John Hicks, testified that Hoover tried to borrow a revolver of him on the afternoon of the homicide." The defendant complains of the rulings made on the trial, and brings the case here for review.

Waters & Waters and David Overmyer, for appellant. F. B. Dawes, Atty. Gen., A. E. Crane, and Keeler. Welch & Hite, for the State.

JOHNSTON, J. (after stating the facts). The most important exception urged by the appellant for reversal was taken upon the refusal of the court to charge the jury upon the defense of insanity. Testimony tending to show mental derangement and incapacity was offered and received, but the court, upon request, declined to submit the question or take the opinion of the jury thereon. It appears that soon after the tragedy Newman was found lying on his back, moaning and apparently in great agony; and there was testimony also that he was in a dazed condition, as if he did not know what he was doing. The shocking discovery of an adulterer in the house with his wife, the mother of his three children, would naturally cause tremendous excitement and mental disturbance. Hoover had gone into the home of Newman for the purpose of having sexual intercourse with his wife, and what their situation was when found, or whether taken in the act of adultery, does not appear. Knowledge of his wife's shame, or even the discovery of his wife in the lustful embrace of Hoover, afforded Newman no excuse or justification for killing Hoover. Such a discovery, as the court properly advised the jury, might be considered by them in determining the degree of the offense of which the defendant was guilty, if guilty of any, but could not of itself justify or excuse the killing of the deceased. However, the shock and mental disturbance necessarily caused by such discovery might be considered in connection with the testimony that Newman was dazed and appeared not to know what he was doing. It is argued that preparation for the difficulty and the recollection of the occurrences by Newman are inconsistent with the idea of actual insanity. It is true that the testimony of mental incapacity is not strong, and possibly the jury might have readily concluded that it was insufficient to relieve Newman of responsibility for the homicide. The testimony upon this question related to his conduct after the homicide, and, of course, it is

without effect unless it appears that insanity existed at the time the alleged offense was committed. In such case, however, the acts and conduct of the defendant shortly before or after the homicide may be shown in order to determine his mental condition at the time. The testimony was received by the court, and whether strong or weak, whether sufficient or insufficient, to show insanity, were questions for the determination of the jury. In such cases testimony of claimed mental disorder should be carefully scrutinized and weighed, but the province of estimating the weight of the testimony belongs to the jury rather than the court. In denying their request for an instruction which appears to have been drawn in proper form, the court undertook to estimate the weight of the testimony, and clearly trench upon the functions of the jury. The testimony does not reveal the details of the homicide, but there is abundant evidence of a terrible struggle in and about the house. The door had been broken open, the ceiling of the kitchen had been scraped by a gun or pistol barrel, two shots had been fired into the walls, blood was found in several places as well as upon the door casing, and the hinge of the door was bloody and bent. Who began the struggle and who was the aggressor in the fight, or what occurred immediately prior to the killing of Hoover, can only be surmised. The testimony is very meager and unsatisfactory in some respects, but, in view of the statements alleged to have been made by the defendant, we regard it to be sufficient to take the case to the jury. The claim that the verdict is without support cannot be sustained. The testimony was largely circumstantial, however, and it was therefore vitally important to the defendant that the jury should be fully and fairly charged upon all the issues in the case.

A number of other exceptions were taken to the rulings upon the instructions, but, except the omission of an instruction upon the subject of insanity, we discover no cause for complaint. In every other respect the charge appears to cover the testimony in the case, and to fairly present the law applicable to the facts upon which proof was offered. For the error mentioned the judgment will be reversed, and the cause remanded for a new trial. All the justices concurring.

(16 Wash. 333)

GOETZINGER v. ROSENFELD et al.

(Supreme Court of Washington. Feb. 2, 1897.)

APPEAL—SUFFICIENCY OF BRIEF—MORTGAGE—PRIORITY OF LIEN.

1. Where the court made no special findings of fact separately from its decree, but adjudged the lien of a mortgage superior to that of a judgment, appellant's brief, assigning as error such holding, sufficiently points out the error complained of.

2. Where a mortgage is given to secure an antecedent debt, it is not prior in lien to a judgment entered the same day on which the mortgage was filed, though the judgment entered was not filed until after the filing of the mortgage, but will prorate with the judgment.

Appeal from superior court, Yakima county; Carroll B. Graves, Judge.

Action by George Goetzinger against James L. Rosenfeld and others. Judgment for plaintiff, and defendant W. H. Vessey and wife appeal. Reversed.

Whitson & Parker, for appellants. H. J. Snively and Fred Miller, for respondent.

REAVIS, J. The plaintiff commenced an action in the superior court of Yakima county to foreclose a mortgage executed by the defendant Rosenfeld and wife to plaintiff upon certain real estate in the city of North Yakima. The mortgage was dated the 10th day of May, 1894, and filed for record on that day at 3 o'clock p. m. On the same day the defendant W. H. Vessey obtained a judgment against defendant J. L. Rosenfeld in the superior court of Yakima county, which was entered in the journal as of that day. In the complaint it was alleged that defendants Vessey and wife claimed an interest in the real estate described in plaintiff's mortgage, but that the claim of Vessey and wife was inferior to that of plaintiff. Vessey and wife answered, and set up the judgment, claimed a lien thereunder, and alleged that at the date thereof Rosenfeld and wife were the owners of the real estate as community property, and that the judgment was a community debt, and alleged that the lien of the judgment was superior to that of the mortgage. The court heard oral testimony to determine the question of the actual time of filing for record of both the judgment and the mortgage, and held, upon the proof taken, that the mortgage was filed first, and was, therefore, prior to the lien of the judgment, and should be first satisfied out of the proceeds of the real estate mortgaged.

Respondent moves to strike appellants' brief on three grounds: (1) That the appellants are made to appear as plaintiffs, and the respondent as one of the defendants; (2) that the errors relied upon to reverse the judgment are not clearly pointed out; (3) that the finding appealed from is not printed in the brief, nor was any finding that the court was requested to make, and which was refused. The appellants' brief states that the court held that the mortgage was prior to the lien of the judgment, and that is assigned as error. We think this sufficiently points out in this case the error complained of, as there is but a single question presented. The superior court made no special findings of fact separately from the decree, but decreed the lien of the mortgage superior to that of the judgment. Therefore it would be of no assistance to this court to print in the brief the decree, or that portion of it

relating to the priority of the mortgage over the lien of the judgment; and the motion to strike the brief cannot be sustained.

Respondent maintains that the judgment of W. H. Vessey was obtained upon a community debt, and that the appellants could not prorate with the respondent as against the community interest of Sere Rosenfeld, the wife, because appellants introduced no testimony to show that it was a community debt, and there was no finding by the court upon that issue. We think the presumption, in the absence of any proof, is in favor of the judgment creditors' contention that the judgment was obtained upon a community debt, and there is no question but that the real estate, the subject of this controversy, was community property.

The single question presented here is as to the priority of the mortgage which was assigned by the court over the judgment lien. At common law the judgment lien was established on the first day of the term in which the judgment was rendered, but such rule has been generally abrogated by practice, and in some instances by statute, in this country. The rule is fixed in this state by statute. "The lien shall attach from the day of the date of said judgment." 2 Hill's Code, § 449. The court will not look further into the fraction of a day under this statute than to determine a superior equity. Where a purchaser in good faith parts with money for real estate upon a clear record, he ought to be protected against a judgment obtained upon the same day, but not actually entered at the time of the advancement of the money; and we think the same protection should reasonably be afforded a mortgagee who actually advances money upon the security on a clear record. Mr. Freeman, in his treatise on Judgments, says: "It seems to be well settled \* \* \* that, unless the law provides for fractions of days, all judgments entered on the same day will be regarded as if entered at the same time, and as creating liens equal in point of priority, and entitled to be paid pro rata out of the debtor's real estate. Still this rule does not prevail universally. In many instances courts have inquired, even as between different judgments, the precise time when they were entered or docketed, and decided that the law will take notice of fractions of days in the contests between creditors seeking to have funds realized from the sale of lands applied in satisfaction of their judgment liens. Upon principle, one who advances money and takes a mortgage or deed of trust as security ought to be protected from secret liens to the same extent as if he were a purchaser of the property taking a conveyance of the legal title. The authorities, however, do not concur in this conclusion. In some of them, mortgagees are treated with the same indulgence granted to purchasers." Freem. Judgm. (4th Ed.) § 370. In Pennsylvania the rule is that a mortgage and judgment entered on the same

day will be regarded as taking effect simultaneously, and as entitled to be paid pro rata. Put some courts, while conceding the necessity to ascertain the hour of the entry of the lien, nevertheless refuse to enter into any examination beyond the record, and the question is determined upon the record alone. But the weight of authority, and certainly sound principle, would seem to justify an inquiry into the precise time at which the judgment was entered, by less than record proof. The maxim that the law divides the day where equity requires it, would seem to be the correct one; and the law ought to divide the day in favor of one who loans money, or parts with anything valuable, when the inducement for his action is the security given him upon the then unincumbered real estate of the borrower. We do not think that the equity of the mortgagee, where he has advanced his money, is necessarily or ordinarily inferior to the equity of a purchaser. In this cause the superior court heard other than record testimony to determine the precise time of the filing of the judgment, and also of the mortgage; and, while there was some conflict in the testimony of the witnesses, we think the court found correctly that the mortgage, which bore upon its face the hour of filing,—3 o'clock in the afternoon,—was placed of record before the judgment. It appeared from the testimony of counsel for the plaintiff, the mortgagee, that the time of the filing of the judgment was fixed in their memories, because plaintiff's claim had been held by them for collection for a considerable time, and they were watching the progress of the trial between Vessey and Rosenfeld in order to file their mortgage before the judgment was actually entered. One of the attorneys for plaintiff testified: "The judgment entry in said cause was not filed until after the mortgage sued on here was filed. I am certain of this, because we had the claim of plaintiff for collection, and we were watching it for the purpose of getting in ahead of the judgment, and my attention was particularly called to it at the time." The judgment of Vessey was evidently filed very shortly after the mortgage, the same afternoon, after 3 o'clock. There was no new consideration whatever for the execution of the mortgage held by plaintiff. It was executed to secure an antecedent debt. We cannot place this mortgage in the same rank with one which was executed upon a present valuable consideration, and where the mortgagee in good faith advanced his money upon the faith of an existing clear record of unincumbered real estate. We think that here the court, having inquired into the fraction of the day to determine the equities between the lien of the judgment and the mortgage, should, upon the testimony, have found them equal, and directed that they be prorated in the proceeds from the real estate covered by both liens. The cause is therefore reversed, with the direc-

tion to the superior court to modify its decree in accordance with this opinion.

DUNBAR and GARDNER, JJ., concur.

(16 Wash. 399)

**CARKEEK v. BOSTON NAT. BANK OF SEATTLE et al.**

(Supreme Court of Washington. Feb. 2, 1897.)

**FRAUDULENT CONVEYANCES—VENUE—PLEADING.**

1. A conveyance from a husband to a wife being attacked by creditors as voluntary, the wife showed that the consideration was the conveyance by her of other land previously acquired from the husband. *Held* that, though such other land lay in a different county, the court was not precluded by 2 Hill's Code, § 158, requiring actions affecting title to be commenced in the county where the land lies, from determining whether it had been conveyed to the wife in fraud of creditors.

2. A complaint by a wife to enjoin the sale on execution against the husband of land acquired by her from him by a deed reciting a consideration of one dollar was met by an answer attacking the conveyance as voluntary, and the reply alleged that the real consideration was the conveyance by the wife of separate property. *Held* that, though there was no allegation to that effect in the answer, defendants might show that the separate property also was acquired from the husband in fraud of creditors.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Meta Carkeek against the Boston National Bank of Seattle and A. T. Van De Vanter, sheriff. From a decree for defendants, plaintiff appeals. *Affirmed*.

Lindsay, King & Turner, for appellant. Strudwick & Peters, for respondents.

REAVIS, J. A suit in equity was commenced by appellant to restrain respondents (defendants) from selling, upon execution against her husband and a third person, certain real estate situate in King county, claimed by appellant as her separate property, acquired in July, 1893, from her husband. She alleged title by deed of that date from her husband, reciting the consideration as one dollar. The respondents answered, attacking the conveyance of July, 1893, to appellant from her husband, as being in fraud of creditors of the husband, the respondent bank being of such creditors, its demand accruing in March, 1890, and alleging such deed was without consideration, and a voluntary conveyance by the husband. The appellant replied, alleging that the real consideration of the deed of July, 1893, from the husband to the appellant was an exchange of certain lands in Mason county, alleged to be the separate property of the appellant, for the lands in King county conveyed in the deed of July, 1893. At the trial respondents attacked the claim of separate ownership of appellant to the Mason county lands, which were acquired by appellant in January, 1892, from her husband, through an intermediate conveyance, as being in fraud of creditors, and having been a voluntary con-



veyance from her husband at the time he was indebted to the respondents and other creditors in an amount beyond his ability to pay.

Appellant contends that the court erred in finding that the conveyance to appellant in July, 1893, of the land in King county, was void for want of consideration, and maintains that the superior court of King county was without jurisdiction to try the title to land situated in Mason county, and cites 2 Hill's Code, § 158, and the following cases: *North Yakima v. Superior Court of King County*, 4 Wash. 655, 30 Pac. 1033; *McMaster v. Thresher Co.*, 10 Wash. 147, 38 Pac. 780; *McLeod v. Ellis*, 2 Wash. St. 117, 23 Pac. 76. It may be here said that the question before the trial court was the consideration for the lands conveyed by the husband to the wife in King county, and which were sought to be subjected to respondents' execution. The question of title to the Mason county lands arose incidentally as a part of the question raised upon the title to the King county land. The court had jurisdiction to try the validity of appellant's claim to the King county lands, and the authorities cited by appellant here do not apply to this case, as each arose on a different state of facts from the one at bar.

It is also contended by appellant that there is no attack in respondents' pleading upon the validity of the conveyance of January, 1892, of the Mason county lands, and no allegation of the then insolvency of the husband, or of the indebtedness at that time, and no allegation sufficient to support a decree on the ground of fraud as to such conveyance; and a number of authorities are cited to support this contention. It is sufficient to state that the title to the Mason county lands by appellant was put in issue by appellant in the reply, and we think that this case, from this point of view, falls within the rule stated in *Parker v. Dacres*, 1 Wash. St. 190, 24 Pac. 192, where it is said: "Had the plaintiff in this action set out fully his chain of title, so that it would have appeared that he claimed under said Shell, it might have been necessary for defendant, in order that he might show acts of said Shell, to have set out the same in his answer. But when, as in this case, a defendant is not at all advised as to the source of the plaintiff's title, he can content himself with a general denial, and thereunder introduce any legal evidence that tends to defeat the title of the plaintiff, as shown by his proofs. Any other rule would work great hardship to a defendant, while the enforcement of said rule cannot work hardship to a plaintiff, as he can, if he so desires, so shape his complaint as to compel defendant to fully disclose his defense in his answer."

The court found that the husband of appellant and one John Nicholas incurred the debt upon which respondents' judgment was based upon the 31st day of March, 1890, in the sum of \$2,500, evidenced by a promissory note of that date; that this promissory note was re-

newed at intervals of three months; that prior to December 31, 1890, the respondent bank requested of the husband, William Carkeek, and the said Nicholas to furnish a statement of the property owned by them, and, pursuant to such request, Carkeek and Nicholas furnished a statement showing that Carkeek owned, as his individual property, besides his interest in the lands in King county, conveyed in July, 1893, to appellant, the 150 acres of land in Mason county, which were thereafter conveyed to the appellant in January, 1892, and that the respondent bank relied upon the representations contained in the statement as to the property owned by Carkeek; and also found that, on July 3, 1893, the conveyance made by Carkeek to his wife (appellant), with the consideration stated therein of one dollar, was an exchange in fact for the Mason county lands, which were then conveyed to Carkeek, the husband of appellant, on July 3, 1893, and that the lands were practically of the same value. The court also found that the deed of Carkeek, the husband, to appellant was voluntary, and without consideration, as to the creditors of said William Carkeek, and operated to hinder, delay, and defraud his creditors, including the respondent bank.

We think the evidence in the record supports these findings, and they are decisive of the case. The conveyance of January, 1892, by the husband to the wife, the appellant, was of real estate in Mason county, which had been acquired with community funds, and was a voluntary gift to the wife. At that time the condition of the community indebtedness, including that to the respondent bank, was not such as to permit such a gift from the husband to the wife as against existing creditors of the community. We have mentioned that these questions relating to the good faith in the conveyance of January, 1892, arose upon the reply of appellant, and it was competent for the respondents to meet the allegations of the reply by the evidence which was introduced at the trial, and to show that the conveyance was made without consideration, and was void as to existing creditors. In view of this evidence, such conveyance was constructively fraudulent, and cannot defeat the claim of respondent for satisfaction from the real estate taken upon execution. The judgment must be affirmed.

SCOTT, C. J., and ANDERS, DUNBAR, and GORDON, JJ., concur.

(16 Wash. 232)

DAVIS v. ATLAS ASSUR. CO.

SAME v. IMPERIAL INS. CO.

(Supreme Court of Washington. Feb. 4, 1897.)

TRIAL—INSTRUCTIONS.

Where the court instructs the jury that there is one question for them to determine, failure to instruct it to disregard a certain other issue is not error.

On rehearing. Denied.

For former opinion, see 47 Pac. 436.

Stratton, Lewis & Gilman, for appellant Atlas Assur. Co. Sharpstein & Blattner, for appellant Imperial Insurance Co. Stanton Warburton and G. C. Britton, for respondent.

GORDON, J. Counsel for the appellant in the above cases, which were tried together in the lower court, and which involve substantially the same questions, have filed elaborate petitions for rehearing, which we have carefully considered, and in denying them deem it sufficient to notice only the following points, which are most strenuously urged:

1. It is insisted that the lower court erred in submitting to the jury the "question as to whose fault it was that no new arbitration was entered upon." It is urged that the evidence fully established that the company offered to resubmit, and that the offer was ignored by the respondent. In the opinion heretofore filed we said: "From the verdict arrived at, we are bound to presume that the jury found that it was the fault of the company that no new arbitration was entered upon, and we are unable to say that such finding is not without sufficient evidence to support it." In the petition counsel very earnestly requests the court to point out where the evidence to support this finding can be found. We supposed our meaning was made clear in the opinion filed. As noticed therein, there was considerable correspondence between counsel representing the insurance companies and the respondent and his counsel prior to the institution of these actions. Respondent's proofs of loss were rejected by the companies, for the reason that they were "not in accordance with the award of the appraiser." The companies also took the position that a valid award had been made, and further stated that: "Of course, this award must control if valid; and we know of nothing tending to invalidate it. \* \* \* We know of no reason why the parties to the submission agreement should not abide by the award." In this connection we stated in the opinion: "But the correspondence referred to must be interpreted in the light of the fact that the company was bound to know what its appraiser knew, namely, that the sum of \$1,900 specified in the so-called 'award' was erroneous, and had not in fact been agreed upon as the amount of the loss, and that no award had in fact been made. It also should have known that the agreement for submission was not in accordance with the terms of the policies, inasmuch as the blank form for submission was furnished by its appraiser. Besides, it was conceded by counsel for the appellant upon the trial below that the terms of submission to appraisement were not in accordance with the terms of the policy." With knowledge

(presumptively) of the facts which rendered this so-called "award" invalid and ineffectual, the companies nevertheless professed to believe it was valid and binding. They were as much bound to know it was invalid as the respondent was to point out to them why it was so. In this condition of the record we were constrained to hold that there was sufficient evidence to support the finding of the jury that "it was the fault of the companies that no new arbitration was entered upon."

One other point remains to be noticed. It is urged that the court erred in refusing to instruct the jury upon the issue of fraud. It is also insisted that there was no evidence of fraud, and that the court should have withdrawn all questions of fraud from the consideration of the jury. We think, upon examination of the record, that that is what the court, in effect, did by the instruction which is set out in the opinion. In that instruction the jury were expressly told that "the question here for your determination is as to whose fault was it that no new arbitration was entered upon," and the verdict of the jury was made to depend upon that question. The jury were further told: "If you find that the defendant company is clear of fault in this respect, then the plaintiff is without right to maintain this action, and your verdict will be for the defendant company." In the light of this instruction, it seems clear to us that the jury could not have been misled, and that no prejudice resulted to the appellants growing out of the court's failure to give the instructions which were requested by them upon this subject. After re-examination of the entire record, we adhere to the conclusion heretofore announced, and the petitions for rehearing must be denied.

SCOTT, C. J., and DUNBAR, J., concur.

(16 Wash. 709)

BASH et al. v. EISENBEIS et al.  
(Supreme Court of Washington. Feb. 5, 1897.)

APPEAL—LIABILITY ON BOND.

Where an appeal is dismissed on motion of complainants, the costs cannot be decreed against the sureties on the appeal bond, if it was not filed in time.

Appeal from superior court, Jefferson county; R. A. Ballinger, Judge.

Action by Henry Bash and others against Charles Eisenbeis and others. Judgment for plaintiffs, and they appeal. Dismissed.

Geo. H. Jones, for appellants.

PER CURIAM. The appellants move, ex parte, to dismiss their appeal herein. The respondents not having appeared, and the time for filing their brief having long since expired, the motion will be entertained without notice to them. It appearing that the notice of appeal was served on the 27th

day of January, 1896, and filed on the 29th day of said month, and that the bond on appeal was not filed until the 15th day of February, 1896, the motion to dismiss is granted, with costs against the appellants, but not against the sureties upon the appeal bond. *Allen v. Catlin*, 9 Wash. 603, 38 Pac. 79; *Grunewald v. Grocery Co.*, 11 Wash. 478, 39 Pac. 964; *Railway Co. v. Brailard*, 12 Wash. 22, 40 Pac. 382.

(16 Wash. 462)

COOPER et al. v. CITY OF SEATTLE.  
(Supreme Court of Washington. Feb. 11, 1897.)

INDEPENDENT CONTRACTOR.

Where a city charter confers on the board of public works the control of the streets, and provides that improvements made thereon shall be made under the management of the board, a contractor paving a street under a contract providing that the city engineer shall have superintendence of the improvement, and that any person employed on the work disobeying the city engineer shall be discharged, is a servant of the city, and not an independent contractor, and the city is liable for injuries caused by his negligence.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Isaac Cooper and Louis Levy, partners, against the city of Seattle. Judgment for plaintiffs. Defendant appeals. Affirmed.

John K. Brown and F. B. Tipton, for appellant. Blaine & De Vries, for respondents.

GORDON, J. The appellant entered into a contract with Spurr & Wilmot to improve and pave a certain street in the city of Seattle. While engaged in that work, the contractors excavated under a certain water main, removed the earth from around it, and thereafter filled up the excavation. As a result of such excavation and removal of the earth which supported it, the main burst, causing water therefrom to flow into the cellar of respondents, damaging their goods. This action was brought to recover from the city the damages so sustained. There was a verdict and judgment for the respondents, from which the city has appealed.

The only question which we need to consider is whether Spurr & Wilmot were independent contractors, for whose negligence the appellant is responsible. The charter of the city of Seattle, amended March 8, 1892, and in force at the time when the contract in question was entered into, conferred upon the board of public works the management and control of public streets and alleys of the city; also the superintendence of streets, making the improvements therein, and the management, building, and repairing of all sewers and connections therewith. It further provides that such improvements as are made by contractors shall be made under

the management of the board of public works. The contract and specifications in the case under consideration contained numerous provisions requiring the material used for the work to be of the kind and dimensions designated by the city engineer; also that the general plan should be subject to "such changes or additional plans or instructions as the city engineer might require, \* \* \* before the beginning or during the progress of the work." The contract also contained the following stipulations: "Plans and Superintendence. This improvement shall be under the superintendence of the city engineer, and any orders or directions given by him or his duly-appointed representative shall be respected, and immediately and strictly obeyed, by the contractor, or any overseer in charge of the work. It is hereby understood that wherever the term 'engineer' or 'city engineer' are mentioned in these specifications, it shall mean himself or any representative duly appointed by him." "General Stipulations. Whenever the contractor is not present on the work, orders will be given to the superintendent or overseer who may have immediate charge thereof, and shall by them be received and strictly obeyed. And if any person employed on the work shall refuse or neglect to obey the directions of the city engineer or board of public works in anything relating to the work, or shall appear to be incompetent, disorderly, or unfaithful, he shall, upon the requisition of the engineer, be at once discharged, and not again employed upon any part of the work." There was also a provision requiring the contractors to save the city harmless from suits brought against it by reason of the negligent performance of the work. We think that under the provisions of this contract, which practically placed the work under the control, direction, and management of its engineer, Spurr & Wilmot did not become independent contractors, within the meaning of the rule which exempts a city or other employer from liability for an injury caused by negligence in the prosecution of the work. Under the contract the city retained the right to direct and control the work, and to discharge all persons employed thereon who should neglect or refuse to obey its engineer in charge. The cases of *Pack v. Mayor*, 8 N. Y. 222, *Blake v. Ferris*, 5 N. Y. 48, and the other cases cited by counsel, did not contain provisions of the character noticed in the present contract, and we think those cases do not conflict with the conclusion at which we have arrived in the present case. See, also, *City of Seattle v. Buzby*, 2 Wash. T. 25, 3 Pac. 180; *Fink v. City of St. Louis*, 71 Mo. 52; *City of Cincinnati v. Stone*, 5 Ohio St. 38.

Affirmed.

SCOTT, C. J., and DUNBAR, ANDERS, and REAVIS, JJ., concur.

(16 Wash. 702)

**RAMAGE v. LITTLEJOHN.**

(Supreme Court of Washington. Feb. 13, 1897.)

**APPEAL—DISMISSAL.**

Where no bond on appeal was served or filed within five days after notice of appeal, as provided by Laws 1893, c. 61, § 6, the appeal will be dismissed.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by J. F. Ramage against A. J. Littlejohn. Judgment for plaintiff, and defendant appeals. Dismissed.

Sharpstein & Blattner, for appellant.

**PER CURIAM.** This appeal is from a judgment of the superior court of Pierce county entered upon the verdict of a jury. The record shows that the notice of appeal was served and filed on the 4th day of August, 1896, and that no bond on appeal was served or filed within five days after the giving of the notice. Section 6 of chapter 61, Laws 1893, p. 122, provides that: "An appeal in a civil action or proceeding shall become ineffectual for any purpose unless at or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party conditioned," etc., " \* \* \* be filed with the clerk of the superior court. \* \* \* " Upon the face of the record, it appears that we are without jurisdiction to entertain the appeal. Dismissed.

(16 Wash. 408)

**SMITH v. CITY OF SPOKANE.**

(Supreme Court of Washington. Feb. 3, 1897.)

**MUNICIPAL CORPORATIONS—SIDEWALKS—NEGLIGENCE—DAMAGES.**

1. Plaintiff fell in attempting, slowly and with ordinary care, she testified, to pass over a walk covered with rough ice. She knew of the existence of the ice, and, moreover, she could have seen it, but it was not clear that she did so; nor did it occur to her that the walk was dangerous. *Held*, that the question of her negligence was for the jury.

2. Where the complaint stated the exact nature of the injuries, and the evidence supported it, a request—made on the trial, without notice—that plaintiff submit to a personal examination was properly refused.

3. The fact that a request was for an examination by physicians selected alone by the requesting party was ground for refusing it.

4. A verdict for \$10,500 for the loss of a leg, and permanent, painful internal injuries, is not excessive, where the person injured was 38 years of age, of good health, and capable of earning \$75 per month, and was wholly incapacitated by the injuries.

Appeal from superior court, Spokane county; Jesse Arthur, Judge.

Action by Belle H. Smith against the city of Spokane. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Plummer, for appellant. L. H. Plator and Fenton & Saunders, for respondent.

**ANDERS, J.** About 7 o'clock on the evening of February 2, 1895, while the plaintiff and respondent was walking south on the east side of Stevens street, between Sprague street and First street, in the city of Spokane, she slipped and fell upon the ice which had accumulated upon the sidewalk, and broke the smaller bone of one of her legs, near the ankle, and also received internal injuries of a serious nature. Subsequently she brought this action against the city to recover damages for the injuries thus sustained; alleging, in effect, in her complaint, that the city was negligent in not keeping the sidewalk in a reasonably safe condition, and that such negligence was the sole cause of her injury. As an affirmative defense, the city alleged that the injury received by plaintiff, if any, was caused wholly by her own negligence and want of proper care. Upon this issue the cause proceeded to trial, and at the close of plaintiff's evidence the defendant moved for a nonsuit, and at the conclusion of all the testimony in the case the defendant moved for a peremptory instruction to the jury to return a verdict for the defendant. These motions were based upon the alleged ground that the undisputed evidence showed that plaintiff's injuries were caused by her contributory negligence. Both of these motions were denied, and this ruling of the court is one of the principal errors relied upon for a reversal of the judgment. It is conceded that it was the duty of appellant to keep its sidewalks free from obstructions and defects, and in a reasonably safe condition for travel, and it is not seriously contended that it discharged its duty in that regard. The evidence clearly shows that at the place where plaintiff fell and was injured, and which was in the business portion of the city, the sidewalk was covered with ice and snow to the depth of from four to eight inches, and had been so covered for a month prior to the time when plaintiff fell upon it, and that the city had not attempted to remove the ice and snow from the walk, or to take any steps whatever to render it safe for pedestrians, although its street commissioner had been personally notified of the condition of the sidewalk at this particular point some days before the accident, by an individual who had himself fallen on the ice at the same place where the plaintiff fell. The testimony clearly shows that the sidewalk where the plaintiff was injured was several inches lower than the vacant lot adjoining; that during the preceding month of January the snow had melted at various times, and run down off the vacant lot upon and across the sidewalk, thus causing an accumulation of ice and snow thereon, which, by alternate freezing and thawing, and the passing of pedestrians and the crossing of wagons, had become rough, uneven, and rounded up to such an extent that it was dangerous for

persons to pass over it. This snow and ice, in the condition in which it then was, clearly constituted an obstruction to travel, which it was the duty of the city to remove, and which rendered it liable in damages to any one injured thereby while in the exercise of ordinary care and prudence. *Calder v. City of Walla Walla*, 6 Wash. 377, 33 Pac. 1054. It appears from the testimony of the plaintiff that at the time the accident happened she was going to the Hotel Spokane, situated on the corner of Stevens and First streets, with the view of attending a reception which she was informed would there be given in honor of J. L. Wilson; that she was not walking rapidly, and was careful how she walked,—as careful as any person would ordinarily be when walking along the street; that she had safely passed over this sidewalk in the daytime five or six times during the three preceding weeks,—the last time about a week before the accident; and that the ice and snow upon the sidewalk at the time she was injured seemed to be in about the same condition, so far as she was able to observe, as it was when she saw it the week before, and at other times. It is not clear from her testimony that the plaintiff noticed the real condition of this particular part of the sidewalk before she stepped upon it, but she does say that she observed its condition after she fell, and especially after she was assisted into a sleigh which was standing close to the edge of the sidewalk at the time. There was an electric arc light at the Sprague street crossing, and another about a block away, which afforded sufficient light for the plaintiff to see the condition of the street with more or less distinctness. Upon this state of facts, did the court err in denying the defendant's motions? In other words, would the trial court have been justified in saying, as matter of law, as it was in effect requested, that the plaintiff was guilty of contributory negligence, and therefore not entitled to recover in this action? We think this question must be answered in the negative. The question of negligence on the part of the defendant, or of contributory negligence on the part of the plaintiff, is ordinarily a question of fact, to be determined by the jury from all the facts and circumstances in evidence. It is true that there may be cases where the effect of the undisputed facts is so manifest that it may properly be determined by the court as a pure question of law. But, "when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." *Railway Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679. See, also, *McQuillan v. City of*

*Seattle*, 10 Wash. 464, 38 Pac. 1119; *Railroad Co. v. Stout*, 17 Wall. 657; *Roux v. Lumber Co.*, 85 Mich. 519, 48 N. E. 1092. We think that, upon the undisputed facts of this case, candid and intelligent men might reasonably differ as to whether the plaintiff was or was not in the exercise of ordinary care and prudence at the time of the accident, and it therefore follows that the court committed no error in submitting the case to the jury. The learned counsel for appellant contend that the facts of this case are "on all fours" with those in the case of *Wright v. City of St. Cloud* (Minn.) 55 N. W. 819, wherein the court held, as matter of law, that the plaintiff was guilty of such contributory negligence as precluded a recovery. But in this we think counsel are in error. An examination of the opinion of the court in that case will disclose that the plaintiff not only saw the condition of the sidewalk before she attempted to pass over it, but that it occurred to her the moment she saw it that it was a dangerous place to walk. In this case there is no evidence that it occurred to plaintiff that the walk was dangerous, or that she had full and present knowledge of the "risk incident to traveling over it." The decision of the court in that case was not predicated upon the mere fact that plaintiff had knowledge of the condition of the sidewalk, but upon the fact, with others, that she was conscious of the danger of slipping and falling at the moment she undertook to pass over it. That the ruling of the court would have been different in the absence of present knowledge of the dangerous condition of the sidewalk, and of the risk of slipping and falling, we apprehend will appear from an inspection of the opinion of the same court in the later case of *Maloy v. City of St. Paul* (Minn.) 56 N. W. 94, in which *Wright v. City of St. Cloud* is commented upon, and in which it is said: "It is certain that previous knowledge of the existence of a defect has an important and oftentimes a decisive bearing upon the question of contributory negligence; but mere inattention to a known danger, on the part of this plaintiff, cannot be held to conclude her."

The next assignment of error is that the verdict is against the evidence, as shown by the special findings of the jury. The finding specially complained of by appellant is that in which the jury found that plaintiff could not see, and did not know of the existence of, the snow and ice on the sidewalk just before or at any time prior to her attempting to walk over the same. This is claimed by appellant to be contrary to the undisputed evidence. But, even if that be so, it does not necessarily follow that the judgment should be reversed, for, as we have seen, the fact that she may have had such knowledge is not itself conclusive proof of contributory negligence on her part. *McQuillan v. City of Seattle*, supra, and cases cited.

The special findings of the jury are in no sense inconsistent with the general verdict, and we are clearly of the opinion that the latter is justified by the evidence.

It is next objected that the court erred in refusing to require plaintiff to submit to an examination of her person by physicians. The record relative to this matter is as follows: "The defendant, by counsel, at this time asked the court for an order compelling the plaintiff to undergo an examination by physicians McLeod, Olmsted, and Mason, in order that the defendant might use said physicians as witnesses. The plaintiff, by counsel, objected to such an order being made, and the court sustained the objection and allowed the defendant an exception." This request was made at the close of the testimony of Dr. Webb, who was a witness for plaintiff, and in the middle of the trial, and without any previous notice to the plaintiff. The complaint alleges, and the plaintiff had testified, that she had suffered a permanent displacement of the womb, as a result of her fall upon the sidewalk; and Dr. Webb, her physician, testified that he attended plaintiff soon after she received the injury, and found, by a personal examination of her condition, that there was a displacement of the womb, of recent origin, and that it was permanent, and of such a nature as to cause a permanent injury to a woman of the age of plaintiff. The power of the court to make the order requested is not here in question, but it is contended on behalf of the respondent that the refusal of the request was within the sound discretion of the trial court, and that such discretion was not abused; and we are inclined to agree with counsel's views in that regard. That the trial court is vested with a wide discretion in the exercise of such power, and that it may refuse to grant such an order as was here requested, when the sense of delicacy of the plaintiff may be offended by the exhibition, or where the testimony would be merely cumulative, or where the necessities of the case do not demand it, or where, in the judgment of the court, the examination would not materially aid the jury, seems to be established by the authorities. *Graves v. City of Battle Creek* (Mich.) 54 N. W. 757. See, also, *Owens v. Railroad Co.*, 33 Am. & Eng. R. R. Cas. 524; 1 *Thomp. Trials*, § 859. It is not shown by the record why the court refused to make the order, but the fact that the request was for an examination by physicians selected by appellant alone was a sufficient ground for refusing it. *Id.* § 860. And besides, for aught that appears from the record, the learned judge may have had other sufficient reasons for refusing to grant defendant's request.

The jury returned a verdict in this case in favor of the plaintiff for \$10,500, and it is earnestly insisted on behalf of the defendant that it is so excessive that a new trial ought to be awarded on that ground alone.

The undisputed testimony of Dr. Webb is to the effect that the injury to the respondent's leg is permanent, and will probably result in amputation; that the internal injury is also permanent and painful. And respondent herself testified that she was 38 years of age, and that prior to this injury she was, in every respect, a strong and healthy woman; that she had previously been employed as a teacher, and as such had earned \$75 per month, but was wholly incapacitated from following her previous vocation, by reason of her injuries; and that from the time of the accident up to the time of the trial, a period of some eight months, she had scarcely been free from pain. It was the province of the jury to assess the damages under the instructions of the court, and the court, on motion for a new trial, refused to set aside the verdict. We perceive nothing indicating that the jury, in assessing the damages, was influenced by prejudice or passion, and it is only in such cases that the court is authorized by the statute to set aside a verdict on the ground of excessive damages. The law applicable to the facts of the case was carefully and fully presented to the jury. The respective parties were represented by able counsel, and a fair trial was had. No error appears in the record, and the judgment must therefore be affirmed, and it is so ordered.

DUNBAR and GORDON, JJ., concur.

(16 Wash. 465)

BROWN et ux. v. SEATTLE CITY RY. CO.  
et al.

(Supreme Court of Washington. Feb. 13,  
1897.)

STREET RAILWAYS—CONTRIBUTORY NEGLIGENCE—  
PLEADING—ALIGHTING FROM MOVING CAR—  
QUESTION FOR JURY—INSTRUCTIONS.

1. The complaint having negatived contributory negligence, an allegation in the answer that plaintiff's injuries were caused by her "carelessness, fault, and want of care," if denied by plaintiff in her reply, is a good plea of contributory negligence.

2. Whether a female passenger is negligent in attempting to alight from a moving street car is for the jury.

3. An instruction that if plaintiff alighted from a moving street car without notice to the conductor, or without his knowledge, she did so at her peril, provided the conductor "could not, by the exercise of the highest degree of care and caution, avoid injury" to her; and that if the conductor, knowing that she was about to alight, "or by the exercise of extraordinary care \* \* \* could have known it, started the car," etc., plaintiff could recover,—is not erroneous, where the jury were also told that it was not incumbent on the conductor to anticipate such action on plaintiff's part.

4. A street-car company is bound to use the highest degree of care to avoid injury to passengers.

Appeal from superior court, King county;  
R. Osborn, Judge.

Action by W. P. Brown and Celestia M.

Brown, his wife, against the Seattle City Railway Company and W. A. Underwood, its receiver, to recover for personal injuries sustained by the female plaintiff. From a judgment for plaintiffs, defendants appeal. Affirmed.

Andrew F. Burleigh and Thos. A. Gamble, for appellants. J. T. Ronald, for respondents.

REAVIS, J. The appellant company is the owner of a cable railway in Seattle. The eastern terminus of the road is situated on the shore of Lake Washington, at the foot of Yesler Way, and its western terminus is also on Yesler Way, at the junction of that street with Occidental avenue. At the western terminus of the road is a turntable on which the trains of the railway are run and turned around preparatory to starting on their trip eastward to Lake Washington. On the 22d of September, 1893, between 5 and 6 o'clock in the afternoon, a train of the appellant company, consisting of a dummy and a trailer car, arrived at the turntable at the western terminus of the road, and was turned around, and coupled together in the usual manner. The train had not yet started on its trip to the lake, when the respondent Mrs. Brown entered the car, where there were three or four passengers already seated. She took her seat on the south side of the car, near the front door. Just as she was seated, her husband, one of the respondents, followed her, and called out to her, asking if she had "got the medicine for the old lady." Mrs. Brown replied that she had forgotten it, and, getting up, went hastily out of the car to the front platform, and stepped off the car, and, while stepping off, was thrown down, and sustained severe injuries.

Before proceeding to discuss the errors assigned by appellants, we desire to notice the objection made to the answer by the respondents. The complaint of respondents as plaintiffs in the superior court, after alleging negligence of the appellant (defendant below), continues and negatives contributory negligence on the part of respondents by stating in the fifth paragraph of the complaint as follows: "Whereby the said plaintiff Celestia M. Brown, without negligence or fault on her part, but wholly owing to said reckless, careless, and sudden jerking and starting of said car by defendant's servants and employes as aforesaid, was violently and with great force thrown from the platform step of said car to the ground." The defendant company, in its answer, after denying the material allegations of the complaint, endeavored to set up contributory negligence on the part of the plaintiff injured, in the following language: "For a further separate affirmative defense to the cause of action in the complaint set out, defendants aver: (1) That whatever injuries were received by plaintiff Celestia M. Brown or by her husband, W. P. Brown, or either or both of them, in the manner and

form as set out in the complaint, or otherwise howsoever, were not so received or sustained through any fault or negligence of these defendants, or either of them, their officers, agents, or servants, but such injuries were caused by the carelessness, fault, and want of care on the part of said plaintiffs, and each of them, and particularly on the part of said plaintiff Celestia M. Brown." Plaintiffs did not move against the answer to have it made more specific, nor demur thereto because it was insufficient, but filed a reply denying all the allegations of contributory negligence set up in the answer, but on trial objected to any evidence of contributory negligence on the ground that the affirmative defense in the answer did not state facts sufficient to constitute a defense. The court overruled the objection to this testimony, and it was admitted. We think the action of the lower court was correct in its ruling on this objection. However imperfectly the affirmative defense stated the plea of contributory negligence against plaintiffs, there was a sufficient statement, when denied by the plaintiffs in their reply, to make the plea good, especially in view of the fact that plaintiffs had chosen in their complaint to affirmatively negative contributory negligence on the part of the plaintiff injured.

The errors complained of by appellants here may be reduced to two: First, that the motion of appellants for a nonsuit upon the testimony should have been granted by the superior court on the ground that the evidence did not sustain the verdict; and, second, that the superior court should have granted a new trial because an inspection of the whole evidence will conclusively show that the verdict of the jury was against the weight of evidence. The other point argued by appellants is that errors were committed in the instructions given to the jury. The appellants maintain that it was not shown satisfactorily that the respondent notified the conductor of her intention to alight from the car before attempting to do so. Upon this point the testimony of Mrs. Brown is as follows: "I got on the car right there at the turntable, where they stop, and I went in, and just got seated, and Mr. Brown came to me, and he says, 'Have you got that medicine for the old lady?' And I said: 'No. I will get up—I will get up and go out before the car starts.' And with that—the conductor was standing at the end—I threw my hand up at him like that [illustrating], and I raised up quickly, and stepped out of the door. I went to the platform, and stepped to the last step, and was about to step off, when the car started up with a jerk, and I was holding onto the rail with this hand [illustrating]. When the car started up that way it threw me clear around. I went clear around like that [illustrating], and my dress caught on something. Anyhow it tore my hold off of the bar, and I don't know how far I went, or anything like that, when the wheel went over my left

foot, just above the ankle." And again, Mrs. Brown said on cross-examination: "Q. You say you looked towards the conductor? A. I did. Q. Or did you simply throw your hand up? A. I threw my hand at him like that [showing]. Q. What did you say the conductor was doing? A. He was leaning back, and he appeared to be looking through the car. Q. He was looking through the car at that moment? A. Yes, sir. Q. When you threw your hand up? A. When I threw my hand at him he first looked at me, and he took his hat off, and then he reached for the bell. I didn't notice him any other way. But I just threw my hand out, and I looked at him. Then I started off." And again: "Q. Was the car in motion when you got up? A. No, sir; the car was standing still. Q. When did the car start? A. The car started just as I was about to step off. Q. Step off where,—from the platform or the step? A. Off of the step. Q. How did the car start? A. It started sudden, like that." There were other witnesses who corroborated Mrs. Brown in her statement that the car was standing still when she arose to go out, and that simultaneously with her act of stepping on the ground the car started, throwing her backwards, and under the same. Mrs. Brown's statement that she put up her hand to the conductor when she arose in the car before starting to get off is contradicted by the evidence of several witnesses, who state that they did not see her make the signal to the conductor, and by the conductor himself; but we cannot determine, from our inspection of the whole record, that Mrs. Brown is necessarily a discredited witness. It is true, her interests were involved in the result of the suit, and that was a matter for the jury to take into consideration. There was evidence to support the verdict if the witness was credited by the jury. We do not think it is the function of the court to weigh the credibility of the witnesses; and, where there is substantial conflict in the testimony, the case is for the determination of the jury.

The second point made by appellants upon the insufficiency of the evidence to support the verdict is that the plaintiff did not show that the car was not in motion when Mrs. Brown attempted to alight. There is certainly substantial conflict in the evidence that went to the jury on this point, and we cannot announce as a legal proposition that a passenger upon a street-railway car may not get off the car when in motion. It would depend entirely, in our judgment, upon the circumstances,—that is, the rate of speed, place at which the passenger might attempt to alight, and other things,—which would make each case depend upon the particular facts, and necessarily, ordinarily, be a question of fact for the jury to determine whether the act of the passenger was negligent. We do not think the views here expressed necessarily conflict with the decision of this court in *Guley v.*

*Transportation Co.*, 7 Wash. 491, 35 Pac. 372, as the court there used the expression that the "clear" weight of all the evidence must be on one side to justify the court in taking the decision from the jury. But the court does not favor any extension of the rule announced in the case cited. Some of the cases cited by appellants upon the duty of the passenger when boarding or alighting from a street car may be here noticed. In *Nichols v. Railroad Co.*, 106 Mass. 463, the defendants, in view of the evidence, requested the court to instruct the jury as follows: "That if the plaintiff took upon herself the charge of the car, and, without notice to any one, the conductor being then on the car, she rang the bell, and, without the knowledge of driver or conductor, proceeded to get off, she could not recover. That it was the duty of the plaintiff to have notified some one in charge of the car, if she desired to get off; and if she got off without such notice, or without the knowledge of those in charge of the car, she did so at her peril, and cannot recover,"—which was refused. The supreme court said: "We are of opinion that the substance of these instructions should have been given. If the plaintiff attempted to get off the car without any notice to the conductor or driver, and was injured by the sudden starting of the car, such injury cannot be attributed to the negligence of the defendants. The alleged negligence consisted in improperly starting the car when a passenger was getting off; but if the conductor and driver neither knew, nor were notified, nor had the means of knowing, that a passenger desired to get off, or was in the act of getting off, there was no negligence in starting the horses at a faster gait. Upon the evidence reported in the bill of exceptions, it would be competent for the jury to find that the plaintiff undertook to get off without any notice to the defendants' servants in charge of the car, and without their knowing, or having the means of knowing, that she was getting off; and we think the defendants had the right to a specific instruction that, if they so found, the plaintiff could not recover. This is substantially the instruction requested by the defendants, and we think the jury may have been misled by the refusal to give this instruction, and that the general instructions would not correct the effect of this refusal." In another case cited by appellants—*Eppendorf v. Railroad Co.*, 69 N. Y. 195—the court says: "Ordinarily, it is perfectly safe to get upon a street car moving slowly, and thousands of people do it every day with perfect safety. But there may be exceptional cases, when the car is moving rapidly, or when the person is infirm and clumsy, or is incumbered with children, packages, or other hindrances, or when there are other unfavorable conditions, when it would be reckless to do so; and a court might, upon undisputed evidence, hold as



matter of law that there was negligence in doing so. But in most cases it must be a question for a jury. Here there was nothing exceptional, and no reason apparent why plaintiff might not, with prudence, have expected to enter the car with safety. He had the right to expect that the speed of the car would continue arrested until he was safely on the car. It was the act of the driver in letting go the brake without notice, and thus suddenly giving the car a jerk while plaintiff was getting upon it, that caused the accident. Upon all the evidence of this case it was for the jury to determine whether the plaintiff was chargeable with negligence, and whether such negligence contributed to the injury." The case of *Railway Co. v. Hassard*, 75 Pa. St. 367, was where a boy was injured, and the principal question discussed by the court was what increased degree of care was incumbent on the carrier in view of plaintiff's inexperience and tender years; and is not in point here.

The exceptions to the instructions of the superior court may be discussed together. An instruction was given as follows at the request of respondents: "If the jury believe, from a fair preponderance of the testimony in this case, that on or about the 22d day of September, 1893, the plaintiff Celestia M. Brown was a passenger upon one of the street cars of the defendant operating on Yesler avenue, in the city of Seattle, and that, while such car was stopped, the plaintiff Celestia M. Brown, in the exercise of due care and diligence on her part, was in the act of alighting from said car, and that the defendant, by its conductor, knowing the same, or by the exercise of extraordinary care and diligence on the part of such conductor could have known it, started the car while the plaintiff was so getting off, and before she had a reasonable time to do so, and thereby threw the plaintiff down upon the street, and by reason thereof she was injured, then the defendant would be liable," etc. In connection with this, the court gave the following instruction at the request of the defendants, with the modification italicized: "Gentlemen of the jury, the court instructs you that it was the duty of the plaintiff Celestia M. Brown, in this case, to have notified some one in charge of the car if she desired to get off, and, if she got off without such notice, or without the knowledge of those in charge of the car, while said car was in motion, she did so at her peril, *provided you should further find from the evidence that the conductor in charge of said car could not, by the exercise of the highest degree of care and caution, avoid injury to plaintiff.*" It is claimed by appellants that the court here virtually charged the appellants as insurers, and absolved the respondent Mrs. Brown from all responsibility, however negligent she might have been; but the court gave also the following instructions in the course of its charge: "Gentlemen of the

jury, the court further instructs you that the law imposes no duty upon a railway company to anticipate the committing of acts of negligence by any of its passengers, nor is it incumbent upon a railway company, its agents, servants, or employes, to be on the lookout for the commission of acts of negligence by passengers riding upon its cars. If, therefore, you find from the evidence in this case that plaintiff Celestia M. Brown placed herself in a dangerous position by rushing out on the front platform of the car of the defendant company, and attempted to alight from the front platform of the car while the same was in motion (at a high rate of speed), the court instructs you that she thereby assumed the risk of the position in which she placed herself voluntarily; and if you find that such an act was an act of negligence on her part, and by such an act she directly contributed to the injuries received by her, then she was guilty of contributory negligence, and cannot recover from the defendants in this case. The court further instructs you that it was not incumbent upon the servant of the defendants, the conductor in charge of the car, to be on the lookout for such action on the part of the plaintiff, if you should find that she committed such acts, nor was it negligence on the part of the conductor to ring the bell and signal the gripman to start the car, unless he actually saw the position of danger in which the plaintiff had placed herself, and not otherwise. If the jury believed from the evidence that the plaintiff Celestia M. Brown attempted to jump off the front platform of the car while the same was running at its ordinary rate of speed, then the plaintiff was guilty of contributory negligence, and if you so find your verdict will be for the defendants." We think, construing the instructions altogether, they fairly stated the law as applied to the facts of the case, and the error assigned upon the instructions is not well taken. It is said in *Shear. & R. Neg.* § 51: "It is the settled rule of common law throughout the United States, and probably also in Great Britain and Ireland, that common carriers of persons, and especially railway companies, are liable for any damage suffered by their passengers which is proximately caused by the failure of such carriers to use the highest degree of prudence, and, in some cases, the utmost human skill and foresight. This precise language is constantly used in charging juries, and it is sustained by such controlling authority as to make it useless to discuss its propriety at any length." We think the above citation is a fair statement of the law as announced by the best authorities. We do not doubt that the utmost care is required, and this is due to the essentially modern regard for human life in the development of applied science. The jury having found a verdict for the plaintiffs below, and there being substantial evidence

upon which its conclusion is based, this court cannot disturb the judgment. Affirmed.

SCOTT, C. J., and ANDERS and GORDON, JJ., concur.

(16 Wash. 412)

GLEASON et al. v. TACOMA HOTEL CO.  
et al.

(Supreme Court of Washington. Feb. 5, 1897.)

CONSTITUTIONAL LAW—LABORERS' LIENS—EXECUTION CREDITOR—FILING OF CLAIMS—PREFERENCE—DISPUTE—JOINDER.

1. 1 Hill's Code, § 3124 (Code 1881, § 1974), providing that where execution is issued, except for labor done, persons who have claims against the execution debtor for labor done may give notice thereof to the creditor and the officer executing the writ, and may prosecute their claims to judgment, if disputed, and that the officer shall pay all valid claims for labor as preferred, within limitations as to amount, is not unconstitutional as not "due process of law."

2. As jurisdiction had been acquired over the judgment debtor in the original action, the action is pending till the judgment is satisfied, and want of notice of the claims is no objection.

3. Laborers whose claims are disputed may join in one action, by the express provisions of the statute.

4. An objection to the misjoinder of parties can be taken only by the execution debtor.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

There was an action brought by Robert Wingate, receiver of the Merchants' National Bank, against the Tacoma Hotel Company. Plaintiff had judgment, and levied on defendant's property. Prior to the execution sale, Mary Gleason and others, having claims against defendant for labor done, filed their claims for preference. All the claims were disputed by the execution creditor, and the claimants joined in an action against the judgment debtor and execution creditor. From a judgment in favor of plaintiffs, defendant Wingate, receiver, appeals. Affirmed.

Murray & Christian, for appellant. Thad Huston, for respondents.

GORDON, J. In March, 1896, the sheriff of Pierce county, under and by virtue of an execution issued out of the superior court of said county upon a judgment rendered therein in favor of the appellant, Wingate, as receiver of the Merchants' National Bank, against the Tacoma Hotel Company, levied upon certain personal property of said company, and advertised the same to be sold on the 27th of March, 1896. Prior to said sale, namely, on March 26th, the respondents—being servants, clerks, and laborers having claims against the judgment debtor for labor performed and services rendered—gave separate notices of their respective claims, duly verified, to the said sheriff and to the appellant, pursuant to the provisions of section 3124, 1 Hill's Code (section 1974, Code 1881),

which section is as follows: "In cases of executions, attachments, and writs of similar nature issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers who have claims against the defendant for labor done, may give notice of their claims and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs at any time before the actual sale of property levied on, and unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within sixty days next preceding the levy of the writ, not exceeding one hundred dollars. If any or all the claims so presented and claiming preference under this title are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days from [for] the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim of priority of payment thereof; and the officer shall retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim, until the determination of such action; and in case judgment be had for the claim or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim, with the same rank as the original claim." Thereafter, the appellant having disputed all the claims so presented, respondents joined in an action brought for the purpose of enforcing the liens claimed by them upon the fund derived from a sale of the property so levied upon by the sheriff, said fund being then in the possession of the clerk of said court. The appellant was made a party defendant in the action, and appeared and demurred to the amended complaint therein. Among other grounds of demurrer, it was urged that there was a defect of parties plaintiff, that several causes of action had been improperly united, and that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and exceptions duly taken, and the appellant having elected to stand by his demurrer, and refusing to plead, the cause proceeded to trial to the court without a jury, upon respondents' complaint and the answer of the judgment debtor, the hotel company, and resulted in judgment and decree in favor of the respondents, establishing their claims, and directing the clerk of the court to pay them the amount of said funds received from the sheriff as proceeds of the sale. From this judgment and decree the execution creditor has appealed.

Appellant assigns as error the order of the court in overruling the demurrer to the complaint. He contends that the provisions of section 3124, above set out, are repugnant to the fifth amendment, and section 1 of the fourteenth amendment, of the constitution

of the United States, and also to section 3 of article 1 of the constitution of the state of Washington, providing that "no person shall be deprived of life, liberty, or property without due process of law." The ground upon which this contention proceeds is that the section in question permits the taking of the debtor's property without notice or process directed to him. The purpose of the statute was to give the persons therein mentioned, who by their labor had contributed to the property of the debtor, a preference over general creditors, and to afford a speedy and inexpensive method by which their claims for such labor might be enforced. The section is identical with section 1206 of the Code of Procedure of California (3 Deering's Code), and was upheld in *Mohle v. Tschirch*, 63 Cal. 381, the only case directly in point to which we have been cited. By requiring the claimant to establish his claim in court at the instance of either the debtor or creditor, and affording all parties an opportunity to be heard, the constitutional rights of the parties are preserved, and the act is not open to the objection that it deprives one of his property without due process of law.

We also think the objection of want of notice to the debtor is fully answered by the application of another well-recognized principle, namely: "Jurisdiction having been once acquired over the judgment debtor in the original action, that action is still pending until the judgment is satisfied. Proceedings to compel the application of money or property in the hands of other parties to the satisfaction of the judgment are proceedings in that action." *High v. Bank* (Cal.) 30 Pac. 556, and authorities there cited.

Another objection which is urged to this act is that it gives to persons of a particular class a lien upon property which they have not helped to construct, and in this respect is a denial of the equal protection of the laws, and amounts to a deprivation of property without due process of law. No authority has been cited in support of this position. Questions of mere legislative policy do not concern the courts, and we are not satisfied that the act contravenes any constitutional right.

It is further urged that the demurrer should have been sustained upon the ground of misjoinder. We think that the statute itself furnishes a sufficient answer to this objection. Section 1953 of the Code of 1881 provides that "any number of persons claiming liens under this chapter [137] may join in the same action, \* \* \*." Section 1978 provides that "all rights secured to the holders of liens upon logs, under the provisions of chapter 137, shall inure to the benefit of those holding liens under the provisions of this chapter [139]," and further provides that such persons shall have the same rights—among others, "of joinder of parties"—as

are afforded to the holders of liens under said chapter 137. Of this section (1978) this court, in *Pain v. Isaacs*, 10 Wash. 173, 38 Pac. 1038, said: "For some reason the compiler of the statutes [Hill's Code] seems to have omitted section 1978 of the Code of 1881 therefrom. A reference to the omitted section, which has not ceased to be the law of the state, shows farm laborers to have all the rights secured to loggers in the matter of the joinder of parties. Therefore the objection cannot prevail." Section 3124 of volume 1 of Hill's Code, which is assailed as unconstitutional in this proceeding, was section 1974 of the Code of 1881, and belonging to the chapter of which section 1978, supra, was a part; and it follows that section 1978 is as applicable to actions commenced under section 1974 (section 3124, Hill's Code) as to any of the actions provided for under chapters 137 or 139 of the Code of 1881.

But the demurrer on the ground of misjoinder was properly overruled for another reason, viz.: Appellant cannot be heard to urge the objection of misjoinder. That objection belonged to the debtor alone, and, to have been available, it should have been timely raised, otherwise it is deemed to have been waived. In this case the only party who was entitled to take advantage of the objection waived the right to do so by failing to take it either by demurrer or answer. Perceiving no error in the record, the judgment and decree will be affirmed.

DUNBAR, ANDERS, and REAVIS, JJ.,  
concur.

(16 Wash. 417)

HENRY v. GREAT NORTHERN RY. CO.  
(Supreme Court of Washington. Feb. 5, 1897.)

APPEAL—JURISDICTION—COSTS.

An appeal in an action not within the jurisdiction of the supreme court should be dismissed, with costs against appellant, but not against the sureties on the appeal bond.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by H. M. Henry against the Great Northern Railway Company to recover the value of a horse killed by defendant. Plaintiff had judgment, and defendant appeals. Dismissed.

Burke, Shepard & McGilvra, for appellant.  
L. H. Coon, for respondent.

PER CURIAM. This being an action at law for the recovery of money, and the original amount in controversy not exceeding the sum of \$200, and the action not involving the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute (Const. art. 4, § 4), the appeal is dismissed, with costs against the appellant, but not against the sureties upon the appeal bond, as we have no jurisdiction to affirm the judgment of the lower court. *Grunewald v. Grocery Co.*, 11 Wash. 478, 39 Pac. 964.

(16 Wash. 450)

**BANK OF BRITISH COLUMBIA OF  
VICTORIA v. CITY OF PORT  
TOWNSEND.**

(Supreme Court of Washington. Feb. 11, 1897.)

**ACTION AGAINST CITY—COMPLAINT—SUFFICIENCY.**

1. In an action against a city to recover an amount due on warrants drawn by the city on certain street-grade funds, an allegation that the city "duly" entered into a contract for the grading of a certain street is sufficient to authorize proof that the contract was entered into under a valid city ordinance.

2. An action at law will lie against a city for an amount due on warrants, where the city agreed to provide a fund for the payment of the warrants according to law, and failed to do so.

3. A complaint for recovery of damages for failure to pay the amount of certain city warrants which omits to aver the amount of damages is not demurrable if it contains a prayer for judgment in a specified amount.

Appeal from superior court, Jefferson county; R. A. Ballinger, Judge.

Action by the Bank of British Columbia of Victoria, B. C., against the city of Port Townsend. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Morris B. Sachs, for appellant. Trumbull & Trumbull, for respondent.

ANDERS, J. This action was brought to recover from the defendant city the amount alleged to be due on various warrants drawn by the city upon certain street-grade funds in favor of plaintiff's assignors, under an alleged contract with the city for street improvements.

The complaint, for a first cause of action, alleges, among other things which it is not here necessary to set forth, that on or about the 26th day of February, 1890, the defendant, the city of Port Townsend, duly made and entered into an agreement with one Charles O'Brien for the grading and filling of Munroe street, in said city, and by which said agreement the said defendant agreed to make and deliver to said Charles O'Brien warrants upon the treasurer of said city, payable to the order of said O'Brien, for the amount due and payable to him under and by virtue of said contract, said warrants to be drawn upon, and to be paid out of, the special fund, to be known as the "Munroe Street Grade and Fill Fund," which said fund the city of Port Townsend agreed to provide and create according to law; that said Charles O'Brien duly performed each and all of the conditions and requirements of said agreement as was required of him, and that on or about the 5th day of April, 1890, the said defendant duly made and delivered to said Charles O'Brien, in part payment for the work and labor performed by him, and material furnished by him, under said contract, a warrant, which is literally set forth in the complaint; that afterwards, and on or about the 5th day of April, 1890, the said warrant

was indorsed, for value received, to the plaintiff, and plaintiff is now the owner and holder thereof, and that on the 10th day of September, 1891, the said defendant paid the sum of \$35.15 interest thereon to that date, and on said day paid the further sum of \$245.83 on account of the principal thereof, and that there is now due and owing to the plaintiff thereon the sum of \$245.82, with interest thereon at the rate of 10 per cent. per annum from the 10th day of September, 1891; that the said defendant, the city of Port Townsend, by general ordinance, did prescribe the mode in which the charge on the respective owners of lots or lands and on the lots or lands shall be assessed and determined for the purpose of the said improvement, which said ordinance is entitled as follows: "Ordinance No. 160. An ordinance prescribing the mode in which the charge on the respective owners of lots or lands, and on the lots or lands, shall be assessed, determined and collected for street improvements,"—which said ordinance passed the council March 4, 1887, and was approved by the mayor on the 4th day of March, 1887; that the said defendant did duly make, create, and levy a special tax and assessment for such improvement on the lots and parcels of land fronting on such street, highway, or alley, aforesaid, sufficient to pay the expenses of such improvement; that the said city of Port Townsend has failed, neglected, and refused to collect the said assessment and tax, and has failed, neglected, and refused to create and provide the fund for the payment and redemption of said warrant, or any part thereof, except as hereinbefore alleged to have been paid, and the city of Port Townsend has failed, neglected, and refused, and still fails, neglects, and refuses, to collect the charge, and enforce the lien for such special tax and assessment, as provided by law; that the time allowed by law to collect the assessment and special tax, aforesaid, and provide the fund for the redemption and payment of said warrant, and collect the same from the property liable therefor, and to be assessed therefor, has long since elapsed, and that the said defendant is barred by the statute of limitations from enforcing and collecting the special tax and assessment against the property, and on the lots and parcels of land fronting on the street, highway, and alley along which said improvements were made, and from collecting the amounts of such assessment personally from the owner or owners of the lots and lands at the time of the making of said assessment, and this plaintiff has been, and therefore is, prevented from obtaining payment of the said warrant out of said fund by the failure, neglect, fault, refusal, and fraud of the defendant, without any failure, neglect, fault, refusal, or fraud of this plaintiff, or his assignors. The complaint then demands judgment for the amount, with interest alleged to be due upon the warrant. The same allega-

tions appear in the remaining causes of action set forth in the complaint.

Section 8 of the city charter confers power upon the city to improve its streets in various ways, but it is therein provided that, unless the owners of more than one-half of the property subject to assessment for such improvement petition the council to make the same, such improvement shall not be made until at least five members of the council, by vote, assent to the making of the same. Section 10 of the charter grants power to the city, by general ordinance, to "prescribe the mode in which the charge on the respective owners of lots or lands, and on the lots or lands shall be assessed and for the purpose authorized by this act,"—the act of incorporation; and section 92 provides that the city of Port Townsend is not bound by any contract, or in any way liable thereon, unless the same is authorized by a city ordinance, and made in writing, and by order of the council, signed by the clerk, or some other person, in behalf of the city.

The defendant interposed a demurrer to the complaint, on the ground that it failed to state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiff declining to plead further, judgment was entered against him for costs, and he thereupon appealed.

The first proposition advanced by the learned counsel for the respondent in support of the ruling of the court below is that it does not appear from the complaint that an ordinance authorizing the contract mentioned therein was ever passed by the council, or that the owners of more than one-half of the property subject to assessment for such improvement petitioned the council to make the same, or that at least five members of the council, by vote, assented to the making of such improvement. It is claimed by counsel that these are jurisdictional facts, and must be expressly stated in the complaint, in order to set forth a cause of action. It is true that, if it does not appear that the contract was authorized by an ordinance of the city, it is not binding, and the plaintiff cannot recover in this action, but it is also true that, if these necessary facts may be proved under the allegations of the complaint, the complaint must be deemed sufficient as against the demurrer.

We think that the complaint is sufficient to authorize proof that the contract was entered into in accordance with an ordinance of the city, for it, in legal effect, sets forth that fact. The meaning of the word "duly," as defined by Webster, is "In a due, fit, or becoming manner; properly; regularly;" and if the city duly entered into the contract, it properly entered into it, and it could only properly do so by virtue of an ordinance. It is a general principle in pleading that whatever is necessarily implied need not be averred, and, accordingly, it was held in *Rockwell v. Merwin*, 45 N. Y. 167, that an allegation in the com-

plaint that plaintiff was duly appointed receiver by an order of a justice of the supreme court, without pleading any judgment or proceeding upon which he was appointed, authorized proof on the trial of all the facts conferring jurisdiction. In *Cruger v. Halliday*, 3 Edw. Ch. 570, it was held that: "\* \* \* Under the allegation that trustees have been duly appointed, and have accepted and taken on themselves the office, it is to be inferred that everything has been done to constitute them trustees de jure until the contrary appears." In *People v. Walker*, 23 Barb. 304, it is said that "\* \* \* the averment that a meeting was duly convened implies that it was regularly convened, and, if necessary to its regularity, that it was an adjourned meeting." In *Culligan v. Studebaker*, 67 Mo. 372, the court held that the allegation, in a petition on a special tax bill, that the contract for street improvement, under which it was issued, was "duly awarded" by certain officers having the power of awarding contracts, is sufficient, and dispenses with the necessity of stating the particular facts which authorized them to award the contract. And in *Werth v. City of Springfield*, 78 Mo. 107, which was an action for negligently changing the grade of a street, the court said: "It is undoubtedly true that the defendant can only be held responsible for the acts of its officers, agents, or servants in changing the grade of a street, when such change has been authorized by ordinance. But in alleging that the defendant raised the grade to a certain height, it is necessarily implied that it was done in pursuance of some ordinance, as the defendant can only act in such matter by ordinance; and it is a well-established rule in pleading that things which are necessarily implied need not be alleged. \* \* \* If the allegation in question should be denied, the plaintiff would have to introduce in evidence an ordinance authorizing the change of grade, in order to maintain his action against the city."

*City of Kansas v. Johnson*, 78 Mo. 661, was an action to recover a personal tax on the goods of a merchant. The complaint alleged that the city, by its mayor and common council, duly assessed and levied upon the wares and merchandise of said defendant certain taxes, which were specified therein. The defendant objected to the admission in evidence of the ordinance providing for the tax, for the reason that it was not pleaded, and the court, upon this point, used the following language: "Neither is the statement deficient in not alleging that the mayor and council had a right to levy the tax. Whether they had the right was a matter of law, and not of fact, and hence it was unnecessary to allege the existence of the right. \* \* \* The averment contained in the statement that the tax was duly levied, in effect, pleaded the substance of the ordinance, and that is sufficient to authorize its reception in evidence." So we say in this case that the allegation in the complaint that the city duly made and entered

into the agreement set forth therein is sufficient to admit proof of the ordinance, and all other facts claimed to be jurisdictional.

The next contention of the respondent is that appellant is not entitled to any relief in an action at law brought upon the warrants; that he has mistaken his remedy; that an action at law will not lie upon a warrant; and, in support of this position, counsel cites *Soule v. City of Seattle*, 6 Wash. 324, 33 Pac. 384, 1080; *Abernethy v. Town of Medical Lake*, 9 Wash. 112, 37 Pac. 306; *Cloud v. Town of Sumas*, 9 Wash. 399, 37 Pac. 305. While it may be true that one holding a warrant drawn upon the general fund of a city may not maintain an action upon it, we think no such case is presented here. In *Soule v. City of Seattle*, supra, this court said, on petition for rehearing, that " \* \* the main point upon which the case was decided was that the respondent had mistaken his remedy, by reason of the fact that his contract with the city was of such a character that it would not justify the charge of negligence against the city, until it had been fully moved to levy and collect a local assessment to pay for the work. This ground alone, in our judgment, authorized the dismissal of the case." But, according to the allegations of this complaint, which, for the purposes of this demurrer, must be taken as true, the city agreed to provide the fund for the payment of these warrants, according to law. In *Abernethy v. Town of Medical Lake*, supra, the plaintiff held a claim against the town, which had been allowed, and a warrant had been issued therefor, the payment of which was limited to a certain street-grade fund, but there was no such fund, and payment had been refused by the treasurer for want of funds, and the court very properly held in that case that the plaintiff should have demanded a general fund warrant, and, not having done so, could not recover in the action; that his remedy was against the officer to compel him to issue a proper warrant. In *Cloud v. Town of Sumas*, supra, it appears that the plaintiff already had a warrant upon the general fund of the town, and the court said: "All he could obtain upon a judgment in his favor would be a warrant issued by the town authorities for the payment of his claim, in accordance with the provisions of section 674, Hill's Code, and he already has a warrant therefor." But here the plaintiff has no warrant upon the general fund of the defendant, and in fact the object of the action is to obtain such warrant.

It is argued by counsel for the respondent that if this action is not one upon a warrant, it is an action for damages, and, if it be considered as an action for damages, the complaint fails to state a cause of action, for the reason that no damages are alleged therein. It is true that the plaintiff does not state, in express words, that he has been damaged, and claims a recovery therefor,

but it is equally true that such an allegation, while usual, and, perhaps, in some cases essential, is not in all cases necessary. We think this is essentially an action for damages, and, if the allegations are true, and they must be so considered in the present posture of the case, the plaintiff has been damaged in the amount due upon the warrants, and is entitled to recover, under the decision of this court in *Stephens v. City of Spokane*, 11 Wash. 41, 39 Pac. 266, and *Id.*, 14 Wash. 298, 44 Pac. 541, and 45 Pac. 31. It is said by Sutherland in his work on Damages (section 415) that "the controlling part of the complaint, as to the amount of damages, is the prayer for judgment." And in *Sedg. Meas. Dam.* (8th Ed.) § 1260, it is said: " \* \* Except as fixing a limit beyond which recovery cannot be had, the averment of the amount of damages is not a material one."

This question was before the supreme court of California in the case of *Riser v. Walton*, 78 Cal. 490, 21 Pac. 362, and the court there held that a complaint for recovery of damages which omits to formally aver the amount of damages is not demurrable on that account, if it contains a prayer for judgment in a specified amount; and to the same effect is *Bartlett v. Bank*, 79 Cal. 218, 21 Pac. 743. See, also, *Weaver v. Boom Co.*, 28 Minn. 542, 11 N. W. 113, a case directly in point. The complaint in this case, as we have seen, prays for judgment in a specified amount, and is, therefore, under the authorities above cited, sufficient, although it fails to allege that the plaintiff was damaged.

From what we have already said, it will appear that, in our opinion, the complaint states a cause of action, and the judgment will therefore be reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

SCOTT, C. J., and GORDON, J., concur.

(19 Mont. 206)

STATE v. WROTE et al.

(Supreme Court of Montana. Feb. 15, 1897.)

BAIL—ACTION ON BOND—PLEADING.

1. In an action to forfeit a bail bond given for an appearance to answer an information for grand larceny, a complaint is sufficient which alleges that the information charged grand larceny, though it also states that it was committed "by unlawfully taking one cow."

2. Where the complaint on a bail bond alleges that defendant was duly called and failed to appear, it is sufficient, though it does not allege that he made default without excuse.

3. Under Cr. Prac. Act, § 258 (Comp. St. 1887, p. 451), providing that an action on a recognizance shall not be defeated for any defect in form, an averment that defendant was called and failed to appear was sufficient, though it alleged that the judge, instead of the court, declared the bond forfeited.

4. That a complaint in an action on a bond to appear and answer an information did not allege that it was certified by the sheriff, who

took it, to the clerk, who filed and recorded it, did not relieve the sureties from their liability thereon, under Cr. Prac. Act, § 258 (Comp. St. 1887, p. 451).

Appeal from district court, Carbon county; Frank Henry, Judge.

Action by the state against Michael Wrote and others. Judgment for the state, and defendants appeal. Affirmed.

It appears from the pleadings and the record in this case that on the 21st day of May, 1895, in the county of Carbon, one Joseph Smith was committed by a justice of the peace on a charge of grand larceny, and held for his appearance to the district court, in the sum of \$1,000, to answer said charge, and that the appellants in this case became the sureties on the bond of said Smith for his appearance. Said Smith failed to appear at the district court in accordance with the condition of his bond, which was forfeited therefor, and this suit is brought to recover the amount of said bond, of the sureties thereon. The defendants appeared and filed a demurrer to the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action against the defendants, or any of them. The court overruled the demurrer, and the defendants declining to answer, and standing upon their demurrer, judgment was entered against them in accordance with the prayer of the complaint. The appeal is from the judgment.

O. F. Goddard, for appellants. C. B. Nolan, for the State.

PEMBERTON, C. J. (after stating the facts). Counsel for appellants contends that the complaint does not show that the information presented in the district court against Smith charged him with the commission of a public offense. The allegation in the complaint in this respect is that the county attorney filed in the "district court of the Sixth judicial district of the state of Montana, in and for the county of Carbon, an information charging the said Joseph Smith with the crime of grand larceny, committed within the county of Carbon and state of Montana on or about the 15th day of May, A. D. 1895, by unlawfully taking one cow, the property of, and from the possession of, H. C. Lovell." From this it will be seen that the complaint alleges that the information charged Smith with the crime of grand larceny. The condition of the bond is as follows: "Now, therefore, if the said Joseph Smith shall be and appear at the next ensuing term of said court, on the first day thereof, and from day to day, and from term to term, and not depart therefrom without the order of said court, and, if convicted of said crime, will render himself in execution thereof, then this obligation shall be void, otherwise to remain in full force and effect." The complaint charges that the crime of grand larceny was committed by Smith, by

his "unlawfully taking one cow," etc. But we think that part of the complaint alleging how he committed the crime charged in the information was unnecessary. It was surplusage. Omit this part of the allegation, and the complaint alleges that the information charged Smith with grand larceny,—the charge mentioned in the bond as the one on which he was to appear at the district court and answer.

Counsel for appellants says the complaint is bad because it does not allege that Smith, "without excuse," made default of appearance. The complaint alleges that Smith "was duly called at the proper time and place, and failed to appear in person." This charges a failure on the part of Smith to comply with the condition of his bond, and is a sufficient allegation, we think, to authorize a forfeiture, under section 236, Cr. Prac. Act (Comp. St. 1887, p. 451). *People v. Bennett* (N. Y. App.) 32 N. E. 1044. If Smith had a sufficient excuse for not appearing, he ought to have shown it on a motion to set aside the forfeiture.

Counsel for appellants contends that the complaint is bad because it alleges that the judge, instead of the court, declared the bond forfeited. We think that the averment in the complaint that Smith was called and failed to appear in the district court was "equivalent to an averment that his default for not appearing was entered of record." *People v. Huggins*, 10 Wend. 465, and cases cited. This, we think, was all that it was necessary to aver in this respect. This was all that was necessary to aver under section 258, Cr. Prac. Act (Comp. St. 1887, p. 451).

The counsel for appellants also contends that the complaint does not allege that the crime charged in the information was the same crime for which Smith was held to answer. Smith was held to answer for the crime of grand larceny. The complaint alleges that he was charged by the information with the crime of grand larceny, as we have seen above. It certainly does not appear by the complaint that the crime for which he was held to answer and the one charged in the information are not the same, but, on the contrary, it does fairly appear that the crimes alleged in the information and bond are the same.

Counsel for appellants further contends that the complaint does not allege that the bond was certified by the sheriff, who took it, to the clerk, and "filed and recorded by him." This, we think, did not invalidate the bond, or relieve the sureties from their liability thereon. See Cr. Prac. Act, § 258 (Comp. St. 1887, p. 451).

We think the errors assigned are purely technical, and without substantial merit. The judgment appealed from is affirmed.

HUNT and BUOK, JJ., concur.

(19 Mont. 206)

**STATE v. GRAY et al.**

(Supreme Court of Montana. Feb. 15, 1897.)

**GAMING—INFORMATION—QUESTION FOR JURY.**

1. In an information under Laws 15th Ex. Sess. 1887, p. 75, § 10, prohibiting the keeping of a gambling place without paying a license, where the offense of keeping such a place is sufficiently charged, an allegation that the keepers carried it on as the employes of another does not vitiate the information.

2. Under an information for keeping a gambling place without a license, wherein the game of "fan tan" is played, whether such game is one within the prohibition of the "Hunt Gambling Law" of 1889, for which no license can be obtained, is a question of fact for the jury.

Appeal from district court, Silver Bow county; William O. Speer, Judge.

Information against the defendants, W. Gray and others, for keeping and maintaining a gambling house, or place where gambling is carried on for money, without a license. The defendants filed a general demurrer, which was sustained by the court, and the defendants were discharged. The state appeals. Reversed.

The material part of the information charged defendants with "intentionally and knowingly conducting, keeping, and maintaining a certain room and house in which the defendants did keep, and carry on and maintain, a certain game of chance and gambling game, called 'fan tan,' or 'tan,' or 'tan tan,' the said game being a game of chance and gambling game, a more particular description of which was to the county attorney unknown, etc., which said game was dealt and played for money, and checks and representatives of money, \* \* \* and that they, said defendants, then and there being the employes and servants of one John Doe Williams in the keeping, maintaining, and conducting and carrying on of said game in said room or place, as aforesaid, and they, the said defendants, then and there well knew that the said John Doe Williams had not secured a license," etc.

C. B. Nolan, for the State.

**HUNT, J.** (after stating the facts). The record does not show why the district court sustained the general demurrer. Possibly it was because the information first charges the defendants with keeping the room, and in the latter part thereof sets forth that they kept, maintained, and carried on the game referred to in the room, knowing that their employer had not secured a license for keeping and maintaining the house or room where the game was dealt or played for money. There may be some ambiguity of expression in the information, but the facts pleaded are that the defendants kept and maintained the house where "fan tan" was played, and kept and maintained and carried on the game in the house, doing all such acts as the employes of John Doe Wil-

liams, whom they well knew had not secured a license for keeping and maintaining a gambling house, as required by law. But mere uncertainty or ambiguity of expression, where the charge is as plainly averred as in this case, will not warrant a court holding that the facts stated do not constitute a public offense. The essence of the offense charged, under section 10 of an act concerning licenses (page 75, Laws 1887 15th Ex. Sess.), is the keeping of the place where the game is dealt or played for money without first paying a license; and, where the offense of keeping such a place for such a purpose is sufficiently charged, it does not vitiate the information to allege that the keepers maintained and carried on the place as the employes of another. *Chase v. People*, 2 Colo. 509; *Wren v. State*, 70 Ala. 1; *People v. Sam Lung*, 70 Cal. 515, 11 Pac. 673.

It is admitted by the learned attorney general that if the ruling of the district court was made because the game of "fan tan" is prohibited by the provisions of the "Hunt Gambling Law of 1889," the demurrer to the information was well taken, inasmuch as no license could be obtained for carrying on a game prohibited by that law. We find, however, that in the list of games particularly prohibited by the provisions of section 1 of the law of 1889 called the "Hunt Law," there is no specific mention of "fan tan"; nor is it charged in the information herein that the game of "fan tan" is really one of the games prohibited by that law, but called by the different name of "fan tan," or that it is even similar to one of such prohibited games, or that it is a fraudulent game, or that it in any way violates the provisions of the law in force. On the contrary, the information is drawn upon the assumption that "fan tan" is a game which may be played after procuring a license. It may be that the game of "fan tan" is known by persons familiar with gambling games, and it may be that it is one of the games fairly within the prohibited games enumerated in the Hunt law; but, if all this is true, we certainly do not know it, and, without evidence of what it really is, we cannot be expected to judicially know that it is a prohibited game. True, there is a lucid explanation of the game of "fan tan" by Judge Deady in the case of *In re Lee Tong*, 9 Sawy. 333, 18 Fed. 253; but, in our opinion, the proper way to ascertain the facts concerning the methods of playing the game, and the object thereof, is on the trial, where witnesses may testify to such facts. Thus alone can it be shown whether it is a lawful gambling game or a prohibited one. Whether or not the game conducted or carried on was the game of "fan tan" is to be determined by the jury upon the evidence before them. *People v. Sam Lung*, *supra*. The province of the court in such a case seems to be to instruct the jury what con-



stitutes the game charged to have been played or conducted. This the court should do after it has heard evidence. But, as said, whether the game played was the one charged or not, the jury are to say. *People v. Carroll*, 80 Cal. 153, 22 Pac. 129. These views do not conflict with the case of *Kenyon v. King*, 2 Mont. 437.

The demurrer should have been overruled. The case is therefore remanded, with directions to the lower court to set aside the order and judgment sustaining the demurrer. Reversed.

PEMBERTON, C. J., and BUCK, J., concur.

(19 Mont. 223,

### SKLOWER v. ABBOTT.

(Supreme Court of Montana. Feb. 15, 1897.)

JUDGMENT—WHEN BECOMES A LIEN—ACTION TO QUIET TITLE—SUFFICIENCY OF ANSWER.

1. Code Civ. Proc. § 307 (Comp. St. 1887, div. 1), provided that after filing a judgment roll the clerk should make the proper entries of the judgment in the docket, "and from the time the judgment is docketed it shall become a lien." *Held*, that a judgment was not a lien until docketed, regardless of when it was rendered.

2. In an action to quiet title, it appeared that plaintiff levied an attachment on the land October 3d. Defendant claimed under a judgment against the attachment defendant not docketed until October 4th, though rendered six days previously; and his answer alleged that, when the attachment was levied, plaintiff and his attorneys knew of the undocketed judgment, and levied the attachment to destroy its value and defraud defendant. *Held*, that the answer stated no defense.

3. In an action to quiet title, an answer which raises an issue as to actual possession is good.

Appeal from district court, Meagher county; Frank Henry, Judge.

Action by Max Sklower against C. P. Abbott to quiet title. From a judgment in favor of plaintiff on refusal of defendant to amend after a demurrer to the answer was sustained, defendant appeals. Reversed.

This was an action to quiet title to real estate situated in Meagher county. From the complaint and answer on file, the facts presented for the court's consideration are as follows: A judgment was duly obtained by a creditor of the original owner of the land on September 28, 1892, but was not docketed by the clerk of the court until October 4, 1892. Appellant (defendant below) bases his title upon this judgment. On October 3, 1892, respondent (plaintiff below), as a creditor, instituted a suit against the owner of the land, and caused an attachment to be levied thereon. The complaint also alleges that, at the time of the levy of the attachment, respondent, as well as the members of the firm of attorneys representing him (this firm having also represented the first creditor in obtaining judgment against the original owner), was fully aware of the existence of the undocketed judgment,

and levied the attachment to destroy its value, and to cheat and defraud appellant. The answer to the complaint raised a direct issue as to who was in the actual possession of the premises. A demurrer was filed on the ground that said answer contained no defense. It was sustained. Appellant refusing to amend, judgment was rendered in favor of plaintiff. The appeal is from the judgment.

Smith & Gormley, for appellant. Max Watterman and Lew. L. Callaway, for respondent.

BUCK, J. (after stating the facts). The first question to be determined is whether the judgment relied upon by appellant was a lien upon the real estate in controversy before it was docketed. The question must be determined by the statute in force at the time. This statute (section 307, Code Civ. Proc.; division 1, Comp. St. 1887) is as follows: "Immediately after filing a judgment roll the clerk shall make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it shall become a lien upon the real estate of the judgment debtor, not exempt from execution, in the county, owned by him at the time, or which he may afterward acquire, until said lien expires. The lien shall continue for six years, unless the judgment be previously satisfied." Under said section, it is manifest that this judgment did not become a lien upon the real estate until after the creation of the attachment lien of respondent. The language of said section 307 admits of no other construction, but, as fortifying it, certain language in the case of *Creighton v. Hershfield*, 2 Mont., on page 390, is worthy of citation. In that case the supreme court of Montana, by Mr. Justice Knowles, in referring to a statute (section 295, Codified St. 1871-72; section 358, Code Civ. Proc.; division 1, Comp. St. 1887) requiring a deficiency judgment in a mortgage foreclosure to be docketed in order to constitute it a lien on real estate, said, in substance: "The object of having a clerk docket a judgment for a deficiency is that the said judgment may become a lien on real estate, and is also to apprise purchasers of such estate of the amount of the lien thereon." If appellant was damaged by any act of the clerk of the court in failing to docket the judgment, or by any negligence or deceit practiced by the attorneys in reference to such docketing, he should seek redress from them. The allegations of the answer in this respect are wholly insufficient to warrant any redress as to respondent. If he was not a party to any fraud or conspiracy entered into for the purpose of delaying the docketing of the judgment,—if there was any such fraud or conspiracy,—he had a perfect right to have his attachment levied before any such docketing.

In one respect, however, the lower court committed error. The possession of respondent at the time of bringing the suit was directly at issue. If he was not in possession at such time, his title should be determined in an action of ejectment, and, in order to maintain this action to quiet title, he must not only allege, but prove, possession on his part. See *Wolverton v. Nichols*, 5 Mont. 89, 2 Pac. 308; *Milligan v. Savery*, 6 Mont. 129, 9 Pac. 894. For the last reason only the judgment of the lower court must be reversed. The cause is remanded, with directions to the lower court to overrule the demurrer and hear testimony on the question of possession. Reversed.

PEMBERTON, C. J., and HUNT, J., concur.

(9 Colo. App. 131)

DE GRAFFENRIED v. SAVAGE et al.  
(Court of Appeals of Colorado. Jan. 11, 1897.)

WATERS—PAROL LICENSE—CONSTRUCTION OF  
DITCH—IMPLIED GRANT.

A parol license to enter and construct a ditch over lands by the gratuitous consent of the owner operates as an irrevocable grant after entry and construction of the ditch, its interrupted use for two years, and the expenditure of money to make the water available for purposes of irrigation.

Appeal from district court, Montrose county.

Action by W. L. Savage and others against James R. De Graffenried to enjoin the obstruction of a ditch, and for damages. From a decree and judgment in favor of plaintiffs, defendant appeals. Affirmed.

Appellant was and is the owner of 40 acres of land in the county of Montrose. Appellees were the owners of parcels of land south of and below that of appellant. In the year 1890 appellees constructed a lateral ditch from a main ditch to their lands, for the purpose of irrigating the same. The lateral ditch was constructed across the 40 acres of land owned by appellant to the lands of the appellees, the ditch being about 80 rods in length, and following as near as practical the public road adjoining the land. It is alleged in the complaint that the entry upon the land and the construction of the ditch were with the consent, knowledge, and acquiescence of the defendant, and that the plaintiffs used the ditch for the purpose of irrigating the land without objection or interruption for two years; that plaintiffs had no other means of irrigating their lands but by the water through this lateral ditch. The injury complained of is alleged in the complaint as follows: "That said defendant has willfully and forcibly filled said ditch in places, so as to obstruct the flow of water therein and therethrough, and the same has become obstructed by wash and fill, and plaintiff [defendant] refuses to allow plain-

tiffs, or either of them, to remove said obstructions, or to clear said ditch, and threatens them with violence if they attempt to run water through the same, and so threatens by violence and force to prevent said plaintiffs, or either of them, from further use or occupation of said ditch or lateral." Prayer for an injunction and for damages. A temporary injunction was granted. Defendant answered, denying the allegations of the complaint, and filed a cross complaint, demanding damages for the construction and operation of the ditch upon his land, and asking for the dissolution of the injunction. The court found for the plaintiffs, refused to dissolve the injunction, and gave judgment against the defendant for \$1.00 and costs; from which an appeal was taken to this court.

L. F. Twitchell and S. S. Sherman, for appellant. John Gray, for appellees.

REED, P. J. (after stating the facts). No abstract is made of the evidence in the case for the reason given by appellant "that no error is assigned as to the findings of fact by the court." The court found that the ditch was constructed in 1890, and was constructed with the knowledge and consent of the defendant; that no consideration was paid or agreed to be paid by the plaintiffs or their grantors; that no consideration has ever been paid; that the ditch was constructed on a line across the land of appellant practically agreed upon between the parties at the time of the survey; that the appellant made no objection to the construction or use of the ditch across his land until after it was fully completed, and being used by the appellees; that appellees have improved their lands and cultivated them by the use of the water carried through the ditch; that the ditch had been constructed and used two years before any objection was made to its maintenance and use upon appellant's land; that after the ditch had been completed and used by the plaintiffs for two years, as stated, appellant interfered with the use of the ditch by the appellees, and filled and obstructed it. It being admitted that the facts were correctly found by the court, the solution naturally follows the finding. The law of the case, as applicable to the facts, was stated by the court as follows: "The right granted the plaintiffs and their grantors is a parol license, but, inasmuch as it was without any limitation as to time, and was acted upon by the plaintiffs and their grantors, and the ditch fully completed and used by them before any objection to such use was ever made by the defendant, it is irrevocable; and, although no deed was ever executed, and no consideration paid, the plaintiffs and their grantors having acted in good faith, and on the faith of the license granted having expended money, the defendant cannot be heard to complain, and

the judgment, therefore, must be for the plaintiffs in the case, and a decree will be ordered enjoining the defendant from in any manner interfering with or obstructing said ditch across his land."

The contention of counsel of appellant is that the court erred in his construction of the law; that the right to enter, construct, and operate the ditch was by parol license, which was revocable by appellant at any time he saw fit; but that by the construction of the court the right of appellees became an easement in the lands of appellant; that an easement could only be created by deed, and as there had been no conveyance, and the license having been revoked, appellees could not enter upon the land of appellant, to repair, maintain, and operate the ditch. It is a matter of very little importance what technical name be given to the right, nor whether an easement or license. If the judgment and decree are right, it is unimportant by what process of reasoning they were arrived at. Section 2260, 1 Mills' Ann. St., is as follows: "Upon the refusal of the owners of tracts of land or lands through which said ditch is proposed to run, to allow of its passage through their property, the person or persons desiring to open such ditch may proceed to condemn and take the right of way therefor." Here consent was given; no compensation required; the ditch was constructed, and operated without objection for two years; then the use was forbidden, and the ditch obstructed. Appellant could have required compensation before allowing entry, and the right, gratuitously granted, under the statute by condemnation; but that was unnecessary. Having waived all right to compensation, and permitted the use for two years, whether appellant could now maintain an action at law, and recover payment for the right of way or damages, is a question not involved, and upon which we express no opinion. But it is clear under all the authorities that appellant could not resort to the summary remedy of obstructing or destroying the ditch, or preventing the parties from entering upon the line of the ditch to operate it. We need not go back to the act of congress of 1866, and assert that by virtue of that act all land subsequently granted by the government was granted subject to the right of way for conveyance of water when a necessity to others, and needful for the reclamation and cultivation of land. This right was recognized and protected by Laws 1861, p. 67. In Phear, Water, 71, it is said the common law recognizes an easement in certain cases, and will imply a grant of such easement where it is especially necessary to the enjoyment of the dominant estate. In Yunker v. Nichols, 1 Colo. 554, Chief Justice Hallett said: "All the lands in this territory which are now held by individuals were derived from the general government, and it is fair to presume that the government intended to con-

vey to the citizens the necessary means to make it fruitful." The greater weight and number of decisions, even at common law, hold that the license was only revocable while it remained executory. After entry, when it became executed, it was irrevocable. See Huff v. McCauley, 53 Pa. St. 206; Veghte v. Water-Power Co., 19 N.J. Eq. 142; Cool v. Lumber Co., 87 Ind. 531; Rogers v. Cox, 96 Ind. 157; Rerick v. Kern, 14 Serg. & R. 267; Cook v. Stearns, 11 Mass. 533; Barksdale v. Hairston, 81 Va. 764; Turner v. Stanton, 42 Mich. 506, 4 N. W. 204. Notwithstanding the nice common-law distinction between a license and an easement attempted to be drawn by counsel in this case, we think it settled by Yunker v. Nichols, supra, and Schilling v. Romlinger, 4 Colo. 100. In the former, Hallett, C. J., said: "It may be said that all lands are held in subordination to the dominant right of others who must necessarily pass over them to obtain a supply of water to irrigate their own lands, and this servitude arises not by grant, but by operation of law. In this case there was evidence tending to prove that defendant consented to the construction of the ditch, which, with the aid of the law, was sufficient to maintain the action. If defendant had refused his consent, the statute prescribed the method of proceeding to perfect plaintiff's right. But, in any event, it was not necessary that defendant should convey to plaintiff the right of way for the ditch." And in the later case, Thatcher, C. J., said: "Primarily, where the climatic conditions are such as exist in Colorado, the right to convey water for irrigating purposes over land owned by another is founded on the imperious laws of nature, with reference to which it must be presumed the government parts with its title. And although a patent from the government may be silent in regard to conditions, which, if expressly named, would have no greater force, it cannot be asserted that therefore they do not exist. Yunker v. Nichols, 1 Colo. 551." It will thus be seen that at that early date the court found it necessary to override and disregard technical rules of law pertaining to riparian rights in other countries, and apply our own laws, made with reference to the climate, the arid and desert character of the land without water, and its prolific fruitfulness by the application of water. The prosperity of the country required that the greatest possible use of the waters should be made, and that no restrictions should exist to its appropriation, transportation, and use; and the right of way for conveying it across the land of another was regarded as a general servitude attaching to such land ex necessitate, regardless of contract. The right might be granted by contract between the parties, by condemnation proceedings, or, as in this instance, by gratuitous consent of the owner; and in either case, after the entry and expenditure of money, the right was irrevocable, and in

cases of this kind the license to enter, after entry and construction of the ditch, operates as a grant, and such grant is presumed and implied. At an early date, in *Bridge Co. v. Dix*, 6 How. 532, the broad doctrine of necessity of constructing with reference to the conditions, surroundings, and circumstances was clearly and forcibly stated by the court in the following language: "Into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself. They are superinduced by the pre-existing and higher authority of the law of nature, of nations, or of the community to which the parties belong. They are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force." The peculiar climatic conditions of this country, and the inapplicability of the laws as construed in other countries, where different natural laws prevail, made it necessary for our courts to adopt the broad rule of construction announced in that case. In *Yunker v. Nichols* and *Schilling v. Rominger*, supra, the court in clear and unmistakable language declared that an executed license was, in effect, an implied grant, irrevocable. In this case the proceeding was in equity. The license was admitted, and, after it became executed, and the ditch constructed and operated for two years, a revocation was claimed, and the right to take possession of the ditch, obstruct and destroy it; the result being, if not the absolute destruction of the value of the lands supplied with water by the ditch, the destruction of the crops, and the forced abandonment of the farms, until some other practical route for the conveyance of water could be found, if possible, and a new ditch constructed, probably inflicting upon appellees damage three or four times greater than the value of appellant's entire parcel of land. The defense is so inequitable it could receive but little consideration from a court of equity. The judgment and decree of the district court are correct, and must be affirmed. Affirmed.

(8 Colo. App. 427)

**GRAHAM PAPER CO. v. SANDERSON.**<sup>1</sup>

(Court of Appeals of Colorado. Sept. 14, 1896.)

**ASSIGNMENT FOR BENEFIT OF CREDITORS—DESCRIPTION OF ASSETS.**

An assignment for benefit of creditors conveying to the assignee all the property of the assignor, of every nature whatsoever, with the statement that the property was more particularly described in the schedule annexed, and that "all the property is conveyed, whether specified in the schedule or not," is valid, though the description in the schedule is of a like general character.

<sup>1</sup> Rehearing denied December 14, 1896.

Appeal from district court, Arapahoe county.

Action by the Graham Paper Company against James B. Hinchman. From an order discharging David T. Sanderson, garnishee, plaintiff appeals. Affirmed.

Rogers, Cuthbert & Ellis and Frank L. Woodward, for appellant. A. W. Hille, for appellee.

**BISSELL, J.** The Graham Paper Company recovered a judgment against Hinchman for \$469.39. Execution was issued, and returned nulla bona. Thereafter a garnishee summons was sued out, and served on Sanderson, who answered "Not indebted." The answer was traversed. On the trial the garnishee was discharged. The appellant, feeling aggrieved, prosecutes this appeal.

The case lies within very narrow limits, and requires barely more than a suggestion to settle the only question presented. Sanderson was an assignee for the benefit of creditors under a deed made by Hinchman prior to the judgment. The whole error laid is predicated on the insufficiency of the deed to pass the title to the assignee. It was in general terms, and conveyed to Sanderson "all the goods, chattels, merchandise, bills, bonds, notes, book accounts, claims and demands, choses in action, judgments, evidences of indebtedness, and property, of every name and nature whatsoever, of the party of the first part." This general granting clause was followed by a statement that the property "is more particularly described in the schedule annexed," with a further clause "that all the property is conveyed, whether specified in the schedule or not." The schedule is printed in the appellant's argument. The description in the schedule is of a like general character, and does not identify the locus of the buildings, improvements, and stock transferred. It is insisted the description is too general, and title cannot be taken to pass by virtue of the general words of transfer. This court is supposed to be controlled by a decision in a case wherein the deed was held to be limited by the terms of the inventory. We do not regard the opinion applicable, nor the facts at all similar. In the case referred to, the only description was that contained in the inventory, and the terms of the inventory were, of necessity, taken as a limitation upon the granting clause. The cases referred to and particularly relied on are *Palmer v. McCarthy*, 2 Colo. App. 422, 31 Pac. 241, and *Burchinell v. Mosconi*, 4 Colo. App. 401, 36 Pac. 307. The contention as to the invalidity of the assignment under consideration is based largely on the general language used in those two opinions respecting the construction of deeds which were adjudged to be insufficient mainly on other grounds than the particular one which was suggested in the opinions, rather than made a basis of the decision itself. It

is quite true the language in the Burchinell v. Mosconi Case admits of the construction contended for, and the learned judge who wrote the opinion declared the language of the description in the deed in that case insufficient, and intimated that, if necessary, he would hold the deed invalid, because of a lack of apt words conveying the assigned property. Under the old assignment act of 1885, the assignor was bound to attach an inventory to his deed of assignment, which should contain a description of the property which he sought to convey. In that case the deed itself declared that all the property which was conveyed was described in the schedule which was attached. Under these circumstances, it might possibly have been well held that the description in the deed was insufficient. There are many authorities of great weight which hold that, where the schedule is made a part of the deed, it may vary its terms, and the general description must be taken as limited by that found in the schedule. This rule proceeds on the general basis that a particular description controls a general one antecedently expressed in the same instrument. *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677. The cases which lay down this rule do it on the principle stated in that opinion, and adopt the construction simply because of the necessity which results from the limitation upon the granting-clauses. It is believed no case can be found which will adjudge a deed containing general granting words like the present would be held insufficient to convey all the property of the assignor, unless this construction was the normal and necessary result of a limitation of the particular words contained in the grant itself. Such is not the present case, for the grantor here directly declares that all his property is conveyed, whether specified or undescribed. The distinction is very aptly stated, and the true rule settled, in *Falk v. Liebes* (Colo. App.) 42 Pac. 46. Language identical with that contained in the present deed was construed in that case. The deed was held good, and the phraseology of the inventory adjudged not to be a limitation on the grant. According to the express language of the instrument, the reference to the inventory was for a more full and particular description, and not by way of limitation. It was the manifest and clear intention of the parties to convey all the property which they owned which was not exempt from execution. This has always been held sufficient. It is only requisite that the description be sufficient when aided by parol proof to ascertain what is granted. This is the clear result of the main line of reputable authorities, and, so far as we are able to see, we find nothing in our opinions on facts at all similar which conflict with these authorities. *Clark v. Few*, 62 Ala. 243; *Nave v. Britton*, 61 Tex. 572; *Coots v. Chamberlain*, 39 Mich. 565; *Burrill*, Assignm. (6th Ed.) § 99; *Clark v. Mix*, 15 Conn. 151; *Pingree v.*

*Comstock*, 18 Pick. 46; *Turner v. Jacox*, 40 N. Y. 470; *Bank v. Roche*, 93 N. Y. 374. These cases are all in harmony with the general propositions laid down in the *Falk* Case, and herein expressed. The judgment of the court below is in accordance with these views, and, deeming it correct, we affirm the judgment. Affirmed.

(9 Colo. App. 11)

TERRY v. WRIGHT et al.<sup>1</sup>

(Court of Appeals of Colorado. Dec. 14, 1896.)

COUNTY COURTS—JURISDICTION—LIABILITY OF JUDGE.

1. County courts are courts of superior or general jurisdiction.

2. Where, under Gen. St. § 3565 (authorizing the court, by citation, to require any person having assets of a decedent to appear for examination, and, on refusal to deliver up the property, to commit him to jail), the court orders a person in possession of property on which an administratrix held a chattel mortgage, without citation, to deliver the same to the administratrix, and such person, on failure so to do, after a trial, is found guilty of contempt, though the acts so done were in excess of his jurisdiction, the judge is not liable to such person in damages.

Error to district court, Boulder county.

Action by W. R. Terry against Alpheus Wright and others. A demurrer to the complaint was sustained, and plaintiff brings error. Affirmed.

An action brought by the plaintiff in error against Alpheus Wright, county judge of Boulder county, the sureties upon his official bond, and others, for damages for an alleged illegal arrest and imprisonment. On the 16th day of January, 1895, Esther M. Austin lent \$514 to Catharine O'Brien, administratrix of the estate of John H. Hager. An order was obtained from the county court by the administratrix of the estate to borrow the money, and execute a chattel mortgage upon the personal property to secure the payment. Austin lent the money, and took the security. On the 1st day of May, 1895, Austin filed an affidavit: That the note became due April 19th, and was unpaid except \$30; that affiant was informed and believed that plaintiff had in his possession cows, horses, wagons, and harness covered by the chattel mortgage; that she had demanded the property, and plaintiff refused to deliver it; and that all the property was needed to satisfy the claim,—upon which the county judge made the following order: "It is therefore ordered by the court that W. R. Terry, within 48 hours after the service upon him of a copy of this order, turn over and deliver unto Esther M. Austin, or to her duly-authorized agent, the following property, to wit: 8 head of cows, branded 20 on left shoulder and hip; three set of double Concord harness; two 3½ inch spindle wagons, with four-inch tires; and three bay mares, and one bay horse,

<sup>1</sup> Rehearing denied February 8, 1897.

each branded 20 on left shoulder." The time mentioned in the order having expired, and no delivery having been made of the property, an affidavit stating the facts was filed. A writ was issued. Plaintiff answered, and was brought before the court, and required to answer and plead to the matters contained in the affidavit. Counsel filed the following motion: "(1) That the said county court has no authority in law to make the order herebefore set forth. (2) Because it is an attempt by the said court to determine the possessory right to property ex parte, the parties themselves not being properly before the court, nor the subject-matter (the property in controversy) not being in the custody of the court, or its officers or representatives,"—which was overruled. A hearing was had. Testimony for the people and plaintiff was taken. The judgment of the court was as follows: "And the court having heard the testimony on behalf of the people, and the defendant not contradicting the said testimony, the court finds the defendant guilty of contempt of court, and sentences him to the jail of Boulder county, Colorado, there to remain until he purges himself of said contempt, by surrender and delivery of eight (8) cows, two (2) wagons, and two (2) sets of double harness to Esther M. Austin, or in case he has sold them, or any of them, the purchase price thereof to be paid into court, together with the costs of this proceeding. It is further ordered that the said defendant pay all the costs of these proceedings, and that execution issue therefor." A mittimus issued, and it is alleged that the plaintiff was confined in the county jail for two days. A writ of habeas corpus was sued out of the district court, and, upon hearing, plaintiff was discharged. The suit was brought for \$15,000, damage alleged to have been sustained by reason of the alleged illegal arrest and confinement. A demurrer was filed to the complaint, and sustained by the court. The judgment upon the demurrer is the only question to be reviewed here.

Adams & Adams and M. B. Carpenter, for plaintiff in error. Sylvester S. Downer, for defendants in error.

REED, P. J. (after stating the facts). It is contended that the proceeding was illegal and unwarranted; that no notice was given plaintiff to appear and show cause; no opportunity for him to assert and establish title to the property. The course pursued does seem summary and arbitrary, purely ex parte, based upon the affidavit of the mortgagee alone, and an order made for the delivery of the designated property within 48 hours, regardless of how it came into his possession or his right to retain his possession; but those questions are not before this court for review. The estate of Hagar was in process of administration. The assets of the estate were in the hands and control of

the court. Application had been made and leave obtained to borrow the money, and secure it by chattel mortgage. It was the duty of the court to see that the assets of the estate were not dissipated or improperly disposed of. How it should have been exercised is another question. As far as can be gleaned from the record, when plaintiff was brought before the court, there was no attempt at justification. As far as appears, the only defense was the interposition of the motion on a question foreign to the proceeding for contempt, where the duty imposed was to purge and exonerate himself from the charge of contempt. This might have been done by showing that the property was not under his control or in his possession, and had not been after the execution of the mortgage; in the nature of a disclaimer; or he might have justified, and showed a right superior to that of the mortgagee. Failing to do either, his course seems to have been contumacious and defiant, and to have warranted the course pursued by the court. We do not determine whether or not the court could legally make the order to turn over the property.

The law in regard to contempt of court is probably about as well defined as other branches of jurisprudence, yet in each case is greatly controlled by the facts and circumstances of the particular case. Section 3565, Gen. St., is as follows: "If any executor or administrator, or other person interested in the estate, shall state upon oath to any county court that he believes that any person has in his possession, or has concealed, or embezzled, any goods, chattels, moneys or effects, books of accounts, papers or any evidences of debt whatever, or titles to land belonging to any deceased person, the court shall require such person to appear before it, by citation, and may examine him on oath touching the same, and if such person shall refuse to answer such interrogatories as may be pronounced to him by the court or person interested as aforesaid, or shall refuse to deliver up such property or effects as aforesaid, upon requisition being made for that purpose, by an order of the said county court, such court may commit such person to jail until he shall comply with the order of the court therein." By the statute it appears that, before making an order to turn over property, the court shall cite the party before it, and examine the party on oath, etc. This clause could only be operative against the charge of concealment or embezzlement or secretly remaining in the possession, which was not this case. There was no statement of belief making the inquisition necessary. As stated above, when served with the notice to deliver the property within 48 hours, he had that time in which to appear and show why he should not do it. The arrest without citation may have been irregular. It was summary, but was certainly within the general and inherent power of the

court, regardless of the statute; but, before the judgment and order of commitment, a trial was had of some sort, in which plaintiff put in his testimony and made his defense; and, after such defense, the court, upon the facts, found him guilty of contempt. Counsel have not given us the testimony, nor an abstract of it. The presumption is that it clearly established a flagrant contempt. Such having been the case, under section 3565, supra, it was the duty of the court to commit the plaintiff until he complied with its orders.

The county courts of this state are superior courts of general jurisdiction, and without the statutory provision the judge would have the same power to punish for contempt that pertains to the highest tribunal. See *Martin v. Force*, 3 Colo. 199; *Gomer v. Chaffe*, 5 Colo. 383; *Hughes v. Cummings*, 7 Colo. 138, 203, 2 Pac. 289, 928; *Hughes v. McCoy*, 11 Colo. 591, 19 Pac. 674. The latter case was almost a counterpart of the one under consideration. Suit was brought by a private person against the county judge for damages alleged to have been caused by his judicial acts. The supreme court said: "In such determination the judge misinterpreted the law, and the order made and entered by him in the premises was unwarranted." The court further said: "As to whether the judge's acts, under the said provision of our Code, were simply erroneous, or were in excess of his jurisdiction, we need not, and therefore do not, determine. It is evident that he was acting as judge in the premises, and, by virtue of the statute mentioned, was so acting in a subject-matter of which he had jurisdiction. According to the weight of authority, the judge so acting is not liable to a party aggrieved thereby, even if the acts so done were in excess of his jurisdiction, as excess of jurisdiction is distinguished from entire want thereof. It has been determined by this court that our county courts are courts of superior or general authority." "A court with general jurisdiction is not an inferior court, because an appeal may be taken from its decisions to a higher court." *Newell*, *Mal. Pros.* § 50. And see *Hawes*, *Jur.* § 258; *Harvey v. Tyler*, 2 Wall. 328. County courts in the state of Illinois are not invested with the same extended jurisdiction as our county courts, but were by statute invested with common-law jurisdiction. In relation to them, the supreme court said, in *Anderson v. Gray*, 134 Ill. 550, 25 N. E. 843: "County courts in this state, in the exercise of the common-law jurisdiction, which has been conferred upon them by statute, are entitled to the same presumption in favor of their jurisdiction as circuit courts. They are courts of record, and have the same power to pass upon their own jurisdiction, and to exercise it, without setting forth in their proceedings the facts upon which they determine their jurisdiction. These characteristics distinguish them from courts of in-

ferior jurisdiction, in which jurisdiction in every case must affirmatively appear."

It may be well to say, in passing, that the fact that the plaintiff was taken by writ of habeas corpus before a judge of the district court, and discharged, adds nothing to the supposed cause of action. The authority of the district court to review proceedings for contempt in another tribunal of general jurisdiction is very questionable, but we are not called upon to decide such question of jurisdiction, and will not decide or discuss it; but it must be borne in mind that the district court or judge did not review the case by virtue of an appellate jurisdiction, but reviewed the acts of the county court upon an application for habeas corpus, reversed the judgment, and discharged the plaintiff. Further comment is unnecessary, when it is considered that both are superior courts of general jurisdiction.

From the earliest organization of modern courts in England, to the present time, the law has been that judges of superior courts could not be made liable in suits for damages brought by private persons for official acts as judge, even when the acts complained of exceed his jurisdiction. The English books announce the rule from the time of Edward III. (A. D. 1354) down to the present time. See 1 *Rolle*, *Abr.* (1431) 92; *Baggs' Case* (1616) 11 *Ooke*, 93b; the last leading case I have found being *Scott v. Stansfield*, L. R. 3 *Exch.* 220. Such has been the declared rule of law in the United States from the earliest adjudications to the present time. The earliest leading case was that of *In re Yates*, 4 *Johns.* 314; *Yates v. Lancing*, 5 *Johns.* 282, 9 *Johns.* 396. The case was three times in the court of errors and appeals. The chancellor committed the lawyer for an alleged contempt, and he was released by the supreme court upon habeas corpus. The chancellor again committed him for the same contempt. The statute of that state allowed a person \$1,250 damages who was, after a discharge of habeas corpus, a second time committed for the same offense. The lawyer brought suit for damages under the statute. *Id.*, 5 *Johns.* 282. Chief Justice Kent (afterwards chancellor) delivered an elaborate and exhaustive opinion, holding that the action would not lie. He said: "Every court judges exclusively for itself of its own contempts. No other court, and much less a single judge out of court, can undertake to judge of the question. The plaintiff was recommitted—to use the language of the order—for contempt and malpractice, and whether the court of chancery was right or wrong in considering that the plaintiff's conduct amounted to a contempt, and whether it took the proper steps to ascertain the contempt, is perfectly immaterial as to the point of jurisdiction. It had authority to punish contempts. It must judge what are contempts." "Judicial exercise of power is imposed upon the courts. They

must decide and act according to their judgment, and therefore the law will protect them. The chancellor, in the case of the plaintiff, was bound to imprison and re-imprison, if he considered his conduct as amounting to a contempt of his court. The obligations of his office left him no volition. He was as much bound to punish a contempt committed in his court as he was bound in any other case to exercise his power. He may possibly have erred in judgment in calling an act a contempt which did not amount to one, or regarding a discharge as null when it was binding. This court may have erred in the same way; still it was an error of judgment, for which neither the chancellor nor the judges of this court are or can be responsible in a civil suit." And concludes as follows: "Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society, and overturn those institutions which have hitherto been deemed the best guardians of civil liberty."

The leading case in the United States supreme court is *Bradley v. Fisher*, 13 Wall. 355, opinion by Mr. Justice Field, in which he carefully reviewed the whole question. Fisher had been disbarred by the criminal court of the District of Columbia, without notice or an order to show cause or an opportunity to defend. The court held that the disbarring of the lawyer was an act exceeding the jurisdiction of the court, but that, the act being judicial, the judge was not liable in a suit, although the complaint alleged that the judge acted "maliciously and corruptly," and concluded that, except in cases where there was clearly no jurisdiction over the subject-matter, a judge could not be held liable. *Lange v. Benedict*, 73 N. Y. 12, is considered a leading case. Benedict, United States district judge, adjudged an unwarranted sentence upon a conviction before him. The party was released upon habeas corpus, was again brought before the court, and resentenced to imprisonment, and brought an action against the judge for damages. In the very elaborate and able opinion by Folger, J., it is said: "Where jurisdiction over the subject-matter is vested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction are to be exercised are generally as much questions for his determination as any involved in the case, although upon the correctness of his determination in those particulars the validity of his judgment may depend. For such an act a person acting as judge is not liable to a civil or criminal action. The power to decide protects, though the decision be erroneous." And see *Cooley, Torts*, § 419; *Grove v. Van Duyn*, 44 N. J. Law, 634. The law in this state appears to have been settled in the able and

carefully considered opinion in *Hughes v. McCoy*, supra, and appears to be conclusive of this case.

It is clear upon the authorities that no action for damages could be maintained against Judge Wright. Although a great many suits of the same character have been brought in different courts, I can find no instance where a recovery was allowed. The suit against the judge not being maintainable, the suit against Esther M. and S. B. Austin, who were joined as defendants, and who made the affidavits upon which the proceedings were instituted, must also fail. The other defendants were sureties upon the judge's official bond. It is contended that plaintiff in error could not in any case maintain an action upon the bond; that it must be brought by the people; also, that, if an action could be maintained against the judge, it could not be against his sureties. In our view of the case, it is not necessary to determine these questions. The complaint stated, as shown, no cause of action. The judgment sustaining the demurrer was correct, and must be affirmed. Affirmed.

(9 Colo. App. 137)

#### CITY OF DENVER v. HICKEY.

(Court of Appeals of Colorado. Jan. 11, 1897.)

MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECTIVE SIDEWALKS—WAIVER OF DEFENSE—INSTRUCTIONS.

1. A city which holds the fee of its streets is not relieved of the duty to properly construct and repair the sidewalk in front of the post office because the federal government owns the lots and building thereon, and constructed a sidewalk, and the legislature ceded to the United States jurisdiction over such lots.

2. In an action against a city for injuries caused by a defective sidewalk in front of the post office, the complaint alleged that the duty to properly construct and to repair such places rested on defendant, and that at the time of the accident it was unsafe. The answer admitted its duty as alleged, but denied the unsafe condition. *Held*, that defendant could not insist that the federal government owned the lots, had jurisdiction over the same, and constructed the walk.

3. Plaintiff alleged that the sidewalk was defective in construction, and dangerous from its local condition at the time of the accident, and the court charged the law on the hypothesis of defective construction. *Held*, that defendant could not complain that such instructions were inconsistent with instructions, given at its request, on the hypothesis that the walk was dangerous from its local condition at the time of the accident.

Appeal from district court, Arapahoe county.

Action by Bridget Hickey against the city of Denver for personal injuries caused by a defective sidewalk. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

F. A. Williams and G. Q. Richmond, for appellant. Felker & Dayton, for appellee.

BISSELL, J. The personal injury which Bridget Hickey received by falling on a side-



walk in Denver, and the negligence of the city, are the gravamen of this suit. The accident occurred on Sixteenth street, near Arapahoe, in front of the post office. The sidewalk was laid in 1893, and was what is known as a "cement walk." Its construction and condition were the matters alleged to show negligence. The verdict was against the city, and in this statement the facts which must of necessity be taken as established by the verdict will be narrated without regard to the city's contentions respecting the proof. The surface of the walk was of such a high grade and density of cement that it was exceedingly smooth, resembling, as some witnesses say, "a glazed surface." The contractor indented it, but the indentures were so shallow that they did not sufficiently roughen the surface to make the walk safe for pedestrians. Whenever there was any rain or dampness, or any fall of snow which melted or was so light as not to cover the walk, it was exceedingly difficult for a pedestrian to maintain his equilibrium. A snowstorm commenced on the 3d of February, and ceased some time on the 4th. When the appellee was going down town, about 4 or 5 o'clock in the afternoon, and got onto this walk, she slipped, lost her balance, and fell. The result was a collesse fracture at the wrist. No question is made respecting the extent or character of the injury, or the amount of the verdict, and no other or further statement will be made respecting them. The appellee wore rubbers, and, according to her testimony, was using due care while walking. There was evidence which tended to show that on the morning of the 4th the walk was cleaned off by the janitors of the post-office building, in front of which the accident happened; and it is by no means evident that the accident happened by reason of neglect in this particular. There was a good deal of evidence offered which tended to show that the walk was dangerous because of its slippery surface. The evidence tended to prove that it ought to have been more deeply chipped and indented, in order to make it rougher, and avoid the smooth condition which made it unsafe. This work was afterwards done by the city, and seems to have entirely remedied the difficulty.

There were two theories on which the case was tried, and towards which the testimony was directed. On the establishment of either, the plaintiff could probably recover. Only two propositions are relied on by the city to reverse the judgment. One is based on an alleged inconsistency in the instructions, and the other relates to a defense to which the city seems to attach a good deal of importance, proceeding from the locus of the injury, and the rights of the federal government, as they are contended to exist, over the property in front of which the walk was laid.

The particular spot where Mrs. Hickey fell was in front of the post-office building, near

the corner of Sixteenth and Arapahoe. The lots extended from the alley, which is midway between Curtis and Arapahoe streets, to Arapahoe, and westward for a specific distance, and were deeded to the federal government for post-office purposes. A building was erected on it. The building and the lots are, of course, under the jurisdiction and control of the federal government. In 1883 (Laws 1883, p. 205) the legislature ceded to the United States jurisdiction over these lots when the government should become the owner of the fee. The city assumes that, because this jurisdiction was granted to the government, its duties with respect to the walks in front of it were in some manner changed, and it was excused from the exercise of the care and the doing of the things which are conceded to be its general duties in other parts of the city. It is insisted that, because the government laid the walk and the city could not control the work, therefore it was absolved from either supervising the construction or remedying any defect in the pavement which resulted from the construction or the character of the surface. It seems to us there are several answers to the contention. In the first place, the complaint charged that the duty rested on the city; that the sidewalk was unsafe, and was at the particular date of the happening of the accident in a dangerous condition, whereby the accident occurred. The answer admits that the city was a municipal corporation, charged with the duty of constructing, maintaining, and keeping in repair the sidewalks within the city. It also admitted that the place where the accident happened was Sixteenth street, one of the principal thoroughfares of the city, and one with respect to which the admitted duty existed. The denial simply went to the allegations concerning the condition of the walk, either as a local matter or as the result of construction. Under these circumstances, we do not see how, having raised no issue respecting it, the city is in a position to insist that it was under no obligation to care for the particular sidewalk, and that it was relieved of this duty because of the relations of the federal government to the property in front of which the sidewalk was laid. Being outside of any issue presented by its plea, it was unavailable for the purposes of defense. It is equally true that the matter was not suggested during the trial in such a manner and in such form as to preserve the point, and make it available on this appeal. Beyond this, we are unable to see that, had the proof been offered, it was a matter of defense which was available to the city, or would in any wise serve to discharge it of the duty which would otherwise have been laid on it, to properly maintain, supervise, and care for the construction and the condition of its streets and sidewalks. The fee of the streets is in the city. The rights of the abutting property owners are like those

which are enjoyed by all the citizens,—those of passing and repassing, with added privileges with reference to ingress and egress to the property of which the citizen may happen to be the owner. The fact that the government owns the lots which abut on the street in no manner varies or changes the duties of the city with reference to its sidewalks. It is under precisely the same obligation and owes the same duties to all the citizens with reference to the particular walk laid in front of that building that it is under and owes these citizens with reference to any other walk laid in front of property owned by a citizen. The fact that the city might not be able to control the government when it constructed the walk, and that, possibly, injunctive or other relief might not be open to the city to restrain the government from doing what it attempted to do, does not relieve the city of the duty, if the sidewalk was not correctly laid or properly constructed, to tear it up, and build other walks, in accordance with its own notions of what is essential to the safety and security of the citizen. In fact, this record shows that, subsequent to the time of the happening of this and some other injuries, one of which is before us in a case following this (*City of Denver v. Human*, 47 Pac. 911), the city did do what it ought to have done in the first place,—roughen the walk, and render it safe and secure. It is hardly worth while to cite the authorities in this state and in other states establishing the duty of the city with respect to its walks. The law is too thoroughly and completely settled. No defense came to the city by reason of the legislation referred to, or its legal or collateral effect. When the jury found the city had failed to perform its duty, and the plaintiff proved her damages, she was entitled to recover, notwithstanding this legislation.

Equally inoperative are the objections which the city makes to the instructions. It is conceded at first blush, disregarding the two theories on which the case was tried and the two bases on which the case was laid, it might appear the instructions were inconsistent and inharmonious. It must be admitted the rule has often been expressed that where instructions are inconsistent and inharmonious, and calculated to confuse the jury, an inaccurate instruction having this effect will not be cured by a subsequent one which correctly states the law. Conceding this proposition does not preserve the assignment of error in favor of the appellant. The plaintiff alleged that the walk was defective in its construction, dangerous in its condition, with knowledge to the city, and unsafe and insecure because of its local condition at the time of the happening of the accident. We do not discuss the question of notice, because it is alleged in the complaint, and not denied in the answer. We are therefore permitted to proceed on the hypothesis that the city had full notice with respect to its unsafe and insecure condition, and likewise had

notice of its condition as effected by the local situation. Dismissing, then, the question of notice, it brings us to the proposition that the instructions are not open to the criticisms made by the city. We are hardly required to set forth these instructions, and demonstrate their accuracy and sufficiency; but we can decide this appeal, and at the same time effectuate any useful purpose, by the simple suggestion that the instructions charged the jury with reference to the two hypotheses. In other words, the jury were substantially told that if they found from the evidence that the sidewalks were unsafe and insecure, by reason of the method of their construction and the character of the surface, and the accident happened therefrom, they could, granting a verdict in favor of the plaintiff with respect to her injuries, find for her in such sum as, in their judgment, would afford her proper compensation. The jury were likewise told if they found from the evidence that the accident happened because the city failed to keep the walks in proper condition after a storm, and the surface was slippery, insecure, and unsafe by reason of it, and the accident happened because of it, then, in that event, they might likewise find a verdict for the plaintiff. Of course, in stating this law to the jury, the court properly limited it by telling the jury that if the city had not had a reasonable time after the storm to put the sidewalk in proper shape, and if the accident happened shortly or immediately after the storm, then the city would be excused for its failure to put the sidewalk in proper condition. It must be remembered, however, that all these instructions with reference to the effect of a storm on the sidewalk, and the duty of the city as modified by the local condition, were asked by the city. The plaintiff asked no instruction about it, apparently resting the case substantially on the theory that the sidewalk was improperly constructed, and in a condition which made it dangerous for the use of its citizens. Under these circumstances, we do not see how the city can complain because these instructions were given, or because of any inconsistency which thereby resulted in the entire charge, nor that it can complain because of the alleged tendency to confuse the jury. If this did result, it was the city's own fault in asking the instructions. As before intimated, we do not see that such was the actual or necessary result of these two classes of instructions. While they were very properly asked by the city, since there was evidence tending to show that, possibly, the accident happened because of the storm, and not because of the defective construction, we are unable to see that they could in any manner have confused or misled the jury. The jury were very fully and aptly instructed in regard to the law; the case was exceedingly plain; and the testimony fully sustains the verdict. As we read the record, the accident happened because of the defective construction, and not because of local conditions, except as those local conditions tended

to emphasize the dangers resulting from this defective construction. We are unable to discover any errors in the case. The case was fairly tried, properly put to the jury, and, the verdict being sustained by the evidence, the judgment entered thereon must, of necessity, be affirmed. Affirmed.

(9 Colo. App. 144)

**CITY OF DENVER v. HUMAN.**

(Court of Appeals of Colorado. Jan. 11, 1897.)

DAMAGES—ACTION FOR INJURIES—EVIDENCE.

In an action by a woman for personal injuries, in which no special damages were claimed for loss of time from inability to labor, evidence that plaintiff had not "been out to service since the injury" was admissible to show her condition after the accident.

Appeal from district court, Arapahoe county.

Action by Matilda Human against the city of Denver for personal injuries caused by a defective sidewalk. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

F. A. Williams and G. Q. Richmond, for appellant. Geo. O. Norriss and W. Henry Smith, for appellee.

BISSELL, J. Mrs. Human brought this suit against the city to recover for an injury which she received in slipping on the sidewalk which was under discussion in the case of *City of Denver v. Hickey*, 47 Pac. 908, immediately preceding this. It would only incur the reports to write an extended opinion in this case, disposing of the same questions which were settled in the case of *City of Denver v. Hickey*. We are quite at liberty to refer to that case for our views respecting the duties of the city and its responsibilities with reference to the care of its walks, and particularly that walk laid in front of the post office. The only difference between this case and that lies in the fact that the city offered the deeds from Tabor to the government, in order to show that title had passed to the United States, whereby the legislation which gave the government jurisdiction over those lots had become effectual. According to the views which we expressed in the *Hickey* Case, this made no difference, and in no measure tended to alter, lessen, vary, or modify the duties and liability of the city. If there was testimony on which the verdict could stand, the city could not escape responsibility because the title was in the government, or because the federal authorities had laid the walk. It was obligated to see that the walk was properly laid, and the surface in a safe and suitable condition for the traveling public. There is enough evidence in the case to justify the verdict of the jury, and the city cannot, because of the conveniences or the vesting of jurisdiction, escape this responsibility.

There is only one question in this case which at all varies it from the other. There

was considerable evidence introduced to show the condition of Mrs. Human's hand and arm before and after the injury. No question is made respecting the admissibility of all this testimony and its relevancy to the issue, except in so far as it may be affected by a single question put to her daughter, who was asked whether her mother had been out to service since the injury. The question was objected to, but its answer, which was in the negative, was admitted. This is the principal and only difficulty suggested by the record. It is possibly on the border line which separates admissible from inadmissible testimony, because of the condition of the pleadings. General damages were alleged, but there was no averment of any special loss sustained by reason of the plaintiff's inability to labor, and the loss of time and wages as the result of this disability. It must be conceded that special damages can only be proved and recovered when they have been laid in the complaint. The only question is whether this rule was violated in permitting the witness to answer this specific question. We do not so understand it. In the first place, evidence had already been given in that direction by the plaintiff; and, if the answer was objectionable, it was not taken advantage of early enough in the case to render the present exception one on which a reversal could be based. We are bound, in considering these appeals, to disregard whatever errors are harmless when substantial justice has been done between the parties, and we might very easily sustain this verdict on that hypothesis. We are well satisfied, however, that this fact was admissible for the purpose of proving the condition of her arm and hand after the happening of the injury. Evidence of the use which the plaintiff was able to make of her arm before and after the accident affords a basis for the jury's judgment respecting the plaintiff's loss. Many cases have recognized evidence of this sort as admissible, so long as the jury is properly controlled by instructions that the verdict may not be enlarged by proof of the pecuniary loss resulting from inability to do the work which had theretofore been done. It is true, in this case the jury were not instructed on this subject; but the defendant failed to ask any instructions respecting it, and we are unable to see that, of necessity, this matter entered into the jury's computation as a matter of damage. As has been said in some cases, evidence of this sort conduces to prove the extent of the plaintiff's injury, and assists the jury in determining the fact that the plaintiff has sustained an injury of no slight character. The legitimacy of this sort of evidence has been recognized by the supreme court of the United States, and by learned courts in other jurisdictions. *Wade v. Leroy*, 20 How. 34; 3 Suth. Dam. p. 263 et seq.

In the present suit the plaintiff did not attempt to show what her earnings had been

when she was out at service before the injury, nor what she could probably have earned had she been able to resume her business after the accident happened. This proof, of course, would have been essential had there been any allegations of special damages, and she had sought to enhance her recovery by proof of the value of her loss of time. Since she offered no proof in that direction, we do not see that the general rules respecting the production of testimony to recover for a personal injury were infringed by the particular question put to the witness. The question simply elicited the fact that after the injury she was unable to go out to service, and it may be said to have tended to show the condition in which she was left by reason of the hurt. We are unable to discover any errors in the record which ought to be permitted to disturb the judgment, and it will accordingly be affirmed. Affirmed.

(9 Colo. App. 226)

**CORNELL v. CONINE-EATON LUMBER CO. et al.<sup>1</sup>**

(Court of Appeals of Colorado. Dec. 14, 1896.)

**MECHANICS' LIENS—FORECLOSURE—PARTIES—PRIORITIES.**

1. The beneficiary of a trust deed is not the owner of the property on which it is given, within the provision of Gen. St. 2152, that to an action to enforce a mechanic's lien the owner of the property shall be made a party.

2. The purchaser of property at sale under a trust deed, after commencement of an action to enforce a mechanic's lien, and after expiration of time for bringing the action, is not a necessary party.

3. A beneficiary in a trust deed, or one who, after commencement of action to foreclose a mechanic's lien, buys the property under the trust deed, having a right, under Gen. St. § 2161, and Code Civ. Proc. § 22, to intervene and interpose any legal defense, by failing to do so, knowing of the action, waives his right to be a party.

4. Not only the right of a beneficiary under a trust deed given on property after commencement of work on a building thereon, but that of any one subsequently acquiring rights under the trust deed, is subject to a mechanic's lien for the work; Gen. St. § 2149, providing that the lien shall relate back to the commencement, and have priority over any subsequent incumbrance.

Appeal from district court, Arapahoe county.

Action by John Cornell against the Conine-Eaton Lumber Company and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Talbot, Denison & Wadley, for appellant. John S. Macbeth, Daniel Sayer, and J. B. Willsea, for appellees.

REED, P. J. This was a suit brought in equity by appellant against appellees to remove a cloud upon the title of plaintiff to a certain building lot in the city of Denver. Prior to June 5, 1893, William Noltie was the owner of

the lot, and very shortly before that date conveyed it without consideration to Morgan Price, for the purpose of having Price secure a loan upon it for the use and benefit of Noltie, so that the name of the latter would not appear in the transaction. On the 5th of June, 1893, Price borrowed from the Sprague Investment Company \$2,500, made his note payable to the company, and executed a trust deed upon the property to Wellington G. Sprague, as trustee, to secure the payment of the note. Noltie received the proceeds, and on the same date Price reconveyed the property to Noltie. For the purposes of this case, the intervention of Price in the affair will be disregarded, and the transaction treated as that of Noltie.

Previous to the Price trust deed, in May, Noltie commenced to build upon the lot in question, and the building was in course of construction at the time of the making of the Price trust deed. Some time in June appellant purchased the Price note from the Sprague Investment Company. No notice was put of record of the transfer, nor personal notice given to any of appellees. The \$2,500 was not paid by the Sprague Investment Company to Noltie at the time the Price note was given, but was partly paid. The balance remaining with the company was drawn from time to time as the building progressed. Previous to September, 1893, the building was completed, and Noltie was indebted to the Conine-Eaton Lumber Company and others of appellees for material and labor in its construction. The parties to whom the money was due, not knowing that the note had been transferred, applied to the Sprague Company for information, were not then informed as to the transfer, but were informed that there was probably money enough in the hands of the company to the credit of Noltie to pay the demands against the building. Failing to get payment, the lumber company and other claimants within the statutory time commenced proceedings to establish liens against the property. Suit was brought by the lumber company on the 1st of November, 1893, in which the Sprague Investment Company and W. G. Sprague and others were made defendants; but plaintiff having no knowledge of the transfer of the note, and supposing from the statements and conduct of the investment company that it was still the owner, plaintiff was not made a party. Some time before the trial, appellant was informed by his attorneys of the bringing and pending of the suit, but did not intervene nor defend; took no part in it. The testimony shows that the Sprague Investment Company never informed lien claimants who was the owner of the note, but at all times conveyed the idea that it was the owner. In November, 1894, the case came on for trial. Neither the investment company nor W. G. Sprague disclaimed, or asked substitution of appellant. It appeared upon the trial from the evidence that the appellant was the owner. The lien claimants, plaintiffs in the former suit, testify that upon the trial was the first

<sup>1</sup> Rehearing denied February 8, 1897.

knowledge they had of the interest and claims of appellant. Judgments and decrees of liens were entered in favor of the claimants and against the defendants, including the investment company, that had not disclaimed, and against W. G. Sprague, trustee. In the summer of 1894, W. G. Sprague, on default of payment of interest, advertised the property for sale under the trust deed. It was sold July 24, 1894, bid in by appellant's agent, the amount of the sale indorsed upon the note, and a deed made to appellant, who went into the possession of the property. Some time subsequent to the decrees of November 1, 1894, the property was sold under the decrees in the lien suits, purchased by appellees, or some of them, and a deed executed and delivered by the sheriff. Appellant claimed a superior title, and alleged the invalidity of the lien title, and that it was a cloud upon his title, and prayed for its removal. There was a decree for the defendants, from which an appeal was prosecuted to this court.

It is contended by counsel for appellant that he was an indispensable party, and that, not having been made a party in the lien proceedings, he is not concluded by them, nor his title in any way affected. The validity of this claim is the only question presented for determination in this case. The proceeding to create and enforce liens of mechanics, laborers, and material men is purely statutory. Any material departure from the provisions of the statute invalidates the proceedings. But, like all other cognate acts, courts are required to liberally construe the statute to effectuate the intention of the legislature, and give the beneficiaries under the act the right and remedy sought to be established. The provisions of the statute necessary to be considered are:

"Any number of persons claiming liens and not contesting the claims of each other may join as plaintiffs in the same action, and when separate actions are commenced the court may consolidate them upon motion of any party or parties in interest or upon its own motion. Upon such procedure for consolidation, one case shall be selected with which the other cases shall be incorporated, and all the parties to such other cases shall be made parties defendant in said case so selected. All persons having claims for liens, the statements of which shall have been filed as aforesaid, shall be made parties to the action. Those claiming liens or [who] fail or refuse to become parties plaintiff, or for any reason shall not have been made such parties, shall be made parties defendant. Any party claiming a lien not made a party to such action may, at any time before the trial of the action, or before the final hearing of the case by the court, be allowed to intervene by motion, upon cause shown, and may be made a party defendant on order of the court. The court shall fix the time for such intervenor to plead or otherwise proceed. The pleadings or other proceedings of such intervenor thus made a party shall be the

same as though he had been an original party. Any such defendant, by way of answer, shall set forth by cross-complaint his claim and lien. Likewise such defendant may set forth in said answer defensive matter to any claim or lien of any plaintiff or co-defendant, or otherwise deny such claim or lien. And such defendant may, by his answer, set up that there are other persons who claim liens upon the property described, naming them, and asking that they be summoned to appear and maintain the same. Thereupon an amended summons shall issue in like form as the original, but so modified as to make parties defendant of the persons so named in the answer in addition to the other defendants. Said last named summons shall be served upon such new defendants as in other cases. The owner of the property to which such lien shall have attached shall be made party to the action." Gen. St. § 2152.

"It shall be sufficient to allege in the complaint in relation to any party claiming a lien, whom it is desired to make a defendant, that such party claims a lien under this act upon the property described." Id. § 2153.

In section 2161, Gen. St., it is provided: "The practice under this act shall be in accordance with the Code of Civil Procedure of the state of Colorado."

The sections of the Code necessary to be considered are:

Section 16, c. 1, Laws 1887: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in."

Section 17: "When in a civil action a person not a party thereto, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, and upon due service upon the adverse party of his complaint or answer, the same proceedings shall be had as if he had been an original party to the action."

Section 22: "Any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both."

Also section 2149, Gen. St., as follows: "All such liens shall relate back to the time of the commencement to do work, or furnish material, and shall have priority over any and every lien or incumbrance subsequently intervening, or which may have been created prior thereto, but which was not then recorded and of which the lienor under the act had no notice."

Appellant evidently bases his contention on the last clause of section 2152: "The owner of the property to which such lien shall have attached shall be made a party

to the action." The note and conveyance by trust deed to W. G. Sprague, as trustee, to secure the investment company, were executed June 5, 1893, and the note assigned to appellant some time during the same month. The sale of the property under the trust deed and purchase for appellant by his agent occurred July 24, 1894. By the provisions of the statute (section 2149) the lien attached in May, 1893, and the suit to enforce the liens had been pending eight months when appellant acquired title by sale of the property. The liens, relating back to the commencement of the construction, had attached nearly a month before the execution of the trust deed. The statute requires "the owner of the property to which such lien shall have attached" to be made a party. Did the conveyance in trust to secure a loan invest either the trustee or cestui que trust with the title, within the purview of the statute? If so, which of them, or both? It is clear that, if any title passed by the trust conveyance, it was to the trustee, not to the cestui que trust, and that he did not become invested with any title until the sale and purchase July 24, 1894. In Phil. Mech. Liens, § 397, it is said: "A mortgagee is not an owner, within the meaning of the mechanic's lien law, and is not entitled to a notice of a suit upon a lien claim. The owner, under such a statute, of the legal estate, is alone to be made a party." The construction of the word "owner" in the statute of the state of New Jersey, where, as in our statute, it is required that the owner be made a party, was directly adjudicated in *Tompkins v. Horton*, 25 N. J. Eq. 284, in which it was said: "It is evident that by the word 'owner,' in this section, is meant the person for whom, as the owner of the land, the building is constructed." That trust deeds are mortgages with power of sale, and only differ from mortgages by providing for sale without foreclosure, see *Manufacturing Co. v. McAllister*, 6 Colo. 261; *Dupree v. Rose* (Utah) 37 Pac. 567; *Story*, Eq. Jur. § 1018; 1 *Jones*, Mortg. § 62; 2 *Jones*, Mortg. § 1769; 2 *Perry*, Trusts, § 602b; *Eaton v. Whiting*, 3 Pick. 484; *Sargent v. Howe*, 21 Ill. 148; *Chafee v. Bank*, 71 Me. 514; *Shillaber v. Robinson*, 97 U. S. 68; *Railroad Co. v. Doyle*, 11 Fed. 253. Giving the word "owner" the construction warranted by the decisions directly upon the question, we conclude that at the inception of the suit appellant was not an "owner," and was not by the statute required to be made a party. Appellant's counsel asserts, "In foreclosing a mechanic's lien, the beneficiary in a trust deed is a necessary party," and in support of the statement cites *Clark v. Manning*, 95 Ill. 580, *Gayes v. Bank*, 85 Ill. 256, and *Phil. Mech. Liens*, "as to parties." These are the only authorities in support of the contention. We cannot find in *Phillips on Mechanics' Liens* the authority for the contention. Liens being purely creatures of statute, Mr.

*Phillips* cites and discusses the statutes of several different states, in some of which mortgagees are specifically made necessary parties; but when discussing statutes like our own, where there is no provision requiring them to be made parties, he clearly states, as in the paragraph above cited, that "a mortgagee is not within the meaning of the mechanic's lien laws, and is not entitled to a notice of a suit upon a lien claim." In *Clark v. Manning*, supra, relied upon by counsel, occurs the following, which I cite in support of the position stated above: "The remedy given the mechanic or material man is purely statutory, and, unless enforced in the manner and within the time prescribed in the statute, he can have no lien that will prevail against other creditors." The difference between the statutes of Illinois under which the decisions were made and our statutes is very marked. In section 2161, Gen. St., occurs the following: "That practice under this act shall be in accordance with the Code of Civil Procedure of the state of Colorado." The statute in force in the state of Illinois at the time of the decisions cited was as follows: "For the purpose of bringing all parties in interest before the court, the court shall permit amendments to any part of the pleadings, and may issue process, make all orders requiring parties to appear, and requiring notice to be given, that are or may be authorized in proceedings in chancery, and shall have the same power and jurisdiction over the parties and subject, and the rules of practice and proceedings in such cases shall be the same as in other cases in chancery, except as is otherwise provided in this act." "In proceedings under this act all persons interested in the subject matter of the suit, or in the premises intended to be sold, may, on application to the court wherein the suit is pending, be made or become parties at any time before final judgment." "Parties in interest, within the meaning of this act, shall include all persons who may have any legal or equitable claim to the whole or any part of the premises upon which a lien may be attempted to be enforced under the provisions of this act." *Cothran's Ann. St. c. 82, §§ 9, 12, 13, 28*. It will be seen that the proceeding in Illinois is purely a chancery proceeding, controlled by the rules and principles governing that court, and shall embrace "all persons who may have any legal or equitable claim to the whole or any part of the premises," etc. This is sufficiently broad to embrace an incumbrance, and require the owner to be made a party; and in section 28 it is clearly shown that a person having an incumbrance was included in those mentioned as necessary parties. The proceeding in Illinois being a purely chancery proceeding and mortgagees being specially included in the statutes, while the proceeding here is under the Civil Code and the statute designating who shall be parties, and mortgagees not being

included, are according to a well-known maxim of construction excluded. The decisions in the state of Illinois have no controlling significance. The statute not only designating parties, but fixing an absolute limit as to the time in which proceedings shall be instituted, it would seem that the status of the parties at the time of bringing the suit must control; and, appellant not being an owner, and, as a mortgagee, not, under the statute, a necessary party, I conclude that, as far as appears from the record and facts, the suit was properly brought. The statute of limitations to the bringing of the action compelled the bringing of the suit at the time it was brought to prevent a bar, and the question of parties must be determined as of that date.

It is contended that it was the duty of the lien claimants to ascertain who held the indebtedness, and then make appellant a party. The trust deed was of record. The notice it conveyed was that the investment company was the beneficiary. It and the trustee were made parties. It is shown that the lien claimants had no knowledge of the ownership of the note by appellant until the trial of the case, November 1st. The claims for lien had been of record over a year. Appellant admits knowledge of the pendency of the proceedings for months. The investment company declined to disclaim and give the plaintiffs a better writ by disclosing the name of the owner. Appellant declined or failed to intervene, and it is now claimed that, not having been made a party, and having had "no day in court," he was not concluded by the litigation. Such contention cannot prevail. His rights as owner did not accrue until July 24, 1894. Had he been brought in by the plaintiffs, it would have been, under the authorities, a new suit, and barred by the statute. Ample provision is made both in the General Statutes and the Code for appellant to intervene and protect any interest he had. Failing to do so, he cannot take advantage of it, nor can the lien claimants be prejudiced by it. I can find no provision or authority in the statute for lien claimants to bring in parties whose rights did not accrue until after the institution of the suits. In section 2149, Gen. St., it is provided that the lien shall relate back to the time of the commencement to do the work or furnish the material, and shall have priority over any subsequent lien or incumbrance. At the time of making the trust deed to the investment company the building was in course of construction. The investment company took the security, subject to any liens or disabilities arising, or which might arise, under the contract for construction. Appellant acquired by the assignment no greater rights or better security than that of his assignor. From the assignment in June, 1893, until July, 1894, he was a mortgagee. On that date he took title as owner, subject to all liens that attached under the

former owner. The suits to enforce liens had been in existence for eight months. Appellant and his counsel admit that he had notice of the pendency of the suit "long before the suit was tried." The statute gave him the right to intervene and interpose any legal defense he may have had. Failing to do so, he must be deemed to have waived the right to become a party.

There is no assertion of any legal defense of appellant against the claims of the lien claimants, and, having failed to avail himself of his statutory rights, he should not be heard to say that the lien judgments were not valid against the property by reason of appellees failing to do for him what he declined to do for himself. To give the statute the construction contended for by counsel would be unjust and oppressive, and might, in many instances, prevent lien claimants from enforcing any rights under the statutes. We do not undertake to determine what, if any, right of redemption appellant had or has, nor do we intend to preclude him from asserting any right he may have. The question must be determined on the case made when a suit is brought for that purpose. In construing a statute, identical in its provisions with ours, it is said in *Tompkins v. Horton*, 25 N. J. Eq. 284, in addition to the paragraph cited above: "The title of a purchaser at a sheriff's sale under an execution issued upon a judgment recovered under a mechanic's lien, general as against the owner and special as against the lands, is paramount to all incumbrances put upon the property after the commencement of the building." The judgment of the district court must be affirmed. Affirmed.

(30 Or. 333)

#### GRADY v. DUNDON et al.

(Supreme Court of Oregon. March 1, 1897.)

HIGHWAYS—ESTABLISHMENT—JURISDICTIONAL DEFECT—CURATIVE ACT—ADVERSE USER.

1. An order of the county court establishing a county road is void for want of jurisdiction, where the record does not show that notice of the application for the order was given as required by Hill's Ann. Laws Or. § 4063.

2. Act Oct. 20, 1870, curing irregularities in the laying out of a highway, is without effect, where the original proceedings were without jurisdiction.

3. The uninterrupted obstruction of a county road for more than 10 years bars the rights of the public by adverse possession, though on a few occasions persons have been permitted to drive across the premises.

Appeal from circuit court, Lincoln county; J. C. Fullerton, Judge.

Suit by Catherine M. Grady against Alonzo Dundon, supervisor, and others. From a decree in favor of defendants, plaintiff appeals. Reversed.

This is a suit by Catherine M. Grady against Alonzo Dundon as road supervisor, D. P. Blue as county judge, and M. L. Trapp

and J. O. Stearns as county commissioners, of Lincoln county, Or., to enjoin a threatened trespass. The plaintiff alleges that she is the owner in fee, and for more than 10 years prior to the commencement of this suit has been in the peaceable, open, and exclusive possession, of a tract of land about 50 feet in width and 70 in length, lying south of and between the Oregon Pacific Railroad Company's right of way and Depot slough; in the town of Toledo, upon which there have been erected a store and a butcher shop; that the defendants, wrongfully claiming that a county road had been laid out and established across said real property, are threatening to, and unless restrained will, tear down and remove said buildings, and open the pretended highway, to her irreparable injury; and prays that the threatened trespass may be permanently enjoined. The defendants, after denying the material allegations of the complaint, allege that at its regular term in May, 1867, the county court of Benton county, which at that time had jurisdiction over the territory now included within the borders of Lincoln county, upon a petition therefor signed by 12 householders, appointed viewers and a surveyor, who viewed and surveyed a county road from a stake at the mouth of Depot slough to a point intersecting another county road, and having made a report thereof, the court thereafter, at its said term, made an order establishing a county road across said premises, in pursuance of which the road supervisor opened the same, and that it had been continuously used thereafter as a public highway until 1890, when the plaintiff, without any license therefor, obstructed the same with the said buildings; that John Graham, the plaintiff's father and grantor, was the owner of the premises in question when said proceedings were had; that he was one of the petitioners for the road, and present at and assisted in its location, and from that time until his death, in 1883, he at all times recognized it as a duly-established highway, and that the plaintiff obtained her title to the said premises with notice of its location thereon. The reply having put in issue the allegations of new matter contained in the answer, the cause was referred to E. O. Potter, Esq., who took and reported the evidence, from which it appears that the defendants introduced, over the plaintiff's objection, a copy of the order of the county court of Benton county, which recites that the viewers and surveyor had viewed and surveyed a road as prayed for in the petition, and that, no remonstrance having been filed or claims for damages presented, it was ordered that the road so surveyed be declared a public highway, and the road supervisor was ordered to open the same; but there is no finding, nor does it otherwise appear from the record, that any notice was given of an intention to apply for the location of said road. The referee having found for the defendants, the court affirmed his report, and

dismissed the suit, from which decree the plaintiff appeals.

W. S. Hufford, for appellant. J. K. Weatherford, for respondents.

MOORE, C. J. (after stating the facts). Counsel for plaintiff contends that, the defendants having attempted to justify the threatened injury by alleging the existence of a public highway across the premises in question, the burden of proof was upon them to show that the road had been legally laid out, established, and opened; while counsel for the defendants maintains that the road was viewed, surveyed, and recorded after July 1, 1866, and that under the act of the legislative assembly approved October 29, 1870 (Laws Or. 1870, p. 67), all irregularities in the proceedings were thereby validated. In *Cameron v. Wasco Co.*, 27 Or. 318, 41 Pac. 160, it is said: "In the matter of laying out and establishing roads, county courts are of inferior and limited jurisdiction. *Thompson v. Multnomah Co.*, 2 Or. 34; *Johns v. Marion Co.*, 4 Or. 46; *State v. Officer*, Id. 180; *Canyonville & Galesville Road Co. v. Douglas Co.*, 5 Or. 284. But when the record of their proceedings shows that jurisdiction has been obtained of the subject-matter and of the parties interested in locating and establishing a county road, the same intendments obtain in favor of the regularity of their proceedings as prevail in courts of general jurisdiction. *State v. Myers*, 20 Or. 442, 26 Pac. 307; *Bewley v. Graves*, 17 Or. 274, 20 Pac. 322." The record offered in evidence failing to show that any notice whatever was given of the intention of the petitioners to apply to the county court for the location and establishment of a county road across the premises in question, it cannot be said that jurisdiction was obtained to make the order upon the validity of which the defendants rely (*Latimer v. Tillamook Co.*, 22 Or. 291, 29 Pac. 734), for the law then and now in force provides that "when any petition shall be presented for the action of the county court for laying out, alteration or vacation of any county road, it shall be accompanied by satisfactory proof that notice has been given by advertisement, posted at the place of holding county court, and also in three public places in the vicinity of said road or proposed road, thirty days previous to the presentation of said petition to the county court, notifying all persons concerned that application will be made to the said county court at the next session for laying out, altering, or vacating such road, as the case may be." *Hill's Ann. Laws Or.* § 4063. The power to appropriate private property to public use is derived from the legislative assembly, which may prescribe the mode of its exercise, and must provide a judicial tribunal for the determination of certain facts as a prerequisite to the exercise of such power (2 Kent, Comm. \*340); but the legislative assembly cannot dispense with notice of some kind to the owner of the prop-



erty affected by the location of a public highway, for to do so would be a violation of the fourteenth amendment of the federal constitution, and tantamount to the deprivation of property without "due process of law." The question is therefore presented whether the legislative assembly can by an act give life to a judicial proceeding which was void for want of jurisdiction. Mr. Endlich, in his work on Interpretation of Statutes (section 291), in discussing this subject says: "It is a proposition too well settled by authority to admit of dispute, or call for extended discussion, that curative acts, especially upon matters of public concern, are to be allowed the retroactive effect they are clearly intended to have, even though vested rights and decisions of courts be set aside by them, so long as they do not undertake to infuse life into proceedings utterly void for want of jurisdiction." The rule seems to be well settled that the legislative assembly may, by a subsequent act, validate a departure from a prescribed procedure when it could have adopted such a course in the first instance, but it cannot make good retrospectively acts which it had no power to permit or sanction in advance (Cooley, Const. Lim. 382; Pryor v. Downey, 50 Cal. 388); and hence it cannot, by a subsequent act, give life to any judicial proceeding that was void for want of jurisdiction over the parties (Israel v. Arthur, 7 Colo. 5, 1 Pac. 438; Lane v. Nelson, 79 Pa. St. 407; Richards v. Rote, 68 Pa. St. 248). Without notice of some kind, the county court can obtain no jurisdiction of the person of the owner of real property in condemnation proceedings, and any order or judgment rendered without notice must necessarily be void, and, as the legislative assembly cannot validate a judicial proceeding void for want of jurisdiction, it follows that no rights can be predicated upon the order of the county court declaring the route surveyed a public highway.

2. The evidence tends to show that John Graham, the plaintiff's grantor, admitted while holding the legal title that a county road had been established across the premises, but, whatever the effect of such admissions may be, we think they are rendered inoperative by reason of an adverse user by the plaintiff and her predecessors in interest. The evidence also tends to show that the premises border upon Depot slough, a navigable stream, and that they are submerged thereby at high tide; that John Graham erected on the land a small warehouse, which remained there several years; that his son Joseph built a sidewalk provided with a rail and banisters across the upper end of said premises, about from 2 to 5 feet above the surface of the ground, and that this walk has been constantly maintained thereon more than 10 years prior to the commencement of this suit. It is true the evidence tends to show that this walk has been taken up a few times to permit persons to drive to the slough, but otherwise

there has been an uninterrupted obstruction to travel. It may well be doubted that the road was ever opened across the premises, though it appears that about 20 years ago some persons landed horses and cattle from a scow which were driven over the same, and that some wood and hay had been landed in the same manner and hauled across; but there has not been, in our judgment, such a use of the premises as to indicate that a public road had ever been established there. The store and butcher shop have not been built 10 years, but we think there has been such an adverse user as to bar the right of the public, and for this reason the decree is reversed, and one will be entered here perpetually enjoining the defendants from trespassing upon said premises.

(30 Or. 328)

## OREGON POTTERY CO. v. KERN.

(Supreme Court of Oregon. Feb. 23, 1897.)

WITNESSES — CROSS-EXAMINATION — EVIDENCE OF VALUE — COMPETENCY.

1. In an action for the loss of a scow, where plaintiff's witness has testified that it was built by S., and was in good condition when leased to defendant, defendant may, on cross-examination, show who S. was, what his qualifications as a builder were, to what use the scow had been put before its delivery to defendant, and whether it had ever before been sunk.

2. Where a witness has testified that he caulked the scow just before its delivery to defendant, and that it was then in good condition and worth about \$2,500, defendant may, on cross-examination, ask: "Did you ever know anything about that scow before you were called to repair it? Did you ever examine it?"

3. The fact that a witness has had his attention called to scows, and has heard men accustomed to buying and handling such property discuss their value, does not render him competent to give an opinion of the value of a scow in controversy.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by Oregon Pottery Company against Daniel Kern. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This is an appeal from a judgment in favor of plaintiff rendered in an action brought to recover the value of a scow leased to the defendant, and lost while being used by him. The complaint avers that the loss occurred through the negligence and carelessness of the defendant and his employes, while the defense is that it was due to defective construction, by reason of which the scow was unfit for the uses for which it was hired. On the trial A. M. Smith, vice president and manager of plaintiff, was called as a witness, and testified in its behalf, among other things, that the scow in question was built for plaintiff in 1891 by one Silas Smith; that it was built in a good and workmanlike manner, and was used by the plaintiff during the years 1891, 1892, and 1893 in carrying clay from Lewis and Clarke river to Portland; that in June,

1894, it was leased to the defendant in good condition, and while being used by him was sunk in the Columbia river and lost. On cross-examination, the defendant's counsel put to the witness the following questions: "Who is Silas Smith? Did you ever know him before he built this scow?" and, "Did you ever know or hear of that scow being sunk in your service or in anybody else's service before she finally sunk in defendant's service?" But the court refused to permit the witness to answer either of these questions, on the ground that they were not proper cross-examination, and such refusal is assigned as one of the errors on this appeal. For the purpose of showing that the scow was in good condition at the time it was delivered to the defendant, one J. F. Steffen was called as a witness for plaintiff, and testified in chief, among other things, that he was a shipbuilder by occupation, and had been for 22 years; that he knew the scow in question, and was employed to and did caulk her about the 1st of June, 1894; that she was then in good condition, about four years old, and worth about \$2,500. On cross-examination he was asked: "Did you ever know anything about that scow before you were called to repair it? Did you ever examine it before?" To this question the plaintiff, by its counsel, objected on the ground that it was not proper cross-examination, which objection was sustained, and this is also assigned as error. For the purpose of proving the value of the property in question, the plaintiff called one Blaine R. Smith, who, after testifying that he had been acquainted with the business of plaintiff since 1891, and that his attention had been called to the scows used on the river, and that he had heard men accustomed to buying, owning, and handling such property, from 1891 down to the time of the trial, discuss the price of scows, was asked by counsel for plaintiff: "What, in your judgment, was this particular scow worth in the summer and fall of 1894?" An objection to this question, on the ground that the qualification of the witness to give an opinion as to the value of the scow had not been shown, being overruled, the witness answered: "Well, I consider it worth about \$2,800 to \$5,000,—probably \$3,000." And this ruling is also assigned as error.

E. C. Bronough, for appellant. J. B. Cleland, for respondent.

BEAN, J. (after stating the facts). The first two assignments of error relate to the rulings of the trial court in the matter of the cross-examination of the witnesses Smith and Steffen. Under our Code (Hill's Ann. Laws, § 837) an adverse party has the right to cross-examine a witness as to any matter stated in his direct examination or connected therewith. This is a substantial right, of which he cannot be deprived, nor can it be restricted so as to prevent him going fully into all matters connected with the examination in

chief. *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093; *Sayres v. Allen*, 25 Or. 211, 215, 35 Pac. 254; *Maxwell v. Bolles*, 28 Or. 1, 41 Pac. 661. Within the limitations indicated, a free range should always be allowed in conducting the cross-examination. And as said in *Ah Doon v. Smith*, supra: "It should not be limited to the exact facts stated on the direct examination, but may extend to other matters which tend to limit, explain, or qualify them, or to rebut or modify any inference resulting therefrom, provided they are directly connected with the matter stated in the direct examination." Under this rule, the defendant had a clear right to put to both Smith and Steffen on cross-examination any questions calculated to test the means and extent of their knowledge as to the condition, structure, and workmanship of the scow in question. Smith testified, on his direct examination, that it was built in 1891, in a good and workmanlike manner, by Silas Smith, and that it was in good condition at the time it was delivered to the defendant, in June, 1894. This was material testimony in the case, and it would seem that the defendant ought to have been permitted on cross-examination to show who the builder was, whether he was skilled or experienced as a scow builder, to what use the scow had been put by the plaintiff or by any other person to whom it had been rented, whether it had ever been sunk before, and, in fact, any matter within the knowledge of the witness bearing upon the original construction of the boat or its condition when hired by his company to the defendant. Steffen testified, on direct examination, that he caulked the scow in June, 1894, and it was then in good condition and worth \$2,500. But the weight and value of his testimony would depend upon the extent of his knowledge as to the quality and quantity of the material out of which it was constructed, and the method and sufficiency of the way in which it was put together. Inquiry as to such knowledge, and whether he had ever examined it before, was calculated to show the means and extent of his information in this regard, and was, therefore, within the limits of a proper cross-examination. But in view of the rule that the range and extent of such an examination is not subject to appellate review, except in case of an abuse of discretion, we should probably hesitate to reverse the case on this point alone, although we are unable to very clearly see, from the record before us, the ground upon which the court below put its ruling. But, however this may be, we are clear the judgment must be reversed upon the other assignment of error.

The value of the scow was a material question in the case. The plaintiff claimed and alleged it to be worth at the time of its loss \$3,000, while the defendant denied that it was of any greater value than \$800. As evidence on this question, the witness Blaine R. Smith was permitted, over defendant's objection, to give his opinion as to its value, without show-

ing that he was possessed of sufficient knowledge to entitle him to do so. The value of property of this kind may be established by the opinion of witnesses who first show that they are qualified to give an opinion. This is one of the admitted exceptions to the general rule prohibiting a witness from testifying as to his opinions upon a given subject. But before he is permitted to give such testimony it must be made to appear that he "has had the means to form an intelligent opinion, derived from an adequate knowledge of the nature and kind of property in controversy and of its value." *Whitney v. City of Boston*, 98 Mass. 312; *Haight v. Kimbark*, 51 Iowa, 13, 50 N. W. 577. Now, it does not appear that the witness Smith had any knowledge of the kind of property in question, or of its value, except what was derived from hearing others discuss the price of scows in some general way. It is true he says his attention had been called to scows used on the river, and that he had heard men accustomed to buying, owning, and handling such property discuss their value, but this is not sufficient to render him competent to give an opinion of the value of the particular scow in question. Its value depends upon its intrinsic properties and the state of the market, and it nowhere appears that the witness had any knowledge whatever upon either of these questions. Indeed, it does not appear that he ever saw or knew anything about the scow in controversy. It is therefore clear that he was not competent to give an opinion upon the question of value. Before he could be permitted to do so it must be shown that he possessed some special knowledge on the subject, and because no such showing was made it was error to admit his testimony. The judgment of the court below is reversed, and a new trial ordered.

(30 Or. 340)

**SIME v. SPENCER**, Supervisor.

(Supreme Court of Oregon. March 1, 1897.)

**HIGHWAY—PROCEEDING TO ESTABLISH—PETITION—INSUFFICIENT DESCRIPTION.**

Under Hill's Ann. Laws, § 4062, requiring a petition for a county road to "specify the place of beginning," etc., a petition which merely describes the road as "commencing in the center of the county road leading from P. to A. valley, at a point about 150 yards in a southwesterly course from the dwelling of S., thence," etc., is insufficient.

'Appeal from circuit court, Benton county; J. C. Fullerton, Judge.

Suit by Alex Sime against William Spencer, supervisor. From a decree in favor of defendant, plaintiff appeals. Reversed.

This is a suit to enjoin the defendant, who is the supervisor of road district No. 30 in Benton county, from opening a newly-laid county road ordered opened by the county court. A demurrer was interposed to the complaint, which was sustained, and a decree entered in favor of defendant, dismiss-

ing the complaint, and for costs and disbursements. Plaintiff appeals.

W. S. McFadden, for appellant. J. H. Wilson, for respondent.

**WOLVERTON, J.** The only question in the case is whether the county court of Benton county, Or., acquired jurisdiction to view, lay out, locate, and open the alleged county road, the opening of which plaintiff is resisting, and its solution depends mainly upon the sufficiency of the petition for such road. It may now be regarded as firmly settled that the county court, while in the exercise of its prescribed powers in the laying out, alteration, and vacation of county roads, is a court of limited and inferior jurisdiction, and that every essential jurisdictional fact must therefore affirmatively appear by the record in support of its orders, but, having once acquired jurisdiction, the same intentions obtain in favor of the regularity of its proceedings as prevail in courts of general jurisdiction. *Bewley v. Graves*, 17 Or. 274, 20 Pac. 322; *State v. Myers*, 20 Or. 442, 26 Pac. 307; *Thompson v. Multnomah Co.*, 2 Or. 34; *Johns v. Marlon Co.*, 4 Or. 46; *State v. Officer*, Id. 180; *Canyonville & G. Road Co. v. Douglas Co.*, 5 Or. 280.

One of the statutory instrumentalities by which jurisdiction is acquired for the establishment of a county road is the petition, which it is prescribed "shall specify the place of beginning, the intermediate points, if any, and the place of termination." Hill's Ann. Laws Or. § 4062. Now, the complaint for the injunction is predicated upon the alleged insufficiency of the petition, in not having specified with reasonable certainty and definiteness either the place of beginning or termination. The description of the proposed new road is as follows: "Commencing in the center of the county road leading from Philomath to Alsea valley, at a point about one hundred and fifty yards in a southwesterly course from the dwelling of Alex Sime; thence, running in an easterly direction, through the lands of A. Sime and Isabella Gallatly, and between the graveyard and the creek on the Gallatly land; and thence through the land of Joseph Gray, to a point near the small creek known as 'Gray Branch,' about one hundred yards below where the present county road crosses said creek; thence, up the valley of said small creek, to the present county road as traveled from Philomath to Alsea." In *Johns v. Marlon Co.*, supra, the last course and termination was described in the petition as follows: "Thence southerly, to intersect the county road near the foot of Nevil hill, near the south line of John A. John's land claim." And it was held that the place of termination was entirely too indefinite to be deemed a compliance with the statute. It was said in a later case (*Canyonville & G. Road Co. v. Douglas Co.*, supra) that the court went to the extreme verge of the law in *Johns v.*

Marion Co. Burnett, J., however, dissented from the view taken by the majority of the court, and thought that the Johns Case was decisive of the question under discussion. In a still later case (*Woodruff v. Douglas Co.*, 17 Or. 314, 21 Pac. 49), under the following description, viz.: "Thence southwest, above said Archambeau's barn, westerly on the premises of Joseph Champagne on the most practicable route, and through the premises of the said Champagne, leaving his house to the left, and intersecting the present Cole's valley and Roseburg county road at a point between the residence of Charles La Point and O'Brien,"—it was held that the petition wholly failed to designate or specify the particular or distinct point of termination of the proposed road, and did not answer the requirements of the statute, and that by reason thereof the court acquired no jurisdiction to locate the road in question. The place of beginning in the petition which we are now considering is not more definitely fixed or described than in either of the cases above referred to. It is designated as being in the center of the county road, etc., at a point about 150 yards in a southwesterly course from the dwelling of Alex Sime. The dwelling is undoubtedly a monument capable of identification, but, taking it as the initiative point from which to ascertain the place of beginning of the proposed road, we have yet to find the place through the instrumentality of two terms, viz. "about" and "southwesterly course," employed for the purpose, which are by nature indefinite. "About" signifies "nearly," "approximately," "in the neighborhood of," "not much more or less." Black, Law Dict. So that we may say the place of beginning is approximately 150 yards from the dwelling of Alex Sime. But a "southwesterly course" may mean any direction between south and west lines, and it would be impossible through the agency of these terms to locate any definite or distinct point in the center of the county road leading from Philomath to Alsea. *Ames v. Union Co.*, 17 Or. 600, 22 Pac. 118, is not in point upon this question. There the "Clarke cabin" marked the place of beginning, which was described as being situate "about forty rods west and about thirty rods north from the southeast corner of section 6," etc. From the description the Clarke cabin was easily located. One of the purposes of the statutory requirements of the petition is, no doubt, to place interested parties in the possession of information so distinct and definite as that they might know with reasonable certainty in what manner and to what extent they will be affected by the establishment of the proposed road. While a slight variance in many instances might not make any material difference, yet in others it may become of vital importance, and the law should receive such a construction as will make it effective under

all conditions and circumstances. Such has been the trend of former cases. We think the petition under consideration is fatally defective, as it respects the location of the place of beginning, and the termination point is scarcely more specific. This being so, the county court had no jurisdiction to establish or order the road in question to be opened; hence, the defendant being without authority in the premises, the complaint is sufficient. The decree of the court below will therefore be reversed, and the cause remanded, with instructions to overrule the demurrer.

(30 Or. 259)

**HOLBROOK et al. v. INVESTMENT CO.**

(Supreme Court of Oregon. Feb. 23, 1897.)

**REAL-ESTATE BROKERS — CONTRACT — SALES ON CREDIT — PAYMENTS — COMMISSIONS — FORFEITURE OF CONTRACT.**

Real-estate brokers agreed to sell certain lots in consideration of all the proceeds above \$800 an acre. It was also agreed that the price might be paid in installments of \$5 or more a month, the brokers to retain \$10 from the first two installments, and one-half of each installment thereafter till their commissions were paid. Later there was a supplementary agreement that, if any of the purchasers on credit should forfeit their contracts, all forfeited installments paid to the brokers on such sales might be retained as commissions; and, should they effect a resale on credit, all installments thereafter paid were to be divided equally, till the vendor should have received under the new sale \$800 an acre. *Held* that, where contracts were forfeited for nonpayment, unpaid commissions for the original sales were also forfeited.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by F. B. Holbrook and another against the Investment Company. From a judgment in favor of plaintiffs, defendant appeals. Plaintiff Riggen appeals from an order enforcing an execution as to costs and disbursements and one-half of the judgment. Reversed.

This is an action by S. B. Riggen and F. B. Holbrook against the Investment Company, a corporation, to recover compensation for services in negotiating sales of real property on credit, the contracts for which were canceled by the defendant for failure of the purchasers to pay the installments of the purchase price at the time agreed upon. The record discloses that on October 7, 1890, the plaintiffs, as partners, were employed by the defendant to negotiate the sale of certain town lots in Irvington Park, Multnomah county, for which service it agreed to pay them all sums realized therefor in excess of \$800 per acre, and it was also agreed that the purchase price might be paid in installments of not less than \$5 per month, without interest, in which case the plaintiffs were to retain the first two payments, not exceeding \$10, and one-half of each installment thereafter, until their com-

pensation was fully paid; that on February 12, 1891, the parties entered into a supplementary agreement, by the terms of which it was provided that, if any of the persons to whom these lots had been or might be sold upon credit should forfeit their rights, all forfeited installments paid to the plaintiffs on such sales might be retained as commissions, and, should they effect a resale of the premises on credit, all installments thereafter paid were to be divided equally between the plaintiffs and defendant, until the latter should receive, under the new sale, \$800 per acre; that on October 17, 1891, Riggen having assigned to Holbrook all his interest in the contract, the partnership existing between them was dissolved, Riggen retiring therefrom, in consideration of which Holbrook agreed to pay him 25 per cent. of the gross profits thereafter derived from the sale of said lots, to collect at his own expense, and pay him, one-half of all moneys due the firm, and also to pay all debts that he might thereafter incur on account of the prosecution of the business, while each agreed to pay one-half of the firm debts then outstanding; that on January 9, 1892, Riggen, for a valuable consideration, transferred to Holbrook and one E. Williams all his right, title, and interest in and to the contract entered into between the Investment Company and Riggen & Holbrook, excepting, however, his interest in the commissions due or to become due on lots sold up to that date; that on September 3, 1891, the plaintiffs sold on credit, to one Mrs. C. E. Stevenson, four lots in said tract, for \$675, of which she paid \$20 down, and promised to pay \$20 on the 3d of each month thereafter until the purchase price was fully paid, whereupon the defendant entered into a contract with her upon these terms, which stipulated that time was of the essence of the agreement, and that the defendant had the option to declare the payments made thereon forfeited, and to cancel the contract, unless the payments were made at the time agreed upon; that Mrs. Stevenson, under said contract, paid to the plaintiffs \$300, of which they retained \$170, and paid the remainder to the defendant, as its part thereof, but she made default in the payment of the installment which became due November 3, 1892, and, having made no further payments thereon, the defendant, on July 24, 1893, exercised the option reserved in the contract, and gave her notice thereof, whereupon she surrendered her rights under the agreement, and delivered it up to the defendant to be canceled; that thereafter Holbrook and Williams resold the said lots to her, and she entered into a new contract with the defendant for the purchase thereof, in which the payments theretofore made were taken into account, and paid the money due under the new contract to Holbrook, who retained one-half thereof, and paid the remainder to the defendant. The plaintiffs allege that on November 3, 1892, there was due on Mrs. Stevenson's contract \$350,

of which they are entitled to \$177.55 when collected; and that thereafter, and before the expiration of the time limited therefor, she tendered the amount due, but the defendant refused to receive the same, and without the knowledge or consent of the plaintiffs, and with intent to deprive them of their compensation, it obtained a surrender of her interest in the land, and canceled her contract; and that the plaintiffs thereafter demanded of the defendant said \$177.55, but it refused to pay the same. The complaint contains six separate, but similar, causes of action, and a prayer for judgment for the sum of \$951.11. The defendant, after denying the material allegations of the first cause of action, sets out copies of the several contracts hereinbefore mentioned, and alleges that it was the duty of the plaintiffs to collect the money as it became due from Mrs. Stevenson under her contract, but that they neglected or were unable to do so after November 3, 1892, after which time she made no payment or offer of payment thereon, and that on July 24, 1893, defendant exercised the option contained in the contract, and that the cancellation was made with the full knowledge and consent of Holbrook, as the representative of the plaintiffs. The answers to the other causes of action are, in effect, the same as the foregoing. The reply having put in issue the allegations of new matter contained in the answer, a trial was had before the court, at which the defendant, after the plaintiffs had introduced their evidence and rested, moved the court for a judgment of nonsuit; but, the motion being overruled, the court found the facts in substance as hereinbefore set forth, and gave judgment for the plaintiffs in the amount demanded, from which the defendant appeals. Within 10 days from the time this appeal was perfected, the plaintiff Riggen obtained an order of the court for leave to issue execution to enforce the payment of the judgment, notwithstanding the appeal, and from this order the defendant also appeals. An execution having been issued in pursuance of the foregoing order, the court, upon motion, ordered the sheriff to enforce the writ as to the costs and disbursements, but to collect from the defendant only one-half of the judgment, and to return the writ when satisfied to that extent, whereupon Riggen appeals from this latter order.

Geo. H. Williams, for appellants. R. R. Dunlway, for respondents.

MOORE, C. J. (after stating the facts). Counsel for the defendant contends that his client, in the agreements entered into with the plaintiffs, reserved the right to declare a forfeiture of any contract of purchase for the mere nonpayment of any installment due thereon, and to order a resale of the premises affected thereby, and, in case of such declaration of forfeiture, it was also understood that plaintiffs' right to any unpaid

commissions thereon should be forfeited; that, the resales of lots having been made after the dissolution of the co-partnership, the firm of Riggen & Holbrook have no interest in any commissions claimed on account of such resales; that the court erred in its refusal to grant a judgment of nonsuit, and that the findings of fact do not support the judgment, for which reason it should be reversed; while counsel for the plaintiffs maintain that the written agreement of the defendant to convey any of the lots in Irvington Park transferred to the obligee an equitable estate in the premises, the surrender of which, upon a declaration of forfeiture thereof, was tantamount to a settlement of an existing obligation, and amounted to a substituted payment of the debt due under the contract of purchase, which at once entitled the plaintiffs to their commissions.

The question involved renders an examination and construction of the contracts entered into between the parties necessary. The first contained the following provisions: "In case lots are sold on time in pursuance of this agreement, it is agreed that said lots may be sold on installments of not less than five dollars (\$5) per month, without interest; and in such case the parties of the second part shall retain the first two installments, not exceeding ten dollars (\$10), and out of each installment thereafter one-half thereof, till their commission or compensation shall have been fully paid." This clause was modified by the contract entered into on February 12, 1891, which contained the following stipulation: "In all cases where sales have been or shall be made by the parties of the second part of lots, under said agreement of October 7, 1890, and the purchasers shall forfeit their rights under such sales, and a second sale is had, all installments paid to the parties of the second part under such forfeited contracts shall be considered payments upon the commission of the parties of the second part under the terms of said agreement of October 7, 1890; that is to say, that in case the parties of the second part shall have received two installments upon such forfeited contract, and a new sale is made, all installments under said new sale shall be divided equally between the parties of the first and second parts, until the parties of the first part shall have received thereout the full amount coming to them under the terms of said agreement, which is a modification of the same." It will be observed that the parties to these contracts did not expressly provide that the defendant should declare a forfeiture of the rights of the purchasers, under their respective agreements, for the nonpayment of any installment when due; but it was clearly understood that some of these agreements would probably be forfeited, anticipating which the parties hereto agreed upon a method for the disposal of the property affected thereby,

and a settlement of the purchase price and commissions in case of a resale thereof. In the contracts entered into between the defendants and the purchasers of these lots, it was stipulated that time should be of the essence of the agreement, and that the obligor should have the option to declare the amounts paid thereon forfeited, and the contract canceled, in case of default in any payment; but the plaintiffs, not having been parties thereto, were probably not bound by the terms of these agreements. In equity it has been held in this state that a bond for a deed transferred to the obligee the equitable estate in the premises, while the obligor held the legal title as security for the payment of the purchase money. *Burkhart v. Howard*, 14 Or. 39, 12 Pac. 79. But at law the rule is otherwise; the vendee, under a bond for a deed, it has been held, acquires no interest or estate whatever in the land agreed to be conveyed. *Sayre v. Mohnney* (Or.) 47 Pac. 197. And, the case at bar being an action at law, the defendant had the undoubted right, as between itself and a defaulting purchaser, to declare the contract at an end, and to enforce the provisions agreed upon. 2 Warr. Vend. 818; Pom. Spec. Perf. Cont. § 390; *Snider v. Lehnerr*, 5 Or. 386; *Frink v. Thomas*, 20 Or. 263, 25 Pac. 717.

This being so, the question is presented whether the plaintiffs, under their contracts with the defendant, are bound by such forfeiture and cancellation. The rule is well settled that a real-estate broker, in the absence of any agreement to the contrary, has earned his commission when he effects an actual sale, or produces a purchaser who is ready, able and willing to purchase, upon the terms indicated by the principal. *Fisk v. Henarie*, 13 Or. 156, 9 Pac. 322; *Kyle v. Rippey*, 20 Or. 446, 26 Pac. 308; *Booth v. Moody* (Or.) 46 Pac. 884. But here the rule is varied by the agreement that, on the sale of a lot upon credit, the plaintiffs should retain, as their commission, the first two installments, not exceeding \$10, and one-half of each installment thereafter until their compensation was fully paid. Under this clause, it must be conceded that the plaintiffs could not recover from the defendant any part of their commissions, except as the purchasers paid the installments stipulated in their agreements. An examination of the second contract entered into between the plaintiffs and defendant discloses that a forfeiture of the rights of purchasers, and a second sale of the same premises, presumptively, operated beneficially to each party, since the amount paid thereon was retained by each; and while the plaintiffs, on the subsequent sale, were not entitled to the first two installments, they were to receive one-half of each installment until they obtained the full amount coming to them as if no previous sale had been made. In other words, the plaintiffs, upon a declaration of

forfeiture, retained the money they had received, and also obtained another commission for securing a purchaser for the same property. Prior to the dissolution of the partnership, Riggen would probably have reaped a decided advantage from the forfeiture of these agreements and a resale of the lots; and hence the contract with the defendant of February 12, 1891, prescribing the mode of adjusting such commissions, was a valuable property right, which inured equally to each partner; and this being so, when Riggen, upon a dissolution of the partnership, assigned to Holbrook all his interest in the contract for the sale of Irvington Park lots, the latter thereby acquired whatever interest the former had therein, and, as a consideration therefor, Holbrook agreed to pay him 25 per cent. of the gross profits to be derived from all subsequent sales. Under this agreement, Riggen became entitled to commissions upon the resale of lots, the agreement to purchase which had been declared forfeited; but, when he assigned to Holbrook & Williams all his interest in the contract for the sale of lots in Irvington Park, he was no longer entitled to any portion of the commissions arising from sales or resales of this property thereafter to be made.

Counsel for plaintiffs cite and rely upon the case of *Bush v. Abraham*, 25 Or. 336, 35 Pac. 1066, in support of the theory that the surrender by the purchaser of his right under an agreement to convey reinvested the defendant with the equitable estate in the premises, and, being a substituted payment, amounted to a settlement by the purchaser of the obligation, and at once rendered the commissions, on account of such sale, due and payable, notwithstanding the forfeiture. The rule announced in that case cannot, in our judgment, have any application to the case at bar, for the reason that the parties stipulated, impliedly, for the forfeiture, and also that the commissions were not to be paid except as they were collected from the purchasers. It is true, the parties did not in direct terms stipulate that the defendant should have the right to declare a forfeiture of any of the contracts of purchase, or that, upon a declaration of such forfeiture, their commissions on account of the sale should also be forfeited; but, having agreed to take another commission on account of a resale of the lots declared forfeited, we think it is inferred from a fair construction of their contracts that they agreed to these terms; and, as the forfeitures complained of were declared by the defendant after Riggen had assigned his interest to Holbrook & Williams, neither he nor the firm of which he was a member had any interest in the commissions thereafter earned on account of the sales or resales of any of this property; and, this being so, the findings of fact do not support the judgment, and the court erred in its refusal to grant a judgment of

nonsuit, for which reasons the judgment is reversed, and the cause will be remanded, with instructions to dismiss the action. The judgment being erroneous, the order allowing the issuance of an execution thereon must be reversed also, and the appeal of Riggen from the order requiring the writ to be returned is dismissed.

(31 Or. 35)

# RIGGEN et al. v. INVESTMENT CO.

(Supreme Court of Oregon. Feb. 23, 1897.)

PARTNERSHIP—DISSOLUTION—RETIRING PARTNER—  
ASSIGNMENT OF INTEREST—ESTOPPEL  
TO SUE ON FIRM CLAIM.

1. A dissolution agreement contained an assignment by the retiring partner to the other of all his interest in the business, and provided that each partner was to pay one-half of the firm debts, and that the continuing partner should collect moneys due, and pay the retiring member one-half thereof. *Held* not an assignment by the retiring partner of his interest in commissions earned by the firm before dissolution.

2. A retiring partner is not estopped, by his agreement in articles of dissolution that the continuing partner should have the sole right to sue in the firm name, from suing in the firm name on a debt which was due to the firm before the dissolution, if he has not assigned his interest therein to the continuing partner.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by S. B. Riggen and another against the Investment Company. From a decree dismissing the action on the pleadings, plaintiffs appeal. Reversed.

This is an action by S. B. Riggen and F. B. Holbrook against the Investment Company, a corporation, to recover compensation for services in negotiating sales of real property. The plaintiffs allege that on October 7, 1890, they were partners in business as real-estate brokers, and on that day entered into a contract with the defendant by the terms of which they agreed to sell, if possible, all the lots and blocks in Irvington Park, Multnomah county, belonging to the defendant, and for such sales as they could make the defendant promised to pay them all sums realized thereon above the rate of \$800, net, per acre; that on October 17, 1891, the partnership was dissolved, Riggen retiring therefrom and Holbrook continuing the business, but each partner retained his interest in all commissions theretofore earned by the firm; that, prior to such dissolution, they, in pursuance of the terms of the agreement, sold to one F. R. Musser two lots in said tract for \$250, and the purchaser, having paid that amount to the defendant, obtained its deed for the premises; that, under said contract, plaintiffs were entitled to \$169.10 as commissions on account of such sale, but the defendant paid thereon \$95 only, leaving \$74.10 still due them. The complaint contains nine other similar, but separate, causes of action, and a prayer for judgment for the sum of

\$2,277. The defendant, answering specially, in the nature of a plea in bar, alleges that Riggen, in the agreement of dissolution, assigned all his interest in the business of the firm to Holbrook, and gave the latter the sole right to use the name of the firm, to collect all moneys due to it, and to settle up its affairs; that this action had been commenced by Riggen without the authority, consent, or knowledge of Holbrook, and that the former had no right to maintain the same in the name of, or to collect any of the commissions due, the firm. The reply, after admitting that the action was instituted by Riggen in the name of the firm, denies the material allegations of the answer, and also sets out a copy of the contract of dissolution, from which it appears that Riggen assigned to Holbrook all his interest in the business, and agreed that the latter should have the sole right to settle up the affairs of the firm, and to collect all moneys due it, but upon condition that he should immediately render a true account, and pay Riggen one-half thereof, free from all charges for such collections. Holbrook was also granted the sole right to use the firm name for one year, and thereafter until 90 days' written notice of the revocation thereof by Riggen, after which neither member of said firm was to use its name. Holbrook agreed to pay Riggen 25 per cent. of the gross profits thereafter derived from the sale of the Irvington property, and each agreed to pay one-half of all debts of the firm, but Riggen was not to be responsible for any indebtedness thereafter incurred. A demurrer to the reply having been sustained, and the plaintiffs declining to plead further, a judgment dismissing the action was given, from which they appeal.

R. R. Duniway, for appellants. George H. Williams, for respondent.

MOORE, C. J. (after stating the facts). The important question for consideration is whether Riggen, in the contract of dissolution, assigned to Holbrook his interest in the commissions theretofore earned by the firm. The rule seems to be well settled that the dissolution of a partnership by the mutual consent of all its members does not destroy the firm's identity, which, in contemplation of law, continues to exist until its debts are paid and its affairs wound up. *Brown's Ex'r v. Higginbotham*, 27 Am. Dec. 618; *Gannett v. Cunningham*, 34 Me. 56. As a corollary from this rule, it necessarily follows that each partner, after the dissolution of the firm of which he is a member, has the same power to collect debts due the firm, unless he has assigned his interest therein, that is possessed by a partner in the ordinary course of the partnership business. *Major v. Hawkes*, 12 Ill. 298; *Gordon v. Freeman*, 11 Ill. 14; *Robbins v. Fuller*, 24 N. Y. 570. And hence all active part-

ners at the time when a contract is made with the firm should join in an action for the breach of it. *Dacey, Parties*, 151; *Hawes, Parties*, § 88; *Lunt v. Stevens*, 24 Me. 534. In *Gram v. Cadwell*, 5 Cow. 489, a partnership having been dissolved, it was agreed that the retiring member should receive his capital in 10 days, while the remaining member was to assume the payment of all the firm debts. A debtor of the firm, having notice of the agreement of dissolution, paid his debt to the retiring partner; and, an action having been thereafter brought against him by the remaining partner, it was held that the agreement was a virtual conveyance of the interests of the retiring member, and, this being so, a payment to him by one having notice of the assignment was not a discharge of the firm debt, and hence not a bar to the action. In that case, the agreement of dissolution, having provided that the remaining partner should assume the payment of the firm debts, and also refund the amount of the retiring partner's capital, necessarily disposed of the latter's interest in the firm, except, possibly, the profits of the business, if any; and while the agreement did not, in terms, provide for the assignment of such interest, the court, in view of its provisions, and of the valuable consideration paid, may have been justified in concluding that it was tantamount to an assignment. But in the case at bar each partner was to pay one-half of the firm debts, and the retiring partner was to receive one-half of all moneys due the firm, free from all charges for collecting the same. We think it cannot be inferred from the agreement of dissolution that Riggen intended to assign to his partner his interest in the commissions earned by the firm, and that the right of Riggen to maintain this action in the name of the firm is unquestioned, unless he is estopped by his agreement that Holbrook should have the sole right to use the name of the firm. Each partner is the agent of his co-partners, and has implied authority from them to make such contracts as may be necessary or convenient for the successful operation of the partnership business. *Dacey, Parties*, 267. And hence each partner may occupy the dual character of principal and agent. *Id.* 149. Holbrook, as a partner, had equal authority with Riggen to collect all moneys due the firm, and, when the right to collect such debts was granted by Riggen, no new or superior power was thereby conferred. In *Napier v. McLeod*, 9 Wend. 120, a partnership having been dissolved, one of the members was appointed by the others an attorney in fact, irrevocably, to collect the debts due the firm; and, having commenced an action against a debtor for goods sold and delivered, the latter pleaded that he had settled the account with and obtained from one of the members a release of all demands. The



plaintiff, replying, set out a copy of the power of attorney, and alleged that the defendant had notice of the appointment; but, a demurrer having been interposed thereto, it was held that no interest in the effects of the firm was transferred by the appointment, and, the instrument being the evidence of a mere naked power, the authority creating the agency was competent to destroy it, notwithstanding the power purported to be irrevocable. To the same effect, also, see Story, Ag. § 476, and MacGregor v. Gardner, 14 Iowa, 326. Under the rule there announced, Riggen did not entirely abandon the right to participate in the liquidation of the partnership business, but might, at his own mere pleasure, resume the authority which he had ostensibly surrendered; and as no interest in the commissions earned by the firm had been transferred, and as no rights of the defendant or of Holbrook are prejudiced thereby, Riggen is not estopped by his appointment, and Holbrook cannot insist upon acting as sole principal and agent, when his co-partner has withdrawn his confidence and seeks to enforce his strict legal right. Story, Ag. § 463. The judgment will therefore be reversed, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

(116 Cal. 108)

PEOPLE ex. rel. SPENCER v. KNIGHT.  
(S. F. 396.)

(Supreme Court of California. Feb. 20, 1897.)  
ATTORNEY FOR STATE BOARD OF HEALTH — APPOINTMENT.

St. 1891, p. 209, § 1, provides that the attorney for the state board of health shall be appointed by the governor, and hold his office for four years, and until his successor is "elected" and qualified. *Held*, that the person appointed to fill it during the first term was not entitled to hold it until his successor was "elected," a successor being appointed and having qualified.

In bank. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Quo warranto by the people of the state of California, on the relation of Dennis Spencer, against George A. Knight. From a judgment in favor of relator, defendant appeals. Affirmed.

Denson & De Haven, for appellant. W. W. Foote and Garret McEnerney, for respondent.

HARRISON, J. The appellant was appointed attorney for the state board of health, by virtue of the provisions of an act authorizing such appointment (St. 1891, p. 209), June 13, 1891. July 11, 1895, the governor appointed the relator to succeed the appellant in the said office, and a commission therefor was duly issued to him. After qualifying for the office, the relator presented to the appellant his commission, and notified him that he had filed his oath

of office, and demanded to be let into the possession and enjoyment of said office; but the appellant refused, and has ever since refused, to let the relator into the possession of said office, or to permit him to hold and exercise the same. The present action was brought under the provisions of section 803, Code Civ. Proc., for the purpose of having the appellant excluded from said office, and establishing the right of the relator thereto. Judgment was entered in favor of the relator, from which the present appeal has been taken.

Section 1 of the act above named is as follows: "Section 1. The office of attorney for the state board of health, and the board of health of the city and county of San Francisco, is hereby created; such attorney shall be appointed by the governor, and shall hold his office as such attorney for the term of four years, and until his successor is elected and qualified." The proposition contended for by the appellant, and upon which he claims the right to retain the office, is that, by reason of the last clause in the foregoing section, his successor is to be elected by the people, and that, until such election has been had, there is no vacancy in the office, and, by virtue of section 879 of the Political Code, he is entitled to retain possession of the office. This construction of the section fails, however, to give effect to the provisions therein, which are declared with definiteness, and attributes a controlling effect to a provision which is merely subsidiary and incidental to the purpose of the act. There is no provision in the section, or elsewhere upon the statute book, that this office shall be filled by an election. On the contrary, the office is created by the act, and the provision that "such attorney shall be appointed by the governor" is an express legislative declaration of the mode in which the office shall be filled. The appointment of the officer is not limited to the first appointment, but includes every "such attorney." By the succeeding clause his term of office is fixed at four years, and at the expiration of that term the right of the governor to appoint the successor of the first incumbent was the same as for the original appointment. The additional words "until his successor is elected and qualified" cannot have the effect to overcome the previous declaration that the officer is to be "appointed," or justify an inference that the legislature intended that the office should be elective. That the provision in the act that "such attorney shall be appointed by the governor" was intended by the legislature to apply to future incumbents of the office is corroborated by the fact that no provision has been made for an election of the officer, or declaring the constituency by which he should be elected. The judgment is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.; GAROUTTE, J.

(116 Cal. 69)

**O'NEAL v. HART et al.** (S. F. 489.)

(Supreme Court of California. Feb. 13, 1897.)

**MORTGAGES—COUNSEL FEES—DEFICIENCY.**

1. A provision in a mortgage that counsel fees shall be part of the costs of foreclosure, and that the decree shall retain them, authorizes the court to include them in the decree as part of the obligation secured by the mortgage.

2. The court need not of its own motion direct that, if the proceeds of the foreclosure sale are insufficient to pay the judgment against the mortgagor, the deficiency shall be docketed against not only the mortgagor, but also against his grantee, who assumed the mortgage.

3. The grantee of a mortgagor having assumed the mortgage, and having defaulted, and a deficiency judgment having been entered against the mortgagor, the mortgagor was not entitled, until he had paid such judgment, to a judgment against the grantee for the deficiency.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by one O'Neal against one Hart and another. From a judgment for plaintiff, defendants appeal. Affirmed.

T. W. Nowlin and A. A. Moore, for appellants. J. K. Peirsol and C. T. Johns, for respondent.

**PER CURIAM.** 1. The mortgage which is foreclosed herein was given to secure the payment of a promissory note of the defendant Hart, and contained a clause which provided that in a suit for its foreclosure "a decree may be had to sell the said premises in the manner prescribed by law, and out of the money arising from such sale to retain the principal and interest, together with the costs and charges of making such sale, and of suit for foreclosure, including counsel fees, at the rate of five per cent. upon the amount which may be found due for principal and interest by the said decree." This express provision that counsel fees are to be regarded as a part of the costs of a suit for foreclosure, and that, if such suit be brought, there shall be entered therein a decree to retain said counsel fees, created an obligation for their payment upon the mortgagor of the same nature as his obligation to discharge other costs of foreclosure, and authorized the court to include them in its decree as a part of the obligation secured by the mortgage.

2. The court did not err in refusing to direct that, if the proceeds of the sale are insufficient to pay the amount of the judgment against Hart, the deficiency should be docketed against the defendant Burdick as well as Hart. Hart had conveyed the mortgaged premises to Burdick after the execution of his mortgage to the plaintiff, and his grantee had assumed the mortgage and agreed to pay the same. This would have authorized the court, at the request of the plaintiff, to enter a judgment that any deficiency be docketed against both Burdick and Hart; but, as the plaintiff declined to make such request, the court was not required to in-

clude it in the decree. Hart, by virtue of the provisions of his mortgage from Burdick, was entitled to a judgment against Burdick, not only for the amount of Burdick's note, but also for such an amount as he might pay in satisfaction of his mortgage to the plaintiff. He could not, however, claim any judgment therefor until after he had made such payment, and the decree provides that, for whatever deficiency he shall pay upon the judgment in favor of the plaintiff, judgment therefor shall be docketed in his favor against Burdick. The judgment is affirmed.

(116 Cal. 51)

**FIRST NAT. BANK OF SANTA ANA v.****ERRECA et al.** (L. A. 147.)

(Supreme Court of California. Feb. 15, 1897.)

**CHATTEL MORTGAGE OF SHEEP.**

A mortgage of sheep does not extend the lien thereof to wool thereafter growing on them, or lambs in gestation at its date.

Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by the First National Bank of Santa Ana against Erreca and others. Judgment for plaintiff. Defendant Bruschi and others appeal. Modified.

Gibson & Titus, J. C. Hizard, and J. W. Ballard, for appellants. Victor Montgomery, for respondent.

**HARRISON, J.** The plaintiff brought this action for the foreclosure of a chattel mortgage upon 2,330 sheep, that had been executed to its assignors January 18, 1894, by the defendants Erreca and Barrandeguy. In April, 1895, the mortgagors had sold to the defendant Bruschi 14,000 pounds of wool that had been grown upon the sheep described in the mortgage, after its execution, and sheared therefrom by the mortgagors; and in May, 1895, they sold to the defendant Cassou 815 lambs that had been born from the mortgaged sheep subsequent to its execution. The court held that the wool and the lambs thus sold were covered by the mortgage, and rendered judgment directing their sale. From this judgment, Bruschi and Cassou have appealed.

In *Shoobert v. De Motta*, 112 Cal. 215, 44 Pac. 487, it was held that in this state the lien of a chattel mortgage upon domestic animals does not cover the increase of the animals, unless expressly mentioned therein. The provision in section 2955, Civ. Code, authorizing the execution of a chattel mortgage upon "sheep, and the increase thereof," does not extend the lien of a mortgage upon "sheep" to the "increase" of the sheep, but implies that, unless the increase is covered by the terms of the mortgage, it is not included therein. In that case it was also said: "If the mortgagor retains the possession of the mortgaged property, he is at liberty to deal with and use it as its owner, and whatever income or profit may be derived from such use

belongs to him, and not to the mortgagee." In *Simpson v. Ferguson*, 112 Cal. 180, 40 Pac. 104, and 44 Pac. 484, it had been held that the mortgagor of real property was entitled to whatever crops might grow upon the mortgaged property prior to a foreclosure, and it was also said in *Shoobert v. De Motta*: "If, in the case of sheep, the use to which the mortgagor puts the ewes is for breeding lambs, there can be no sufficient reason given why the lambs that are dropped by the ewes should belong to the mortgagee, any more than the wool which is sheared from their backs." The present case presents a question which was not involved or decided in that case,—i. e. whether the lien of the mortgage includes lambs in gestation at its date; but, upon the principles of that case, it must be held that they are not so included. As the lien of the mortgage extends only to the property described therein, and as the mortgagor remains the owner of the property mortgaged, he has an unrestricted right to sell or dispose of its fruit or increase. His right to dispose of lambs in gestation at the date of the mortgage is the same as his right to dispose of oranges which were on the trees, or wheat which was in the ground or standing in the field when the mortgage was made.

It is but just to counsel and to the court below to say that the decision in *Shoobert v. De Motta* had not been rendered when the present case was tried, or the appeal therefrom taken to this court. The superior court erred in holding that the wool sheared from the sheep and their increase was covered by the mortgage, and subject to its lien, and it is directed to modify its judgment in accordance with this opinion.

We concur: VAN FLEET, J.; GAROUTTE, J.

(116 Cal. 91)

SCHART v. SCHART et al. (L. A. 197.)  
(Supreme Court of California. Feb. 17, 1897.)

SERVICE OF PROCESS—NOTICE OF MOTION.

1. Service by publication on nonresidents whose address is known is not complete until copies of the summons and complaint are mailed to them, as required by the order for publication.

2. A defendant mortgagor need not be served with notice of motion to set aside a default judgment in foreclosure proceedings against her and her co-defendant, a prior mortgagee, under which judgment the property was sold to plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Henrietta Schart against Freda Schart and Louis J. Bock to foreclose a mortgage. From an order setting aside a judgment by default against defendants, plaintiff appeals. Affirmed.

Donnell & Howland, for appellant. H. O. Collins, for respondents.

SEARLS, C. This is an appeal from an order of the court below setting aside a judgment by default, rendered against the defendants, on the ground that the summons was served by publication, and that no copy thereof was served upon the defendants by mail or otherwise, although the defendants were nonresidents of the state, and their residence, as shown by the affidavit for publication, was known, and although the order for publication required copies of the summons to be forwarded to said defendants by mail. The motion to set aside the default was made within one year after the entry of default and judgment, as provided by section 473, Code Civ. Proc. The moving affidavits show that defendant Bock is the holder and owner of a prior mortgage upon the property covered by plaintiff's mortgage, which was foreclosed in the action. The substituted service was not complete unless a copy of the summons and complaint were deposited in the post office, directed to the defendant, as required by the order of the judge. It became, therefore, not only the right, but the duty, of the court, to set aside the default and judgment inadvertently entered.

Appellant objects that the notice of motion by defendant Bock should have been served upon his co-defendant, Freda Schart. Bock is not seeking any relief against his co-defendant here, but only against the plaintiff. If he shall file a cross complaint, it will be time enough to serve her therewith. Where the direct legal effect of an order determines the right of a party, he must have notice of the application therefor. This is illustrated in a case where a motion is made to set aside a judgment under which property has been sold, and purchased by a third party, where it has been held that such third party must have notice. In the present instance the property was sold, and bought in by plaintiff, who had notice; and the direct legal effect of the order appealed from does not in any way operate for or against the defendant Freda Schart. We recommend that the order appealed from be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER OURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(116 Cal. 94)

WIGMORE et al. v. BUELL. (L. A. 175.)  
(Supreme Court of California. Feb. 17, 1897.)

SET-OFF.

Damages for trespass committed by plaintiff in ejectment on land of defendant contiguous to the premises in suit neither arise out of "the transaction set forth in the complaint" nor "upon contract," within Code Civ. Proc. § 438, and hence cannot be set off.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Ejectment by John Wigmore and another against R. T. Buell. From a judgment for plaintiffs, defendant appeals. Affirmed.

Thos. McNulta and Grant Jackson, for appellant. Boyce, Taggart & Kellogg, for respondents.

SEARLS, C. This is an action of ejectment to recover possession of a tract of land situate and being in the county of Santa Barbara, damages for the detention thereof, and for the value of the rents and profits. Plaintiffs had judgment for possession of the land and \$400 damages. Defendant appeals from the judgment. The only error assigned is based upon the refusal of the court, pending the trial, to permit defendant to file an amendment to his answer. The complaint is in the ordinary form in ejectment, and the answer consisted in denials of the allegations of the said complaint. At the trial, and after plaintiffs had rested their case, defendant sought to prove that plaintiffs' cattle had ranged and pastured upon his (the said defendant's) land. Upon an objection being sustained to this and similar evidence, defendant presented and asked to be permitted to file an amendment to his answer, which amendment, omitting the title and merely formal part, is as follows: "(2) The defendant further alleges that during the times mentioned in the complaint, up to 1893, the cattle and stock of plaintiffs ran in common in large numbers with the cattle and stock of defendant on the Rancho San Carlos de Jonata, then and now owned by defendant; that said Rancho San Carlos de Jonata adjoins the lands of plaintiffs, which lands of plaintiffs are part of the Laguna Rancho; that, in consequence of the cattle and stock of plaintiffs running and grazing upon the lands of defendant above mentioned, defendant was and has been damaged in the sum of \$9,000." Plaintiffs' counsel objected to the amendment, and the objection was sustained, to which ruling defendant, by his counsel, excepted.

Waiving the fact that this was a jury trial, that the amendment came after the plaintiffs had closed their case, and that amendments in such cases are within the discretion of the court to grant or refuse, and only subject to revision in cases of an abuse of discretion, we still perceive no error in the ruling. The action, as before stated, is one of ejectment. The proposed amendment did not constitute a defense to the action. It was in the nature of a counterclaim for a trespass committed by plaintiffs upon land of defendant contiguous to the demanded premises. A counterclaim may consist of: "(1) A cause of action arising out of the transaction set forth in the complaint as a foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action arising upon contract; any other cause of action arising also upon contract, and existing at the commencement of the action." Code Civ. Proc. § 438. The cause of action, the trespass set up in the

amendment, did not, in contemplation of law, arise out of the transaction set forth in the complaint, and was not connected with the subject of the action, and hence is not included in the first ground specified in the statute. It does not come within the second subdivision of section 438, for the reason that neither plaintiffs' cause of action nor defendant's amendment is a cause of action arising upon contract, but is a tort, pure and simple. *MacDougall v. Maguire*, 35 Cal. 274; *Lovensohn v. Ward*, 45 Cal. 8; *Demartin v. Albert*, 68 Cal. 277, 9 Pac. 157; *Carpenter v. Hewel*, 67 Cal. 589, 8 Pac. 314; *James v. Center*, 53 Cal. 31. The case of *Commercial Co. v. Story*, 100 Cal. 30, 34 Pac. 671, contains a clear exposition of the principles involved in cases arising under the first subdivision of section 438. We recommend that the judgment be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(5 Cal. Unrep. 806)

VAN SLYKE v. BROADWAY INS. CO.  
(S. F. 542.)

(Supreme Court of California. Feb. 26, 1897.)

In bank. On rehearing. Denied.

For report on appeal, see 47 Pac. 689.

PER CURIAM. A rehearing is denied. The opinion heretofore filed herein is modified by striking out the sentence: "The case presented is one of a patent ambiguity, which cannot be 'holpen by averment.'"

PERES v. CROCKER et al. (S. F. 96.)  
(Supreme Court of California. Feb. 23, 1897.)  
DEED, WHEN A MORTGAGE — EXCLUSION OF EVIDENCE.

1. In an action to declare a deed absolute in form a mortgage, a judgment for defendant cannot be set aside where, in confirmation of the presumption of the deed, there was evidence from the conduct of the grantor, and from his pecuniary condition at the time of its execution, and his declarations before and after, that the deed was in fact absolute.

2. Where plaintiff had already testified as to what he told his grantee certain lands conveyed by him "ought" to have been worth at the time, exclusion of his estimate of their value was harmless.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Louis Peres against Mary Ives Crocker and others. Verdict for defendants. From an order denying a new trial, plaintiff appeals. Affirmed.

N. Hamilton, Geo. H. Maxwell, R. M. F. Soto (Rodgers & Paterson, of counsel), for appellant. Wilson & Wilson and A. L. Rhodes, for respondents.

BRITT, C. Plaintiff claims that certain deeds of land, absolute in form, by him executed to one Charles McLaughlin, whose interest defendants have acquired by devise, were intended by the parties thereto to operate virtually as a mortgage; and he prosecutes this action to obtain an accounting of the rents and profits of the land, and to redeem the same from the effect of the deeds, or compel a reconveyance of the residue after apportioning to defendants enough thereof at its present value to satisfy any indebtedness ascertained to be due from him on such accounting. The court found that the deeds were intended to be absolute, according to their purport, and the chief contention of plaintiff on appeal is that this conclusion was not justified by the evidence at the trial. While acknowledging the presumptions attending the findings, he yet insists that, "resolving every conflict of testimony in favor of the respondents, the whole evidence taken together, in its legal effect, is counter to the decision of the court, and justly demands a reversal of its action." Invited by the apparent candor with which this contention is urged on behalf of appellant, we have attentively examined the voluminous statement of evidence brought up in the record. We are thus informed that for many years prior to May 12, 1881, an action entitled "Blum v. Sunol and others" was pending in the courts of the state, in which claim was laid by Blum to an undivided two-thirds interest in and to the Rancho de los Vaqueros, more commonly called in the record here the "Basco Ranch," containing about 17,700 acres, situated in Alameda and Contra Costa counties, and in the possession of Louis Peres, the plaintiff in the present action. The latter had undisputed title in one-third of said rancho, and claimed to be owner of seventeen-eighteenths thereof as purchaser under sundry defendants in Blum v. Sunol, in whose name he defended that suit. In 1879 judgment was rendered in Blum v. Sunol in Blum's favor. Subsequently an order was made granting a new trial. Blum appealed from such order, and his appeal was pending in the supreme court on said May 12, 1881. Peres' interest in the rancho was then incumbered by two mortgages,—the first in favor of one Dupuy for the principal sum of \$70,000, the second in favor of one Arsiniega for \$10,000; both mortgage debts being then due, and together amounting, with accrued interest, to above \$95,000. These mortgages were in course of foreclosure in a suit against Peres then recently instituted, and a contract had been made between said Dupuy and Blum for an adjustment of their conflicting interests when by means of the foreclosure the title of Peres should be extinguished. Peres was also under contract with his attorneys in Blum v. Sunol to give them 1,000 acres of the rancho as their fee contingent upon success in that litigation. At the same time he

owned free of any incumbrance a tract of 880 acres in the near vicinity of the rancho. Such smaller tract was of the value of \$4,400, and his seventeen-eighteenths of the rancho was worth, had the title been clear, say \$170,000. In this posture of his affairs Peres executed to McLaughlin, on said May 12, 1881, the deeds mentioned at the outset of this opinion; one purporting to be a grant, bargain, and sale of the Basco rancho, the other of said tract of 880 acres. McLaughlin at once took possession of the lands, paid off the said mortgages, and assumed the defense of Blum v. Sunol, himself or his successors in estate paying as expenses of that action about \$17,000, exclusive of attorney's fees. He died December 13, 1883, and his wife, Kate D. McLaughlin, who became his executrix, was sole devisee under his last will. She died on March 16, 1888, leaving a will whereby she devised her whole estate to the defendants in this action. The order granting a new trial in Blum v. Sunol was affirmed (63 Cal. 341). The second trial, had in 1884, resulted adversely to Blum. He again appealed, but in July, 1889, a compromise was effected whereby, in consideration of \$8,500 paid by the executors of Mrs. McLaughlin, he released his claims to the rancho. Peres began the present action, July 9, 1890. The lands involved were then worth some \$350,000.

Peres is the only surviving person professing to have actual knowledge of the terms of the oral agreement between himself and McLaughlin which led to the deeds in question. His testimony at the trial was, in effect, that McLaughlin agreed to treat the deeds as a mortgage; and to reconvey the land to Peres when the Blum suit should be won and Peres had repaid him "in money or in land" for his advances to discharge the mortgages and resist the suit of Blum, with interest; also to account for the rents and profits received meanwhile. As tending to corroborate the statements of Peres, we note that the tract of wholly unincumbered land was included in the conveyance; that the land was worth (with clear title) nearly twice the sum necessary to pay off the mortgages of Dupuy and Arsiniega, and besides yielded under the McLaughlin management a gross return in rents, etc., of about \$14,000 per year; that Peres rendered some assistance in procuring testimony for the second trial of the Blum case; also certain evidence of parol declarations by McLaughlin in disparagement of his apparent title. It was testified that he stated to one witness: "It [the rancho] is not mine; if Peres wants it back, I expect to give it to him;" that he took "the fight off Peres' hands to beat Blum"; to another, that he had taken the deeds as security for money advanced to pay off two mortgages, and for money "that I may give him in the future to help him out in his lawsuit"; and to a third, that he had loaned some money on the rancho. Appellant lays

stress also on a promise made to him by McLaughlin that in case of his success in the litigation he would be generous or liberal to him (Peres). It seems to us, however, that this matter has very equivocal significance in the case.

But the court below was of opinion that the lands were conveyed to McLaughlin in consideration of his engaging to discharge the debts of Peres secured by said mortgages, and that he contracted no other obligation to Peres; and tending to uphold this finding there was evidence, besides the matters already stated, that Peres was without money to pay off the mortgages, and expected besides that the future litigation with Blum would necessitate large expense; that when Dupuy insisted on payment of his mortgage Peres threatened to settle with Blum, and allow Dupuy to take what would be left; that when Dupuy forestalled such action, and himself made an alliance with Blum and began suit for foreclosure, both Peres and his counsel in the case of *Blum v. Sunol* were greatly perturbed, and considered the situation desperate; that the transaction with McLaughlin occurred in this emergency; that the value of Peres' undisputed interest in the land was then far below the sum McLaughlin was required to pay for the release of the existing mortgages, while for any purpose of raising money the value of that part claimed by Blum was greatly impaired; that, according to Peres' own statement, no rate of interest to be paid by him to McLaughlin was mentioned between them; that Mr. E. J. Pringle, a gentleman of character and repute as the parties agree, who for many years had been attorney and counsel for Peres, and under whose direction the deed of the rancho to McLaughlin was drawn, had, as he testified, no intimation from Peres that the deed was to serve as a mortgage, but believed it to be absolute, and on that assumption thenceforward conducted the litigation with Blum in the interest of McLaughlin (as he had done previously for Peres), at length compromising the suit without consultation with or objection from Peres; that Peres accepted a lease of part of the rancho from McLaughlin, and paid rent therefor, afterwards assigning his lease with McLaughlin's consent and removing from the land; that he made no arrangement for payment of taxes; these were paid by McLaughlin and his successors, to whom, after 1881, the land was assessed; that Peres never sought an inspection of the accounts of the business of the rancho, nor after the execution of the deeds had or claimed any part in its management. In 1885 Peres owed the executrix \$700 for rents, and a larger sum for cattle he had bought of McLaughlin. The second trial of *Blum v. Sunol* had then been had, and Peres preferred a request for consideration at the hands of the executrix because of her deceased husband's promise to be liberal with him if that suit should be won. She refused, and required payment of his said account for

rents and cattle, and thereupon to settle the same he transferred to her a certificate of purchase of 120 acres of state land adjoining the rancho. There was, besides, the testimony of several witnesses to divers statements of Peres inconsistent with the theory that he yet retained interest in the title; in substance, that his mortgages became due and he could not hold his land any longer, that he had sold it out to McLaughlin, that McLaughlin was the owner, had got it all, etc. We have endeavored to exhibit only more prominent features of the evidence, omitting matter touching mainly the credit of witnesses, and much besides which may have influenced the court below.

Counsel differ little as to the law of the case. That the evidence to sustain such an action must be cogent and clear has been often remarked. Thus it has been said that "the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage, otherwise the intention appearing on the face of the deed ought to prevail." *Henley v. Hotelling*, 41 Cal. 27. "Unless the evidence is such as to leave in the mind of the trial judge a clear and satisfactory conviction that the instrument which in form is a deed was intended by all the parties thereto as a mortgage, the finding should be against the plaintiff." *Mahoney v. Bostwick*, 96 Cal. 58, 30 Pac. 1020. So, *Ahern v. McCarthy*, 107 Cal. 383, 40 Pac. 482; *Cline v. Robbins*, 112 Cal. 584, 44 Pac. 1023; and numerous other cases. The trial court is the appropriate tribunal to weigh the evidence, and determine whether it is convincing and satisfactory in the sense of these cases, and its conclusion must be accepted on appeal unless obviously to the view of this court its deductions have no adequate support. In the present instance it cannot be discerned that the findings are without such support. In confirmation of the presumption attaching to the deeds themselves, we think the court might conclude upon the evidence, without straining the inference, that the conduct of Peres from and after the execution of the deeds was much more consistent with the character of a vendor, having some vague expectation of possible benefit in case success attended the speculation on which his grantee had purchased the estate, than of a mortgagor expecting to be reinstated in the rights and dominion he had temporarily resigned to a mortgagee; while, if adequate motive for the conveyance was essential to be found, it might be discovered in the difficulties of Peres' situation and the contingency which confronted him, that a sale of his property under foreclosure, in the embarrassed condition of his title, would not raise funds sufficient to pay the debts secured on the same.

Peres, called as a witness on his own behalf, was asked by his counsel, "What did you estimate to be the value of those lands at the time of your negotiation with McLaughlin for this money?" The court sustained an objec-

tion to the question, and it is insisted that here was error. If it be conceded that the evidence sought by the question was within the rule which allows the motive, belief, or intent of a person to be testified by himself directly, and was therefore legally competent, yet we think its rejection could not have prejudiced the plaintiff. He had already testified that he told McLaughlin he had 16,500 or 16,600 acres in the rancho, and it "ought to be worth eighteen or twenty dollars an acre"; also that he would not sell it to him for less than \$350,000. Subsequently it was stipulated between counsel that the value of the rancho at the time in question was \$170,000, this having reference, it seems, to the seventeen-eightieths thereof owned by Peres. Further, to sustain plaintiff's case, it was necessary to show that not only himself, but McLaughlin also, considered or was bound to consider the transaction as a mortgage and not a sale; and no estimate of the value held in the mind of Peres could shed light on the intent of McLaughlin, except that which was communicated to the latter. It is therefore manifest that the result could not have been affected by any answer to the question asked of the witness, and the action of the court excluding it worked no injury. The order denying plaintiff's motion for a new trial should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the order denying plaintiff's motion for a new trial is affirmed.

(5 Cal. Unrep. 604)

**BOWERS RUBBER CO. v. BLASDEL.**  
(S. F. 428.)

(Supreme Court of California. Feb. 19, 1897.)

**SALE—WARRANTY.**

The fact that a buyer paid part of the price did not preclude him from relief, in an action for the balance, on account of the worthlessness of part of the goods, where at the time of payment he had no knowledge of the defects.

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by the Bowers Rubber Company against H. G. Blasdel. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Morris M. Estee (Arthur G. Fisk, of counsel), for appellant. Ryland B. Wallace, for respondent.

PER CURIAM. This action was brought to recover the sum of \$4,588, alleged to be the balance due from defendant to plaintiff for

100 "rubber concentrator belts," manufactured by plaintiff for defendant between January 3, 1893, and December 20, 1893. The defense was that a large number of the said belts were not of good quality, and were not reasonably fit for the purposes for which they were intended. The case was tried by the court without a jury, and, among other things, the court found that 16 of the belts, "by reason of the inferior quality used in the body of said belts, and the improper manner in which the flanges thereof were molded to the sides or edges thereof, were not fit for the purposes for which they were to be used and were of no value," but that the other 84 belts were all "of good quality and fit for the purposes for which they were intended, and the reasonable value of the material used and labor employed in the manufacture thereof was the sum of \$6,862," of which sum defendant had paid to plaintiff on account \$3,600, leaving a balance due to plaintiff from defendant of \$3,262, which on March 2, 1894, defendant promised in writing to pay to plaintiff, with interest thereon. In accordance with the findings judgment was entered on September 19, 1895, that the plaintiff recover the sum of \$3,615.28 and costs; from which judgment and an order denying a new trial the defendant has appealed.

It is claimed by appellant that the finding that 84 of the said belts were all of good quality, and fit for the purposes for which they were intended, was not justified by the evidence, but that, on the contrary, 66 of them were badly manufactured, and therefore practically worthless and of no value. Whether the finding referred to was justified or not is the only question which need be considered. To set out the evidence bearing upon the question, even in substance, would make this opinion quite lengthy, and subserve no useful purpose. We have carefully examined the record, and, in our opinion, there was uncontradicted evidence quite sufficient to show that a considerable number of the belts, other than the 16 which were found to be of no value, were badly manufactured, because of "the improper manner in which the flanges thereof were molded to the sides or edges thereof," and were therefore practically of no value. It was also proved that, when defendant paid the \$3,600 on account, he did not know of the defects in the belts. That part of the finding to the effect that on March 2, 1894, defendant promised in writing to pay plaintiff \$3,262, with interest thereon, is based upon a letter written by defendant on the day named to plaintiff's president, in which he simply says: "I should have paid a portion of the indebtedness some time since, and I will be glad to pay you a good rate of interest on my overtime." The judgment and order appealed from must be reversed, and the cause remanded for a new trial. It is so ordered.

(116 Cal. 97)

**LEE v. SOUTHERN PAC. R. CO. (L. A. 107.)**

(Supreme Court of California. Feb. 19, 1897.)

**ACTIONS AGAINST CORPORATIONS—WHEN AUTHORIZED—RAILROADS—OPERATION BY LESSEE—LIABILITY OF LESSOR FOR PERSONAL INJURIES—PLEADING AND PROOF—VARIANCE.**

1. Const. art. 12, § 10, prohibiting any law permitting the leasing or alienation of any franchise so as to relieve the franchise or property held thereunder from liabilities contracted in the operation of such franchise, does not give the employé of a corporation's lessee a right of action against the corporation for injuries through the wrongful acts of the lessee in the use of the leased property.

2. Though St. 1880, p. 21, authorizes one railway corporation to lease its franchise and property to another, the lessor company is liable to an employé of the lessee for injuries caused by the improper construction of the road.

3. In an action against a railroad company for personal injuries, plaintiff alleged that he was defendant's employé, and that the injury was caused by the improper construction of the road. The proof showed that plaintiff was an employé of defendant's lessee. *Held*, that the variance was immaterial, since he was entitled to recover, though not an employé of either company, not being a trespasser.

Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Charles C. Lee against the Southern Pacific Railroad Company, in which there were special findings of facts, and a general verdict in favor of plaintiff. From a judgment for defendant, notwithstanding the verdict, plaintiff appeals. Reversed, and judgment on the verdict directed.

Cole & Cole, for appellant. Bicknell & Trask, for respondent.

**HENSHAW, J.** Plaintiff brought this action against the Southern Pacific Railroad Company to recover damages for personal injuries sustained by him. He pleaded that the defendant was the owner of a certain railroad in the county of Los Angeles, and of its roadway, tracks, and appurtenances; that, at the time of the injuries complained of, he was employed by the defendant as a brakeman; and that while in the performance of his duties as brakeman, at a siding called Honby, on the line of the road, he was thrown from an engine upon which he was riding, and sustained serious injuries. The cause of the accident was alleged to be the negligence of the defendant in imperfectly constructing the rails and track of the road at Honby, and in allowing this defectively constructed track to remain out of repair, inadequate, and unsafe. The answer admitted the ownership by defendant of the road in question, denied that defendant was engaged in the business of operating the road, denied that plaintiff was or ever had been in its employ as a brakeman, or in any other capacity, and denied the imperfect construction and want of repair of the rails and track. The jury returned a general verdict in favor of plaintiff in the sum of \$8,000. It likewise made special findings of

fact upon certain interrogatories presented. These findings, with certain other facts agreed to by counsel under stipulation, may thus be summarized: The defendant was the owner of the railroad upon which the accident complained of occurred, but, prior to the time of the accident, it had leased the road and all the rolling stock and property of every kind used upon or in connection with it to the Southern Pacific Company of Kentucky. The Southern Pacific Company was at the time of the accident in the exclusive operation of said railroad under the lease. The side track upon which the accident occurred had been constructed by the Southern Pacific Company as an aid or adjunct to the main line. The plaintiff at the time of the accident was in the employ of the Southern Pacific Company, and not of the Southern Pacific Railroad Company. The trial court determined that a conflict existed between the special findings and the general verdict, and holding that, under the special findings, defendant was entitled to judgment, rendered its decision accordingly.

Section 10 of article 12 of the constitution declares: "The legislature shall not pass any law permitting the leasing or alienation of any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges." Upon this language, appellant contends that the constitution gives one a right of action against the corporation which has owned property for an injury which has resulted to him in the use of such property in the hands of a lessee or grantee of the original owner, and from this he insists that his right of action against the defendant is established by the constitution itself. The section in question was adopted by the constitutional convention without debate. It is a provision peculiar to this state. It has not so far received judicial interpretation; yet we think no difficulty need be experienced in arriving at its true meaning. It is not to be construed as a grant of authority to lease, but as a restriction upon the power of the legislature to make such grant of authority. *Abbott v. Railroad Co.*, 80 N. Y. 27; *Railway Co. v. Morris*, 68 Tex. 49, 3 S. W. 457. It declares: (1) That, if a lease or sale shall be made of the franchise or property of a corporation, the lessee or grantee shall take such franchise or property cum onere, subject to any of the liabilities of the grantor at the time existing and enforceable against the franchise or property. This provision is for the very obvious purpose of preventing a corporation, by selling or assigning its franchise or property, from saving harmless the franchise or property, and leaving remediless one who but for the lease or sale could have enforced against the property a judgment which he might recover. It is designed, further, as a declaration that the forfeiture of a franchise for an act committed or omitted by the charter corporation while it



owned such franchise may be enforced after transfer of the franchise by sale or lease. (2) That, in the hands of the lessee or grantee, the franchise or other property shall be subject to the liabilities which may be incurred in its occupation, use, or enjoyment. Thus, the corporation owning the property will not be allowed to save it harmless by conveying it to another corporation. In the hands of the operating corporation, the franchise and property will still be liable,—the one to forfeiture at the instance of the state, the other to execution levy at the instance of any individual who has sustained loss or injury by reason of the wrongful acts of the operating corporation. But it will be noted that the section does not attempt to give, and is not intended to give, a personal action against a corporation where none existed before. It is designed to subject the franchise and property of a corporation, whether the franchise be exercised or the property be used by the corporation itself or by another, to liability for breach of duty. Otherwise, a corporation might own a fully-equipped railroad; it might convey the road and the property used upon and with it to a lessee corporation owning no property whatsoever, and leave the conduct and operation of its property entirely to the lessee. A judgment creditor seeking to make good his claim against the operating company would find no property owned by it upon which it could levy. To prevent this and many other such evasions as might be instanced, the constitutional provision in question was adopted. So far as the case at bar is concerned, it can have but this application, and no more. It would enable the plaintiff injured by the negligence of his employer, the lessee company, to make good his judgment under appropriate procedure out of the leased property; but it would not operate to give the plaintiff, an employé of the lessee company, a right of action against the lessor company, upon the fiction that it was his employer.

Respondent contends that, having made a valid lease of all its railroad property to the Southern Pacific Company, it is absolved from all liability to plaintiff. Upon the part of the appellant it is contended that the lease is without sanction from the constitution and laws of the state, and is therefore void. The question of the validity or invalidity of the lease is thus collaterally presented, but a decision upon it is not necessary to a determination of the rights of the parties hereto. If the lease were made without legislative sanction, it would be void, and, under all of the authorities, the lessor would continue liable for all the negligence of the lessee affecting the public, the latter being treated as operating the road as the mere agent of the lessor. *Arrow-smith v. Railroad Co.*, 57 Fed. 165; *Thomas v. Railroad Co.*, 101 U. S. 83; *Railroad Co. v. Winans*, 17 How. 30; *Railroad Co. v. Brown*, 17 Wall. 445; *Frazier v. Railroad Co.*, 88 Tenn. 138, 12 S. W. 537; *Railway Co. v. Dunbar*, 20 Ill. 623; *Railroad Co. v. Morris*, 68

*Tex.* 50, 3 S. W. 457; *Nelson v. Railway Co.*, 26 Vt. 717. But, conceding all that respondent claims as to the validity of the lease, it does not follow that respondent is relieved from liability to this plaintiff. The act which it is insisted affords legislative authority for the lease in question is entitled "An act permitting and authorizing railway and other corporations organized under the laws of this state, or of any state or territory of the United States of America, or any act of congress of the United States of America, to do business in this state on equal terms." It is found in the Statutes of 1880, at page 21. No terms of the act afford exemption in any respect to the lessor company. Where a statute authorizing leases contains no clause exempting the lessor from liability, it is well settled that the lessor still remains liable for an injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction of its road, station houses, etc.

In *Railway Co. v. Curl*, 28 Kan. 622, a railway company constructed its track, and in the construction omitted to make sufficient cattle guards where the track entered and left an unfenced field. Thereafter the railroad was leased to another company, which, at the time of the injury complained of, was in the full possession and use of the track, and, by the terms of its lease, had contracted to discharge all statutory obligations and duties imposed upon the lessor company. The owner of land adjacent to the railroad brought his action against the lessor company to recover damages for injuries sustained to his crops by straying cattle. Justice Brewer, in delivering the opinion of the court, said: "Defendant contends that, where the statute authorizes the lease by one railroad company to another of its track, the lessor company is not responsible for injuries caused by the torts of the lessee company, and, in support of that doctrine, cites some authorities. To a certain extent this proposition is true. If the injury results from negligence in the handling of trains or in the omission of any statutory duty connected with the management of the road,—matters in respect to which the lessor company could, in the nature of things, have no control,—then the lessee company will alone be responsible; but, when the injury results from the omission of some duty which the lessor itself owes to the public in the first instance,—something connected with the building of the road,—then we think the company assuming the franchise cannot divest itself of responsibility by leasing its track to some other company. Thus, for instance, in the case at bar the defendant was charged with the duty of placing sufficient cattle guards before it either used this track which it constructed, or permitted any one else to use it; and it cannot divest itself of responsibility for injuries resulting from such omission by leasing its track to some other company. The injury resulted directly from its own wrong, and not from any mere negli-

gence on the part of the St. Louis & San Francisco Railroad Company. It cannot relieve itself by contracting with some other party to discharge its statutory duty. \* \* \* The defendant omitted this duty, and, by the statute, is responsible for all damages sustained by reason of such omission." In *Nugent v. Railroad Co.*, 80 Me. 62, 12 Atl. 797, the defendant railroad, under express authority of law, had leased its road to the Portland & Ogdensburg Railroad, which latter road was engaged in its management and operation. A brakeman of the Portland & Ogdensburg road sued defendant for personal injuries received by reason of the negligent construction of an awning at a station house built by defendant company. The case received elaborate consideration. The action of the brakeman against the owning road was sustained, and the rule deduced in the following language: "Herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains, and the general management of the leased road over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its roads, station houses, etc., the chartered company cannot, in the absence of statutory exemption, discharge itself of legal responsibility." In *Arrowsmith v. Railroad Co.*, 57 Fed. 165, the same rule is enunciated, and numerous authorities cited in support thereof. Indeed, a somewhat extended examination of the cases justifies the conclusion that this principle, at least, is accepted without conflict. An analysis of the case of *Railway Co. v. Culberson*, 72 Tex. 375, 10 S. W. 706, a case upon which respondent strongly relies, will disclose that the law there enunciated is not only not at variance with the principle above mentioned, but embodies a distinct recognition of it. In that case an employé of the operating company sued the lessor company, claiming damages for injuries sustained by reason of defective appliances furnished by the operating company. The court held, and very properly, that such an action would not lie against the lessor company, and said: "It may be that if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its employés by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable, merely because it owned the road."

In all cases where a valid lease is found (or, as in this discussion, where it is as-

sumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of the relationship of employer and employé under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company when it attaches does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employé of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employé of the operating company by reason of the negligence of a fellow servant, or of want of skill and care of the lessor company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible. But, where injury has resulted to an employé of the operating company by reason of a failure of the lessor to perform its public duty, as in its failure to construct a safe road, as is here charged, the injured employé may sue the lessor company, as one of the public, for its failure to perform that duty, and not because, between himself and the lessor company, the relation of employé and employer, or any relation of contractual privity, exists. As is said in *Nugent v. Railroad Co.*, supra, where the brakeman of the lessee road was injured by reason of the defective construction of the station house by the charter company: "Our opinion, therefore, is that the plaintiff had the lawful right, as brakeman on the train of the P. & O., to pass and re-pass by the Bethlehem station house of the defendant, which, therefore, owed a duty to him to construct and maintain its station house there in such a reasonably safe manner that its awning would not injure him while in the performance of his duty with due care, and that a negligent breach of that duty by the defendant having resulted in a personal injury to the plaintiff, without fault on his part, he is entitled to maintain this action therefor." So, here, the charge against the defendant is that the injury resulted by reason of its imperfect construction and maintenance of the rails and track of its road. The verdict of the jury for plaintiff is its declaration that the charge was substantiated by the evidence, and the nature of the omission or dereliction is such as to entitle the plaintiff to compensation from the defendant herein for injuries which may have resulted to him by reason of it.

As has been indicated, the plaintiff in this case has averred that he was an employé of the defendant corporation. The proofs in this regard disclose that he was in the employ of the Southern Pacific Company. The variance we think to be immaterial. The averment could be eliminated, and a cause of action would still remain. Plaintiff has

pleaded and shown to the satisfaction of the jury that he was not a trespasser upon the railroad at the time and place where he met with his injury, but that he was there under lawful employment; that, in pursuit of his vocation, he met with an injury occasioned by defendant's defective construction of its roadbed, for which injury the defendant is, in law, responsible. It follows that there is no irreconcilable conflict between the special findings and the general verdict of the jury, and the court should therefore have entered judgment for plaintiff. The judgment is reversed, and the cause remanded, with instructions to the trial court to enter judgment in favor of plaintiff and appellant, under the general verdict of the jury.

We concur: TEMPLE, J.; McFARLAND, J.

(116 Cal. 84)

GARDNER v. SAMUELS et al. (S. F. 336.)  
(Supreme Court of California. Feb. 15, 1897.)

LEASE—CLAIM FOR IMPROVEMENTS—MISJOINDER OF DEFENDANTS—DEMURRER.

1. A demurrer for misjoinder of parties, merely stating that demurrant was improperly joined with the other defendants, is sufficient.

2. Provision in a lease that "it is \* \* \* covenanted and agreed" by and between the parties that the lessee may make improvements, and the lessor, for himself, his heirs, administrators, and assigns, agrees to pay the lessee therefor at expiration of lease, gives the lessee no claim therefor against one to whom the land is conveyed after termination of lease and surrender by the lessee, and no lien on the premises, but merely a personal claim against the lessor.

3. A lessor sued by his lessee for improvements cannot demur for misjoinder of defendants because of joinder of his grantee, against whom no cause of action is stated.

Department 1. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action by Gardner against Samuels and another. Judgment for defendants. Plaintiff appeals. Reversed.

Henry C. Gesford and H. M. Barstow (Dinkelspiel & Gesford, of counsel), for appellant. F. E. Johnston, for respondents.

HARRISON, J. The plaintiff leased from the defendant Samuels, November 18, 1886, a tract of land in Napa county, for the term of three years from May 2, 1887, and entered into possession of said land at the commencement of the term, and at its expiration, May 2, 1890, surrendered the premises to the defendant. The lease contained the following agreement: "It is further mutually covenanted and agreed by and between said parties that said party of the second part may at any time prior to the going into effect of this lease go upon said premises to make such improvements as he shall deem necessary, and said party of the first part, for himself, his heirs, administrators, and assigns, agrees to pay unto said party of the second part, at the expiration of this lease,

for any and all improvements placed upon said premises by said party of the second part, not to exceed the sum of \$1,500," with provision for the determination of the value by agreement or by arbitration. In pursuance of this agreement the plaintiff made certain improvements of a permanent nature upon the land, which at the expiration of the term were of the value of \$2,200. The defendant Morris became the owner of the land on the 10th day of November, 1891, and since that time has been the owner and in possession thereof, and before he purchased the same had full notice that the plaintiff had made these improvements, and also of the agreement by Samuels to pay him therefor, and of his failure to make such payment. At the expiration of the term Samuels refused to agree with the plaintiff upon the value of the improvements, or to pay him anything therefor, and in April, 1894, the plaintiff requested Samuels, and also the defendant Morris, to submit the determination of their value to arbitration, as provided in the lease, and named an arbitrator therefor, but they each refused either to submit the same to arbitration, or to pay for said improvements. Plaintiff thereupon brought the present action to recover from Samuels the sum of \$1,500, and that it be decreed to be a lien upon the land so leased, and for a sale thereof in satisfaction of said lien. The defendants severally demurred to the complaint for want of facts to constitute a cause of action, and also for a misjoinder of parties defendant; each specifying in his demurrer that he was improperly joined with the other. The court sustained the demurrers, and from the judgment entered thereon the plaintiff has appealed.

1. The demurrer was sufficient in form. Each of the defendants distinctly specified therein that the ground of his demurrer for misjoinder of parties defendant was that he was improperly joined with the other defendant. It was not necessary to incorporate into the demurrer an argument in support thereof, or to state therein the reasons why such misjoinder was improper. A demurrer couched in the language of the statute would have been insufficient (*O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269); but a demurring party, by designating the defendants who are improperly joined with him, sufficiently calls the plaintiff's attention to his objection to the complaint.

2. The demurrer of the defendant Morris was properly sustained. The agreement of Samuels to pay the value of the improvements was not a covenant which could be enforced against one who purchased the land after the breach of such agreement. There was no covenant on the part of the plaintiff to make any improvements. He was merely given the permission to do so, and the agreement of Samuels was only for the payment of money therefor. Such an agreement is personal, and does not bind the assignee of the reversion. *Bream*

v. Dickerson, 2 Humph. 126. Section 1466, Civ. Code, declares: "No one merely by reason of having acquired an estate subject to a covenant running with the land is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits." See, also, *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910. Upon the breach of this agreement the plaintiff had merely a right of action against Samuels which was purely personal, and which was not assumed by Morris when he subsequently became the owner of the land. Nor did the agreement of Samuels have the effect to give to the plaintiff a lien upon the land for the security of this payment. It was held in *Ecke v. Fetzer*, 65 Wis. 55, 28 N. W. 266, in an action of ejectment, that a covenant by which the lessor agreed that at the expiration of the term he would pay for improvements that should be placed upon the land by the tenant during the term, bound an assignee of the lease, "who took the assignment of the lease during the term, and received rent as such assignee during said term," and that the tenant was entitled to retain possession of the leased premises until such payment should be made. This right in the tenant exists, however, not by virtue of a lien on the land for the value of the improvements, but upon the principle that the landlord, having agreed to pay for the improvements, cannot maintain ejectment and compel their delivery until such payment is made. If the tenant surrenders the possession, he cannot afterwards claim a lien thereon as against a subsequent purchaser from the landlord. In *Fowler v. Insurance Co.*, 28 Hun, 195, the trustees of a trust estate made an agreement with their lessee that at the expiration of the term he should be paid for certain improvements which he might make upon the property, but did not bind themselves for its payment, and it was held that, as the trustees made the agreement only in their representative capacity, the trust estate was bound therefor, and the lessee was entitled to have the amount decreed to be a lien upon the trust estate. This was the application of a well-known rule of equity, and differs essentially from the principles governing the present case. The parties could have inserted in their lease an agreement that the value of the improvements should be a lien upon the land to be secured thereby, but their omission to do so implies that such was not their intention, and the plaintiff is therefore deprived of the right to such lien. In the absence of an agreement to that effect, a tenant has no lien upon the leased land for improvements placed thereon under an agreement with the landlord to pay for the same at the expiration of the term. *Hite v. Parks*, 2 Tenn. Ch. 375; *Taylor v. Baldwin*, 10 Barb. 582; *Coffin v. Talman*, 8 N. Y. 465; *Beck v. Birdsall*, 19 Kan. 550.

3. The complaint sufficiently states a cause of action against the defendant Samuels. It is urged by the respondent, however, that the demurrer of Samuels was properly sustained

by reason of the misjoinder of Morris with him as co-defendant. The provision authorizing a demurrer for the misjoinder of parties defendant is taken from the system of equity pleading which formerly prevailed. Under that system such demurrer could be interposed only by the party who was improperly made a defendant. A defendant against whom there was a sufficient complaint could not object that others who had no interest in the subject-matter of the suit were made defendants, unless it also appeared that his interests were affected thereby. *Story, Eq. Pl. § 544; Beach, Mod. Eq. Prac. §§ 80, 254; Cherry v. Monroe*, 2 Barb. Ch. 618. This ground of demurrer is authorized by the Code of Missouri, and it is held in that state that the former rule in equity is to be followed. *Ashby v. Winston*, 26 Mo. 210. Another rule of pleading prescribed by the Code, which is also taken from the equity system, is the provision of section 379, Code Civ. Proc.: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." The "controversy" here named is the claim for relief made by the plaintiff against the defendants, which he sets forth in his complaint. In the present case this claim is to have the amount of his demand against Samuels for the value of the improvements placed upon the land declared to be a lien thereon, and to have the land sold for its payment. As Morris is alleged to have an interest in the land, he is a necessary party to the determination of such an action, and he cannot be said to be improperly joined as a defendant, even though the complaint does not sufficiently state an affirmative cause of action against him. If the relief sought by a plaintiff by reason of the cause of action as framed in his complaint would render all of the persons named as defendants proper parties to entitle him to such relief, a defendant against whom a sufficient cause of action is stated cannot demur for misjoinder of defendants because the complaint does not sufficiently state a cause of action against another defendant. "It is only where the complainant has some ground of relief against each defendant, and where his claims for relief against them respectively are improperly joined in one suit, so as to make the bill multifarious, that each defendant has the right to demur upon the ground that the other defendants are improperly joined with him in the suit." *Cherry v. Monroe*, 2 Barb. Ch. 627. In an action to foreclose a mortgage the mortgagor cannot demur for the misjoinder of a defendant whose alleged claim does not appear to constitute a lien upon the mortgaged lands, nor can the maker of a promissory note demur to a complaint against him and the indorser for the misjoinder of the indorser because the complaint fails to state facts sufficient to bind the latter. The judgment is reversed, and the court below is directed to overrule the demur-

rer of the defendant Samuels, with leave to him to answer within such time as it may designate.

We concur: VAN FLEET, J.; GAROUTTE, J.

(116 Cal. 111)

DILLON v. BICKNELL, County Auditor.  
(L. A. 236.)

(Supreme Court of California. Feb. 23, 1897.)  
STATUTE—REPEAL BY IMPLICATION—COUNTY OFFICERS—COMPENSATION.

1. Pol. Code, § 4109, as amended March 7, 1881 (St. 1881, p. 72), providing that certain county officers shall take office on the first Monday after the 1st day of January succeeding the election, and hold for two years, was repealed by the county government act of 1891 (St. 1891, p. 314, § 60), providing that such officers shall hold till their successors are qualified.

2. Under the county government act of 1891 (St. 1891, p. 314, § 60), providing that certain county officers—whose compensation is fixed at an annual sum—shall hold office from the first Monday after the 1st day of January next succeeding their election till their successors are qualified, such officers are entitled to be paid for the actual time they serve.

3. Such right is not affected by section 221 of said act, which requires the county auditor to draw his warrant on the first Monday of each month for the salary due these officers for the preceding month.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Petition by Henry C. Dillon for a writ of mandamus to compel Charles C. Bicknell, auditor of Los Angeles county, to issue a warrant in favor of petitioner. From a judgment for petitioner, defendant appeals. Affirmed.

J. A. Donnell and Geo. M. Holton, for appellant. M. W. Conkling and H. C. Dillon, for respondent.

HAYNES, C. Plaintiff was elected district attorney of Los Angeles county, at the general election in November, 1892, and entered upon his said office on the 2d day of January, 1893, that being the first Monday after the 1st day of January; and his term of office expired on the 7th day of January, 1895, that being also the first Monday after the 1st day of January of that year. The salary was \$4,000 per annum, and he received from the salary fund of the county \$8,000, which was paid him in monthly installments of \$333 $\frac{1}{3}$  per month, by warrants drawn by defendant upon the county treasurer, as provided by section 221 of the county government act of 1891 (St. 1891, p. 419). Plaintiff, claiming that he served as district attorney five days more than two official years, demanded of the defendant, as such auditor, that he draw a warrant upon the county treasurer for his salary for said five days, amounting to \$54.50. The auditor refused to issue said warrant, and the court below, upon the petition of the plaintiff, rendered judgment directing a peremptory writ of mandate to is-

sue as prayed for by plaintiff, and from said judgment the defendant appeals.

Article 20, § 20, of the constitution provides as follows: "Elections of the officers provided for by the constitution, except at the election in the year 1879, shall be held on the even numbered years next before the expiration of their respective terms. Terms of such officers shall commence on the first Monday after the first day of January next following their election." Section 4,109 of the Political Code, as amended March 7, 1881 (St. 1881, p. 72), is as follows: "All elective county, city and township officers, except superior court judges, superintendents of schools and assessors, shall be elected at the general election to be held in the year 1882, and at the general election to be held every second year thereafter, and shall take office on the first Monday after the first day of January next succeeding their election, and shall hold office for two years. The years that said officers are to hold office are to be computed respectively from and including the first Monday after the first day of January of any one year to and including the first Monday after the first day of January of the next succeeding year; provided," etc. It is conceded that, if that section of the Political Code is still in force, it is conclusive as to what constitutes the official year, and that under its provision the demand made by the plaintiff was unauthorized. It is contended, however, that said section has been repealed, and whether it has been repealed or not is, therefore, the controlling question.

The county government act of 1883 (Deering's Pol. Code, Append. p. 850, § 60) is as follows: "The elective county and township officers (except superintendent of public schools and assessors) shall be elected at the general election to be held in November, 1884, and every two years thereafter, and shall take office at 12 o'clock meridian on the first Monday after the first day of January next succeeding their election. \* \* \* All officers elected under the provisions of this act shall hold office until their successors are elected or appointed and qualified." The county government act of 1891 (St. 1891, p. 314, § 60) contained the same provision as to the time when officers should enter upon their office, and contained also the provision that all officers elected under it should hold office until their successors are elected or appointed and qualified. We think it clear that these subsequent acts repealed section 4109 of the Political Code as amended March 7, 1881, though none of them contained any provision expressly repealing that section. Said section 60 is a revision of said section 4109. It covers the same ground, with the exception of the clause defining how the official year shall be computed, but changes a number of its provisions, the more important of which are the following: The old section provided that the election shall be held "at the general election to be held in the year," etc. The new act inserted the word "November" in that sentence, thus changing the time of the elec-

tion from September to November. In the clause in the old act providing that the officer shall take office on the first Monday after the 1st day of January next succeeding his election, and shall hold office for two years, the words "twelve o'clock meridian" were inserted, and instead of the provision that he should hold office for two years it was provided "that all officers elected under the provisions of this act shall hold office until their successors are elected or appointed and qualified," thus repeating the rule fixed by section 879, Pol. Code, for the termination of his incumbency of the office. This change in the section, we think, conclusively indicates that the new section was intended to be a revision of the former section, and preserved all of its provisions that were intended to be retained.

We think the rule was correctly stated by the learned judge of the court below that: "Wherever it clearly appears that the intention of the legislature by the later act is to revise the entire subject-matter of the former, the subsequent act operates as a repeal of the former, although it contains no precise words to that effect." *Treadwell v. Yolo Co.*, 62 Cal. 564; *Charnock v. Rose*, 70 Cal. 192, 11 Pac. 625; *Hanley v. Sixteen Horses*, 97 Cal. 183, 32 Pac. 10; *Ex parte Benjamin*, 65 Cal. 310, 4 Pac. 23. In *Sedgwick on Statutory Law* (page 124) it is said: "Even if a subsequent statute be not repugnant in all its provisions to a prior one, yet, if the later statute was clearly intended to prescribe the only rule which should govern in the case provided for, it repeals the original act." Appellant contends, however, that other provisions of the county government act of 1891 are inconsistent with, and do not justify, the conclusion of the court below, and cites the following section of that act: "Sec. 221. The salaries of such officers named in this act, as are entitled to salaries, shall be paid monthly out of the county treasury; and it shall be the duty of the auditor, on the first Monday of each and every month, to draw his warrant on the county treasurer in favor of each of said officers for the amount of salary due him under the provisions of this act for the preceding month." The above section was also incorporated in the county government act of 1893. Section 117 of the county government act of 1891 (St. 1891, p. 323) provided as follows: "All warrants issued by the auditor during each year, commencing with the first Monday after the first day of January, must be numbered consecutively, and the number, date and amount of each, and the name of the person to whom payable, and the purpose for which drawn must be stated therea. \* \* \*" We do not think these sections sustain appellant's construction. Said section 221 requires the auditor to draw his warrant on the first Monday of the month in which the term of office expires; yet it may happen, and does occasionally happen, that the first Monday in January is the 1st day of January, and the term of the incumbent does not in that case expire

until the second Monday; and in that case, upon the theory of appellant that the month for which the warrant is drawn is necessarily from the first Monday of the preceding month to the first Monday of the succeeding month, it would clearly appear that the incumbent does not, under his theory, always receive pay for the full time for which he serves, whether his successor is elected and qualified on the day fixed by the statute or not. Indeed, under the statute fixing the commencement and termination of the terms of county officers it can never happen that the term consists of precisely two years, it being sometimes more and sometimes less; and therefore the provision fixing the compensation at an annual sum should be construed as fixing the rate of compensation to be paid for the time the officer actually serves. This construction will do exact justice between the preceding and succeeding officers, and not increase the burden to be borne by the people. The judgment appealed from should be affirmed.

I concur: SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(5 Cal. Unrep. 612.)

CITY AND COUNTY OF SAN FRANCISCO  
v. GROTE. (S. F. 379.)<sup>1</sup>

(Supreme Court of California. Feb. 23, 1897.)

EJECTMENT—TITLE TO MAINTAIN.

A city cannot maintain ejectment for recovery of possession of a street dedicated to the public by user, without showing ownership in the fee.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the city and county of San Francisco against Ellen Grote. Judgment for plaintiff. Defendant appeals. Reversed.

T. Z. Blakeman, for appellant. Harry T. Creswell, for respondent.

HAYNES, C. This is an action in ejectment, brought by the city and county of San Francisco against Ellen Grote to recover the possession, for street purposes, of a small strip of land alleged to be a portion of a public street, dedicated to the public as such. Said alleged street is known as "Garden Avenue," and extends through a single block from Devisadero street to Broderick street, between Geary and Post streets, and its alleged width is 25 feet. Defendant's lot lies next to Broderick street, with its front on Geary, and has a depth of 137½ feet, and the demanded premises consists of a strip 12½ feet wide across the rear end of her lot, and which, plaintiff contends, forms part of said street or avenue. The action was tried by

<sup>1</sup> Reversed in banc. See 52 Pac. 127, 120 Cal. 59.

the court without a jury, and findings and judgment were for the plaintiff. The defendant appeals from the judgment, and the facts are brought up by a bill of exceptions.

The record presents three questions: (1) Does the evidence show a dedication of the strip of land in dispute to the use of the public for street purposes? (2) If there was such dedication, was there an abandonment of that portion of the street? (3) Can the city and county of San Francisco maintain ejectment for the recovery of the possession of a public street without showing ownership in the land in fee? If the third question above stated should be answered in the negative, the consideration of the first and second questions becomes unnecessary, and we shall therefore consider that question first.

It is conceded by respondent that the defendant owns the fee in the demanded premises, nor is there any question that, if the said street is a public highway, it is such by dedication arising from the acts and acquiescence of the property owners along the same, and its acceptance, shown by the use thereof by the public. In other words, there has been no conveyance by the property owners of the land alleged to be covered by the street, nor has title to the easement been acquired by condemnation or other legal proceedings, but the right or title of the plaintiff and of the public rests solely in parol. Assuming that it is a street, and that the demanded premises is a part thereof, all the right or interest that the public has therein is an easement consisting in the right to use the same for the ordinary purposes of a highway; and such easement is an incorporeal hereditament. "By the common law and the general rule an ejectment will not lie for anything where an entry cannot be made, or of which the sheriff cannot deliver possession. It would follow, therefore, by this rule, that ejectment is only maintainable for corporeal hereditaments. \* \* \* Things that lie merely in grant are not the subjects of ejectment, because these being incorporeal are in their nature invisible, and therefore not capable of being delivered in execution." Tyler, Eject. 37. "An action of ejectment will not lie against one claiming an easement in a parcel of land, or to his right to enjoy the same; nor will a writ of entry. But the owner in fee of land may maintain a right of entry to establish his title to the freehold against one having a prescriptive right of way over the same." Washb. Easem. (4th Ed.) 740. Newell, Eject. p. 17, lays down the following test as to the cases where ejectment is the only proper remedy: "(1) The thing claimed must be a corporeal hereditament; (2) a right of entry must exist at the time of the commencement of the action; and (3) the interests must be visible and tangible, so that the sheriff may deliver the possession to the plaintiff under the writ of possession issuing out of the court." The same author,

at page 53, enumerates a large number of easements, among which is a "right of way," "a right to a road," which are "in legal consideration not tangible property, and for the recovery of which the action of ejectment will not lie." In *Payne v. Treadwell*, 5 Cal. 312, it was said: "The action of ejectment is merely a possessory action and is confined to cases where the claimant has a possessory title; that is to say, a right of entry in the lands." If it be true that an easement is an incorporeal hereditament, and that such hereditaments lie in grant, because not capable of livery of seisin, it is difficult to understand how there can be an ouster or a withholding of the possession, or how manual possession could be delivered by the sheriff.

This question, however, is not a new one in this state. In *Wood v. Turnpike Co.*, 24 Cal. 474, it was held that ejectment does not lie to try the right to a road or right of way. In that case the plaintiff claimed title to the Truckee turnpike road (a toll road) under a conveyance made by the sheriff pursuant to an execution sale thereof, and the action was brought by said purchaser to recover possession of the road. The court said: "The plaintiff acquired nothing by the purchase of the road to which the action of ejectment has any remedial relations. 'Road' is a legal term, strictly synonymous with the word 'way,' and in the complaint and throughout all the title papers of the plaintiff their identity is strictly recognized; and the 'way' is an easement, and consists in the right of passing over another man's ground. It is an incorporeal hereditament; a servitude imposed upon corporeal property, and not a part of it. It gives no right of possession of the land upon which it is imposed, but a right merely to a party in whom the way is vested to enjoy the way. \* \* \* A deed of a way or a right of way would pass to the grantee no title to or interest in the land. \* \* \* But it is well settled that an action of ejectment will not lie in favor of a party to try his right to enjoy an easement, nor will it lie against one claiming an easement in land to try his right to enjoy it. And the reason is obvious,—the very subject-matter of controversy is incorporeal. It is for that reason that an easement 'lyeth in grant and not in livery.' It is for that reason that the owner of a way cannot be disseised or otherwise ousted from it. He can only be disturbed or obstructed in his enjoyment, and for such injury the remedy is by action on the case at common law, or by bill in equity." Pages 487, 488. *Wood v. Turnpike Co.*, supra, was cited and followed in *City of San Francisco v. Calderwood*, 31 Cal. 585, 590, where it was held that a deed of a way or right of way would pass to the grantee no title to or interest in the land; that it is an incorporeal hereditament and servitude imposed upon corporeal property, and not a part of it, and gives no right to possess the land upon which it is imposed.

In *Fitzell v. Leaky*, 72 Cal. 482, 14 Pac. 200, it was again said: "The owner of an easement upon the land has no right of entry, nor has he any right to possess the land as such."

There are several cases in this state which are claimed to be inconsistent with those above cited, and which should be briefly noticed. The case of *City of San Francisco v. Sullivan*, 50 Cal. 603, was an action of ejectment to recover a portion of a street upon which it was alleged the defendant had entered. The complaint, however, alleged that the city and county of San Francisco was "the owner thereof, subject to the right of its citizens to pass and repass over the same." The court said: "We are of the opinion that the force of the allegations that the plaintiff here is the owner and entitled to the possession of the premises sued for is not impaired or affected by the further allegation that the public has an easement therein as a public street. \* \* \* The existence and enjoyment of the easement is entirely compatible with the seisin of the plaintiff as being the owner of the fee." This case, so far as we have quoted the opinion of the court, clearly sustains the general doctrine that the owner of the fee subject to an easement may maintain ejectment against an intruder who asserts a right inconsistent with the easement, and is not inconsistent with the cases we have above cited. It is true, the court quoted a paragraph from *Dillon's Municipal Corporations*, the first part of which is directly to the point in the case there before the court. The latter part of the quotation has no application to that case. This extract, however, we shall have occasion to notice in another connection. The case of *City of Visalia v. Jacob*, 65 Cal. 434, 4 Pac. 433, was also an action of ejectment for a portion of a public street. The demurrer to the complaint was sustained, and judgment rendered for the defendant. The complaint, however, in that case alleged that the plaintiff was "seised of and entitled to possession of the land, the same being a portion of a public street duly laid out and dedicated to the public use." This allegation is equivalent to an allegation that the fee of the land was in the city. The court in that case also cited *Dillon on Municipal Corporations* and *City of San Francisco v. Sullivan*, supra. It would appear from the language of the complaint that the defendant demurred on the ground that the complaint showed the cause of action was barred by the statute of limitations, and the opinion principally discusses the question whether title to the land dedicated to the public as a street could be acquired by adverse possession.

*Southern Pac. Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032, is also cited by respondent. That case, however, is clearly distinguishable from the case at bar. In that case the plaintiff was granted by congress a right of way

over the public lands, 400 feet in width, for the purposes of a railroad. The action was ejectment to recover from defendant a portion of said right of way occupied by him. The court in its opinion referred to the case of *Wood v. Turnpike Co.*, supra, and distinguished it from the case then under consideration. The grant of the right of way to the railroad company was necessarily exclusive as to the right of occupancy. Quoting from *Railroad Co. v. Benity*, 5 Sawy. 118, Fed. Cas. No. 2,551, it was said: "It may be admitted that for the obstruction of a mere easement the recovery of the possession of the land itself would not be the proper remedy; but, in order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under a grant of right of way, it becomes necessary to take and keep an actual possession of the land. It must also be a possession exclusive of all other persons." Page 285, 86 Cal., and page 1033, 24 Pac. This case, therefore, does not conflict with the views we have above expressed. In the case of *City of Eureka v. Armstrong*, 83 Cal. 623, 22 Pac. 928, and 23 Pac. 1085, and the case of *City of Eureka v. Fay*, 107 Cal. 166, 40 Pac. 235, the action was ejectment for land alleged to be a portion of a public street. In neither of these cases, however, was any question made or considered in relation to the form of the action. But for the quotation of the passage from *Dillon on Municipal Corporations* in the case of *City of San Francisco v. Sullivan*, supra, and *City of Visalia v. Jacob*, supra, there is no real conflict in the decisions in this state upon the subject under discussion, and in neither of those cases was it necessary to decide the question here involved, inasmuch as in both cases it appeared that the fee in controversy was in the plaintiff.

The great consideration which should be given to all propositions of law stated by the learned author above mentioned requires that some notice should be given it. Section 662 of said work is as follows: "A municipal corporation entitled to the possession and control of streets and public places may, in its corporate name, recover the same in ejectment. Where it possesses the fee, although in trust for public uses, there are no technical obstacles in the way of maintaining such action against the adjoining proprietor, or whoever may wrongfully intrude upon, occupy, or detain the property. And, where the adjoining proprietor retains the fee, the courts have overcome the technical difficulties by regarding the right to the possession, use, and control of the property by the municipality as a legal, and not a mere equitable, right." I have examined all the American cases cited by the learned author in the note to said section. The New Jersey cases, it may be conceded, sustain the text, though it will be observed that two of the five cases cited were in equity. Of the cases at law, in *Den v. Dummer*, 20 N. J. Law, 86, the land in ques-



tion was dedicated by the owner of the town site upon a recorded plat for a public market ground. Trustees of M. E. Church v. Mayor, etc., of Hoboken, 33 N. J. Law, 13, was to recover possession of land dedicated upon the original town plat as a public square. The third case—Hoboken Land & Improvement Co. v. Mayor, etc., of Hoboken, 36 N. J. Law, 540—involved the right to a street, which, by the original plat, extended back from high-water mark on the Hudson river. The improvement company—the plaintiff in error, and the defendant below—succeeded to the ownership of the land platted so far as it remained unsold, and was granted a charter by the legislature to fill in land covered by water in front of their property, and construct wharves, etc., but it was provided "that it should not be lawful for the company to fill up any such land covered with water \* \* \* in front of the lands of any other person owning down to the water without the consent of such person in writing." It was held that the city could recover, in ejectment, the street to the new high-water line. City of Winona v. Huff, 11 Minn. 119 (Gil. 75). In a town plat, made under the statute, certain squares mentioned in the certificate to the plat were declared to be for "public use and benefit forever." It was held as to such dedication the plat itself operates as a conveyance to the public, and a claim by the public is unnecessary; that under a statutory dedication the fee simple to the land does not pass, but only such an estate or interest in the land as the trust requires. In the opinion (page 136, 11 Minn. [Gil. 85]) the court said: "The action of ejectment is a mixed action, and the form of remedy by which a person is entitled to recover possession of real property in fee, for life, or for years. It does not lie where the thing to be recovered is incorporeal. Saund. Pl. & Ev. tit. 'Ejectment,' p. 446. The purpose for which the action is brought is not to try the mere abstract right to the soil, but to obtain actual possession. Jackson v. Huntingdon, 6 Pet. 442. For a mere easement, perhaps, the action will not lie; but wherever a right of entry exists, and the interest is tangible, so that possession can be delivered, an action of ejectment will lie. Chit. Pl. 188, 189; Jackson v. Buel, 9 Johns. 298. If, therefore, the plaintiff has an interest in the land and the right of possession, this action may be maintained." It was further held by the court in that case that dedication of lands for different purposes may require different interests or estates to support them. As, for instance, a dedication of land for public buildings, or a burying ground, or a public square, which may be inclosed, improved, and ornamented for purposes of pleasure, or amusement, or recreation, or health. In Weeping Water v. Reed, 21 Neb. 261, 31 N. W. 797, the action was to recover the possession of a square marked "College Square." It was held that there was a dedication of College Square to the public, with a right to the use thereof for

the purposes of an institution of learning so long as the user continued; the title remaining in the public as represented by the municipal corporation for that use, and ejectment will lie to remove any person in unlawful possession. In City of Hannibal v. Draper, 15 Mo. 634, it was held that the memoranda, "Lots numbered two, three, four, in block twenty-six, is intended for church grounds," and as concerning the lots were written the words "church ground," appearing upon a duly-acknowledged plat of the town of Hannibal, it was sufficient, under the act concerning plats, towns, and villages, to vest the fee in the county for public use. In City of California v. Howard, 78 Mo. 88, the action was ejectment for a public street. It was held: "A city invested by law with the title in fee, and the right and control over all public streets, may maintain ejectment for land dedicated for a street." In City of Chicago v. Wright, 69 Ill. 318, 322, the court quoted the above extract from Dillon on Municipal Corporations. That case, however, was a bill in equity, brought by Wright against the city of Chicago and the chief of police, to prevent them from removing certain fences from lands claimed by the city to be a public street. The only ground suggested by the author upon which ejectment is sustained in such cases is "by regarding the right to the possession, use, and control of the property by the municipality as a legal, and not a mere equitable, right."

If it be conceded that where the dedication appears of record, as by recording a plat with streets delineated thereon, and the sale of lots described as bounded thereby, and especially where the municipality has expressly accepted the dedication, the action of ejectment may be maintained,—a proposition we neither concede nor decide,—the case here is very different. There was no dedication by filing a plat showing the existence of any street through the center of the block. Some of the conveyances described the lot as abutting on "an alley," but without designating the width of the alley. Defendant's lot extended to the center of the block, and the conveyance from plaintiff was silent as to an alley. If there was any dedication of the avenue or alley, it was by the individual owners of the lots. There was not, except as to irregular portions, any reservation in the deeds executed by the city of the land covered by the alleged street, and as to the land not conveyed no purpose was expressed in the conveyances; and whether there was any dedication rested wholly upon parol testimony of the acts and declarations of the respective owners, and the use of the way by the public. We think that, whatever may be the rule in cases where the evidence of dedication may be shown from the public records, such evidence of dedication as was given in this case will not support an action of ejectment. It is undoubtedly the general rule that in an action of ejectment legal title to land cannot be proved by parol, and, where not permitted by statute, equitable

defenses thereto cannot be heard. The judgment appealed from should be reversed, and the action dismissed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to dismiss the action.

(5 Idaho, 218)

WILSON et al. v. GRAY et al.

(Supreme Court of Idaho. Feb. 15, 1897.)

AMENDMENT OF PROCESS—FORECLOSURE.

The process or writ authorized by section 4473, Rev. St., may be amended upon a proper showing.

(Syllabus by the Court.)

Appeal from district court, Elmore county; C. O. Stockslager, Judge.

Action by W. E. Wilson and others against James D. Gray and others. Judgment of foreclosure. Application to quash order of sale and counter application to amend said order affirmed. Judgment denied, and order granted by trial court, and defendants appeal. Affirmed.

Wyman & Wyman, for appellants. E. M. Wolfe, for respondents.

SULLIVAN, C. J. This is an appeal from an order of the court, denying the defendants' motion to set aside the decree entered in said entitled case, and to quash the order of sale issued on said decree, and to set aside the service of said order of sale, as well as the sale made thereunder; also from the order of the court granting plaintiffs permission to amend said order of sale. It appears from the record that this action was brought for the foreclosure of a certain mortgage. A judgment and decree of foreclosure was obtained, and the mortgaged property ordered to be sold. Thereafter an order of sale entitled "Execution in Foreclosure" was issued by the clerk of said court, and the property described in said mortgage was sold, and due return of said execution or order of sale made by the sheriff, on the 6th day of July, 1895. Thereafter, on the 7th day of February, 1896, appellants the Grays made the motion to quash and set aside sale above referred to; and on the 10th day of April, 1896, the motion was denied by the court. It is conceded by the appellants that the only question for determination is the validity of the order of sale. If that is sufficient to sustain the sale made under it, the action of the lower court should be affirmed.

Section 4473, Rev. St., provides for the issuance of a writ for the enforcement of a decree of foreclosure, and, among other things, provides as follows: "When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing

the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith." Under the provisions of that section, the writ should contain the recitals required by its provisions, and should also direct the proper officer to execute the judgment. The writ under consideration contains the proper recitals, but fails, outside of the recitals, to command the officer to sell the property. Is it void because of that defect? The recitals contained in the writ were copied from the decree, and direct the sheriff to proceed, and sell the premises described in said decree, at public auction, in the manner prescribed by law, and according to the course and practice of that court, and, after the time allowed for redemption had expired, to execute a deed to the purchaser at such sale, and also direct the manner of the disbursement of the receipts from such sale. The recitals in said writ, which are in the words of the decree, direct the sheriff to do all that a writ issued in the most formal manner could have directed him to do. The process, though erroneous, was not void. It was amendable. *Newmark v. Chapman*, 53 Cal. 557. No injury is alleged or shown arising from the defect in said order of sale. The motion to quash and set aside is based on merely technical grounds. No showing was made on the hearing of said motions that the land sold under said order of sale did not bring an adequate price, or that any one refused to bid at said sale because of the defect in the writ. Under the facts of this case, the order of the court denying the motion to quash and set aside, as well as the order granting the motion to amend said writ, must be sustained; and it is so ordered.

HUSTON and QUARLES, JJ., concur

(5 Idaho, 178)

RAVENSCHRAFT et al. v. BOARD OF COM'RS OF BLAINE COUNTY et al.

(Supreme Court of Idaho. Feb. 1, 1897.)

APPEALS FROM COUNTY BOARDS—PRACTICE—POWERS OF BOARD.

1. Under Act March 6, 1895, no undertaking on appeal from an order made by a board of county commissioners to the district court is required, nor in such case on appeal from the district court to the supreme court.

2. Statement of proceedings required to be published by Act March 6, 1895, does not limit the time within which an appeal from an order of a board of county commissioners can be taken, unless the business of the session of such board has been completed, and the session finally adjourned.

3. Where the validity of an act creating a county is to be litigated, the board of commissioners of such county, in the exercise of a reasonable discretion, may employ private counsel to assist the attorney general in guarding the interests of the county in such litigation.

(Syllabus by the Court.)

Appeal from district court, Blaine county; C. O. Stockslager, Judge.

The board of county commissioners of Blaine county having allowed a claim, J. W.

Ravenscraft and others, as taxpayers, appealed to the district court, where the order of allowance was affirmed, and they again appeal. Affirmed.

A. F. Montandon, for appellants. S. B. Kingsbury and Lyttleton Price, for respondents.

QUARLES, J. In March, 1895, the board of county commissioners of Blaine county, by resolution then entered of record in the record of proceedings of said board, decided to employ the respondents Johnson & Johnson as counsel and attorneys for Blaine county, "to advise, counsel, and direct, and, if necessary, manage and conduct suit for said county, in and about the organization of said county, and maintaining and enforcing the law creating said county, and that for said services they be paid a retainer of one thousand dollars, and a reasonable fee for services," etc. The respondents accepted employment under said resolution, whereupon said resolution (if said board of county commissioners had the power to make it) became an executory contract. The record shows that respondents, acting under said employment, and acting in the interest of Blaine county, and for the purpose of determining the validity of the act creating said Blaine county, rendered professional services in this court in the case of Bellevue Water Co. v. C. O. Stockslager, and in the case of Wright v. Kelley et al., both of which were brought to test the constitutionality of the said act creating Blaine county. Respondents presented their claim for said services in the sum of \$1,000, which claim was duly verified; and on January 22, 1896, said board allowed the said claim of respondents to the extent of \$750, and disallowed the residue thereof. The January meeting of the said board of commissioners was commenced at the time appointed therefor by law, and the record shows that adjournment of said meeting was had from time to time. The said board, on one or more occasions, adjourning over for more than one day; i. e. January 24th "adjourned to February 5, 1896, at which time they propose to complete the business of the term," until April 1, 1896, when the said board adjourned sine die. On the 8th day of May, 1896, the appellants, as taxpayers of said Blaine county, filed with the clerk of said board of commissioners a notice of appeal from the order of said board allowing in part the claim of respondents, as aforesaid, to the district court of the Fourth judicial district in and for Blaine county. This appeal came on for hearing before said district court, and the respondents there appeared, and moved to dismiss the appeal, on the ground that "said appeal was not taken within the time allowed by law, and was not taken within twenty days after the first publication of the statement giving notice to the public of all of its acts and proceedings done

at its regular session beginning January 13, 1896," which motion was by said district court denied, to which ruling respondents excepted, as shown by bill of exceptions appearing in the record in this case; and, for the same reason, the respondents moved to dismiss the appeal in this court. The motion to dismiss the appeal and the case on its merits were heard together, and we are now called upon to decide both the motion to dismiss and the case on its merits.

It appears from the record that a brief statement of all the acts and proceedings of said board of commissioners from January 13, 1896, to January 24, 1896, inclusive, was published in the issues of February 1 and February 8, 1896, of the "Ketchum Keystone," a newspaper published at the village of Ketchum, in Blaine county; that the heading to said statement was in words as follows, to wit: "Report of regular session of county commissioners held at Hailey, January 13th, 1896;" and in said statement the following language was contained: "The following bills were allowed on general fund: Johnson & Johnson, legal services, supreme court, \$750." Respondents contend that the 20-days time within which to take an appeal from the order complained of to the district court commenced on the 1st day of February, 1896, the day on which said statement was first published, as aforesaid. This contention is not correct. The statement which paragraph 19 of section 1759 of the Revised Statutes, as amended by Act March 6, 1895, authorizes, should be published at the final adjournment of the "meeting," "session," or "term" of the board, and after all of the business of the term has been completed. The word "session," as used in the statute, is synonymous with "term"; and the said statement should not have been published till after the "term" was adjourned sine die. The statement published in the Ketchum Keystone was premature, and not sufficient. We are not advised whether such statement was published at the adjournment of the January term, 1896, of said board of commissioners, as would "give notice to the public of all its acts and proceedings," as required by the act above cited, or not. But this does not affect the question before us. Any person aggrieved by an order or proceeding of a board of county commissioners may appeal therefrom, within 20 days after first publication or posting of the statement required by said statute. He need not wait until the statement has been published or posted, but may take his appeal forthwith. But the board could not prevent an appeal from an order made by it, by failing, either intentionally or otherwise, to cause the statement required to be published or posted, as required by the statute.

Respondents also contend that the appeal herein to this court should be dismissed, for the reason that no undertaking on such appeal was given. Prior to the passage of the act

of March 6, 1895, no appeal in a case of this kind could be taken to this court. The different provisions of the act, *supra*, provide for an appeal to this court, and a careful consideration of all of the provisions of said act convinces us that it was the intention that the practice on appeal from the decision of the district court to this court, subject to the rules adopted by this court, should be the same as on appeal to the district court, and that no undertaking on appeal is necessary in either case, unless, for reasons mentioned in the statute, the court should require such undertaking. The motion of respondents to dismiss this appeal is therefore denied.

Appellants do not contend that the amount allowed by the board of county commissioners to respondents was excessive, but insist that the said board had no jurisdiction to employ said respondents for the following reasons, to wit: First. The record of said board of commissioners does not show that said employment of respondents was necessary. Second. The said board should have relied upon the attorney general and the district attorney, instead of employing private counsel.

As to the first point, this court held in *Hampton v. Board*, 43 Pac. 326, and which is relied on as supporting appellants' contention, as follows: "We think that, before the authority given to county commissioners by section 6, art. 18, of the constitution can be exercised, the necessity which authorizes it must not only be apparent, but the facts creating such necessity must be made a matter of record by the board." This rule is complied with in the case at bar by the record of the county commissioners showing the facts that the very existence of Blaine county was involved; that the constitutionality of the act creating Blaine county was to be litigated, and was litigated, in the highest court in the state. Thus, the record shows "the facts creating" the necessity for the employment of counsel by the board of commissioners of Blaine county.

But it is contended by the appellants that the district attorney of the Fourth judicial district, Blaine county, being in said district, was the legal adviser of said board, and that the said board should have relied upon said district attorney, or, in any event, have looked to the attorney general for counsel and assistance in said litigation. It was not the duty of the said district attorney to represent the county of Blaine in said litigation in this court. Owing to the vast importance of the questions at issue in said litigation, involving, as it did, the legal existence of the county, said board of commissioners were justified in employing the services of eminent counsel to look after the interest of their county, and, in the exercise of reasonable discretion, they might employ such counsel to assist the attorney general in litigation wherein the legal existence of the county was in issue and to be determined. The district court properly affirmed the order of the board of county commis-

sioners, and the decision of the district court appealed from is hereby affirmed, without costs.

SULLIVAN, C. J., and HUSTON, J., concur.

On Rehearing.

(Feb. 24, 1897.)

QUARLES, J. Since filing the opinion in this case, the appellants have filed petition for rehearing. We have carefully examined appellants' petition for rehearing, and find nothing, either in the way of argument, or by way of authority, not considered by us on the hearing of this appeal. The petition is merely the statement of the opinion of counsel for appellants adverse to the opinion of this court, and in criticism thereof. For the reason that it presents no new argument, and nothing new in the way of citation of authority, the petition should not be considered. But the seriousness of counsel in his contention that we misunderstood the facts that appear in the record in this case has induced us to carefully consider the record again, notwithstanding the fact that this cause was fully and ably argued by counsel on both sides on the hearing.

The record in this case shows that the existence of Blaine county was in question, or that a contention existed as to the validity of the act creating Blaine county, and that this controversy was to be settled, and that the respondents Johnson & Johnson were selected by the board of commissioners as counsel to represent Blaine county in the prosecution or defense of suits for said county, in order to maintain and enforce the law creating said county. Counsel for appellants contends that the board of commissioners should have shown by their record that such suit had actually been commenced, before it could employ counsel. It was important for many reasons that the controversy aforesaid should be settled, and we think that the county of Blaine could, acting by its board of commissioners, under the constitution, employ counsel to represent it, either in bringing, or for the purpose of defending, a suit to be thereafter brought, to settle a controversy then in existence. That such controversy did exist at the time the board of commissioners employed the respondents is abundantly shown by the record in this case. We think it sufficiently appears by the record of said board of commissioners. And it further appears in the record of this case that the attorney for appellants and other citizens of Blaine county realized the existence of the controversy aforesaid, and for this reason the present counsel for the appellants went to the said board of commissioners, and tendered his services in said controversy free of charge. This action of the learned counsel for appellants, we think, shows that he thought it necessary that private counsel should look after the interests of Blaine county in said controversy in addition to the district attorney.

The said board of commissioners possibly acted on the idea that the cheapest counsel is not always the best or most efficient. The board of commissioners are authorized to employ private counsel when necessary. The question of such necessity, as well as the selection of such counsel, is a matter of discretion with the board of commissioners, and it does not appear in this case that such discretion was abused. A rehearing is denied.

SULLIVAN, C. J., and HUSTON, J., concur.

(5 Idaho, 200)

#### STATE v. LARKINS.

(Supreme Court of Idaho. Feb. 11, 1897.)

HOMICIDE—PRELIMINARY EXAMINATION—INSANITY  
—TESTIMONY BY ACCUSED—DECLARATIONS—APPEAL.

1. Where the record shows that the prosecuting attorney provided by law was present at the time the bill of exceptions of the defendant in a criminal action was settled by the trial judge, and did not object to the settlement of such bill of exceptions, the objection that the record on appeal does not show that the defendant gave notice of the time that such bill of exceptions would be presented for settlement, will not be heard on appeal, but the appellate court will presume that such notice was given.

2. A defendant is not prohibited by the constitution and laws of Idaho from waiving a preliminary examination, and, if he does so, he cannot complain that he was permitted to do so.

3. The defendant in a criminal action cannot, under the constitution and laws of Idaho, be compelled to testify; and, if he voluntarily takes the witness stand, and testifies in his own behalf, he may be cross-examined about any facts testified to on direct examination, or connected therewith.

4. In a murder case, where the defense is insanity, the burden of proving such defense is on the defendant, but he is not required to establish his defense beyond a reasonable doubt. In such case the vital question is, was the defendant, at the time of the homicide, capable of knowing right from wrong?

5. L., who was on trial for the murder of H., about three hours before the homicide said to D., a witness for the state: "I would like to take you with me, but I have a dirty piece of business to do to-night." *Held*, that such declaration was admissible on the trial to show the animus of defendant towards deceased, and to show the character and intent of the acts of the defendant in committing the homicide.

6. Affidavits disclosing newly-discovered evidence in a criminal case, in order to be entitled to consideration by the appellate court on appeal, must appear in a bill of exceptions, duly settled, in conformity to the provisions of the Penal Code; and an exception to an order denying a new trial must be saved in the same way.

(Syllabus by the Court.)

Appeal from district court, Bingham county; D. W. Standrod, Judge.

James Larkins was convicted of murder, and appeals. Affirmed.

Hawley & Puckett, for appellant. Robert E. McFarland, Atty. Gen., for the State.

QUARLES, J. Respondent moved to dismiss this appeal for the reason that the record

contained no evidence of service of notice of appeal. Appellant suggested diminution of record, and, on leave given, filed a certified copy of the notice of appeal herein, from which it appears by the indorsement of the district attorney that the said notice was duly served. The motion to dismiss the appeal is therefore denied.

It is contended by the learned attorney general, on behalf of the state, that this court should not consider the appellant's bill of exceptions, because the record fails to show that notice of the time when the same would be presented to the district judge for settlement was served upon the adverse party, as required by section 7044, Rev. St. The order settling said bill of exceptions (called "statement" in the record) shows that the district attorney was present when the said bill of exceptions was settled. The object of the motion required by the statute is to furnish either party the opportunity to examine the bill of exceptions presented for settlement by the adverse party, and to give the opportunity to point out to the district judge any errors that might exist in the draft of the bill of exceptions proposed by the adverse party, and to give the opportunity to present amendments; thus insuring correctness in the bill of exceptions. But the object of the statute was attained in the case at bar, the district attorney having been present at the settlement of the bill of exceptions. Being present, it was his duty to object to the settlement of the bill of exceptions, if he had no notice; and, if the district judge should overrule his objection, he should then except, and save his exception by having it incorporated in a bill of exceptions; otherwise this court will not hear such objection, where the record shows that counsel for the adverse party was present when the bill of exceptions was settled. The presumption being in favor of the regularity of the proceedings of the court below, error will not be presumed, and must affirmatively appear by the record. The district attorney having been present at the settlement of defendant's bill of exceptions, and having failed to object to such settlement for want of notice thereof, the presumption is that such notice was given.

The defendant was arraigned in the district court on the 16th day of March; on the 17th day of March, the defendant entered the plea of not guilty; and on the 19th day of March, the defendant moved to quash the information on the ground that "no preliminary examination was had as required by law, or had at all," which motion was overruled, and the defendant duly excepted, and now assigns as error the action of the court below in overruling said motion. The object of requiring a preliminary examination in a criminal case is, primarily, for the benefit of the accused, and to protect him from being restrained of his liberty, unless he consents thereto, until the state has made a prima facie case against him. This is a right given

to every one accused of crime, but this right may be waived by the accused, unless he is prohibited by law from doing so. There is nothing in article 1, § 8, of our constitution which prohibits the accused from waiving a preliminary examination. "No person," in the language of the constitution, "shall be held to answer for any felony \* \* \* unless on presentment or indictment of a grand jury, or on information of the public prosecutor, after a commitment by a magistrate." In the act of March 13, 1891 (1 Sess. Acts, p. 186, § 8), it is provided: "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination." This statute authorizes the defendant to waive a preliminary examination. To this effect is the decision of this court in *State v. Braithwaite*, 2 Idaho, 857, 27 Pac. 731. The defendant, being authorized to waive a preliminary examination, and having done so, cannot be heard to complain that he exercised such authority. The court below properly overruled the motion to quash the information on this ground, and for the further reason that the motion came too late, after the plea of the defendant had been entered, as this court held in *State v. Clark*, decided in February, 1894, and reported in 35 Pac., at page 710.

Numerous exceptions were taken by the defendant to the action of the district court in admitting and refusing to admit evidence offered on the trial. We have carefully considered each of these exceptions, many of which are not of sufficient importance to require mention in this opinion, and those of sufficient importance we will now consider.

The homicide occurred about 5 o'clock a. m., December 25, 1895. The state introduced Frank De Kay as a witness, who testified, over the objections of the defendant, that the defendant was at the place of business or the witness on the night of December 24, 1895, and left about 2 o'clock a. m. of that night; that, just before leaving, defendant said to the witness, "I would like to take you with me, but I have a dirty piece of business to do to-night." This was about three hours prior to the homicide. The introduction of said evidence was objected to by the defendant on the ground that it was not connected with, or shown to relate to, the deceased. According to the testimony of George Colter and Nellie Vernon, who were at the house of deceased during the night of the homicide, the accused went to said house about 3 o'clock a. m., or about one hour after leaving the saloon of the witness De Kay. We think that this evidence was admissible. Being connected, as it was, with the declarations and acts of the accused at the house of deceased, so soon afterwards, it tended to show the animus on the part of the accused

towards deceased; and, further, the declaration of accused testified to by the witness De Kay tended to show an abandoned, reckless, malicious spirit on the part of the accused. This conclusion is supported by the following authorities: *Jordan v. State*, 79 Ala. 9; *Anderson v. State*, Id. 5; *Harrison v. State*, Id. 29; *Dixon v. State*, 13 Fla. 636; *State v. Grant*, 79 Mo. 113; *State v. Hymer*, 15 Nev. 49; *Benedict v. State*, 14 Wis. 423. The supreme court of Missouri, in *State v. Grant*, supra, say: "Under the ruling in *State v. Adams*, 76 Mo. 355, the competency of threats made is not affected by their newness or remoteness, and the authorities cited for the state show that the threats made by defendant 'against policemen' were admissible. Mr. Wills says: 'It is not uncommon with persons about to engage in crime to utter menaces, or to make obscure and mysterious allusion to purposes and intentions of revenge, or to boast to others, whose standard of moral conduct is the same as their own, of what they will do, or to give vent to expressions of revengeful purposes, or of malignant satisfaction at the anticipated occurrence of some serious mischief. Such declarations or allusions are of great moment when clearly connected by independent evidence with some subsequent criminal action. The just effect of such language is to show the existence of the disposition from which criminal actions proceed, to render it less improbable that a person proved to have used it would commit the offense charged, and to explain the real motive and character of the action.' Wills, Circ. Ev., top page 62. In *Stewart's Case* evidence was admitted that he had said that 'he hated all the name of Campbell.' 19 How. State Tr. 100. And vague threats, not against any particular person, have often been admitted, and are competent evidence. *Rex v. Barbot*, 18 How. State Tr. 1251; *Benedict v. State*, 14 Wis. 423. In a comparatively late case in this state a witness was allowed to testify that she heard the defendant say, a short time before the homicide: 'I'll kill him before day. G—d d—n him,' without calling any name. It was held admissible. *State v. Guy*, 69 Mo. 430."

The witness James Kerr testified that about nine days before the homicide the accused went to the house of deceased, and in a conversation in presence of deceased, asked witness if "Red" (referring to a third party) had been there, to which witness replied in the negative, whereupon the accused said that "If he [defendant] caught him [Red] there, he [defendant] would kill the pair of them, and burn the house down, but what he would get them." The defendant objected to said evidence, as being incompetent, irrelevant, and immaterial, which objection was overruled by the court, to which ruling the defendant duly excepted, and the admission of said evidence is one of the errors assigned by the defendant. The record shows that the decess-

ed was an unchaste woman; that defendant and deceased were on intimate terms; that the accused was jealous of the attentions of the person called "Red." For the reasons hereinbefore given, and for the purpose of showing a motive for the commission of the crime alleged, the evidence of the witness James Kerr, mentioned above, was competent, and properly admitted by the trial court.

The defendant testified as a witness in his own behalf, and was cross-examined on behalf of the state, over his objections, about matters relating to the issues in the action about which he had not testified on direct examination, and it is now assigned as error that the trial court permitted him to be so cross-examined. The learned counsel for the appellant contends that such cross-examination was in violation of the constitutional provision that "no person shall be compelled in any criminal case to be a witness against himself." This provision of the constitution was the law of Idaho prior to the organization of our state government, having been adopted as part of our Penal Code, and is found in sections 7357, 8143, Rev. St. Section 8141, Rev. St., provides as follows: "The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code." Section 5956 makes all parties to an action competent witnesses. Section 6079 provides that "the opposite party may cross-examine the witness as to any facts material to the issues in the action, and in so doing may put leading questions." Under the provision of the constitution and statutes cited, the defendant in a criminal action cannot be compelled to testify in such action; but if he voluntarily takes the witness stand, and testifies for himself, he does so subject to the rule that he may be cross-examined in regard to "any facts material to the issues in the action." The authorities cited by learned counsel for the defendant in support of the contention that the defendant in a criminal action cannot be cross-examined as to new matters are not in point. The cases of *People v. Miller*, 33 Cal. 99, *Landsberger v. Gorham*, 5 Cal. 450, and *Aitken v. Mendenhall*, 25 Cal. 212, merely relate to the time at which a witness may be asked in regard to new matter, and do not hold that he cannot be asked as to such new matter. And in *People v. O'Brien*, 66 Cal. 602, 6 Pac. 695, this question arose under a statute which in express terms limited the cross-examination to "matters about which he was examined in chief." A careful study of that case convinces us that it has no application to the case at bar. On the trial the defendant was asked by the district attorney about some matters about which he was not asked on direct examination, but these matters related to facts that were material to the issues in the action. The manner of cross-examination of a witness is a matter largely in the discretion of the trial court,

and the record in the case at bar does not show that this discretion was abused.

One of the errors relied on by the defendant was the refusal of the lower court to permit the witness John Kerr to testify as to his opinion of the sanity of the defendant. The witness Kerr was not an expert witness on the subject of insanity. His evidence showed that he had but a very limited acquaintance with the accused, and he was not, under the rule laid down by this court in the case of *State v. Hurst*, decided at the January term, 1895, and reported in 39 Pac. 554, a competent witness on this question. In *State v. Hurst*, supra, this court held that nonexpert witnesses, who had known the defendant intimately for years, and up to the time of the homicide, were qualified to testify as to the sanity or insanity of the defendant. A nonexpert witness, to be competent to give his opinion as to the sanity or insanity of the defendant in a criminal action, should show, before being permitted to testify on such questions, that he has such intimate acquaintance with the defendant, as well as the necessary opportunity to observe the actions and demeanor of defendant, and has made such observations as would enable him to form an intelligent conclusion as to the state of mind of the defendant. A casual acquaintance, like the witness Kerr, could not be regarded as coming within this rule. The court did permit numerous nonexpert witnesses to testify as to their opinions of the sanity of the defendant, and, this being true, and the defendant having failed to show to the trial court what he expected to prove by said witness in response to said question, we cannot say that any error was committed in this regard.

The defendant excepted to the testimony of the witness Dr. Mitchell to the effect that said witness did not regard the defendant as mentally deranged at the time he (the said witness) treated the defendant, four hours after the homicide. Said witness, we think, showed himself to be competent to testify as to his opinion of the state of mind of the defendant at that time. The witness was an experienced physician, and was then treating a wound on the neck of the defendant, and then conversing with the defendant, and quite naturally observed the actions and conduct of the defendant. The court afterwards refused to permit said witness Mitchell to testify as to his opinion as to the sanity of the defendant just preceding the homicide. No prejudicial error was committed in permitting or rejecting evidence of the witness Mitchell.

We have carefully examined the instructions given by the learned district judge on the trial, and think that the law of the case was fully and fairly given, with the exception of instruction No. 9, which was too favorable to the defendant; and that the instructions requested by the defendant which were refused, so far as they were correct, were cov-

ered fully by the instructions given by the court.

There appears in the record in this case divers affidavits setting forth newly-discovered evidence, and it is insisted that on this ground the court below should have granted the defendant a new trial, and contended that the refusal to do so was reversible error. We should not inquire into this question, for the reason that there is nothing in the record whatever, as it came to this court, to show that said affidavits were used on the hearing of the motion for a new trial. If they were so used, it was the duty of the defendant to have shown, by bill of exceptions duly settled, that such affidavits were used in evidence, or offered, and their admission rejected, on the hearing of the motion for a new trial. Not having been identified in this manner, and the record failing to show that they were used on the hearing of said motion for new trial, we cannot presume that they were so used. But since the argument appellant has filed the affidavit of W. H. Puckett, which shows that the said affidavits were used on the hearing of the motion for new trial; but they cannot be identified in this manner. A careful study of sections 7940 to 7946, inclusive, of our Penal Code, leads to the inevitable conclusion that where, as in this case, a new trial is asked on the ground of newly-discovered evidence, the affidavits showing such newly-discovered evidence must be incorporated into a bill of exceptions, and settled by the trial judge. And it is also necessary to take and save in the same way an exception to an order overruling a motion for a new trial; and this was not done in the case at bar. But, owing to the fact that the life of the defendant is at stake, we have carefully examined the affidavits, though not identified as required by law, and carefully considered the matters therein contained, and are of the opinion that the showing made, if properly before this court for review, is not sufficient to have justified the trial judge in setting aside the verdict of the jury. That which is claimed as newly-discovered evidence, like a large portion of the evidence on the trial, tended principally to establish that the defendant had some peculiar eccentricities, and was at times absent-minded. We think that the preponderance of the evidence was sufficient to show that at the time of the homicide the defendant was capable of distinguishing between right and wrong. The question was one to be decided by the weight of the evidence. Mr. Greenleaf, in his work on Evidence (2 Greenl. Ev. § 372), says: "In criminal cases, in order to absolve the party from guilt, a higher decree of insanity must be shown than would be sufficient to discharge him from the obligations of his contracts." The declaration of the defendant, made a short time prior to the homicide, "that he had a dirty piece of business to do to-night," doubtless convinced the jury, considered in connection with his subsequent movements, that at the time

of the homicide the defendant was capable of distinguishing right from wrong. The evidence showed conclusively that the defendant committed the homicide charged. The only conflict in the evidence was as to the sanity of the defendant. The evidence upon this point was of a very unsatisfactory nature, owing to the meager knowledge of the majority of the witnesses as to the actions and conduct of the defendant. The burden of proving the insanity of the defendant was on the defendant, but he was not required to prove this issue beyond a reasonable doubt, but by a preponderance of evidence only. The trial court, in instruction No. 9, said to the jury that: "If, however, there should be a reasonable doubt as to the prisoner's sanity arise upon the evidence in the case, and upon nothing else, the jury should give the accused the benefit of that doubt." This instruction was erroneous, but not prejudicial, being too favorable to the defendant. In effect, it directed the jury to acquit if they entertained a reasonable doubt as to whether the defendant was sane or insane.

The evidence was sufficient to support the verdict, and, as no prejudicial error appears in the record, the order and judgment appealed from are affirmed.

SULLIVAN, C. J., and HUSTON, J., concur.

On Rehearing.

(Feb. 26, 1897.)

The appellant has filed a petition for rehearing, in which our attention is called to the act of January 10, 1889, which amends section 6079, Rev. St., cited in the original opinion, so as to make it read as follows: "Sec. 6079. The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions; but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination." See Sess. Acts 15th Sess. p. 2. This act was not cited in appellant's brief, nor in the argument of the case, and we inadvertently overlooked it in considering this case. The amendment to section 6079, cited above, changes the practice as to the manner of cross-examination of a witness, and by express terms limits such cross-examination to the facts stated in his direct examination, or connected therewith. Under this rule, the defendant in a criminal action, who has testified in his own behalf, can only be cross-examined by the state as to the facts stated on his direct examination, or connected therewith. We have again carefully examined that part of the record showing the cross-examination of the defendant in the case at bar, and are of the opinion that his entire cross-examination related to facts about which he testified in chief, or connected therewith, unless it be the two following



questions, to wit: "Question. Did you ever have any trouble with Josie Hill? Answer. No trouble. I was acquainted with her. I can't remember when I last saw her. Q. When did you last see her? What was the conversation you had with her the last time you remember seeing her? A. I don't remember the conversation." The defendant objected to said two questions, and we think the objection should have been sustained; but these errors were harmless, as the answers of the defendant were in his favor, and he was not prejudiced thereby. Section 8236, Rev. St., is as follows: "Neither a departure from the form or mode prescribed in this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right." This section was construed by this court in *State v. Reed*, reported in 35 Pac., at page 706. Rehearing denied.

SULLIVAN, C. J., and HUSTON, J., concur.

(5 Idaho, 213)

### MULKEY v. LONG.

(Supreme Court of Idaho. Feb. 12, 1897.)

ALTERATION OF NOTE — EVIDENCE — RELEASE OF SURETY.

1. Under section 6030, Rev. St. Idaho, a party offering in evidence a promissory note showing upon its face that it has been altered is required, before the same can be received, to show that such alteration was made before it came to his hands.

2. A promissory note altered in a material particular is rendered void, as to one who signs it as a surety merely, where such alteration was made without the knowledge or consent of such surety; and a mere verbal promise, without consideration, will not maintain an action against such surety for the amount of such note.

(Syllabus by the Court.)

Appeal from district court, Lemhi county; D. W. Standrod, Judge.

Action by William Mulkey against John Long. Judgment for plaintiff. Defendant appeals. Reversed.

Quarles & Quarles, for appellant. F. J. Cowen, for respondent.

HUSTON, J. This action is brought upon a promissory note executed by defendant and one Jos. B. Miller, of the following form: "\$305. Salmon City, July 10th, 1893. On or before one year after date, without grace, for value received, we, or either of us, promise to pay William Mulkey or order three hundred and ninety-five dollars, with interest from date until paid, at the rate of one per cent. per month; and, if suit be instituted for the collection of this note, we agree to pay a reasonable attorney's fee. [Signed] Jos. B. Miller. John Long." The record shows that the note was made and delivered at the request and for the benefit solely of Jos. B. Miller;

that the defendant never received any benefit therefrom; moreover, that, as originally made, the note was for the sum of \$375, and was payable to Davis Bros.; that the alterations were made without the knowledge or consent of the defendant. But it is contended upon the part of the plaintiff that, after a knowledge of the alterations in the note came to the defendant, he promised and agreed to pay the same. The case was tried to a jury, to whom special findings were submitted, among which was the following, viz.: "Q. 11. Had Long ever promised to pay the note since the date at which he claims to have first discovered the alteration in the note in regard to the change of the amount for which it was given; and, if so, to whom has he made such promise; and was such promise oral, or in writing? A. Yes; to Timothy Dore; orally." Upon this point, which seems to be a crucial one in this case, Timothy Dore testifies as follows, *inter alia*: "It was about the 24th or 25th of March, he [defendant] came to my office and wanted to see the note. I showed the note to him, and he claimed it had been raised \$20. He said the original amount was \$375. \* \* \* But he said he would pay the note. He said he never signed his name to a piece of paper that he did not pay. And two or three days after that he came to me, and wanted me to see Mulkey about the additional \$20, and asked me if Mulkey would not throw off half of it, at least." Defendant does not agree with the witness Dore as to what was said, at the interview referred to. Defendant claims that he did not know of the alteration in the amount of the note until the 27th of March, when the note was first seen by him since he signed it. Dore says that defendant, at the time he showed him the note, remarked that "he did not sign his name to a piece of paper he did not pay," and Dore states that defendant talked with him about what Mulkey would do; and there seems to have been some talk looking towards an adjustment, by Mulkey's taking a mortgage upon Miller's books, held by the defendant. The jury found that defendant made a promise orally to Timothy Dore to pay the note. Defendant denies this.

The first specification of error is in permitting the introduction in evidence of the note sued on; it appearing upon the face of the note that the same had been altered in material particulars, to wit, the name of the payee had been changed, and the amount changed. Appellant contends that under the provisions of section 6030, Rev. St. Idaho, said note was not admissible in evidence. In the complaint no reference is made to any alteration in the note. Section 6030, Rev. St., is as follows: "The party producing a writing as genuine which has been altered, or appears to have been altered after its execution in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the

parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that he may give the writing in evidence, but not otherwise." This section of our statutes was adopted literally from the statutes of California, and the construction thereof by the supreme court of California should be recognized by us. In the case of *Sedgwick v. Sedgwick*, 56 Cal. 213, the court held that as it did not appear upon the face of the note that the alteration had been made after the execution of the note, and that the evidence did not establish such fact, it was not error to allow the note to be read in evidence. The conclusion, it seems to us, from all the decisions, is simply this: The party presenting an instrument which, upon its face, shows that it has been altered, is required to explain such alteration, or at least show that it has not been altered since it came to his hands. The parties who made or executed the instrument may have made or assented to the alteration before its execution, and yet the holder be entirely unable to prove that fact. We think, therefore, that the exigency of the statute is complied with when the party presenting the instrument in evidence has shown that there has been no alteration therein since it came to his hands. *Galiland v. Jackman*, 26 Cal. 85; *Sedgwick v. Sedgwick*, 56 Cal. 213. It is clear from the record that the alterations in the note in this case were made by Miller, and without the knowledge or consent of the defendant. It is also admitted that the money advanced by plaintiff was paid directly to Miller; that defendant was a mere accommodation maker or surety. The jury found that the defendant on or about the 27th day of March, 1895 (the note was due July 10, 1894), promised one Dore, who held the note for collection, that he would pay it, and that this was after defendant had knowledge of the alterations in the note; and it is claimed by plaintiff that such promise by defendant amounted to a ratification of the note, to the extent of establishing the liability of defendant thereon. To maintain this contention, respondent cites 1 Am. & Eng. Enc. Law, 521, and cases there cited. An examination of the text, as well as of the cases cited, will show that what is quoted in the brief applies to the case of a maker of the note, and not to a mere surety. Under the same head, on page 522, note 1, we find the following: "Even where the maker, after noticing the alteration, offered to give another note, at sixty days, in place of it, the court did not regard this as a ratification of the alteration. *Kilkelly v. Martin*, 34 Wis. 525." In that case, as in the case at bar, the note, as to the defendant, had, by reason of the alterations therein, become void, and was no longer his contract, — was no longer enforceable against him as an obligation of his making. Any promise or agreement thereafter made by him to pay the debt for which the note was given, un-

less the same was in writing and predicated upon a valuable consideration, could not be enforced. *Warren v. Fant's Trustee*, 79 Ky. 1; *Wood v. Steele*, 6 Wall. 80; *Bank v. Stowell*, 123 Mass. 196; *Bank v. Clark*, 51 Iowa, 254, 1 N. W. 491. We think the error of the district court, as well as of counsel, lies in not drawing the distinction between the maker of a note and one occupying the position of a mere surety, as an accommodation maker; and this distinction is, we think, clear upon both principle and authority. The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment for defendant with costs.

QUARLES, J., did not sit in this case, having been of counsel. SULLIVAN, C. J., concurs.

On Rehearing.

(Feb. 26, 1897.)

HUSTON, J. We have examined this petition, and find no reason to change the conclusion of the court. The petitioner has spent much time and space in the elaboration and discussion of questions not involved in the decision of this case. We do not feel called upon to reiterate what we have, we think, already made sufficiently clear. The petition is denied.

SULLIVAN, C. J., concurs.

(14 Utah, 477)

ENSIGN v. FISHER et al.

(Supreme Court of Utah. Feb. 9, 1897.)

FRAUDULENT CONVEYANCE—NONSUIT—REVIEW ON APPEAL—SUSPICIOUS CIRCUMSTANCES.

1. The offer of evidence after the overruling of a motion for nonsuit is not a waiver of the exception taken to the order overruling such motion, under *Sess. Laws 1894*, p. 42.

2. Under section 9 of article 8 of the constitution, which provides that "appeals to this court shall be upon the record made in the court below, \* \* \* and that in equity cases the appeal may be on questions of both law and fact," held, that questions of both law and fact arising in equity cases can be reviewed in this court upon the record made in the court below, if properly brought to this court.

3. When there is no testimony offered by the plaintiff, in his affirmative case, tending to establish a prima facie case of fraud in the alleged sale of property with intent to defraud creditors, a motion for nonsuit should be granted. Fraud cannot be presumed from mere suspicious circumstances, but must be proved. Testimony offered held insufficient to make a prima facie case.

(Syllabus by the Court.)

Appeal from district court, Box Elder county; C. H. Hart, Judge.

Action by Martin Ensign, Jr., against George W. Fisher and others. Judgment for plaintiff. Defendant Fisher appeals. Reversed.

Moyle, Zane & Costigan and J. M. Coomba, for appellant. B. H. Jones, for respondent.

PER CURIAM. The plaintiff filed his complaint March 30, 1896, and alleged therein that on April 14, 1894, he filed his complaint, and obtained judgment thereon, against the defendant George W. Fisher, on February 26, 1896, in the district court for the county of Box Elder, for the sum of \$150.48, which judgment was then properly docketed; that on March 28, 1896, an execution was issued thereon, and returned unsatisfied; that on April 28, 1894, defendant George W. Fisher and Mary F. Fisher, his wife, made and delivered to their daughter Lillie Bland a deed of conveyance to the land in question. Plaintiff further alleged, on information and belief, that the said deed was so made for the use of the defendant George W. Fisher, without consideration, and with intent to hinder and defraud creditors of their lawful suits and damages, debts, and demands; that, since said deed was executed, the possession of said land had remained under the control and possession of defendant Fisher, under the fraudulent pretense that he was the agent of the grantee; that, at the time the conveyance was made, defendant Fisher was insolvent, and had no property in the state out of which an execution could be collected; and prayed that said conveyance be set aside as fraudulent. The defendant answered, denying the allegations in the complaint, and alleged that the conveyance was made in good faith, for a valuable consideration, without intent to hinder, delay, or defraud any creditor, and that he was not insolvent at the time of signing the conveyance. The plaintiff offered testimony tending to show that in December, 1894, defendant Mary F. Fisher offered to sell the lots in question; that in April, 1895, one witness heard a conversation between Fisher and a gentleman to the effect that Fisher was going to trade the property; that Fisher had said he had sold the property, but the deed was not made out, and witness was to pay rent to the purchaser. It appears that this witness rented the house from Mr. Coombs, the agent of Lillie Bland, and paid him the rent some of the time, and at one time paid the rent to Fisher. Mr. Standing gave testimony tending to show that Mr. Coombs had spoken to him about buying the property in question in the fall of 1894; that Coombs had the property for sale, and that witness talked to Fisher and Coombs about buying it; that he went over and looked at the property; that Fisher said it was for sale at the sum of \$700. The deed to Lillie Bland was received in evidence. The record in the case of Rankin against Ensign and Fisher, showing a judgment against Fisher, of March 10, 1894, for \$100, and return of execution thereon, showing the judgment was fully paid and satisfied, was also offered in evidence. The record of the judgment set out in the complaint, upon which the plaintiff sought relief, was also introduced in evidence. Af-

ter the introduction of this testimony, the plaintiff rested his case, and the defendant moved for a judgment of nonsuit, on the ground that no evidence had been introduced tending to show that the deed had been executed without a valuable consideration, or in trust, or that the possession of the property remained in the grantor, or that Fisher was insolvent at the time he made the deed or since, or that he was indebted at the time the deed was made, and that no material allegation of the complaint had been established. The court denied the motion, and the defendant excepted, assigning as error the refusal of the court to grant the nonsuit as requested.

Section 9 of article 8 of the constitution of Utah provides "that appeals to this court shall be upon the record made in the court below. \* \* \* In equity cases the appeal may be on both questions of law and fact. \* \* \*" Under this section, questions of both law and fact arising in equity cases can be reviewed in this court upon the record made in the court below, and properly brought to this court.

The testimony offered was exceedingly meager and unsatisfactory. In order to establish a prima facie case as charged, the plaintiff should have shown that the conveyance of April 23, 1894, was without consideration and fraudulent, or that the deed was made in contemplation of insolvency, and that Fisher was insolvent at the time the deed was made and afterwards. No testimony was offered in plaintiff's affirmative case upon these subjects. The testimony that Fisher or his wife had offered to sell the property in the absence of Lillie Bland, during the year 1894 or 1895, taken in connection with the fact that Mr. Coombs was Lillie Bland's agent, and assisted in making the alleged negotiations for the sale, is not of itself sufficient to establish the charges made in the complaint. The fact that Fisher offered to sell the property would not show that Lillie Bland had not purchased the same in good faith, and for a valuable consideration. Fraud, when charged, must be proved. It cannot be presumed without proof. No judgment existed against Fisher at the time of the conveyance. The fact that suit had been commenced against him in a justice's court before the conveyance might be suspicious, but that fact alone should not be held sufficient evidence of fraud to annul a deed subsequently made, without some proof tending to show the fraudulent nature of the transfer.

The offer of evidence after the motion for a nonsuit was overruled is not a waiver of the exception taken to the order overruling such motion, under Sess. Laws Utah 1894, p. 42. Testimony was afterwards introduced by both parties. Upon an examination of the testimony, we are not satisfied that it supports the findings and conclusions reach-

ed by the trial court. The judgment of the court below is set aside, with instructions to grant a judgment of nonsuit, as requested by the appellant.

(19 Mont. 223)

**KNIGHT et al. v. LE BEAU.**

(Supreme Court of Montana. Feb. 15, 1897.)

**ACTION ON NOTE—COMPLAINT BY ADMINISTRATOR—DEMURRER—CAPACITY TO SUE.**

1. A complaint which alleges that plaintiff was duly appointed administrator with the will annexed of the estate of the payee of the note sued on, and that he qualified and received letters, and that the note has not been paid, states a cause of action.

2. Since plaintiff's incapacity to sue is a separate ground for demurrer (Code Civ. Proc. 1895, § 680), the question of capacity cannot be considered on a demurrer for want of facts sufficient to constitute a cause of action.

3. The capacity in which a plaintiff sues is not such an essential element of a cause of action that a demurrer for want of facts sufficient to constitute a cause of action would bring up the question of capacity.

4. Want of jurisdiction over the subject-matter is not ground for demurrer, unless it appears on the face of the complaint.

Appeal from district court, Gallatin county; F. K. Armstrong, Judge.

Action by J. A. Knight and another, as administrators with the will annexed of the estate of George Henry Godwin, deceased, against Peter Le Beau. From a judgment for plaintiffs on the pleadings, defendant appeals. Affirmed.

The plaintiffs' complaint in this action is as follows: "The plaintiffs complain of the defendant, and allege: First. That on the 25th day of November, 1895, the plaintiffs were duly and legally appointed administrators with the will annexed of the estate of George H. Godwin, deceased, and that on the 12th day of December, 1895, they duly qualified as such administrators, and letters of administration with the will annexed, of said estate, were duly and legally issued to them and each of them; and that they and each of them have ever since been, and now are, the duly and legally appointed, qualified, and acting administrators with the will annexed of the estate of George Henry Godwin, deceased. Second. That on the 2d day of January, 1893, at Park Ranch, Cherry Creek, Madison county, Montana, the defendant made, executed, and delivered to the said George Henry Godwin his promissory note in writing, bearing date on that day, which promissory note reads in words and figures following, to wit: '\$500. Park Ranch, Cherry Creek, Madison Co., Montana, January 2d, 1893. One day after date I promise to pay Geo. H. Godwin or order, for value received, five hundred dollars, with interest at ten per cent. per annum both before and after maturity. January 2d, 1893. P. Le Beau.' Third. That, at the time of the appointment of plaintiffs as administrators with the will annexed of said estate as aforesaid, said note was a part of the assets of

said estate, and the property thereof, and the same came into the hands of these plaintiffs, as administrators aforesaid, as the property of said estate; and plaintiffs have ever since been, and now are, the lawful owners and holders of said promissory note. Fourth. That the defendant has not paid said note, or any part thereof, or any interest thereon, but that the principal sum mentioned in said note, with interest thereon at the rate of ten per cent. per annum from the 2d day of January, 1893, is now wholly due and unpaid, and justly owing from defendant to plaintiffs, as administrators aforesaid. Wherefore plaintiffs pray for judgment against the defendant for the sum of \$500, with interest at the rate of 10 per cent. per annum from the 2d day of January, 1893, together with all costs of this action, and for all other proper relief." To this complaint the following demurrer was filed: "Comes now the defendant in the above-entitled action, and demurs to the complaint therein on the following grounds: First. The complaint does not state facts sufficient to constitute a cause of action. Second. The court has no jurisdiction of the subject of the action. Third. The said complaint is unintelligible and uncertain in the following particulars: (1) It cannot be ascertained from said complaint when or where said George H. Godwin died. (2) It cannot be ascertained from said complaint when or by what means said cause of action accrued to plaintiffs, if ever." The demurrer was overruled, and the defendant declining to answer, judgment was rendered in favor of plaintiffs as prayed for. The appeal is from the judgment.

Luce & Luce, for appellant. Hartman Bros. & Stewart, for respondents.

BUCK, J. (after stating the facts). We have before us in this appeal able and elaborate briefs on interesting questions of pleading, and have given the arguments of respective counsel the most careful consideration. Does the complaint state a cause of action? We think it does. It is true that the averments as to the legal capacity of plaintiffs to sue are very defective. Properly, the pleading should have shown by direct averment that Godwin died leaving a will; that a court of this state (naming it) duly made orders admitting said will to probate, and issuing letters of administration with the will annexed to plaintiffs. See 1 Estee, Pl. & Prac. § 419. Section 745, Code Civ. Proc. 1895, is as follows: "In pleading a judgment, or other determination of a court, officer or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction." Under the old common-law rule, in pleading an order of an inferior court, the jurisdictional facts preceding it had to be set forth. Section 745, su-

pra, has changed the old rule, but certainly was not designed to countenance the careless omissions we have mentioned. We strenuously condemn such laxity in pleading. See *Halleck v. Mixer*, 16 Cal. 574; *Bird v. Cotton*, 57 Mo. 568. One of the specific grounds for demurrer designated in section 680 of our Code of Civil Procedure of 1895 is "that the plaintiff has no legal capacity to sue." Of course, under said last-named section, a demurrer on this ground lies only when the legal incapacity appears on the face of the complaint. See *Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135. But a demurrer on the ground of want of legal capacity is something entirely distinct from one which raises the objection that a complaint does not state facts sufficient to constitute a cause of action. When one of these two separate grounds is the basis of a demurrer, the other cannot be considered. See *Pom. Rem. (2d Ed.)* § 208; *Insurance Co. v. Baldwin*, 37 N. Y. 648; *Bank v. Donnell*, 40 N. Y. 410; *Debolt v. Carter*, 31 Ind. 355; *Commission Co. v. Poole (S. C.)* 19 S. E. 203; *Mora v. Le Roy*, 58 Cal. 8; *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313, and 15 Pac. 451; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Halleck v. Mixer*, 16 Cal. 574; and *Bird v. Cotton*, 57 Mo. 568.

The actual cause of action in the complaint under review is the unpaid promissory note executed by defendant to the decedent, Godwin. The capacity in which a plaintiff sues is not necessarily an essential element of the cause of action stated in his complaint. See authorities last cited. In *State v. Matson*, 38 Mo. 480, and *Judah v. Fredericks*, 57 Cal. 389, which are the main precedents relied upon by appellant, the courts evidently proceeded upon the theory that the right of the party to recover is an essential element of the cause of action he states. We can readily understand that the right to recover may be regarded as an element of the cause of action, under certain circumstances. For example, if it appears on the face of the complaint that the plaintiff is in no wise connected with the cause of action, and has clearly no right to recover on it, a general demurrer would lie. See *Berkshire v. Shultz*, 25 Ind. 523. But there is a manifest distinction between a complaint which fails to show any capacity to sue, or any right to recover, and one which only defectively sets forth the capacity or right. In the two cases relied upon by appellant, cited supra, we think the courts overlooked this distinction. For in both of these cases there were allegations showing that the plaintiffs sued as executors of decedents, however defective they may have been. Between a right to recover and the want of legal capacity designated as a ground for demurrer in section 680, Code Civ. Proc. 1895, the difference may not, at times, seem very clear. But if a right to recover is to be regarded as an essential element of the cause of action stated, to such an extent as to include the capacity to sue, then such a doctrine, carried out logically, would

completely nullify the specific statutory ground of demurrer for want of legal capacity to sue. We cannot follow any such doctrine, even if the cases of *State v. Matson* and *Judah v. Fredericks*, supra, and others cited by appellant, do follow and teach it. For the purposes of the general demurrer to the complaint because it fails to state a cause of action, we must accept as conceded that the plaintiffs were the administrators of Godwin, that Godwin was dead, and that the note sued upon is in their hands as administrators of his estate. However defective the allegations, these facts are clearly inferable. Under the general rule that there is no presumption against the pleader, we cannot infer from these averments that Godwin is alive, that he left no will, and that a court qualified to do so did not duly issue letters of administration with his will annexed to plaintiffs. Appellant has cited the case of *Harmon v. Cattle Co.*, 9 Mont. 243, 23 Pac. 470, and *Weaver v. English*, 11 Mont. 84, 27 Pac. 396. We do not think these cases apply in the present appeal. In the former a judgment of an inferior court was relied upon as a cause of action, and the court held that the said judgment was not properly pleaded in the complaint. In the latter, the judgment of the inferior court was relied upon as the gist of a defense, and the court held also that it was not properly pleaded.

Another ground of demurrer relied upon by appellant is that the court had no jurisdiction of the subject-matter of the action. Lack of jurisdiction does not appear on the face of the complaint.

Again, appellant urges that the complaint is unintelligible and uncertain, inasmuch as it cannot be ascertained when or where said Godwin died. But appellant is not injured by such omissions in the complaint. The demurrer was properly overruled in this respect.

Again, appellant urges that the complaint is unintelligible and uncertain because it cannot be ascertained therefrom when or by what means a cause of action accrued to the plaintiffs, if it ever did accrue. The answer to this ground of demurrer is contained in the reasons we have set forth in treating the first ground, namely, that the complaint does not state facts sufficient to constitute a cause of action. If the defendant had wished to test the right or capacity of plaintiffs to sue on the note to Godwin, he should have filed an answer. For these reasons the judgment is affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(19 Mont. 215)

McCARTHY v. O'MARR, Sheriff.

(Supreme Court of Montana, Feb. 15, 1897.)

SHERIFFS—LEVY ON PROPERTY OF THIRD PERSON  
—RETURN TO OWNER—EVIDENCE.

1. Where an officer levies on, under execution, and sells, property which is not that of de-

defendant in execution, he is not liable to plaintiff in execution if he surrenders the property levied on, and returns the proceeds to the purchaser at execution sale.

2. Where a return on execution shows a levy and sale, and a return of the money to the purchaser, as the property did not belong to the defendant, in an action by plaintiff in execution for money received from the sale the sheriff can explain the facts set out in the return.

Appeal from district court, Meagher county; F. K. Armstrong, Judge.

Action by Tim McCarthy against James J. O'Marr. Judgment for plaintiff. Defendant appeals. Reversed.

Assumpsit for money had and received. The complaint alleges that on May 22, 1893, the plaintiff, McCarthy, recovered a judgment before a justice of the peace against Emma Lyons for \$40 and costs, and that on the same day execution was duly issued and delivered to the sheriff pursuant to law; that thereafter the defendant O'Marr, as sheriff, levied upon a piano as the property of Emma Lyons, and on June 9, 1893, sold the same to one Kidd for \$143, but that defendant has neglected to pay the amount of the judgment to the plaintiff. The execution in the case of McCarthy v. Lyons contains the usual and formal recitals, commanding the sheriff to make the sums due on the judgment in the suit of McCarthy v. Lyons out of the personal property of the debtor, and make return within 30 days after the receipt of the execution. The sheriff's return recited that he levied in due form upon a piano then in the possession of defendant's agent, in his county, and that on June 6, 1893, he sold the piano, and realized sufficient to pay the execution, with fees of levy and sale, "and thereupon I returned the money to the purchaser, as the property did not belong to the defendant." The sheriff's answer to the complaint was that, at the time the execution was issued and placed in his hands for service, the defendant had no property in his county, and had had no property therein since said execution, and that the piano mentioned in the complaint never was the property of the defendant named in the execution; that as sheriff, under the order and direction of the plaintiff, McCarthy, he levied upon and sold the piano under the execution, but that at the time of the levy and sale he had no knowledge that the piano did not belong to Emma Lyons, and that, immediately upon ascertaining that the same was not the property of said Emma Lyons, he notified the plaintiff to give him an indemnity bond to protect him on account of the sale of the piano, but that plaintiff did not ever or at all tender him any indemnity bond, and, long after five days had elapsed after the demand for the indemnity bond, he, the sheriff defendant, turned the property over to the owner; that, since the return on the execution referred to in plaintiff's complaint, the defendant, with leave of the court, made and filed an amended return on said execution,

which was as follows: "County of Meagher—ss.: Office of the Sheriff. Leave of court having been first obtained, I hereby make my amended return on the within execution, and certify that I received the within execution on the 26th day of May, 1893, and that I found no property, either real or personal, belonging to the defendant, in the said county of Meagher, out of which I could make the amount of the within execution, or any part thereof. James O'Marr, Sheriff of Meagher County. Dated this 6th day of February, 1894." Defendant denied all damage by any act of his, and says that he has withheld no money collected under said execution from the sale of any property that belonged to the defendant named in the execution. The replication denied that the piano levied on and sold was not the property of Emma Lyons; and, among other things, plaintiff denied that the defendant sheriff ever made or filed an amended return to the execution, or that he ever obtained leave of the court so to do, or that any return ever had been made by the sheriff, except the one set out in the complaint. The case was originally tried before Hon. Frank Henry, as judge, and was taken under advisement by him. Thereafter, and before Judge Henry rendered his decision, it appears that, to avoid the expense of another trial, the testimony as taken before Judge Henry was submitted to Hon. Frank Armstrong, with the agreement by all parties that Judge Armstrong might decide the case as if it had originally been tried before him. Judge Armstrong found from the pleadings and testimony that the judgment was duly rendered in the justice's court for Townsend township, of Meagher county, Mont., in favor of McCarthy and against Emma Lyons, and that in said case, and prior to the judgment, there had been an attachment issued and levied upon a piano in the possession of the agent of defendant in that suit, Emma Lyons; that the sheriff sold the piano under the execution, and that about the time of the sale he returned the money to the purchaser, and released the property to the Capital City Music Company, and that in turning over the property levied upon under the execution to the said Capital City Music Company, and returning the money to the purchaser, he acted wholly without the advice or consent of plaintiff, and that the justice of the peace had never granted the sheriff leave to amend his return upon the execution; and that, as a matter of fact, the sheriff had never filed any amended return with the justice. As a conclusion of law from these findings, Judge Armstrong decided that the sheriff's act in turning the piano over to the Capital City Music Company, and the money to the purchaser, was unwarranted, and did not release him from his obligation to pay over to the plaintiff, and also that, as sheriff, defendant would have no authority to amend his return, and that, therefore, the plaintiff should re-

cover. Judgment was entered for plaintiff. The defendant requested the court to find that the piano was seized by the sheriff at the request and by the order of plaintiff in the suit of McCarthy v. Lyons, and that the piano was at no time the property of Emma Lyons, but was always the property of the Capital City Music Company, and that defendant did not know that the piano was not the property of Emma Lyons until after the sale of the same by him as sheriff. The memorandum attached to the defendant's request, and subscribed by Judge Armstrong, is as follows: " \* \* \* The foregoing facts were established by the proof as admitted by the court at the trial, but, in my opinion, was erroneously admitted, and for this reason I did not consider the same in making up my findings in the case; but, in order to allow the defendant to present the record fully, I hereby annex these findings at his request." The appeal is from the judgment in favor of plaintiff and against defendant.

Smith & Gormley, for appellant. Fletcher Maddox, for respondent.

HUNT, J. (after stating the facts). It is clear, by Judge Armstrong's memorandum attached to defendant's request for findings, that the proof on the trial of the case was to the effect that the plaintiff in the suit of McCarthy v. Lyons directed the defendant herein, as sheriff, to levy upon the piano as the property of Emma Lyons, and that the sheriff did so, and sold the same, without any knowledge of the admitted fact that Emma Lyons had no interest whatever in the property so levied upon and sold. It was also proved that after the sale, and before his return of the execution, the sheriff first found out that Emma Lyons was not the owner of the piano, and that thereupon he delivered the same to the Capital City Music Company, the real owner, and returned the money he had collected on the sale to the purchaser thereat. Upon these proofs, we do not understand that the learned judges who presided in turn during the various stages of the trial of the case disagree. The record and its recitals, by Judge Armstrong, that the proofs were as defendant requested the court to find, justify this statement. But we do understand that they are much at variance with one another both as to the legal competency of such proofs, and as to the legal effect to be given them if competent. It appears to us that the wrong complained of by plaintiff (respondent) is the failure of the sheriff to turn over to plaintiff a sufficient amount of money realized from the sale of the piano to satisfy the execution issued in the case of McCarthy v. Lyons; and we are satisfied that, under the answer of the defendant, he could prove that the piano was not the property of Emma Lyons when attached, nor ever after, and that such proof would be competent evidence that defendant is in no default, but would have been guilty

of conversion had he complied with plaintiff's wishes and paid him the money. We therefore think the evidence of defendant upon this branch of the case was properly admitted on the trial, but improperly disregarded in the findings adopted. It is well established that an officer is under no duty—indeed, he has no right—to execute a process delivered to him for service by seizure of the property of a person against whom the process does not run. *Gallup v. Robinson*, 11 Gray, 20. Furthermore, if a sheriff fails or omits to levy an execution upon goods which did not at the time of the attachment, or afterwards, belong to the debtor, though they had been attached as the property of the debtor, he will not be guilty of any negligence or misconduct at law, and the creditor has no cause of action therefor. And in such an instance it is a good defense, where the officer is sued, to prove paramount title in another. *Canada v. Southwick*, 16 Pick. 556; *Governor v. Gibson*, 14 Ala. 326. This doctrine is reasonable, for, if the judgment debtor in truth has no personal property within the county of the sheriff, why should that officer, assuming he has acted in good faith, be required to pay the judgment of the attaching creditor? *Lumis v. Kasson*, 43 Barb. 373. The statute (section 320, div. 1, Comp. St. 1888), as if to protect a sheriff against liability in trespass for levying upon the personal property of a third party, if such a party claims the property seized, makes it obligatory upon that official to deliver the property levied upon to the claimant, after notice, unless the plaintiff gives him a good bond to indemnify him against loss or damage by reason of holding such property. And if he must turn over property levied upon, when claimed on oath by a third person, unless indemnified, on what principle should he be compelled to apply the proceeds of the sale of the property of a third person towards payment of the debt of the creditor, where he, in all good faith, has only ascertained after such sale that the property has always belonged to a third person, and never did to the judgment debtor? The learned judge who made the findings and conclusions of law in the case upon which judgment was predicated doubtless recognized these principles above stated, but believed that they were inapplicable to the facts, because the sheriff, having made a return of a levy and sale of the piano as the property of Emma Lyons, was estopped from afterwards saying that it was not her property, and hence his payment of the proceeds to the purchaser, and his return of the piano to the Capital City Music Company, were unauthorized by law, and did not release him from his obligation to pay the amount of the plaintiff's judgment to him. The judge was also of the opinion that the sheriff had no authority "to amend his return as attempted by him to be done, as it would have been amending such return so as to state the facts different from what they really were; and, as a legal prop-

osition, an officer can only amend his return so as to make the return correctly set forth what was actually done, and not to change the attitude or status of the parties." But, if we concede that the officer could not make the amended return he did because it contradicted the fact of a levy and sale,—a proposition which we need only concede for the purposes of this opinion,—we nevertheless believe that his defense of paramount title was admissible notwithstanding the first return he made. By it the sheriff recited the actual facts of his levy and sale, and of his subsequent return of the money to the purchaser because the piano did not belong to the defendant named in the execution. There is nothing inconsistent with this return and the fact proved, that the knowledge that Emma Lyons did not own the piano only came to him after the execution sale. So that his attitude upon the trial and as disclosed by his return are not in conflict with one another; and the return, so far as it goes, conforms to the proof. The case is thus brought within the rule laid down in *Hopkins v. Chandler*, 17 N. J. Law, 299, that a sheriff is not, by levy and sale, estopped from denying the plaintiff's right to the proceeds of the sale, nor from showing that the property sold under the plaintiff's execution was not the defendant's, nor liable to such levy and sale. We quote the following pertinent language from the opinion of Chief Justice Hornblower in that case: "It comes, then, to this question: Can a sheriff, after levying upon property and selling it under an execution, withhold the money from the plaintiff, and successfully resist an amercement for not paying it over, upon the ground that the property levied upon and sold by him belonged to other persons than the defendant, and were not liable to the plaintiff's execution? An amercement comes in the place of an action at law for money had and received, and if, in such an action, the facts stated in the case were clearly proved or admitted, we should have no difficulty, perhaps, in saying the plaintiffs ought not to recover. It would seem to be unreasonable, if a sheriff by mistake should sell property not liable to a plaintiff's execution, that he should be compelled to pay the money to the plaintiff, and be left to respond to the owner of the property. And, upon this view of the subject, there would seem to be no good reason why, in a plain case, such as this strikes me to be, we should not, upon a motion for amercement, make a similar decision. \* \* \* The first question, then, is whether the sheriff is estopped by his levy and sale from denying the plaintiff's right to this money? I think not. In an action against him, he would be at liberty to show that the property was subject to prior liens which had exhausted the proceeds; and I can see no reason why he might not be permitted to show that he levied and sold by mistake, under the plaintiff's execution, property that was not liable to such seizure and sale." See, also, *Harris v. Kirkpatrick*, 35

N. J. Law, 392; *Crock. Sher.* § 853; *Com. v. Booker*, 6 Dana, 443; *Freem. Ex'ns*, § 304. It may be that a sheriff cannot, by averments of his pleading, impugn the verity of his official return; yet he is often allowed to prove other facts consistent with it, but tending to exonerate him from a liability apparently created by it. *Murfree, Sher.* § 868. But, as explained, this is not a case where a sheriff seeks to falsify his return on an execution by evidence, but rather one where he has made a special return of facts, and by his evidence fully explains those facts; and this, as against the judgment creditor suing, we think he may do, either in action for money had and received, or for a false return. *Lummis v. Kasson*, 43 Barb. 373; *Fuller v. Holden*, 4 Mass. 498; *Canada v. Southwick*, supra; *Shotwell v. Hamblin*, 23 Miss. 157; *Bank v. Benham*, 23 Ala. 143; *Evans v. Davis*, 3 B. Mon. 344; *Baker v. McDuffie*, 23 Wend. 289; *Alder. Jud. Writs*, p. 578; *Freem. Ex'ns*, § 366; *Decker v. Armstrong*, 87 Mo. 316.

In conclusion, we find appellant's defense is well supported by reason and authority. The judgment is therefore reversed, and the cause remanded, with direction to enter a judgment for the defendant. Reversed.

PEMBERTON, O. J., and BUCK, J., concur.

(19 Mont. 231)

#### REARDON v. PATTERSON et al.

(Supreme Court of Montana. Feb. 15, 1897.)

PLEDGE—CONVERSION—RECOVERY BY PLEDGOR.

In an action by a pledgor against a pledgee for the conversion of a pledge given in lieu of a bond to secure the performance of a contract, a recovery will be defeated by proof that there was a breach of the contract, by which defendant sustained damages in an amount greater than the value of the pledge, and that he sold the pledge for its full value, and gave plaintiff credit for the proceeds.

Appeal from district court, Silver Bow county; J. J. McHatton, Judge.

Action by Timothy Reardon against H. M. Patterson and T. J. Murray for the conversion of a school warrant. Judgment for defendants, and plaintiff appeals. Affirmed.

This action was for the recovery of a school warrant originally issued to appellant (plaintiff below). The judgment in it was rendered before the Codes of 1895 went into effect. The complaint alleges a conversion of the warrant by defendants. The answer denies any conversion, and sets forth affirmatively that in July, 1893, the plaintiff, Reardon, and his partner, entered into a contract with the defendant Murray to plaster the interior of a building belonging to Murray, under the supervision of the defendant Patterson, who was an architect in charge of the work; that the said warrant was delivered to the said Patterson, to be held by him for Murray in lieu of a bond required of Reardon and his



partner under the terms of said contract; that Reardon and his partner failed to perform their covenants in said contract, to the damage of defendant Murray in the sum of \$900; and that thereupon Murray sold the warrant for its value, alleged in the complaint to be \$483.30, and applied the proceeds on the damages he had sustained. The replication denies the delivery of the warrant for the purpose alleged, denies that it was deposited with Patterson in lieu of a bond, and denies any breach of contract on the part of Reardon and his partner, and sets forth that, at the time Patterson turned over the warrant to Murray, it was in Patterson's possession only as a bond and guaranty for the performance of a contract for plastering in the Lynch building which Reardon and his partner had with the firm of White & Demars. It also sets forth that Murray is still indebted to Reardon and his partner for plastering, under the terms of the Murray contract, in the sum of \$276.33, and that a suit on a lien filed by them on Murray's building is still pending in court. The evidence shows that, at the time the Murray contract was entered into, this warrant was in the possession of Patterson, to secure the performance of the White & Demars contract. Reardon testifies: "Along about the 1st of July, we entered into a contract with Murray to plaster his building. The question of a bond came up, and I said to Patterson: 'Of course, we will be through with the Lynch job long before the Murray job will be started, and that warrant can go as a bond on the Murray job.' Patterson said that was all right. \* \* \* There was a delay, and we got through with the Murray job long before the Lynch job, probably a month or more after that." The testimony of Reardon's partner is substantially the same as Reardon's in respect to this agreement as to the warrant. Patterson's testimony is to the same effect. The evidence also shows that Reardon and his partner had had a settlement with White & Demars prior to the disposal of the warrant by Murray, and that White & Demars make no claim to the warrant. The evidence as to whether or not Reardon and his partner complied with the terms of their contract for plastering the Murray building is conflicting. The court found for the respondents (defendants below). This appeal is simply from the order of the court denying appellant's motion for a new trial.

John W. Cotter, for appellant. Corbett & Wellcome, for respondents.

BUCK, J. (after stating the facts). The main specifications of error are that the evidence is insufficient to justify the trial court in finding that there was a breach of contract on the part of Reardon and his partner, and that it is also insufficient to justify any finding that the school warrant was deposited with Patterson as a guaranty for

the performance of the Murray contract. The evidence as to the breach of contract was conflicting, and, under the well-known rule applicable, we cannot disturb this finding. Nor was the evidence insufficient to justify the finding that there was a pledge of the warrant. Upon that portion of Reardon's testimony (quoted in the statement) alone, the lower court had a right to decide that the warrant was delivered in place of the bond required by the contract. It appears clearly enough that Patterson held the warrant primarily to secure the performance of the White & Demars contract. There is no conflict, however, between White & Demars and respondents in respect to it. All right of White & Demars being eliminated, Murray's right alone to the warrant is for our consideration.

But appellant insists that, even upon the assumption that Murray had a right to hold the warrant, he could not dispose of it without notice of sale or a demand for its redemption. Murray sold it for its full value,—\$483.30,—and has credited appellant in that sum upon the damages (in excess of it) which the trial court found he had sustained by reason of the breach of the contract on the part of Reardon and his partner. By disposing of the warrant without giving Reardon an opportunity to redeem it, or any notice of sale, Murray was guilty of a conversion without doubt, and his liability for such a conversion doubtless would be the value of the warrant at the time of the conversion, with legal interest from that date. See *Brunell v. Cook*, 13 Mont. 497, 34 Pac. 1015; *Gay v. Moss*, 34 Cal. 125; *Robinson v. Hurley*, 11 Iowa, 410. Still, do the rules of law as to a notice and demand invoked by appellant avail him under the facts of this case? He has received the benefit of what he might recover even if he could maintain his present action. Murray has credited him with the full value of the warrant. The reason for these rules as to notice and opportunity for redemption are not applicable. These rules are intended to protect the pledgor from a sacrifice of a pledge. By mere conversion of a pledge, a pledgee does not necessarily annul the contract upon which it rests. See *Jones, Pledges*, § 420. A conversion by a pledgee does not per se absolve the pledgor from the payment of the debt he has secured. As a rule, before a pledgor can recover the property pledged, or its value, in an action for conversion, he must establish a right of possession. Without right of possession such a suit is not maintainable. See *Laubenhimer v. Bach, Cory & Co.* (decided at this term) 19 Mont. 177, 47 Pac. 803. And the right to the possession of the property which he has pledged follows from the extinguishment of the debt secured, or a sufficient tender of payment of such debt. A tender of what was due Murray was essential for the establishment of the right of plaintiff to recover in this action. *Robinson*

v. Hurley, 79 Am. Dec. 497, and note on page 596; Hancock v. Insurance Co., 114 Mass. 155; Jones, Pledges, § 748.

There are two more specifications of error to be disposed of. A witness for plaintiff, in reply to a question, testified as follows in reference to a conversation he had had with a witness for defendants: "The conversation was, he called me across the street, and said, 'Hello, Bill, do you want to make three dollars?' I said, 'How, Jack?' and he said, 'Well, there is a subpoena; go and see Murray's lawyer, and get subpoenaed, and there is three dollars in it.'" The trial court, on the ground that this answer was immaterial, struck it out. This ruling was correct.

Another witness for plaintiff, in answer to a question as to a conversation he had had with a witness for defendants, testified as follows: "I had a conversation with John Gill within the last two weeks, on Main street. He came to me, and said, in the presence of Mr. Gallagher, 'You want to subpoena me for a witness there.' I said to Mr. Gill, 'I have not got anything to do with the case.' He said, 'Well, I will see Tim [Reardon]. He don't have very much to say to me, and I don't like to ask him.' I said, 'I have not got anything to do with it, but I can tell him what you say.' He said, 'I will make a first-class witness for you. I know that Murray has had miners working around there, picking up big planks, and dropping them on the floors.'" This answer was also stricken out, on the ground that it was immaterial. This last ruling may have been erroneous, but soon afterwards the same witness was allowed to testify to substantially what was contained in the answer excluded. The error, if any, was cured. The order denying the motion for a new trial is affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(19 Mont. 53)

PRIEST v. EIDE et al.

(Supreme Court of Montana. Feb. 15, 1897.)

On rehearing. Denied.

For former opinion, see 47 Pac. 206.

PER CURIAM. As stated in the opinion of the court, this is the second appeal of the case. In the first trial of the case the district court sustained a demurrer to the complaint. Thereupon plaintiff dismissed the suit without prejudice, and commenced another suit against the same defendants. On the trial, under the complaint in the new suit, the court nonsuited plaintiff. From this action plaintiff appealed, and this court reversed the judgment of the lower court, and held that the defendants were all liable on the bond without its being reformed. The case went back for new trial, and the district court followed the opinion of this court, and judgment was accordingly rendered

against the defendants for the amount of the bond. The principal ground for rehearing is the contention of appellants that, the plaintiff having failed to appeal from the order of the district court sustaining the defendants' demurrer to the complaint in the first suit on the ground that defendants were not liable on the bond, he is now estopped from litigating the matter, and that this court has no jurisdiction to determine that matter in this appeal, and had no right so to do on the former appeal. To uphold this contention would be to grant a rehearing of the former appeal, and reverse the conclusion then reached by this court. This cannot be done, especially in view of the fact that a majority of the justices now composing this court were trial judges who had had to do with the case below, and who now deem themselves to be disqualified from passing upon the merits of this appeal, and only participate at all by consent of parties. We must, under the circumstances, overrule the petition for rehearing, believing the law of the case to have been settled.

(16 Wash. 382)

STATE ex rel. MULLEN v. DOHERTY.

(Supreme Court of Washington. Feb. 1, 1897.)

QUO WARRANTO — JURY TRIAL — AMENDMENT OF CITY CHARTER — NOTICE OF ELECTION.

1. No right to trial by jury in a quo warranto proceeding is given by Declaration of Rights, art. 1, § 21, providing that the right to trial by jury shall remain inviolate; Code 1881, § 248, in force at the date of the adoption of the constitution, providing that either party "in an action at law" on an issue of fact should have a right to trial by jury.

2. Const. art. 11, § 10, providing that all charter elections should be had upon notice, which notice should specify the time of the election, and should be given for at least 10 days, does not require that the notice should be given by posting in each election district.

3. Act March 24, 1890, relating to amendments of a city charter, provided for notices in each election district by publication in the daily newspapers, and "causing the same to be posted at each polling place in the several election districts thereof." A city ordinance submitting the proposed amendments provided for the posting of a certified copy of every amendment at each of the polling places within the city. The city clerk did not post certified copies, as provided by the ordinance, but newspaper clippings, containing copies of the proposed amendments were duly posted in the voting booths, and the court found that the pendency of the election was a matter of public notoriety throughout the city. *Held*, that the failure of the clerk to discharge his full duty under the law did not render the election invalid. Dunbar, J., dissenting.

4. Under a provision of the city charter for the appointment of commissioners of public works by the mayor, to hold office at the pleasure of the appointing power, no confirmation by the city council is necessary.

5. Failure of a city clerk to record amendments to the city charter in the charter book, as required by law, does not affect the validity of the amendments.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by the state of Washington, on the relation of Robert B. Mullen, against Thomas E. Doherty. Judgment for relator, and defendant appeals. Reversed.

Govnor Teats and W. O. Sharpstein, for appellant. Claypool, Cushman & Cushman and Doolittle & Fogg, for respondent.

GORDON, J. This action was instituted in the superior court of Pierce county to oust the appellant, Doherty, from the office of commissioner of public works of the city of Tacoma. The relator, Mullen, was a member of the board of public works, appointed under the provisions of the city charter of the city of Tacoma, and the appellant, Doherty, claims the office by virtue of certain amendments to the city charter, which he alleges were adopted by the legal voters of the city at an election held on April 7, 1896. Under the provisions of these alleged amendments Doherty claims to have been duly appointed as commissioner of public works. The contention of the relator is that these amendments were never legally adopted, and that they are inoperative, and void. Issue of fact was joined, and the cause tried to the court. Findings of fact and conclusions were duly entered, upon which judgment was entered for the relator, from which judgment Doherty has appealed.

The first point urged in the brief of the appellant is that the court erred in overruling appellant's demand for a jury trial. The contention is that sections 32, 33, and 34 of the act of March 15, 1893 (Sess. Laws 1893) p. 416, are unconstitutional, in that they abridge the right to a trial by jury. The provision of the constitution relied upon is found in section 21, art. 1, of the declaration of rights, which, among other things, provides that "the right of trial by jury shall remain inviolate. \* \* \*" The decisions bearing upon this branch of the case are conflicting, but an examination of the numerous cases cited, and others not referred to, by counsel, has satisfied us that the great weight of authority in this country is against the position contended for by appellant's counsel. The effect of the declaration of the constitution above set out is to provide that the right of trial by jury as it existed in the territory at the time when the constitution was adopted should be continued unimpaired and inviolate. *Whallon v. Bancroft*, 4 Minn. 109 (Gil. 70); *State v. Minnesota Thresher Manuf'g Co.*, 40 Minn. 213, 41 N. W. 1020; *Taliaferro v. Lee* (Ala.) 13 South. 125. Section 248 of the Code of 1881, in force at the date of the adoption of the present constitution, was as follows: "Either party shall have the right in an action at law, upon an issue of fact, to demand a trial by jury." But proceedings in quo warranto, prohibition, and the like are special and extraordinary proceedings, and do not fall within the purview of section 248, su-

pra, which restricted the right of trial by jury to actions denominated as actions at law. *Whallon v. Bancroft*, supra; *State v. Minnesota Thresher Manuf'g Co.*, supra; *Taliaferro v. Lee*, supra. This construction of the constitutional provision in question harmonizes with the further provision contained in section 4, art. 4, of the constitution, which provides that "the supreme court shall have original jurisdiction in \* \* \* quo warranto," and any other construction of the first-mentioned provision would render the latter provision of the constitution nugatory and ineffectual. But, aside from this, we think that by the great weight of authority the right to trial by jury in quo warranto proceedings did not exist at common law at the date of the early settlement of this country. We have discovered no case in which the right was upheld prior to the passage of the act of parliament in 1730 known as 3 Geo. II. c. 25, and, as well said by the supreme court of Arkansas in *State v. Johnson*, 26 Ark. 281: "If this right existed before this time, it was certainly a work of supererogation on the part of parliament to enact the law." One of the best-considered cases which we have examined upon this subject is that of *Taliaferro v. Lee*, supra, decided in 1893, wherein it is said that: "In proceedings to try the right to a public office there was no common-law right of the suitor to a trial by jury, and hence such suitor is not within the protection guaranteed by that clause of the bill of rights which provides that the right of trial by jury shall remain inviolate." See, also, *Spell. Extr. Rel.* § 1875; *State v. Vail*, 53 Mo. 97; *Wheat v. Smith* (Ark.) 7 S. W. 161; *State v. Lupton*, 64 Mo. 415.

2. The respondent contends that the charter amendments upon which the right of the appellant to the office is based were never legally submitted or adopted by the voters, because the notice required by the constitution and laws of the state and ordinance of the city council was not given. The provision of the constitution upon which this contention rests is section 10, art. 11, providing: "\* \* \* All elections in this section authorized shall only be had upon notice, which notice shall specify the time to call such election, and shall be given for at least ten days before the time of election in all election districts of said city. \* \* \*" The provision of the statute upon which the respondent relies makes it the duty of the legislative authority of the city to "give at least ten days' notice in each election district of said city, by publishing such notice in two daily newspapers published in said city, and by causing the same to be posted at each polling place in the several election districts thereof, of an election, which notice shall specify the object for which said election is called." Section 3, Act March 24, 1890 (Sess. Laws 1890, p. 216). Section 4 of the ordinance submitting the proposed amendments is as follows: "That,

it shall be the duty of the city clerk, and he is hereby ordered and required, to post at each of the polling places within the city of Tacoma, on or before said April 7th, 1896, so that the same shall be prominently posted upon that date, a full, true, and correct certified copy of each and every one of the proposed amendments to the said city charter as contained in this ordinance, for reference by electors and election officers." The clerk complied with section 4 of the ordinance in all particulars except that he did not post certified copies of the proposed amendments in the different polling places within the city. But the court found that newspaper clippings containing copies of the proposed amendments "were duly posted in all of the voting booths of the city of Tacoma by the election officers at said voting places." The court also found that notice of the election signed by the city clerk was published in the Tacoma Daily Ledger, the Tacoma Morning Union, and the Evening News,—all daily newspapers published in said city,—from the 28th of March to the 7th day of April, inclusive, and that no other or further notice of such election, nor the election on said proposed amendment, was given. The court found that these newspapers circulated throughout the political divisions of the city of Tacoma, and 120,000 copies were distributed in each and every one of the political divisions and precincts. Also: "That the said amendments were discussed by the people generally in their homes, from the platform, and from the pulpit in the various churches of the city, to such an extent that the pendency of said election for the adoption or rejection of said proposed amendments was a matter of public notoriety throughout said city." The election at which these proposed amendments were submitted was the annual municipal election provided by law for the election of city officers. It appears from the record that at that election 5,364 was the highest number of votes cast, and that of this number 3,604 votes were cast upon the question of the amendment which related to the office of commissioner of public works. The trial court concluded: "That the posting of full, true, correct, and certified copies of each and every one of the proposed amendments to the city charter, as contained in Ordinance 1,061, at each of the polling places in the city of Tacoma, on or before April 7, 1896 (the date provided for the election), was a prerequisite to the holding of the election on said date as to the adoption of the said proposed amendments; and, such notice not having been given, no legal election was had." Also: "That the notice prescribed by section 10, art. 11, of the constitution of the state of Washington, and section 3 of the act of the legislature of said state on March 24th (Laws 1890), was and is a notice to be posted at each polling place and in each election district of the city proposing to adopt charter amendments." We think the conclusions of the learned trial

judge cannot be sustained. The section of the constitution referred to is silent as to the method of giving notice; in other words, it does not provide the particular kind of notice or state how it shall be given. The language is that notice "shall be given for at least ten days \* \* \* in all election districts of the city." We think it does not follow from this language that notice could only be "given" by posting notices in each election precinct, and yet that is what the court in effect held. But it must be conceded that the kind of notice prescribed by the statute and the ordinance was not given, and the question turns upon whether the failure to give such notice invalidates the election. The rule established by an almost unbroken current of authority is that the particular form and manner pointed out by the statute for giving notice is not essential; and, where the great body of the electors have actual notice of the time and place of holding the election, and of the questions submitted, this is sufficient. The vital and essential question in all cases is whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election. *Wheat v. Smith*, supra; *McCrary, Elect.* § 143 et seq.; *Cooley, Const. Lim.* p. 88 et seq.; *Dishon v. Smith*, 10 Iowa, 212; *State v. Grey*, 21 Nev. 373, 32 Pac. 190; *Railroad Co. v. Pinckney*, 74 Ill. 277; *Com. v. Smith*, 132 Mass. 289; *State v. Jones*, 19 Ind. 356. Indeed, we think the question must be regarded as settled in this state by the decision of this court in *Seymour v. City of Tacoma*, 6 Wash. 427, 33 Pac. 1059. It was there said that: "The formalities of giving notice, although prescribed by statute, are directory merely, unless there is a declaration that, unless the formalities are observed, the election shall be void. 'It is a canon of election law that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election.' *Dill. Mun. Corp.* § 197, note 3, and cases cited." Applying this well-established rule to the facts found in the case at bar, it becomes at once apparent that the failure of the city clerk to discharge his full duty under the law, and to observe in detail the provisions of the statute and ordinance in reference to the giving of notice, did not render the election invalid. Having ascertained "that the amendments were discussed by the people generally in their homes \* \* \* to such an extent that the pendency of said election for the adoption or rejection of said proposed amendments was a matter of public notoriety throughout said city," and having further ascertained by the vote actually polled that the great body of the electors expressed their will upon these amendments, which it was their province to adopt or reject, the conclusion is inevitable that the result of the election was not affected by the fact that a literal compliance with the form-

allities prescribed by law for giving notice was not observed. The very purpose for which the statute directed the posting of notices was accomplished when actual knowledge of the election was brought home to the voter; it matters not by what means the knowledge was imparted to him. To hold otherwise would be to disregard the expressed will of the people in a matter which the law has confided to them.

3. The lower court found that the appointment of Doherty was never confirmed by the city council, and upon this finding based a conclusion that he had no right to assume the privileges or duties of the office of commissioner of public works until his appointment was confirmed by the city council. The respondent contends that this in itself constitutes sufficient reason for affirming the judgment, but we think the conclusion that without confirmation by the council the appellant could not hold the office here in dispute was unwarranted. Section 1 of amendment No. 3, which we have found was adopted, does not require that the appointment of the commissioner of public works shall be confirmed; on the contrary, it expressly provides that the person appointed by the mayor "shall hold office at the pleasure of the appointing power." and it further provides that conflicting provisions of the charter should be deemed amended accordingly.

4. We do not deem it necessary to advance further reasons for our conclusion that the court erred in holding that the amendments failed because they were recorded in the charter book by the city comptroller acting as city clerk, instead of by the city clerk. What has been said under point 2 in this opinion applies with equal force to this question, and, in addition thereto, the omission of the clerk to record the amendments would at most only concern the manner in which they might be proved. They became amendments by virtue of the vote of the electors, and not by virtue of their being recorded in a particular method. The only object attained by recording them in a particular manner is that they are thereby entitled to have judicial notice taken of them by all courts of the state.

5. We think the notice of election as published was sufficient, when considered in connection with the ordinance which contained the proposed amendments,—and of the existence of which all persons within the city must be presumed to have had knowledge,—to convey to the voters all necessary information in reference to the character of the proposed amendments; and hence the notice sufficiently specified the object for which the election was called within the meaning of the constitutional provision regarding notice. We have also examined the other objections urged in the brief of respondent against the validity of these amendments, and, without especially enumerating them, we deem it sufficient to say that we do not regard them as being entitled to serious consideration. Upon the record we

47 P.—61

think that the appellant was entitled to judgment confirming his right to the office, and that the court erred in directing otherwise. The judgment appealed from will be reversed, and the cause remanded, with instructions to the lower court to proceed to render judgment in favor of the appellant in accordance with this opinion.

SCOTT, C. J., and REAVIS and ANDERS, JJ., concur.

DUNBAR, J. (dissenting). I think the constitution, fairly construed in the light of the law as it then existed in relation to notices of this kind, meant a notice by posting, and, if that be true, no other kind of notice, however efficient, can be substituted. I therefore dissent.

(16 Wash. 700)

#### STATE v. BUHMANN.

(Supreme Court of Washington. Feb. 6, 1897.)

CRIMINAL LAW — NEW TRIAL — DISCRETION OF COURT.

The denial of a new trial in a criminal case will not be disturbed if the record does not show an abuse of discretion.

Appeal from superior court, Whitman county; E. H. Sullivan, Judge.

Fred Buhmann was convicted of assault and battery, and appeals. Affirmed.

Neill & Bull, for appellant.

PER CURIAM. The defendant was convicted of assault and battery, and has appealed, alleging as error the refusal of the court to grant his motion for a new trial, based upon certain matters shown by affidavits submitted by him. Counter affidavits were submitted by the state, and there is nothing to indicate that the court abused its discretion in denying the motion. Affirmed.

(16 Wash. 426)

#### STATE v. GIN PON.

(Supreme Court of Washington. Feb. 6, 1897.)

JURY — WITNESSES — OATH — HOMICIDE — INSTRUCTIONS.

1. Omitting from the oath to the jury in a capital case the words "according to the evidence," which are used in Laws 1891, p. 59, § 68, requiring the jury to be sworn to try the issue between the state and the prisoner according to the evidence, was not reversible error, where the court charged fully and correctly as to burden of proof, and the objection was first raised on appeal.

2. After Chinese witnesses in a criminal case had taken an oath according to the custom and religion of their country, it was not error to require them to take the statutory oath.

3. A charge that there must be a fixed design to kill, and that the premeditation "may take place but a moment before the doing of the act, but both states of mind must have actual exist-

ence to make the offense murder in the first degree," is not objectionable, as providing for no appreciable space of time between the intent to kill and the act of killing. *State v. Rutten*, 43 Pac. 30, 13 Wash. 203, distinguished.

Appeal from superior court, Spokane county; Jesse Arthur, Judge.

Gin Pon was convicted of murder in the first degree, and appeals. Affirmed.

James E. Fenton, W. W. Saunders, and Alex. M. Winston, for appellant. J. W. Feighan, for the State.

DUNBAR, J. The appellant was convicted, by the superior court of Spokane county, of the crime of murder in the first degree, and the judgment of death was pronounced, from which judgment this appeal is taken. The evidence is not brought here on the appeal, and the appellant relies on three alleged errors, viz.: (1) That the oath administered to the jury differed substantially from the form fixed by statute; (2) that the court, over the objections of the appellant, permitted the Chinese witnesses to be resworn in the ordinary manner, after they had taken the oath which, according to their religion, they believed to be most binding upon their consciences; (3) that the instructions of the court were erroneous.

The oath administered to the jury was as follows: "You and each of you do solemnly swear that you will well and truly try Gin Pon, and true deliverance make between the state and the prisoner at the bar. So help you God." Section 68, p. 59, Laws 1891, provides that the jury shall be sworn or affirmed well and truly to try the issue between the state and the prisoner at the bar, whom they shall have in charge, according to the evidence. It is the contention of the appellant that there is a material and substantial difference between the form of oath prescribed by the statute and the oath administered to the jury in the trial of this cause, and several cases are cited to sustain this contention. The cases cited, however, are mostly old cases, and the decisions were rendered by courts which had not so liberally construed the criminal statutes of their respective states as has the court of this state. And, in addition, they were cases where either an exception was taken to the form of the oath at the time it was administered, or where the discrepancy had been called to the attention of the trial court on motion for a new trial. In the case at bar the first objection to the form of the oath is raised in this court. No exception was taken to it at the time, nor was it called to the attention of the lower court on a motion for a new trial, or in any other way. The motion for a new trial was based upon two grounds: (1) Error of law occurring at the trial, and excepted to at the time by the defendant; (2) that the verdict rendered herein is contrary to law and to the evidence. This mo-

tion was submitted without oral argument, so that it would have been impossible for the court from said motion to have had its attention directed to the alleged error in the administration of the oath.

We are aware of the rule governing the rights of persons charged with felonies, but we do not think that there was such a substantial variance from the form of the oath prescribed by the statute that the appellant was in any way injured by the omission complained of. It is true that the oath prescribed is to the effect that they shall try and true deliverance make between the state and the prisoner at the bar according to the evidence. But the jury could not but understand that their verdict was to be rendered upon the evidence produced in the case. There is no other method of trial prescribed by the law, and the same law which prescribes the form of the oath makes it the duty of the court to instruct the jury upon their duty in relation to the testimony, and the duty of the jury to obey such instructions, and it affirmatively appears in this case that the jury were so instructed. The court, among other things, instructed the jury as follows: "Under the plea of not guilty the defendant is entitled to take advantage of every defense known to the law. Before you can find him guilty of any crime whatsoever in this information, every essential allegation constituting such crime must be proven by the state to your reasonable satisfaction, and beyond a reasonable doubt. The law presumes the defendant innocent of all crime until he is proven guilty by the evidence in the case to your satisfaction beyond a reasonable doubt,"—and much more to the same effect. So that, considering the oath administered in connection with the instruction of the court, which the jury were bound to obey, the irregularity complained of ought not to constitute reversible error.

The state filed a motion to be permitted to amend the statement of facts to show that the oath prescribed by the statute was actually administered, and that the omission alleged as error was simply an inadvertent omission in the preparation of the statement of facts; and affidavits were offered in support of this motion. This court did not see its way clear to allow an amendment to the statement of facts, but we mention this to accentuate the importance of not permitting a defendant, even though charged with a felony, to quietly submit to an irregularity of this kind until after the trial court had lost jurisdiction of the case and the power to correct its records to show the actual facts, and thereby work a reversal of the judgment. Such a holding, we think, would not be in the interest of substantial justice, but its only effect would be to cause the miscarriage of justice.

On the second proposition it seems that the oath which was administered to the witnesses, who were Chinese, was administered according to the custom and religion of their

country, viz. each witness blew out a candle, and his oath was that, if he did not tell the truth, he would be snuffed out as was the candle. But, after this Eastern form of oath was administered, the court also administered the form of oath prescribed by our statute; and the appellant insists that the taking of this second oath in some way weakened the influence of the other oath in the minds of the witnesses. We think this contention scarcely merits a discussion.

The last error complained of is as to the instructions of the court. After defining murder in the first degree, the court said: "You will observe, however, that 'malice,' as used in the definition of murder in the first degree which I have just read to you, is qualified by the words 'deliberate' and 'premeditated'; and, as thus qualified, it means a fixed design to unlawfully take human life, accompanied with some degree of reflection thereon, and the act of killing which follows. The premeditation and reflection thereon may take place but a moment before the doing of the act, but both states of mind must have actual existence to make the offense murder in the first degree." It is insisted that this instruction is opposed to the announcement made by this court in the case of *State v. Rutten*, 13 Wash. 203, 43 Pac. 30. We think the instruction given in this case and the one criticised in *State v. Rutten*, supra, are easily distinguishable. In that case the instruction was as follows: "Premeditated malice is where the intention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon before the fatal stroke is given. There need not be any appreciable space of time between the formation of intention to kill and killing. They may be as instantaneous as successive thoughts. It is only necessary that the act of killing be preceded by the concurrence of will, deliberation, and premeditation on the part of the slayer." And the court reiterated the statement that, in deliberating, there need be no appreciable space of time between the intention to kill and the act of killing, but that they might be as instantaneous as the successive thoughts of the mind; and it was thought by this court that such an instruction did away with the distinction made by the statute between murder in the first and second degrees. But the instruction in the case at bar provides for an appreciable space of time, viz. a moment, and this is a moment of time before the doing of the act. It is true that a moment is the smallest division of an appreciable space of time, but it is a division, and an appreciable one, and this qualification removed the instruction from the objections commented upon in the case above referred to. The judgment is affirmed.

SCOTT, C. J., and GORDON and REAVIS, JJ., concur. ANDERS, J., did not sit on the trial of this case.

(16 Wash. 445)

## FIDELITY &amp; CASUALTY CO. v. CITY OF SEATTLE.

(Supreme Court of Washington. Feb. 8, 1897.)

MUNICIPAL CORPORATIONS—NEGLIGENCE—MEASURE OF DAMAGES.

1. In an action against a city for damages caused by the bursting of a defective water main, a charge that plaintiff must show that the defects were known to the city, or were "of such character as to have been readily ascertained on reasonable inspection," did not relieve the city from liability if it had caused a mere optical inspection, without practical tests.

2. The measure of damages for the negligent breaking of glass windows was the difference between what the glass was worth immediately before the breaking and what it was worth immediately after, where the complaint did not seek damages for the expense of replacing it.

Appeal from superior court, King county; R. Osborn, Judge.

Action by the Fidelity & Casualty Company against the city of Seattle. Judgment for defendant, and plaintiff appeals. Affirmed.

Brinker, Jones & Richards, for appellant John K. Brown and F. B. Tipton, for respondent.

DUNBAR, J. Spurr & Willmot, contractors, under their contract with the respondent, the city of Seattle, in preparing Front street and Yesler Way, in the city of Seattle, for paving, uncovered the water main on Yesler Way in front of what is known as the "Olympic Block," belonging to the estate of L. M. Starr, deceased. While engaged in tearing down a foundation wall, they caused a large piece of concrete to fall upon the water main, by reason of which the pipe burst, and a large volume of water, carrying dirt and gravel, was forced against the front of the Olympic Block with such violence that it broke three transom lights and three lower lights of plate glass in said building. For the purposes of this case the contractors will be considered agents and servants of the city. The appellant was the insurer of the glass which was broken, and, after the accident, replaced the same, and paid therefor the sum of \$266.30. Having made good this loss to the Starr estate, it brought this action against the city for damages. Defendant offered no evidence, and the case was submitted to the jury on the evidence of plaintiff, and verdict was rendered for defendant. There are four assignments of error. The first and second are in relation to instructions to the jury. The third is that the court erred in refusing to grant plaintiff's motion to set aside the verdict, and grant a new trial; the fourth, that the verdict is contrary to the evidence.

The first instruction complained of is as follows: "The court further instructs you that as to the contention of the plaintiff that the water pipe in question was not of such strength and thickness as it should have been for the purposes for which it was used, but was defective and weak, of less thickness than required for pipe used for such purpose;

that before the party—the city—can be held liable for such defects, the plaintiff must not only prove that said pipe was not of such strength and thickness as it should have been for such purpose, and that the same was practically instrumental in causing the injury complained of, but must further show, by a preponderance of the evidence, that such defects were known to the defendant at the time said injury occurred, or were of such character and nature as to have been readily ascertained upon reasonable inspection thereof; and if you do find that such pipe was defective in the respects complained of, yet, if you further find that such defects were of such a character as could not have been readily ascertained upon reasonable inspection thereof, and that the same were unknown to the defendant, then you cannot consider such defects." It is claimed that this instruction was misleading, from the fact that it virtually instructed the jury that the only duty of the defendant in regard to the pipe was to look at the same, and, if no defects were visible to the eye, that it was then warranted in placing said pipe where, if it burst, it would cause great damage to property, etc., and perhaps loss of life; and that such cursory examination would absolve the city from liability. It is claimed that the instruction should have gone to the effect that tests should have been used to ascertain the defects in the pipe. We think this objection is far-fetched, and that the appellant has not placed a proper or ordinary construction upon the language used by the court. Inspection is not necessarily confined to optical observation, but is ordinarily understood to embrace tests and examinations. The definition cited from Webster by the appellant, namely, "to look upon; to examine for the purpose of determining quality, and detecting what is wrong, and the like," seems to us sufficient to show the failure of the contention, and we think the ordinarily accepted meaning of the word "inspection" is fully as broad and comprehensive as the definition given by the lexicographer above. The name "inspector" is given to a person whose duty it is to make tests of machinery, and it is a generally recognized fact that when an officer or agent of any kind is instructed to inspect, the duty goes beyond a mere survey of the eye, and implies such tests as are necessary to ascertain the quality of the thing inspected, whatever it may be; and we have no doubt that the jury in this case understood that a reasonable inspection meant a reasonable examination,—such an examination as was necessary to determine the quality of the pipe. Possibly a better word might have been used by the court in its instructions to the jury, but cases will not be reversed on account of mere choice of expressions or words used by the court in its instructions to the jury.

The second instruction complained of was as to measure of damages. The court instructed the jury that the measure of damages was the

difference between what the glass broken was worth immediately before the same was broken and what it was worth immediately after it was broken. The complaint in this case alleges that plaintiff was damaged by the defendant by reason of its "breaking in and destroying glass in the doors and windows of said building, of great value, to wit, of the value of two hundred sixty-six and  $\frac{30}{100}$  dollars (\$266.30), to the damage and injury of said estate of L. M. Starr, deceased, in the sum of two hundred sixty-six and  $\frac{30}{100}$  dollars (\$266.30)." It is insisted by the appellant that the rule of damages should not be varied to meet the requirements of pleadings, but that it should be stated generally, and that the lower court should have instructed the jury that the measure of damages should include not only the value of the glass, but the expense of replacing the glass; in other words, that the amount of the recovery would be such an amount as would put the premises in as good condition as they were in before the accident. We think, however, that no element of damages could be awarded to the plaintiff that it did not claim in its complaint,—that the judgment could not be greater than the demand,—but, outside of this, we think the instruction was substantially correct, and was not in conflict with the ruling of this court in *Koch v. Investment Co.*, 9 Wash. 405, 37 Pac. 703. There it was said that such an instruction as was contended for by the appellants, under the circumstances of that case, was a good form of instruction; but it was also asserted that many other forms of charge which might have been given in such a case would have been proper. And with the view that we take of this case, even if the court had not given the proper instruction, it was absolutely immaterial under the evidence, for the jury failed to find any damages at all and must have so failed to find because in their judgment the defendant was not proven guilty of neglect under the instructions of the court, which we think were proper. The two other assignments go to the sufficiency of the testimony to sustain the verdict, or rather that the verdict was contrary to the evidence. We have examined the testimony in this case. It was submitted to the jury under proper instructions, and its verdict will not be disturbed by this court. The judgment is affirmed.

SCOTT, C. J., and ANDERS, GORDON, and REAVIS, JJ., concur.

(16 Wash. 459)

DON YOOK v. WASHINGTON MILL CO.  
(Supreme Court of Washington. Feb. 11, 1897.)

EVIDENCE OF CONSIDERATION — STATUTE OF FRAUDS.

1. A consideration consistent with that recited in a bill of sale, either of a different kind or in addition to that expressed, may be shown by parol.



2. A promise to pay the debt of another as part consideration for property purchased from the debtor is an original promise, based on a valuable consideration, and not within the statute of frauds.

Appeal from superior court, Jefferson county; R. A. Ballinger, Judge.

Action by Don Yook against the Washington Mill Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. N. Livermore and Geo. H. Jones, for appellant. White, Munday & Fulton, for respondent.

GORDON, J. In the month of December, 1893, the logging company of Balentine & Kelly was indebted to the respondent for board and supplies in the sum of \$325. The firm was also owing appellant. At or about that time the firm of Balentine & Kelly sold and delivered to the appellant a certain boom of piles, the nominal consideration expressed in the bill of sale being \$300. Respondent claims that, as a part of the consideration for the logs, the appellant agreed with the firm of Balentine & Kelly to assume and pay the indebtedness of said firm to the respondent. The jury returned a verdict for respondent, and from the judgment entered thereon defendant appealed.

Appellant complains of the ruling of the court which permitted the respondent, over appellant's objection, to show the actual consideration for the logs; contending that, in the absence of any allegation in the complaint of fraud or mistake in the execution of the bill of sale, the consideration expressed therein could not be questioned. The point was decided adversely to appellant's contention in the case of *Van Lehn v. Morse* (Wash.) 47 Pac. 435.

It is next urged that the court erred in denying a motion for nonsuit, because of the alleged insufficiency of plaintiff's evidence. An examination of the evidence satisfies us that the nonsuit was properly denied. We do not think that the case falls within the statute of frauds. The promise of appellant to pay the debt due from Balentine & Kelly to respondent was founded upon a consideration moving from Balentine & Kelly. It was therefore an original promise, and not within the statute.

It is also contended that the verdict was contrary to the evidence. Appellant denies that it promised to pay the respondent's claim. The witness Balentine testified that at the time of the execution of the bill of sale, and as a part of the consideration therefor, Mr. Blake,—appellant's manager, with whom all the dealings were had,—said he would "pay the Chinaman's bill, take their own bill out, and turn the balance over to us." This was corroborated by the witness Howard, and further by the respondent himself, who testified that Mr. Blake promised to pay his bill in Seabeck. "He said he would pay me in ninety days." There were

other circumstances developed upon the trial which we think tend strongly to support the case of the respondent, and the verdict had substantial evidence in its support. The conclusion at which we have arrived makes it unnecessary to consider the action of the court in striking appellant's motion for a new trial from the files. The judgment appealed from will be affirmed.

SCOTT, C. J., and DUNBAR, ANDERS, and REAVIS, JJ., concur.

(16 Wash. 444)

# STATE ex rel. NEWLAND v. SUPERIOR COURT OF LEWIS COUNTY.

(Supreme Court of Washington. Feb. 6, 1897.)  
PROHIBITION—WHEN LIES—REMEDY BY APPEAL.

Where a court directs the sale by a receiver of assets of an insolvent, based in part on an agreement between certain of the parties interested, the remedy of creditors not parties to the agreement is by appeal, under Laws 1893, p. 119, and not prohibition.

Application by the state of Washington, on the relation of John T. Newland, for a writ of prohibition to the superior court of Lewis county. Denied.

Edward F. Hunter and C. H. Forney, for relator. Reynolds & Stewart, for respondent.

SCOTT, C. J. This is an application for a writ of prohibition to restrain the respondent from selling, through a receiver appointed by said court in the matter of the insolvency of the Commercial State Bank of Chehalis, certain assets of the bank, being claims against the "Doernbecher Furniture Manufacturing Company," also in the hands of a receiver. The sale was sought to be made to the "Doernbecher Manufacturing Company," an alleged corporation, which was claimed to be insolvent. The order directing the sale was made upon a showing based in part on an agreement between certain of the parties interested, but to which agreement some of the creditors of the Commercial State Bank aforesaid were not parties, and they resisted the application, and objected to the order. The relator is one of said creditors.

Upon the facts shown, no ground exists for the issuance of the writ. It appears that the respondent had jurisdiction of the proceedings in the matter of the insolvency of the bank aforesaid, and of the property in question, and consequently had authority to direct its disposition; and, if the creditors objecting to such sale were aggrieved, they have an adequate remedy by appeal. Laws 1893, p. 119. The order directing the sale should be regarded as a final one in that particular proceeding, for the purposes of an appeal. *Tompson v. Lumber Co.*, 5 Wash. 527, 32 Pac. 536. The writ denied.

ANDERS, DUNBAR, and REAVIS, JJ., concur.

(16 Wash. 430)

STATE ex rel. TAYLOR v. MAPLE,  
Treasurer.

(Supreme Court of Washington. Feb. 6, 1897.)

## TAX SALES—FORFEITURE—REDEMPTION.

Laws 1893, p. 370, §§ 105-134, provide for sales for delinquent taxes; that every tract offered, and not sold for want of bidders, "shall be forfeited to the county"; that land sold may be redeemed in two years from date of sale; and that one desiring to purchase any tract forfeited to the county shall apply to the treasurer, who shall receive the taxes, etc., due, and give such person a certificate of purchase. Section 135 requires the treasurer to enter, each year, against each tract sold and unredeemed, and each tract forfeited to the county, the year for which it was sold or unpaid, and to advertise and sell said property on which taxes become delinquent "in the manner hereinbefore required," as if it had never been sold or forfeited to the county, and provides that the county may, by its agent, attend such sale, and buy said lands, and acquire the same rights that individuals have, in case of sale for taxes. *Held*, that the forfeiture to the county is not a sale, and where the county sells land so forfeited, and issues a certificate of purchase, the time for redemption runs from the date of such certificate, and not the date of forfeiture. *Doudna v. Harlan* (Kan. Sup.) 25 Pac. 883, distinguished.

Appeal from superior court, King county; R. Osborn, Judge.

Application by the state of Washington, on the relation of H. C. Taylor, for a writ of mandamus to compel J. W. Maple, treasurer of King county, to issue a tax deed. From a judgment denying the writ and dismissing the action, relator appeals. Affirmed.

Brinker, Jones & Richards, for appellant. A. W. Hastie and W. W. Wilshire, for respondent.

REAVIS, J. Application was made by the relator for a writ of mandamus to compel the respondent, as treasurer of King county, to issue a tax deed to the relator for real estate in the city of Seattle. In 1891 a tax was duly assessed and levied upon the property, and was not paid, and became delinquent. Thereafter, on the 9th day of June, 1894, the property was sold for the payment of the delinquent taxes, under judgment of the superior court, and, there being no bidder at the tax sale, the property was duly forfeited to King county. On the 2d day of March, 1895, the relator applied to the county treasurer to purchase the rights of the county in the property forfeited, and paid to the treasurer the amount due for taxes, together with penalty, interest, and costs, and all taxes theretofore forfeited, and which were a lien upon the property, and the treasurer issued to the relator his certificate of purchase of the real estate. This certificate contained the provision that the holder thereof should be entitled to a deed of the land at any time after two years from the date of the tax sale. The property has not been redeemed. After giving due notice to the owners of the property and the persons in possession that the time of redemption would

expire on the 9th day of June, 1895, and that he would thereafter apply for a deed to the property, and there being no redemption, the relator filed the proof of the notice with the treasurer; and afterwards, on the 17th of June, 1896, the relator duly demanded of the respondent, as treasurer, that the deed to the real estate issue to him. The respondent refused to comply with the demand on the ground that the time of redemption had not expired. An alternative writ of mandate was issued to the respondent, who appeared and demurred to the petition, setting up the facts as above related, on the ground that "it did not state facts sufficient to entitle said relator to relief by a writ of mandamus, or to any equitable relief whatsoever, and that said petition did not state facts sufficient to constitute a cause for said proceeding, or for any action or proceeding against the above-named respondent." On the trial the superior court sustained the demurrer and dismissed the action.

The single vital question presented for our consideration is whether the time of redemption commenced to run at the date of the tax sale, which took place on June 9, 1894, or from the date of the certificate of purchase issued by the county treasurer to the relator, on the 2d day of March, 1895. In arriving at a correct construction of the revenue laws of 1893, under which this controversy arises, we have but little aid from the cases cited in the briefs, as they all arose upon statutes unlike ours. As maintained by counsel for the relator, the statute of Kansas seems to be more nearly similar to ours than any other we have examined. That statute provides, in two sections, as follows:

"Sec. 6327. If any parcel of land cannot be sold for the amount of taxes and charges thereon, it shall be bid off by the county treasurer in the name of the county for such amount."

"Sec. 6330. When any land or town lots shall, at any tax sale, be bid off by the county treasurer for the county, it shall be the duty of the county treasurer to enter the same on the book of tax sales in the same manner as though such land or town lots were sold to other purchasers and he shall number each tract or town lots, as though they were sold to other purchasers, and he shall number such tract of land or town lots consecutively, in like manner as though a certificate of sale had been made; but no certificate of sale shall be made except as follows: Whenever any person shall pay into the county treasury a sum of money equal to cost of redemption at that time, of any such tract of land or town lot, the county treasurer shall give such person a certificate, dated the day when it is issued, describing the land or town lots bid off for the county, the amount for which it was so bid off, the amount paid into the county treasury by such person for such tract of land or town lot, the time when the owner

of such certificate will be entitled to a deed, and shall number such certificate to correspond with the number of the tract of land or town lot, as numbered in the book of tax sales, which certificate, before it shall be of any validity, shall be assigned to such person by the county clerk, who shall make an assignment on his duplicate book of tax sales; and such certificate, so assigned by the county clerk, shall vest all the interest of the county in or to such land or town lot, in such person, and such certificate shall be assignable to the same extent and in like manner as certificates given to purchasers at tax sale." Comp. Laws Kan. 1885.

Construing this statute, the supreme court of Kansas says, in *Doudna v. Harlan*, 25 Pac. 883: "The plaintiff next complains that 'the court erred in finding that the bidding off of the lots in controversy by Labette county was a sale.' The contention of the plaintiff is that, when the county bids off property at a tax sale, it does not become a purchaser, but simply bids off the property, and holds it until some one pays the taxes and penalties thereon, and takes an assignment of the bid from the county, and that in such case there is no sale of the property until it is assigned by the county to the party paying the county the taxes, penalties, and costs thereon. We do not think this position is tenable. There is but one sale mentioned in the statute, and that very clearly refers to the bidding off of the property at the time it is advertised to be sold for the taxes. Nor do we think it any less a sale, because it is bid off by the treasurer for the county, than when bid off by some person for himself or some other individual. The 'bidding off' of the property by the treasurer in the name of the county, and for the county, has been constantly treated as a sale by the bench and bar of the state. If the county is not a purchaser when property is so bid off, who is the owner in the meantime? The former owner has lost his title, except so far as he has the right of redemption. No third party has obtained any interest therein as yet, and there must be some person, natural or artificial, in whom ownership of the property rests. Besides, if the county has obtained no interest in the property bid in, how can it transfer by assignment any interest therein? We think the county becomes a purchaser at the tax sale, when, in the absence of other bids equal in amount to the taxes, penalties, and costs against the property, the treasurer bids the property off in the name of the county, and that the redemption period commences to run from the date thereof."

Section 105, Laws 1893, p. 370, provides for the entry of judgment by the superior court for delinquent taxes, and an order of sale thereunder. In the following sections, due notice and other requirements for the sale are provided for: Section 109 provides that all sales shall be publicly conducted. Sec-

tions 110-112 provide for the certificate of the county treasurer to the county clerk, and an entry of all tracts or lots forfeited to the county and sold in the tax-judgment sale, redemption, and forfeiture record required to be kept in the office of the county clerk. Section 113 provides that the county treasurer shall attend at the place of sale and make the sales; that he shall offer for sale separately, and in consecutive order, each tract of land, etc., upon which the taxes have not been paid. Section 114 is as follows: "The person at such sale offering to pay the amount due on each tract or lot for the least quantity thereof, shall be the purchaser of such quantity, which shall be taken from the east side of such tract or lot. In determining such piece or parcel of such tract or lot, a line is to be drawn due north and south, far enough west of eastern point of tract, to make the requisite quantity." Section 115 is as follows: "Every tract or lot so offered at public sale, and not sold for want of bidders, shall be forfeited to the county in which such property is situated, and in which such sale is made: provided, however, that whenever the superior court and county treasurer shall certify that the taxes, penalties, interest and costs on forfeited lands equals or exceeds the actual value of such lands, the officer directed by law to expose for sale lands for delinquent taxes shall, upon receipt of such certificate, offer for sale to the highest bidder the tract or lands in such certificate described, after first giving ten days' notice by advertising, in some paper of general circulation in his county, the time and place of sale, together with the description of the tracts or lands so to be offered. \* \* \*" Section 121 provides: "Real property sold under the provisions of this act may be redeemed at any time before the expiration of two years from the date of sale by payment, in legal money of the United States, to the county treasurer of the proper county the amount for which the same was sold, together with 20 per cent. interest thereon from the date of sale until payment. The person redeeming such property shall also pay the amount of all taxes, assessments, penalties, interest and costs accruing after such sale, with 20 per cent. interest thereon from the day the same were due until paid, unless such subsequent taxes or assessments, penalties, interest or costs has been paid by or on behalf of the person for whose benefit the redemption is made, and not being purchaser at the tax sale, or his assignee. \* \* \*" Section 122 is as follows: "If any purchaser of real estate sold for taxes or assessments shall suffer the same to be forfeited to the county or sold again for taxes before the expiration of the last day of the second annual sale thereafter, such purchaser shall not be entitled to a deed for such real property until the expiration of a like term from the date of the second sale

or forfeiture, during which time the land shall be subject to redemption upon the terms and conditions prescribed in this act; but the person redeeming shall only be required to pay, for the use of such first purchaser, the amount paid by him. The second purchaser, if any, shall be entitled to the redemption money as provided for in the preceding section. \* \* \* Section 134 is as follows: "If any person shall desire to redeem, or purchase, any tract of land or lot forfeited to the county, he shall apply to the county treasurer who shall receive from such person the amount due on said tract or lot, together with the penalty, interest and costs on all taxes heretofore forfeited, and shall give such person a duplicate receipt therefor, setting forth a description of the property and the amount received, which receipt shall be evidence of the redemption or sale of the property therein described, as the case may be. In case of sales the county treasurer shall make the receipt in the form of a certificate of purchase, in the same manner as though said property had been bid off at the regular sale for delinquent taxes. Property purchased under this section shall be subject to redemption notice, etc., as if sold at regular public tax sale." Section 135 provides, in substance, that the treasurer shall each year enter against each tract of land sold for taxes and remaining unredeemed, and on each tract of land or lot theretofore forfeited to the county for unpaid taxes, in columns for that purpose, the year for which said lots or tracts were sold or unpaid, and he is authorized to advertise and sell said property on which said taxes become delinquent in the manner hereinbefore required, as if said property had never been sold or forfeited to the county; "and the county may by its agent attend such sale for taxes and buy said lands and acquire the same rights that individuals now have under the law, and acquire, hold, sell and dispose of said title thereto the same as and in the same manner as individuals may do under the laws of this state in case of sale for taxes." Construing these sections together, so as to give proper effect to each of them and to the intention of the legislature, it is apparent that the first sale under the judgment of the superior court is a public sale, and that the first offer at such sale, by the treasurer, of a tract of land, is to the bidder who will take the least quantity and pay the taxes, interest, costs, and penalty. If there is no such bidder, the land is declared to be forfeited to the county under section 115. The proviso in this section, however, seems to indicate that if the superior court and county treasurer shall conclude that the land forfeited to the county is not worth more than the taxes, with the accruing penalties, etc., it shall be sold for delinquent taxes to the highest bidder for the whole tract, in a different manner from the first sale, where they were first offered.

Section 135 directs a sale, in years following the first sale made under the judgment of the court, of the lands which were first sold, and upon which the taxes have been subsequently unpaid by the purchaser, or the lands forfeited to the county, and at such sale the county may, by its agent, purchase as an individual, with all the rights to the land which may be acquired by an individual. Evidently the forfeiture to the county cannot be a sale, in the sense in which that term is used in the first public sale of real estate for delinquent taxes. It is also further provided in the act under consideration that if a purchaser at the public sale shall permit the subsequent taxes which accrue for two years to remain unpaid, and a second sale is made, the first purchaser shall not receive a deed for two years thereafter, or four years from his first purchase, and that during this whole period the owner of the land may redeem. The right of redemption given by this statute is two years from the date of sale. In the case under consideration the date of sale is the day on which the certificate of the county treasurer shall issue to the relator. By the Kansas statute above cited, the county treasurer is expressly made the agent of the county, and is authorized and directed expressly to bid in the land for and on behalf of the county. By our statute, provision is made for the land being bid in for and on behalf of the county by its agent, whereby the county shall become the purchaser. This is the only method provided for purchase by the county, and its application is restricted to cases of sales of lands theretofore forfeited to the county, and to sales taking place subsequently to a previous forfeiture or public sale; and in such case the treasurer is not expressly or by implication constituted such agent, or authorized to make such bid for and on behalf of the county, but another agent is designated. The form of the certificate to the purchaser of the forfeited land is provided in section 134. It does not make such sale take effect by relation to the time of forfeiture. The right of the owner to redemption is from the date of sale, and not from the forfeiture. The time to redeem from the forfeiture is indefinite, and runs until the county has made a sale. The judgment is affirmed.

SCOTT, C. J., and ANDERS, DUNBAR,  
and GORDON, JJ., concur.

(16 Wash. 439)

SCOTT v. HALLOCK et al.

(Supreme Court of Washington. Feb. 6, 1897.)

ACTION AGAINST PARTNER—ANSWER—PLEADING  
NOVATION—DEMURRER—WAIVER OF ERROR  
—RIGHT TO APPEAL.

1. An answer, by a partner, to a complaint on contract, which alleges that he had sold all his interest in the firm to the other partners: that they had agreed to carry out the contract.

and released him from liability thereunder; that plaintiff had accepted the new firm as parties to the contract, and had received from them partial payments thereon,—shows a complete novation.

2. Under Laws 1893, c. 61, § 1, providing that an appeal from a final judgment brings up any order made in the same proceeding, a defendant does not waive error in sustaining a demurrer to a portion of his answer setting up affirmative matter by going to trial on the issues formed by the denials in his answer, if he appeals from the final judgment against him.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Ira A. Scott, as receiver, against G. E. Hallock and others. From a judgment against defendant G. E. Hallock, he appeals. Reversed.

Richard Saxe Jones and Brinker, Jones & Richards, for appellant. J. R. & R. M. Kinneer, for respondent.

GORDON, J. Respondent, as receiver of the firm of Lynch & Jose, instituted this action against G. E. Hallock, Fred Atkinson, and W. L. Atkinson, as partners doing business under the name of the Twin Mountain Shingle Company, to recover a balance alleged to be due upon a certain written contract for the purchase and sale of shingle bolts. The complaint in the action shows that respondent was appointed receiver on the 19th day of December, 1894; that the contract upon which the action was founded was entered into on the 20th day of October, 1894, and was executed in the name of the firm by G. E. Hallock. The amended answer of the appellant, G. E. Hallock, in addition to containing denials of essential allegations in the complaint, as an affirmative defense set out that on the 6th day of April, 1895, the appellant, G. E. Hallock (theretofore a member of the firm), sold all of his right and interest in and to the firm business, and everything pertaining thereto, to the other partners, Fred Atkinson and Will Atkinson, who, as a part of the consideration for the sale, assumed and agreed to carry out all the terms and conditions of said written contract, and to hold the appellant free and clear from any claim arising thereunder; that the respondent, as receiver, acting with the consent and under the direction of the court, agreed to accept a new co-partnership, composed of Fred Atkinson and Will Atkinson, as parties to said contract, and agreed to and did release the appellant from all obligation arising thereunder; that the new co-partnership thereafter, in accordance with said agreement, made partial payments under said contract as modified by the parties, and the respondent accepted said payments of said new co-partnership with the understanding and agreement that the appellant was forever relieved from the obligations thereof. The court sustained a demurrer to this affirmative answer, and the appellant duly excepted. Thereafter the cause came on for trial before the court without a jury. The appellant asked leave to amend

his answer, which was denied by the court. On the trial the appellant offered to prove the various matters set up in the affirmative defense, which we have referred to, which offers were refused by the court upon objection of the respondent's counsel. The trial terminated in a judgment for the respondent, from which this appeal is taken.

The appellant assigns as error the order of the court sustaining respondent's demurrer to the affirmative answer. He urges that the pleading was sufficient to show that there was a novation, and we think his contention must be upheld. The rule is thus stated in 16 Am. & Eng. Enc. Law, p. 900: "In the case of a retiring partner it is well settled that he is not discharged from liability for the debts of the old firm even though the continuing partner, or the new firm, agrees with him to pay them, and, in general, the creditor is not to be affected or given any new rights by an arrangement by or between his debtors to which he is not a party. But if the creditor assents to such an arrangement, or agrees to accept the continuing partner or new firm as his debtor, and releases the retiring partner or the old firm, then a novation of the debt is effected." See, also, the authorities cited there in support of the proposition, many of which we have examined, and find to fully support the doctrine of the text. See, also, 3 Add. Cont. (Am. Notes by Abbott & Wood) foot page 843. In 1 Bates, Partn. § 505, the learned author says: "The creditor's promise to one partner to release him, although made after dissolution upon the retirement of such partner, when not accompanied by a promise of the other partner to the creditor to assume the entire debt, or by a change of security, is a nudum pactum, because founded on no consideration whatever. \* \* \*. But if the other partner promise the creditor to assume and pay the entire debt, and the creditor promises to look to him alone, a substitution of debtors is effected, and the other partner is released."

Respondent urges that appellant is not entitled to have this court review the order of the superior court which sustained the demurrer. His contention is that "the appellant should have stood by the order of the court sustaining the demurrer, permitted judgment to go against him without further contest, and then have appealed from that judgment." His theory is that appellant, by proceeding to trial upon the issues raised by the denials contained in his answer, and by asking leave to further amend (which was denied), thereby waived his right to urge as error the order of the court sustaining the demurrer. He also urges that an order sustaining a demurrer is not an appealable order, and cites, in support of the latter proposition, *Mason Co. v. Dunbar*, 10 Wash. 163, 38 Pac. 1003. But the appeal in that case was attempted prior to the entry of a judgment in the action, and hence was premature. Section 1, c. 61, p. 119, Laws 1893, upon the sub-

ject of "Appeals," provides that any party aggrieved may appeal "from the final judgment entered in any action or proceeding, and an appeal from any such final judgment shall also bring up for review any order made in the same action or proceeding, either before or after the judgment." The demurrer in the present case did not go to the whole answer, but only to the affirmative defense attempted to be set up. It still left an issue of fact to be disposed of, and appellant was not obliged to abandon that part of his defense, but can avail himself of the right to review the order of the court which sustained a demurrer to his affirmative answer, since judgment has gone against him upon the general issue. The logic of respondent's position is that a defendant who pleads one or more defenses, as to one of which a demurrer is sustained, must elect either to stand by that defense alone, and abandon the remaining ones, or waive his right to review the ruling of the court upon that defense, and plant himself solely upon those which have not been demurred to. In this position, we think, the law does not sustain him. The statute has designated a simple method by which an aggrieved party may have the adverse rulings of the court made in the course of litigation reviewed,—by appealing from the final judgment, and bringing to the supreme court so much of the record as will show the rulings complained of.

The further contention of appellant, that it sufficiently appeared from the affirmative answer that plaintiff had neglected to bring in a necessary party, cannot be sustained. As an independent defense, the answer was insufficient to show that one who was a partner at the date of the contract was not joined as a defendant in the action. But for the error in sustaining the demurrer the judgment will be reversed and the cause remanded, and the court below is directed to overrule the demurrer and proceed to a new trial of the action.

ANDERS, DUNBAR, and REAVIS, JJ.,  
concur.

(16 Wash. 418)

STATE ex rel. HEMEN v. CITY OF  
BALLARD et al.

(Supreme Court of Washington. Feb. 5, 1897.)

MUNICIPAL CORPORATIONS—MANDAMUS—SPECIAL  
ASSESSMENTS—ILLEGAL INCORPORATION—  
CURATIVE ACT—LIMITATION.

1. Under Laws 1893, p. 183, legalizing the incorporation of cities and towns attempted to be incorporated under the act of March 27, 1890, which had been declared void, and requiring the councils of such cities or towns to levy new assessments for local improvements where former assessments had been, or should thereafter be, declared void by the courts, "either directly or by virtue of any decision of such court," mandamus will lie to compel a reassessment where the former assessment was made under such act of March 27, 1890, though the validity of the particular assessment in question has not been directly adjudicated.

2. The act of March 9, 1893 (Laws 1893, p. 183), which by its terms legalized the incorporation of towns and cities attempting to incorporate under prior void statutes, making them valid corporations, and declaring that all contracts and obligations made and incurred while acting as such de facto corporations should be legal, is valid.

3. No right of action existed in a city or town to enforce local assessments levied under the invalid act of March 27, 1890, until the taking effect, on June 7, 1893, of the legalizing act of March 9, 1893; hence the statutory period of limitation of two years had not expired at the time of the taking effect of the act of March 20, 1895, extending such period to 10 years, which was passed with an emergency clause, and the extension applied to all such actions.

Appeal from superior court, King county;  
J. W. Langley, Judge.

Mandamus, on relation of F. P. Hemen, against the city of Ballard and others, to compel the levy of assessments for street improvements. Judgment for the relator, and defendant city appeals. Affirmed.

P. V. Davis, for appellant. Battle & Shipley, for respondent

GORDON, J. The town of Ballard was originally incorporated under the provisions of the act of February 2, 1888, providing for the incorporation of towns, which act was held unconstitutional in *Territory v. Stewart*, 1 Wash. St. 98, 23 Pac. 405. Thereafter the town of Ballard attempted to reincorporate under the provisions of the act of March 27, 1890 (sections 496-500, inclusive, 1 Hill's Code), which latter act, in *Town of Denver v. City of Spokane Falls*, 7 Wash. 226, 34 Pac. 926, was also held invalid. After such attempted reincorporation, proceedings were taken for the improvement of a large number of streets in the said city, and assessments were levied upon property fronting on said streets, to defray the expenses of such improvement. Said assessments so attempted to be levied were not paid by the property owners, and thereafter became delinquent. From time to time during the progress of the work, street-grade warrants were issued by the city to the contractors, in payment of labor and materials used in such improvement. These warrants were made payable out of special street improvement funds. Thereafter they were presented to the municipal authorities for payment, and payment refused, on account of the lack of funds. On March 9, 1893, an act was passed legalizing and validating the incorporation or reincorporation of towns and cities attempted under the provisions of the act of March 27, 1890 (Sess. Laws 1893, p. 183).

The respondent herein, who is the owner of a large number of the warrants heretofore referred to, commenced this suit for the purpose of compelling the authorities of Ballard to levy reassessments under the provisions of the act of March 9, 1893 (Sess. Laws, p. 226), to enforce the payment of the cost of improving said streets. The affidavit of re-

spondent in support of his motion for the writ, in addition to stating the facts already recited, sets out the various ordinances and proceedings under which the improvements were made, and the attempted assessments laid; also, that demand had been made by the holders of the warrants upon the authorities of Ballard to take proceedings to raise funds for their payment. To the alternative writ which was issued, and the affidavit upon which it was based, the city entered a general demurrer, which was overruled; and, appellant having elected to stand by its demurrer, the court proceeded to hear the cause, made its findings of fact and conclusions, and entered a decree, in which it was determined that the original proceedings for the levying of the assessment were invalid and void, and directed the issuance of a peremptory writ requiring the authorities of Ballard to proceed in the manner provided by law for the making of reassessments. From the order overruling this demurrer, and the decree as entered, the city has appealed.

It is urged by the appellant that the demurrer should have been sustained, for three reasons:

1. Because there had been no prior judicial determination of the invalidity of the original assessments as to any of the streets which had been improved. This contention is founded upon a provision contained in section 1 of the act of 1893, which in substance is as follows: That whenever an assessment for laying out, establishing, or grading any street, avenue, or alley, or for any local improvement which has heretofore been made, or which may hereafter be made, by any city or town, has been or may be hereafter declared void, and its enforcement under the charter or laws governing such city or town refused by the courts of this state, or for any cause has been heretofore, or may be hereafter, set aside, annulled, or declared void by any court, either directly or by virtue of any decision of such court, the council of such city or town shall, by ordinance, order and make a new assessment or reassessment upon the lots, etc. It is not pretended that any authority existed in the town of Ballard, as incorporated under the acts of 1888 or 1890, *supra*, to levy assessments for street improvements or otherwise, inasmuch as both of those acts were unconstitutional. *Territory v. Stewart*, *supra*; *Town of Denver v. City of Spokane Falls*, *supra*. The effect of these decisions was to render all proceedings attempted by virtue of those acts ineffectual for any purpose, as much so as if they had been so declared by a decree in a direct proceeding; and the language of section 1, *supra*, clearly includes such a case. That language is "or declared void by any court, either directly or by virtue of any decision of such court." Hence we think that no prior adjudication of the invalidity of these various assessments in a direct pro-

ceeding was necessary before the city could proceed to reassess under the provisions of the act of 1893.

2. It is next contended that, because the city was without power to authorize the improvement of streets pursuant to the acts of 1888 or 1890, everything done or attempted by it during the period of its existence under said acts was absolutely void, and, being so, it is without power or authority to reassess under the act of 1893. This objection is fully met and answered by the decision of this court in *Pullman v. Hungate*, 8 Wash. 519, 36 Pac. 483, where it was held that the act of March 9, 1893 (*Sess. Laws*, p. 183), providing for the legalization of cities and towns which had attempted to incorporate or reincorporate under the act of March 27, 1890, was constitutional and sufficient to validate the *de facto* town which had attempted to incorporate under the void act of March 27, 1890. The act in question, by its terms, made them valid incorporations, with the powers and duties under which they were assuming to act at the date of its passage. The act itself expressly provides that "all contracts and obligations heretofore made, entered into or incurred by any such city or town so incorporated or re-incorporated, are hereby declared legal and valid and of full force and effect" (*Laws* 1893, p. 184); and we think that the contracts for grading and improving the various streets were among the "contracts \* \* \* declared legal and valid" by that act. See, also, *State v. Winter* (Wash.) 46 Pac. 644; *Cooley, Tax'n*, p. 312; 1 *Dill. Mun. Corp.* § 79; *Boardman v. Beckwith*, 18 Iowa, 292; *City of Clinton v. Walliker* (Iowa) 68 N. W. 431.

3. The remaining ground upon which the demurrer was urged is that the assessments levied became delinquent more than two years prior to the commencement of this action, and all proceedings looking towards their enforcement were barred by the statute of limitations. The argument is that the collection of these assessments cannot be enforced by the city in a direct suit against the abutting property, because the bar of the statute is complete. We are of the opinion that the statute of limitations does not begin to run until a right of action exists, and it follows from what has been already said that no right of action existed in the town of Ballard to enforce these assessments prior to the going into effect of the act of March 9, 1893, legalizing and validating the incorporation or reincorporation of cities and towns. That act had no emergency clause, and hence, under the constitution, did not go into effect until June 7, 1893. So that, clearly, the statute of limitations could not, and did not, begin to run until said last-mentioned date, viz. June 7, 1893. It may be conceded that the statute of limitations then in force, as applied to actions to enforce assessments, required the action to be brought within two years. *City of Spokane v. Ste-*

vens, 12 Wash. 667, 42 Pac. 123. But by the passage of the act approved March 20, 1895, which, by reason of its emergency clause, went into effect on that day, it was provided that all actions to collect special assessments for local improvements of any kind, or to enforce any lien for special assessments, might be commenced "within ten years after said assessment shall have become delinquent or due." Sess. Laws 1895, p. 270.

It is not contended that the legislature had not power to extend the period of limitation at any time prior to the expiration of the period prescribed by the statute in force at the time of the passage of the new law; and inasmuch as the bar of the statute was not complete at the date of the going into effect of the act of March 20, 1895, it follows that, under the provisions of said last-mentioned act, any action to enforce these assessments may be instituted within 10 years after the right of action actually accrued, which, as above noticed, was on March 9, 1893. The decision in the case of *City of Ballard v. West Coast Imp. Co.* (Wash.) 46 Pac. 1055, wherein this court affirmed a judgment of the superior court which dismissed the action "without prejudice to whatever rights the plaintiff may have to make a reassessment, and to the laws relating to reassessments," was based upon admissions of the parties at the trial which were considered of controlling consideration. The opinion in that case distinctly sets forth what those admissions were, and shows that the question was "determined upon the record which the parties have made." Nothing which was therein decided conflicts with the conclusions which we have reached in the present case. It follows that the demurrer was properly overruled, and the decree appealed from will be affirmed.

SCOTT, C. J., and DUNBAR, ANDERS, and REAVIS, JJ., concur.

(9 Colo. App. 153)

#### RANKIN v. UNDERWOOD et al.

(Court of Appeals of Colorado. Feb. 8, 1897.)

#### APPEAL—CONFLICTING EVIDENCE—MEMORANDUM—ADMISSIBILITY.

1. A verdict on conflicting testimony will not be disturbed.

2. A memorandum of what plaintiff claimed in the course of a conversation in which the parties had attempted to settle the claim in controversy, made by defendant at the time, cannot be used against plaintiff as an admission.

Appeal from district court, Weld county.

Action by N. L. Underwood and another against John A. Rankin. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

James W. McCreery and Charles D. Todd, for appellant. H. E. Churchill, for appellees.

BISSELL, J. This suit was begun in April, 1895, by Underwood and his wife against Rankin, the appellant, under an agreement, as they alleged it, whereby the plaintiffs entered Rankin's employ, and took charge of his farms and ranches in Weld county, at a specified wage. The agreement of employment also included, according to the cause of action as stated, an agreement by Underwood and his wife to board the farm hands employed on the ranches at a fixed price per week. They alleged the commencement of the employment according to the agreement, and its continuance for a fixed period, and the obligation of the defendant to pay the plaintiffs a certain sum for the wages of the husband, and a certain sum for the board of the ranch hands. This included the material furnished, and the labor of the wife in caring for the household matters and in cooking for the help. The defendant denied the agreement as stated, although he admitted the employment of Underwood, but disputed the compensation. It is wholly unnecessary to state the terms of the engagement or the differences between the parties. The issue was sharply defined, and was submitted to the jury, under instructions which are uncomplained of, and they rendered a verdict against the defendant for \$242.34.

The case calls for no extended discussion of any particular proposition of law, because no question was made respecting the joinder of parties or the right of recovery except as to the services claimed. On these matters evidence was introduced on behalf of both parties, and the jury found on all matters with the plaintiffs. This verdict settles the question of fact, and, although the appellant insists that the verdict was not sustained by the testimony, we find enough in the record on which the jury might conclude the proof was for the plaintiffs if they accepted their theory of the engagement and their evidence respecting it. Since the verdict was rendered on conflicting testimony, we are not at liberty to disturb it, so long as we are able to find anything in the record on which it can be rested.

The principal argument of counsel is based on the rulings of the court with reference to the admission of testimony. We are unable to say that the court committed error in its rulings, or that the questions which were objected to and excluded were proper in form. If they had been, and the questions ruled out as they were, it cannot be seen that they operated to the prejudice of the defendant, or would have produced a different result, nor that the substantial rights of the parties have not been settled on the trial. The only inquiry which was objected to and which furnishes any basis for discussion is one put to the defendant, which sought to elicit the substance of a memorandum and its rejection as evidence. We are unable to conclude it was an admissible piece of testi-



mony. After the engagement was terminated, Underwood and Rankin came together for the purpose of trying to effect a settlement; and, in the course of the conversation, Underwood stated the details of what he claimed, which Rankin states he made a memorandum of. He gave his version of what occurred, and his statements were before the jury for their consideration. The memorandum was made by the defendant, and not by the plaintiffs, and therefore could not be taken as an admission, and therefore usable as against them; and while it might have been referred to, and probably was, for the purpose of refreshing the recollection of the witness, it did not become a competent piece of testimony, and its exclusion did not constitute error.

The defendant set up the failure of the plaintiffs to perform their engagement, and attempted to show, by way of mitigation of recovery, that the services were not worth the sum claimed. While it is somewhat doubtful whether that line of examination was permissible under the issues, and whether the real issue had not been narrowed down to one of contract, which would exclude this class of testimony, the question which was propounded and ruled out was clearly inadmissible in the form in which it was put, and error cannot be successfully assigned on the ruling. Aside from this consideration, however, the defendant did give testimony as to the value of Underwood's labor, and the actual fact was therefore before the jury.

We are unable to find any errors of law inhering in the record, and since, so far as we are able to discover from a perusal of the testimony, substantial justice was done between the parties, and we are bound by the verdict, the statute does not permit us to overturn the judgment, even though we might differ with the jury in respect to the weight and preponderance of the testimony. The judgment must therefore, under these very well settled rules, be affirmed. Affirmed.

(9 Colo. App. 189)

**HOEFFER v. AGEE et al.**

(Court of Appeals of Colorado. Feb. 8, 1897.)

**REPLEVIN — UNDIVIDED INTEREST IN PROPERTY.**

Replevin will not lie for an undivided interest in property.

Appeal from Weld county court.

Replevin by Horace A. Agee and John M. Hamm against Charles Hoeffer. Judgment for plaintiffs, and defendant appeals. Reversed.

Sullivan & May, for appellant.

**THOMSON, J.** Replevin for an undivided interest in certain personal property. The affidavit described the property as follows: "The undivided one-half of all the

alfalfa hay now in stack on the south one-half (S.  $\frac{1}{2}$ ) of the southwest one-fourth (S. W.  $\frac{1}{4}$ ) of sec. 8, township 2 N., range 66 west of the sixth P. M. The undivided one-half of all the oats now in granary on the above-described ranch."

Replevin is an action provided for the recovery of specific articles of personal property. The plaintiff must be entitled to the possession of the property in its entirety. The action cannot be maintained for an undivided interest. The title of the owner of an undivided interest, as also the title of his co-owner, embraces every part of the property, and he cannot take any portion of it without taking something which belongs to another. The right of possession is also equally in each, and neither can be summarily deprived of it by the other. To enable the plaintiff to maintain replevin, his right to the possession must be exclusive. There are methods by which the owner of an undivided interest may assert his rights, but the remedy is not replevin. This action, being replevin for an undivided interest, must fail. Wells, Repl. § 154; Jackson v. Stockard, 9 Baxt. 260; Kimball v. Thompson, 4 Cush. 441; Kindy v. Green, 32 Mich. 310; Hart v. Fitzgerald, 2 Mass. 509; Spooner v. Ross, 24 Mo. App. 599. Let the judgment be reversed. Reversed.

(9 Colo. App. 154)

**SHERMAN et al. v. BOARD OF COUNTY COM'RS et al.**

(Court of Appeals of Colorado. Feb. 8, 1897.)

**APPEAL—RECORD—INJUNCTION—BOND.**

1. When the bill of exceptions makes no reference to the folio numbers on the margin of the abstract, as required by court of appeals rule No. 16 (33 Pac. vi.), assignments of error based thereon will not be considered.

2. Where an injunction bond was conditioned to pay "defendant," etc., defendant could not sue thereon to the use of a third person, who was the only person having a real interest in the suit, and the only one who was injured by the injunction, and at whose instance the injunction was dissolved, in the absence of allegations so connecting such person with the suit as to authorize a recovery for his benefit.

Appeal from district court, Logan county.

Action by the board of county commissioners and M. Thimgan, county treasurer, to the use of John W. Wilson, against H. C. Sherman and others. From a judgment for plaintiffs, defendants appeal. Reversed.

W. L. Hays, for appellants. W. E. Crissman, for appellees.

**THOMSON, J.** Action by the board of commissioners of Logan county and M. Thimgan, treasurer of that county, to the use of John W. Wilson, upon an injunction bond given in a suit against the board of commissioners and the treasurer. The bond is as follows: "State of Colorado, Logan county—ss.: In the District Court of the 13th

Judicial District of the State of Colorado, in and for the County of Logan. A. F. Browns and E. F. Phillips, Plaintiffs, vs. The Board of County Commissioners of Logan County, and M. Thimgan, County Treasurer of Logan County, Defendants. Undertaking on Injunction. Whereas, the above-named plaintiffs have commenced an action in the district court of the 13th judicial district of the state of Colorado, in and for the said county of Logan, against the above-named defendants, and is about to apply for an injunction in said action against said defendants, enjoining and restraining them from the commission of certain acts, as in the complaint filed in the said action is more particularly set forth and described: Now, therefore, we, the undersigned, residents of the county of Logan, state of Colorado, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake, in the sum of two hundred dollars, and promise, to the effect that, in case said injunction shall issue, the said plaintiff will pay to the defendant all costs and damages as shall be awarded against the complainant in case the said injunction shall be modified or dissolved in whole or in part. Dated this 27th day of September, A. D. 1894. H. C. Sherman. E. F. Phillips. John W. Van Deventer." The complaint alleges that the injunction on account of which the bond was given was dissolved at the instance of Wilson; that he was the real party in interest, and the only party damaged by the injunction; and that his damages consisted in expenses incurred by him in procuring the dissolution, and in moneys expended and loss sustained in consequence of the injunction. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, the defendants answered, and, upon a trial, judgment went for the plaintiffs.

The printed abstract of the record, in so far as the bill of exceptions is concerned, utterly fails of compliance with rule 16 of this court (33 Pac. vi.), which requires appellants and plaintiffs in error to refer to the folio numbers in the transcript and bill of exceptions, on the margin of the abstract, in such manner that orders, pleadings, and evidence referred to in the abstract may be easily found in the record. The purpose of this rule is obvious, and counsel are not at liberty to disregard it at pleasure. The bill of exceptions, as the abstract contains it, is quite voluminous; the print is so small that reading it is difficult; and neither in the margin nor elsewhere does it refer to a single folio number. It is therefore practically useless. Fourteen alleged errors are embraced in the assignment. The most of them question the rulings of the court in the admission and rejection of evidence at the trial. On account of counsel's disregard of the rule prescribing the manner in which the

proceedings at the trial shall be laid before us, the objections to these rulings will not be considered; and, if the record were otherwise free from error, we should assume the correctness of the rulings, and the sufficiency of the evidence to support the verdict, and affirm the judgment. But the complaint is bad. The promise in the bond or undertaking was that the plaintiffs in the injunction suit would pay to the defendants the costs and damages which might be awarded against the plaintiffs in case the injunction should be dissolved. No damages to those defendants are alleged. The only damages occasioned by the injunction were, as appears from the complaint, sustained by Wilson. But he was not a defendant, and there are no allegations so connecting him with the injunction proceeding as to authorize a recovery for his benefit. It is alleged that the injunction was dissolved at his instance, and that he was the only person damaged by the injunction; but this is not enough. The complaint should state facts from which the court could see how he was interested in the suit, why he sustained his damages, and how it came about that he was entitled to interfere in the litigation and procure the dissolution of the injunction. Whether his relation to the injunction suit was such that he became entitled to the benefit of the undertaking is a question of law, to be determined upon the facts; and it is the facts, and not the pleader's conclusions, which must appear in the complaint. It may be gathered from the answer and the argument that Wilson was the proprietor of a newspaper, and had a contract with the board of commissioners for the printing of the delinquent tax list and notice of tax sales of Logan county for the year 1894; that, at the suit of certain taxpayers, the board and the treasurer were enjoined from paying him out of the public funds for his work; and that the injunction bond was given in that proceeding. It may be that the facts, if properly set forth, would authorize a recovery in this suit in Wilson's behalf. If the only effect of the injunction was to prevent him from performing his contract and receiving his money, then he was the only person injured by the injunction; and, if he could not use the names of the obligees in the bond to indemnify himself for his losses, the giving of an injunction bond in such a case would seem to be a useless formality. If such were the facts, we think the damages sustained by him should be considered as having been sustained by the judgment defendants, and recoverable in their names for his benefit. *Andrews v. Woolen Co.*, 50 N. Y. 282. But, whatever may have been the facts, the complaint does not disclose them; and, in consequence of its failure to show a cause of action, the judgment must fail. The judgment will therefore be reversed and remanded, with leave to the plaintiff to amend his complaint. Reversed.

(9 Colo. App. 292)

**LATHAM v. GREGORY et al.  
HALEY v. LATHAM.**

(Court of Appeals of Colorado. Feb. 8, 1897.)

APPEAL—REVIEW—REMARKS OF COUNSEL—ATTACHMENT—INTERVENTION.

1. A verdict on issues of fact will not be disturbed where it is sustained by the evidence.

2. Alleged error in remarks of counsel will not be reviewed where they were not objected to when made, and the attention of the court was not called to them.

3. Under Code, § 106, permitting the person claiming the property attached to intervene, his application is in time where made after judgment by default has been set aside, and before trial on the merits.

4. Where the record on appeal shows that intervenor on attachment rested on production of his evidence, and that the attaching creditor filed a motion to dismiss, it cannot be presumed that other evidence was introduced sustaining an erroneous judgment of dismissal.

5. Where in attachment a judgment is rendered for defendants, a judgment against a garnishee, in favor of plaintiff, is erroneous, whether the money garnished belonged to defendants or to an intervenor.

Appeal from district court, Arapahoe county.

Action by Arthur Latham against A. J. Gregory and others. Ora Haley intervened. From a judgment for defendants, and against the intervenor, plaintiff and intervenor appeal. Affirmed as to plaintiff, and reversed as to intervenor.

Robert E. Foot, for Arthur Latham. Joseph W. Taylor, for A. J. Gregory et al. and Ora Haley, Intervenor.

**BISSELL, J.** This record discloses a series of most unusual circumstances. The appellant Latham obtained a judgment, and collected \$661 thereon, from a stranger who was neither privy nor party to the contract, and, on the final hearing of the main case, was adjudged to have been paid the amounts which were the subject-matter of the action, and the defendants had a judgment over and against him for \$475. Unless compelled by inexorable principles, no such inequitable results should be permitted to stand. Latham brought suit in July, 1892, against A. J. and N. J. Gregory, on two notes, dated the 24th of September, 1890, for \$300 and \$322, respectively, due in 30 and 60 days, with interest. Summons was issued, and a personal service attempted. It was not accomplished, and, on filing the statutory affidavit, the plaintiff made publication of his summons, and, on its completion, judgment was entered on the 30th day of December, 1892, against A. J. Gregory and the Commercial National Bank, as the garnishee and debtor of the Gregorys. The attachment which was issued in aid of the action had been served on the bank, and the bank had answered an indebtedness to Gregory in the sum of \$661. When the judgment was entered, in December, the bank, on production of a certified copy of it, paid the amount of the judgment

which had been entered against it as garnishee, by a check payable to the order of the clerk of the district court. The clerk indorsed the check to the plaintiff's attorney, who collected the money, retained a part of it for his fees, and paid the balance over to the plaintiff. Shortly thereafter, Ora Haley, who appears in the record as an intervenor, on inquiry at the bank as to the status of the account, discovered the recited situation, and proceedings were at once instituted by the Gregorys to set aside the judgment which had been obtained. On a showing as to the nonservice of process and other facts which gave the court jurisdiction and entitled it to act, the court, on the 15th of February, 1893, set aside the judgment, and permitted the Gregorys to defend. The defense in general was a payment provable and established according to the verdict of the jury by evidence which showed an agreement between the Gregorys and Latham at about the time of the execution of the paper, or after its maturity, by which the Gregorys turned over to Latham a large amount of real and personal property which he was authorized to sell, and apply the proceeds to the liquidation of the debt. Proof was offered of the value of the property and its sale, whereby their plea of payment was attempted to be established. Prior to the actual trial, the question of the rights of the intervenor were submitted to the court. Under this petition of intervention, which sought to set aside the garnishment, and discharge the levy, and release the property from the writ, the intervenor introduced proof which tended to show that Gregory was Haley's foreman, running his sheep business west of the Divide, and, as such foreman, clothed with authority to care for the business, pay all bills incurred, and, in general, liquidate whatever expenses might attend its management. The proof also was to the point that, to provide the foreman with means for this purpose, Haley furnished money in checks of various amounts to Gregory, who indorsed them in his own name, and deposited them to his own credit in the bank, and afterwards checked on them in liquidation of the expense account. The only evidence offered on this subject was the evidence of Gregory and Haley, and, there being no countervailing proof, it may be taken as established that the money in the bank was Haley's, and was not Gregory's. The plaintiff did not undertake to controvert the evidence, but evidently relied on his motion to dismiss the intervention, because the account stood in Gregory's name, and not in Haley's, and therefore the attaching creditor could hold it as against Haley's claim. The petition of intervention aptly stated the rights of the parties, and while it did not set up all the antecedent proceedings, nor pray a judgment against Latham, which could very properly have been done as for money had and received, it was probably sufficient to raise

the issue, and permit the introduction of proof. The court did not proceed to dispose of this motion until after the trial of the main case. The issues, which have been suggested, rather than exactly stated, were submitted to the jury, under instructions to which no objections were made; and the jury found that the notes had been paid by the property received, and that the value of the property which Latham had appropriated to his own use exceeded the debt by \$475, and they found against him in that sum. The court to whom was submitted the rights of the intervenor thereupon found the issues against the intervenor, and judgment was entered against him for costs. As would not be very extraordinary under these circumstances, both the plaintiff, Latham, and the intervenor, Haley, appealed.

The actual result is that, when Latham brought suit, he had no right of action against Gregory, for his debt had been paid. When he levied his writ of attachment, there was no cause of action on which it could be maintained. His writ was levied on money or property which did not belong to the defendant in the suit, but to another, which money he appropriated to his own use, without claim or title against either the owner or the alleged debtor. His debt was paid. He owed the defendants \$475, and he got more than enough of Haley's money to pay that debt. He thus reaped where he did not sow, and converted that to which another had title, without a shadow of right or excuse.

The appellant Latham attacks the judgment on the ground that it is not supported by the evidence, and for the further reason that the intervenor's attorney, in arguing the case to the jury, contended that Latham had already received \$600 more than the amount of his claim from the defendants. Neither of these matters warrants the reversal of the judgment which was entered against the appellant. In the first place, so far as the issues of fact are concerned, the verdict of the jury was against him, and we are bound by that verdict so long as the record discloses nothing which indicates error occurring at the trial, or bias and prejudice on the part of the jury amounting to a reversible error. We discover neither. The case was fairly tried; the record is free from errors; the verdict can be sustained by evidence in the record; and we are without either the right or inclination to disturb it. The objection to the remarks of counsel is equally groundless for the purpose of an assignment of error. We do not discover in the abstract or in the record that the remark was objected to at the time, the attention of the court called to it, or any instruction asked about it. So far as we are able to see, it was entirely within the range of the rights of counsel to discuss the matter on that basis, and, in making the statement, counsel were more accurate as to the amounts

paid than is usual in such cases, for the verdict found that he had received at least \$475 more than his debt. When counsel come that near the exact facts, they certainly do not trespass on their legitimate prerogatives.

The judgment against the intervenor was undoubtedly wrong. The judgment in favor of the plaintiff against the garnishee should have been set aside if it was not done, as to which we are totally unadvised by the record. The garnishee should have been discharged, and the intervenor given such relief as he was entitled to under his petition. We are clearly of the opinion the intervention was filed in time. Under the statute, there is a distinct statutory provision providing for attachment cases. Code, § 106, permits any person, other than the defendant who claims the property attached, to intervene, and have his claim and title tried. It has already been adjudged that this must be done before trial of the main case and the determination of the principal issue between the parties. The only possible ground of contention as to the failure of the intervenor to act in time proceeds from the fact that the judgment was originally entered by default. It is therefore insisted that the intervenor was not in time, and was without the right to be heard. We do not so interpret the statute, nor the decisions with reference to the time of trial. If the main judgment had been permitted to stand, and had never been set aside, and there never had been any subsequent trial of the issue between the alleged creditor and his debtor, clearly the intervenor would have been without the right to intervene in the suit. His only remedy then would have been to bring an action against Latham for money had and received. Under the circumstances of this case, this right of action inured to him as the result of the subsequent proceedings, and probably as the result of the collection of the money from the bank under the garnishment, even though the judgment against the principal debtor had stood. It is sufficiently clear from the statement of the facts in this case that the money seized by the writ was not Gregory's money, and although the bank had the right to pay it, and Haley probably was without any cause of action against the bank for the payment, yet when it passed into Latham's hands, and he converted it to his own use, a cause of action thereby arose in favor of Haley against Latham. It is tolerably well settled that the attaching creditor acquires no rights as against the actual owner of the money or the property by the levy of his writ thereon and its subsequent sequestration. The remedy for the loss in those cases on the part of the owner is against the trustee, and not against the bank, who is the *cestui que trust*. *Drake, Attachm.* (6th Ed.) § 491; *Bank v. Jones*, 42 Pa. St. 536; *Jones v. Bank*, 44 Pa. St. 253; *Bank v. King*, 57 Pa. St. 202; *Randall v. Way*, 111 Mass. 506; *Meadowcroft v. Agnew*,

89 Ill. 460; Whalen v. McMahon, 16 Colo. 373, 26 Pac. 583; Soap Co. v. Burns, 2 Colo. App. 89, 29 Pac. 915; Rockwell v. Coffey, 20 Colo. 397, 38 Pac. 376.

We apprehend, however, that, under the situation of this case, the intervener was not bound to resort to an independent action against Latham to recover this money. He filed a petition, which sufficiently stated the ownership and title to the money, and the condition of affairs as between the attaching creditor and the intervener. His petition was filed in apt time, and while we think possibly the petition would have better presented the case if it had set up all the facts, there was enough in it to entitle the intervener to relief, and to justify the reversal of the judgment as against him. Probably when the case returns, if the petition is amended, and the parties state all the facts, and pray additional and further relief, on proof of what appears in the record, he will undoubtedly be entitled to a judgment against Latham for the amount of money which he collected of the bank, to which he had no title either as owner or attaching creditor.

The only other matter to which reference is made in the briefs of counsel to which we need advert is scarcely of sufficient consequence to warrant discussion, and that is that the bill of exceptions filed by the intervener fails to state that it contains all the evidence introduced on the trial of the issue between the attaching creditor and the intervener. It is insisted that the court must indulge in the presumption that evidence was introduced which warranted the judgment against the claimant. We cannot, for several reasons, accede to this contention. The record itself shows that the intervener rested upon the production of his evidence. The record then discloses that the attaching creditor filed a motion to dismiss the intervention, because of the situation and the various facts which have been stated. We cannot therefrom conclude that any other evidence was introduced, but we think it sufficiently appears from the record that the bill of exceptions contains all the evidence produced in support of or in opposition to the issue tendered by the petition and the answer thereto. An unanswerable objection to the judgment is found in the fact that Latham was unable to support his alleged cause of action, and had an adverse judgment entered against him. Under these circumstances, he had no claim to the money, whether it was money belonging to Gregory, or whether it was money belonging to Haley. He is absolutely without title, and should be compelled to pay it over to whomsoever may be entitled to it. Haley established his title by uncontradicted testimony, and Gregory would be bound by the judgment as a party to the action, and as a witness who had solemnly testified that the money was Haley's, and not his. Latham could therefore

never be made the subject of an action by Gregory, and, when once he satisfied Haley's claim by paying him the money, he is acquit of all responsibility in the premises. The judgment should be entered against him therefor, and he should be compelled to return that which he received without right, to which he was not able to establish title, either by attachment or otherwise. The judgment as entered against Latham will accordingly be affirmed. The judgment which is entered against Haley, the intervener, will be reversed, and sent back to the district court for further proceedings in conformity with this opinion.

(23 Nev. 830)

ROBINSON v. KIND et al. (No. 1,472.)

(Supreme Court of Nevada. March 9, 1897.)

PROCESS—SERVICE BY PUBLICATION—WHEN AUTHORIZED.

An action to cancel a deed of real and personal property located in the county in which the action is brought is an action "for the recovery of real property, or of an estate or interest therein, or for the determination in [some] form of such right or interest" (Gen. St. § 3040), and hence, being an action in rem, may be prosecuted against a nonresident by publication.

On petition for rehearing. Denied.

For former report, see 47 Pac. 1.

BONNIFIELD, J. The respondent has petitioned for rehearing. The opinion given on appeal will be found in 47 Pac. 1. The statement of the case or the authorities heretofore cited need not be repeated here. Counsel for petitioner admits the correctness of the general rules noted in that opinion as to necessary parties, but strenuously urges that the case at bar comes within the exceptions to the general rules, and as an exception he cites Story, Eq. Pl. § 78, wherein the author says: "Hence it is a common rule of the court that when a person who ought to be made a party is out of the jurisdiction of the court, if the fact is stated in the bill, and admitted by the answer, or proved (if denied) at the hearing, that of itself constitutes a sufficient ground for dispensing with his being made a party, and the court will proceed to a decree without him." Counsel contends that the suit at bar is "not a proceeding in rem, but in personam; that it is not a suit against the property, but a suit against the person"; that "the suit being in equity and in personam, and the Churches being absent from the state, and residents of the state of New York, they could not be brought in because beyond the reach of the state's process, and without its jurisdiction." Counsel cites *Pennoyer v. Neff*, 95 U. S. 714, *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586, and several other cases. We might dispose of this point by simply noting the fact that it does not appear by the bill or complaint, or otherwise by the record, that the Churches are out of the jurisdiction of the

court. "Where the party is out of the jurisdiction, that fact should be positively averred in the bill, and not left to mere inference." *Penfold v. Nunn*, 5 Sim. 408; *Story, Eq. Pl.* § 78. But the residence of a person out of the state who ought to be joined in a suit does not justify the omission to make him a party. Gen. St. § 3052, provides for service of the summons by publication on a nonresident person who is a necessary or proper party to the action. *Barb. Parties*, 333. In the cases of *Hart v. Sansom* and *Pennoyer v. Neff*, supra, it is held, in effect, that if the court which enters the decree or judgment in a given case is authorized to act therein in personam only, it acquires no jurisdiction by publication to grant relief. That rule is well settled, and that is the full extent to which it can be said the authority of these decisions go. In *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, Mr. Justice Brewer delivered the opinion of the court, and in an elaborate review of the authorities says: "A state may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court by publication. The well-settled rules that an action to quiet title is a suit in equity, that equity acts upon the person, and that the person is not brought into court by service by publication, do not apply when a state has provided by statute for the adjudication of titles to real estate within its limits as against nonresidents who are brought into court only by publication." In the case of *Pennoyer v. Neff*, supra, on which case counsel for petitioner seems to rely with confidence as authority for his contention that the Churches cannot be reached by publication, the court, by Mr. Justice Field, says: "Such service may answer in all actions which are substantially proceedings in rem. \* \* \* It is true that, in a strict sense, a proceeding in rem is one taken directly against the property, and has for its object the disposition of the property, without reference to the title of individual claimants, but in a larger and more general sense the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein. \* \* \* So far as they affect property in the state, they are substantially proceedings in rem in the broader sense which we have mentioned." In *Hart v. Sansom*, cited by counsel, the court said: "It would doubtless be within the power of the state in which the land lies to provide by statute that, if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose." In *Arndt v. Griggs*, supra, the court, after quoting the above from *Hart v. Sansom*, says: "And, of course, it follows that if a state has power to bring in a nonresident by publication for the purpose of appointing a trustee, it can, in like manner, bring him in, and sub-

ject him to a direct decree." There are numerous decisions, both of the federal and state courts, to the effect that the state has power through its legislature and courts to dispose of or control property in the state belonging to nonresident owners out of the state where such nonresident owners will not voluntarily surrender jurisdiction of their person to the state, or the courts of the state; and that the owners thereby may be totally deprived of their property, although no notice is ever given to such owners, except notice by publication. *Arndt v. Griggs*, supra, and cases therein cited. Section 3040, Gen. St. Nev., provides that actions "for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest," shall be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial. Actions to set aside fraudulent conveyances of real estate are held to belong to the above class, and may be prosecuted against a nonresident by publication. *Adams v. Cowles*, 95 Mo. 501, 8 S. W. 711; *Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co.*, 46 Fed. 584; *McLaughlin v. McCrory*, 55 Ark. 442, 18 S. W. 762; *Works, Courts*, 270; *Jones v. Fletcher*, 42 Ark. 422. The suit at bar is brought to cancel a deed of conveyance of real and personal property situated in Eureka and White Pine counties, Nev., and re-vest the title in the plaintiff, and is an action in part under the above authorities "for the recovery of real property, or of an estate or interest therein," and necessary parties defendant may be brought in by publication. The court has like power as to the personal property. "If the state court has such power with reference to title to real estate held by nonresidents, how much the more will it have the same with reference to personal property situate within its jurisdiction." *Loaiza v. Superior Court*, 85 Cal. 11, 24 Pac. 707. Where a court of equity is empowered to cancel a deed and establish title to land within its jurisdiction by mere force of its decree, to that extent its action is in rem. *McLaughlin v. McCrory*, 55 Ark. 442, 18 S. W. 762. In *Galpin v. Page*, 3 Sawy. 124, Fed. Cas. No. 5,206, the court held that proceedings which are in form personal suits, but which seek to subject property brought by existing lien or by attachment under the control of the court, and those which seek to dispose of property, or relate to some interest therein, but which touch the property or interest only through the judgment recovered, while not strictly proceedings in rem, so far as they affect property in the state, are treated substantially as such proceedings. In *Pennoyer v. Neff*, supra, the court says that substituted service by publication may answer in all actions which are substantially proceedings in rem. The case at bar is substantially a proceeding in rem. Its direct object is to reach and dispose of the property of the parties described in the com-

plaint. The decree of the trial court is substantially a decree in rem. The court, by mere force of its decree, annulled the deed of conveyance, and vested the title to the property in the plaintiff. Having heretofore fully considered and passed upon the other questions presented by the petition for rehearing, and finding no reason or authority to induce us to change our former opinion, the petition is denied.

BELKNAP, C. J., and MASSEY, J., concur.

(23 Nev. 369)

REINHART et al. v. COMPANY D, FIRST BRIGADE, NEVADA NATIONAL GUARD, et al. (No. 1,483.)

(Supreme Court of Nevada. March 8, 1897.)

APPEAL—TIME OF TAKING—RECORD—REVIEW.

1. If an appeal lies from an order refusing to open a default, it must be taken within 60 days. Gen. St. § 3352.

2. If an order refusing to open a default may be reviewed on appeal from the judgment, it cannot be done where no statement is attached to the judgment roll, and all the facts on which the trial court acted are not in the judgment roll. Gen. St. § 3362.

3. On appeal from an order denying a motion to open a default, the court will strike from the record an alleged answer of appellants which was used by stipulation in the trial court as an affidavit in support of the motion, but which was not certified to the supreme court by the clerk. Gen. St. § 3362.

Appeal from district court, Humboldt county: A. E. Cheney, Judge.

Action by E. Reinhart & Co. against Company D, First Brigade, Nevada National Guard, and others. From an order refusing to set aside a default, and from a judgment in favor of plaintiffs, defendants appeal. Appeal from the order dismissed. Judgment affirmed.

L. A. Buckner, for appellants. Robert M. Clarke and Harry Warren, for respondents.

MASSEY, J. This is an appeal from an order refusing to set aside a default, and from a judgment made and entered in the district court of the Second judicial district of the state of Nevada, in and for Humboldt county. The respondents commenced an action to foreclose a mortgage in said court on the 21st day of May, 1896, and the summons, with the proof of service, was returned and filed on the 22d day of May, 1896. On the 26th day of May, 1896, the appellants filed a demurrer to the complaint, alleging as cause therefor misjoinder of parties plaintiff and defendant, and that the facts stated were not sufficient to constitute a cause of action. On the 19th day of June, 1896, the demurrer was overruled, after argument, by the court, and the appellants were allowed 20 days in which to answer. On the 10th day of July, 1896, default was entered against all the ap-

pellants for failure to answer within the time allowed. On the 27th day of July, 1896, the appellants filed a notice of motion to set aside the default, and by stipulation of counsel for the respective parties the hearing of the said motion was set for July 28, 1896. The minutes of the court disclose the fact that on the last-named date the said motion was made, oral testimony was offered in support of the same, and after consideration by the court the motion was denied. No objection was made and no exception was saved to the order of the court denying said motion; neither does the record in any manner disclose all the facts upon which the court based its action. Thereupon the court appointed a commissioner to take testimony on the amount due on the mortgage sued on, and on the 21st day of September, 1896, upon the report of said commissioner, rendered judgment and decree of foreclosure in favor of the respondents.

The respondents ask this court to dismiss the appeal taken from the order refusing to set aside the default. This motion must prevail. If the order is one from which an appeal can be taken, under the provisions of section 330 of the civil practice act, the right of appeal therefrom was lost, as the appeal was not taken until the 9th day of October, 1896, or more than 60 days after the order was made and entered. Gen. St. Nev. 1885, § 3352; Weinrich v. Porteus, 12 Nev. 102. If it should be contended that the order is subject to review on appeal from the judgment, under the provisions of section 338 of the civil practice act, such contention is answered by the fact that no statement is attached to the judgment roll, and all the facts upon which the lower court based its order do not appear in the judgment roll. Gen. St. Nev. 1885, § 3362; McCausland v. Lamb, 7 Nev. 238; Karth v. Orth, 10 Cal. 192; Harper v. Minor, 27 Cal. 107; Abbott v. Douglass, 28 Cal. 295; Canal Co. v. Kidd, 43 Cal. 180; Stone v. Stone, 17 Cal. 513; Poole v. Caulfield, 45 Cal. 107; McAbee v. Randall, 41 Cal. 136; Dooly v. Norton, Id. 439; Caulfield v. Doe, 45 Cal. 221.

Counsel for respondents ask this court to strike out and discharge from the record the alleged answer of the appellants. This motion must also be sustained. The only purpose for which it could be used was as an affidavit in support of the motion to set aside the default. It was so used in the lower court by express stipulation. It is not a part of the judgment roll, and cannot be so considered. Neither is it properly certified to this court as an affidavit in support of the motion to set aside the default. Gen. St. Nev. 1885, § 3362; Weinrich v. Porteus, supra.

The only remaining matter for consideration is the appeal from the judgment. An examination of the judgment roll fails to disclose any error. The judgment is sustained

by the pleadings and papers constituting the judgment roll, and must therefore be affirmed.

BELKNAP, C. J., and BONNIFIELD, J., concur.

(5 Kan. App. 545)

WALKER et al. v. CAMBERN et al.

(Court of Appeals of Kansas, Southern Department, E. D. March 3, 1897.)

**INJUNCTION—PARTIES—NONJOINDER.**

1. An injunction will not be granted when the parties who are directly affected by its operation are not before the court.

2. Where the record shows that the defendants in an action for an injunction are only nominal parties, and that the real parties in interest have not been brought into court, and where the relief sought would bar the absent parties from their day in court, the court should refuse to grant the injunction, although the defendants who are before the court do not raise the question of a defect of parties, either by demurrer or answer, as required by sections 89, 91, Code.

(Syllabus by the Court.)

Error from district court, Neosho county; L. Stillwell, Judge.

Action by Aldace F. Walker and others against L. S. Cambern and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

This action was brought in the district court of Neosho county, by Aldace F. Walker, John J. McCook, and Joseph C. Wilson, as receivers of the Atchison, Topeka & Santa Fé Railroad, as plaintiffs, against L. S. Cambern, as county treasurer of Neosho county, Kan.; W. P. Wright, as county clerk of Neosho county, Kan.; C. W. Bennett, as sheriff of Neosho county, Kan.; the board of county commissioners of Neosho county, Kan.; school district No. 84, Neosho county, Kan.; and the township of Erie, in county of Neosho, Kan.,—as defendants, to restrain the collection of certain taxes assessed against the property of the Atchison, Topeka & Santa Fé Railroad Company, which was, at the time of the commencement of this action, in the hands of the plaintiffs as such receivers. Upon the hearing of the case, the court found for the plaintiffs as to certain taxes which were levied by the officers of the defendant school district No. 84 and Erie township, and as to such ruling and finding of the court we need not now inquire, as the same is not now before the court; but as to the special taxes set out in the second count in the plaintiffs' petition the court decided adversely to plaintiffs, and overruled and denied the injunction, and to the judgment and decision of the court upon the matters set out in said second count the plaintiffs duly excepted, and the record of said trial and proceedings is brought to this court for review.

The case was submitted to the court upon an agreed statement of facts. Those which

relate to the special taxes set out in the second count, and to such questions as we are called upon to decide in this case, are as follows:

"(14) That on the 14th day of April, 1893, J. W. Baughman and I. N. George presented to the board of county commissioners of Neosho county, Kan., a petition praying for the construction of a certain levee, in said Neosho county, under the provisions of an act of the legislature of the state of Kansas entitled 'An act to provide for the construction and maintenance of levees,' approved March 9, 1893, the same being chapter 104 of the Laws of 1893. That afterwards such proceedings were had by and before such board of county commissioners that said levee was caused to be constructed as hereinafter set forth, and there was assessed to and against said Atchison, Topeka & Santa Fé Railroad Company the sum of \$295.06, which was and is claimed by defendants to be the just and proportionate share of said railroad company for the costs of construction of said levee. A true, full, complete, and certified transcript of all the proceedings had in and about the construction of said levee and the assessment of said benefits is hereto attached, marked 'Exhibit D,' and is made a part of these agreed facts. The said railroad company appeared before the board of viewers by M. N. Wells, resident engineer, and presented its claim for damages for \$1,000, which is hereto attached, marked '1.' It is also agreed that a bond was filed subsequent to the order of the board of county commissioners of November 10, 1893, and approved by the county clerk, a copy of which is attached to these agreed facts, marked '2.'" "(16) That at the time of the assessment and the placing upon the tax roll of said sum of \$6,295.06, as set forth in the preceding agreed fact, said levee was not completed, but the same has since said date been completed."

"No. 1. Application for Damages. To David Miller, Wm. Beemer, and C. H. Howke, viewers engaged in laying out a levee, the line of which is described as follows: Starting 40 rods north of the north line of Sec. 15, township 23 south, of range 19 east, commencing on the bluff on the right of way of the Southern Kansas Railway Company, now operated by the Atchison, Topeka & Santa Fé Railroad Company; thence west to the Neosho river; thence down the river to a point 40 rods south of the center of Sec. 16—28 S., R. 19 east; thence east to a spring branch, about 80 rods; thence northeast to the said right of way of the Southern Kansas Railway,—in Neosho county, Kansas, as petitioned for by J. W. Baughman and others.

"Gentlemen: The Southern Kansas Railway Company respectfully claims (\$1,000.00) one thousand dollars as its damages and compensation on account of the laying out of said levee over its right of way in the west



half of Sec. 15, T. 28 S., R. 19 east of the 6th principal meridian, in Neosho county, Kansas. The Southern Kansas Railway Company, by M. N. Wells, Its Resident Engineer. Dated at Chanute, Kansas, May 3d, 1893."

Indorsed: "Filed June 21st, 1893. T. W. Reynolds, Co. Clerk."

"Dec. 2, 1893. In the Matter of the Baughman Levee. It is ordered by the board that upon the filing with the county clerk of a bond for the faithful performance of and completion of said work, according to his proposition and the specifications, within the time specified, as follows: That portion lying along the river bank to be completed on or before the 1st day of May, 1894, and that portion lying between the river and the railroad, on the south end of said Baughman's land, to be finished by Jan. 1st, A. D. 1895,—the said Baughman is hereby directed to proceed to construct and complete his proportion of said levee, as shown by the specifications, forthwith, and complete the same as above stated. It is ordered by the board that the Co. clerk advertise for bids on work completing of the Baughman levee for the part not yet let, amounting to about 3,200 cubic yards, and for the sewer openings in said levee."

"Jan. 2, 1894. The contract for the earthwork on the Baughman levee is hereby awarded to C. A. Howke, whose bid was the lowest presented, said Howke to receive 11½ cents per cubic yard, said contract covering that part of earthwork as follows: From station naught (0) to station 6x57. Same to be finished by May 1st, 1894. Said C. A. Howke to file a bond satisfactory to the county clerk, to the amount of \$600.00, for the faithful performance of said contract. This January 2, 1894. In the matter of the sewer pipe opening in the Baughman levee, the contract for putting in same was awarded to J. Q. Farmer. Two twelve-inch openings, as per specifications filed in county clerk's office by the surveyor, F. H. Greene, same to be constructed for \$40.00 each. Said Farmer to file bond with the county clerk."

A. A. Hurd, O. J. Wood, W. Littlefield, and J. L. Denison, for plaintiffs in error. S. C. Brown, for defendants in error.

DENNISON, P. J. (after stating the facts). The question of a defect of parties defendant is presented to us in the brief of defendants in error. The plaintiffs in error contend that as the question was not raised in the court below, either by demurrer or answer, as required by sections 89 and 91 of the Code, they have waived the questions. So far as the rights of the defendants themselves are concerned, this must be conceded. The record in this case, however, shows that the defendants in error are only nominal parties in interest. While they were necessary parties to the injunction, it is of no con-

sequence to them whether the injunction is allowed or refused. Under the levee law of 1893, neither the county nor the county board is liable until the assessments are collected and paid into the county treasury. If the injunction is allowed, the assessment will never be collected. It does not make one penny difference to the county or to any of the county officers whether the assessments are ever collected or not. The only persons directly interested are the contractors who did the work. If the assessments are collected and paid into the county treasury, they will get their pay. If they are not collected, they will not. If this injunction is allowed, they have no redress. They cannot recover from the county officers nor from the railway company. They are absolutely barred from any right to recover for their work. If the rights of the contractors were not prejudiced by the injunction proceedings, the provisions of sections 89 and 91 of the Code would apply, and the question of a defect of parties defendant would not be considered by us. As their rights are affected, and as their right to recover for their work is absolutely barred, if the injunction is allowed, the court very properly refused to grant the injunction. For aught that appears in the record, the reason for refusing the injunction may have been that the real parties to be affected by the order were not in court. Our conclusions in this case are in entire harmony with the principle laid down in *State v. Anderson*, 5 Kan. 90. The opinion in that case was rendered in 1869, and has been quoted and followed, when applicable, down to the present time. In that case the question of a defect of parties was not raised in the trial by demurrer or answer, nor in the supreme court. The only question submitted to the court was the validity of a certain statute. The supreme court itself raised the question of a defect of parties. In delivering the opinion of the court, Chief Justice Kingman says: "The only question argued in this case is the one submitted to the district court by the stipulation of the parties. But whatever may be the opinion of the court on that question, if the court below rightfully refused the injunction we can do nothing more than affirm the decision, and we think the court very properly refused to grant the injunction, for the reason that the proper parties were not before it. The order sought in this case was not a preliminary injunction, the granting of which is permitted by the 238th section of the Code, but the final order or judgment in the case; and it has uniformly been held as sound doctrine that the powers of injunction should be applied with the utmost caution. It is the strong arm of the court, and to render its operation benign and useful it must be exercised with great caution and when necessity requires it (*Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 378); and one of the most essential prereq-

uisites for a final injunction is that all persons interested in the subject-matter and result should be made parties (see *Wiser v. Blachly*, 1 Johns. Ch. 438). Chancellor Kent observed: 'You must have before the court all whose interests the decree may touch, because they are concerned to resist the demand and prevent the fund from being exhausted by collusion.' The rule is so obviously proper that it needs no comment, nor to be supported by authority. In the case last referred to it is stated that, while such is the general rule, it is not of universal application, and cites some cases apparently relaxing the strict rule; but no one of them is in any regard an authority for dispensing with the necessity in this case of bringing before the court the several railway companies who are made by the act in question and are shown by the petition to have a direct, positive, and very large interest in the decision of the question raised. If the act of the legislature is held valid, the several companies receive the proceeds of the sale of 500,000 acres of selected lands; if it is held invalid, they lose that much. More need hardly be said to show their interest. Yet the argument might be amplified by showing that the defendant in the suit has no interest in the decision. He is the custodian of the fund merely, and it is of no consequence to him whether he has to pay it to the railway company or to the school fund. He, so far as interest is concerned, is entirely indifferent; and, while he is properly made a party to the suit, he is only nominally a party, without any interest in defending or resisting the prosecution of the suit. The real persons interested in the resistance of the prayer of the petition, and the only ones, are the railroad companies, and, without their being in court, no final order could be made, and until they were made parties no order of any kind ought to be permitted. We think the court properly refused to grant the injunction on this ground. \* \* \* It would not only be against the plain decisions in such cases, but would shock the sense of common justice of mankind, if a court should finally pass upon the merits of the question, involving interests so direct and so vast, without the parties to be affected by the decision having had an opportunity to be heard in the court. In the language of Mr. Justice Tremble, delivering the opinion of the court in *Mallow v. Hinde*, 12 Wheat. 197: 'Such a proceeding would be contrary to the rules which govern the courts of equity, and against the principles of natural justice.' And again the learned judge observes: 'We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's rights without the party being either actually or constructively before the court.' Authorities without limit

might be cited sustaining the same view, but it is not deemed necessary."

The judgment of the district court is affirmed. All the judges concurring.

(5 Kan. App. 549)

### ROUSE v. DOWNS.

(Court of Appeals of Kansas, Southern Department, E. D. March 3, 1897.)

PLEADING—NEGLECT—INSTRUCTIONS—CO-EMPLOYEES.

1. Where a petition contains unnecessary allegations and phrases, which are treated in the trial of the case as surplusage; where there is no claim that the defendant is misled thereby; where no evidence is admitted to sustain them; where no instructions are based thereon; where they are not considered by the jury, and they furnish no basis for the judgment,—*held*, that no prejudicial error was committed in overruling the motion to make more definite and certain.

2. Where the petition, in an action in which exemplary damages are recoverable, charges negligence, and the qualifying adjectives, "gross, wanton, and criminal," are used to qualify the word "negligence," these words were properly treated as surplusage, and the petition states a cause of action.

3. Where the jury finds the plaintiff entitled to only those items which are allowed her under the law, the defendant cannot complain because the court refuses to instruct the jury that they cannot find any other items.

4. In the giving of instructions the court can state the law in its own language.

5. It is not error to refuse to give an instruction, when the jury find against the theory upon which it is predicated.

6. Where a switch is constructed under the supervision and control of a division road master in the line of his duty, such road master is the representative of the railway company; and, where the issue is as to whether it is properly constructed, the court does not err in refusing to instruct the jury that, if the switch was constructed by the section men and work gang, said employés would be co-employés of a deceased fireman, and for any negligence of such co-employés the company would not be liable.

(Syllabus by the Court.)

Error from district court, Neosho county: L. Stillwell, Judge.

Action by Elmina Downs against Henry C. Rouse, receiver of the Missouri, Kansas & Texas Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

T. N. Sedgwick, for plaintiff in error. C. A. Cox and J. L. Denison, for defendant in error.

DENNISON, J. This action was brought in the district court of Neosho county, by Elmina Downs as plaintiff against the receiver of the Missouri, Kansas & Texas Railway Company as defendant, to recover the damages sustained by reason of the death of her minor son, Major W. Downs, who was killed in a railroad wreck while acting in the capacity of fireman in the employ of said receiver. It is conceded that the deceased was a fireman in the employ of the receiver of the Missouri, Kansas & Texas Railway, and at the time of his death was engaged in the discharge of his duties as such fireman be-

tween Paola and Coffeyville, Kan., on what is known as the "Kansas City & Pacific Division of the Missouri, Kansas & Texas Railway System." On the 24th day of May, 1890, the employes of the receiver had put in a switch and switch connection at a small station on the line of said road, known as "Bangor," which is some 12 or 13 miles south of Paola, Kan., and connected said switch with the main line of the Kansas City & Pacific division of said railroad. At about 3 o'clock of the morning of the 25th, being Sunday morning, the train on which Downs was acting as fireman came down over this switch, and the engine jumped the track at or about this switch connection, which resulted in a very disastrous wreck, in which the engine was nearly turned around and thrown upon its side, and several cars upon the switch and in the train were demolished, and engineer Caskey and fireman Downs were so badly injured that they died shortly afterwards. After the wreck it was discovered that there was an indenture in the end of one of the rails at the switch connection, as though it had been struck by the flange of a wheel. The verdict of the jury was in favor of the plaintiff below for the sum of \$500, of which \$250 was for loss of the society, comfort, and protection of her son, and \$250 was for the loss of his support from the time of his death until he should arrive at the age of 21 years. Judgment was rendered upon the verdict, and the defendant below brings the case here for review.

The errors complained of are discussed under four subdivisions, as follows: First, in overruling the motion to make the petition more definite and certain; second, the petition does not state a cause of action; third, in overruling the demurrer to the evidence of the plaintiff below, and refusing to instruct the jury to find for the defendant below; fourth, in the instructions refused by the court.

It is probable that the petition was a little more descriptive than was necessary. However, we cannot ascertain wherein the rights of the plaintiff in error were prejudiced thereby. The unnecessary allegations or phrases were treated as surplusage upon the trial. It is not claimed that the defendant was misled thereby, or that any evidence was admitted to sustain the objectionable allegations of the petition. Neither were the instructions based thereon, nor were they considered by the jury. They certainly do not furnish any basis for the judgment rendered. No prejudicial error was committed in the overruling of the motion to make the petition more definite and certain.

The second subdivision charges that the petition does not state a cause of action. The petition alleges that the defendant below carelessly, negligently, and unskillfully constructed the switch on the 24th day of May, 1890, and that the rails and the switch connection were put together and left in an unfinished

condition and in a dangerous, unsafe manner; that by reason thereof the train ran off the track, causing the wreck which crushed the skull of the said Major W. Downs, and scalded and wounded him so much that he shortly afterwards died. After these allegations occurs the following statement: "That the death of said Major W. Downs and the wreck which caused his death was caused by the gross, wanton, and criminal negligence of the said defendant, his agents and servants, in the careless, unskillful, and negligent manner in which said switch and siding were built and connected with the main line or track, and the negligent manner in which the irons or rails of said main track were relaid, and in the careless and negligent manner in which said switch was left on the night of said wreck, and in the insecure, unsafe, and dilapidated condition of said track, switch, and switch connection at said place of injury; that said Major W. Downs was without fault or negligence in the premises." It is contended that the words "gross, wanton, and criminal," used to qualify the word "negligence," makes this an action for exemplary or vindictive damages, and that no damages are claimed by reason of common or ordinary negligence. The other allegations not upholding a claim for exemplary damages, it is contended that the petition fails to state a cause of action. No authorities are cited to maintain this novel proposition. The petition states a cause of action, and states it quite strongly. The qualifying adjectives, "gross, wanton, and criminal," were properly ignored in the trial of the case, and the case was tried as an action for ordinary negligence. These words were also properly treated as surplusage.

The third subdivision complains of the overruling of the demurrer of the defendant below, and the refusal of the court to instruct the jury to find in his favor. In support of this complaint, plaintiff in error contended that there was an absolute lack of evidence tending to establish the fact that at or prior to the time of the wreck there was any defect in the construction of the switch or the manner of its connection with the main track, and that, if there was such a defect, such defect must have been the cause of the wreck, and must either have been known to the company or its proper officers, or that by the use of reasonable and ordinary care it would have known of it. The pleadings and the evidence in this case were based largely upon the defective condition of the switch and its connection with the main track as aforesaid. The plaintiff below contended, and sought to prove, that the switch and the connection were constructed under the supervision of the division road master, and that the rails constituting the switch proper were not in alignment with the rails of the main track, and that by reason thereof a portion of the switch rail extended past the main line rail

so as to leave what is called in railroad parlance a "lip"; that the flange of the engine trucks struck the end of the rail, which projected on the lip, and climbed upon the top of the rail, and ran off, thereby causing the wreck. The plaintiff below also contended that the railway company was careless, unskillful, and negligent in the construction of the switch and the connections as aforesaid, and left them in an unfinished, dangerous, and unsafe manner. Conductor Moran, who was in charge of the train at the time of the wreck, testified on behalf of the plaintiff below that he examined the track where the engine left it, shortly after the wreck occurred, and he describes its condition as follows: "I noticed the switch was entirely out of place, and a heavy mark on the end of the west rail; and this mark continued on the top of the rail until it reached the frog, and at the point the engine left the track. The marks, as above stated, were, in my opinion, made by the flange of the trucks of the engine at the time of the disaster which was the cause of the wreck. I noticed the lip of the switch at the joint where the engine left the track had a heavy mark on it, as if having been struck by the flange of the trucks of the engine." Brakeman Lamont, who was on the wrecked train, testified that he examined the switch or track after the accident, and he describes its condition as follows: "Well, at the end of the switch I could see where I thought the engine or some of the cars had jumped the rail. That switch was constructed on ties just placed on top of the ground. The track was not finished, but that much of it was done the night before, not yet having time to fill in the dirt." There was considerable other evidence along this same line, and there was considerable evidence that there was a half-inch lip at the switch connection; that with a half-inch lip the engine would be liable to climb; and that a switch so constructed would not be properly constructed, and would probably make trouble. This is some evidence tending to support the allegations of the petition, and was properly submitted to the jury. To offset this evidence, the defendant below introduced a piece of track iron and a piece of the flange of a wheel to demonstrate to the jury that the flange of an engine could not catch on a half-inch lip. These irons were by agreement of both parties taken by the jury to their room, for them to experiment with, and the defendant below submitted special questions upon this subject to the jury, and received the following special findings thereon: "(41) Is it not a fact that the switch at Bangor, where the wreck occurred in which Downs lost his life, was properly constructed under the supervision of division road master Fisher? Ans. We think not. (42) Is it not a fact that in the construction of said switch the employes of the defendant used due and reasonable care? Ans. We

think not. (43) Is it not a fact that a wheel of either engine or cars, unless badly worn, will not catch and climb a half-inch lip? Ans. We think it might." "(46) State whether or not there is any evidence in this case that in the construction of this switch there was left a half-inch lip on the end of the rail by the parties who constructed it. Ans. There was no evidence prior to the wreck, but immediately after there was." It is also contended that the defective switch connection must not only be shown to exist, but that the company either had notice of the defects complained of, or that by the exercise of ordinary care and diligence it might have obtained such notice. Many authorities are quoted to sustain this contention. This is familiar law, and we heartily concur in the contention. The claim in this case is that the defect in the switch connection was in its construction, and that notice to the division road master, under whose supervision it was constructed, is notice to the railroad company, and that, therefore, as he superintended its construction, he was aware of its condition, and, if it was defective, of course he must have known it. This was properly submitted to the jury. The court committed no error in overruling the demurrer to the evidence of the plaintiff below, nor in refusing to instruct the jury to find for the defendant below.

The fourth subdivision relates to the instructions requested by the defendant below. No. 2 of which reads as follows: "In case you find for the plaintiff, you can only find for her in such amount as she would have been likely to have received from deceased from the time of his death until he would be 21 years old, unless you further find that there was some agreement or understanding between the plaintiff and deceased that he should continue to contribute to her support after he should become 21 years old. Then you can find for the plaintiff in such further sum as deceased would in all probability have contributed to her during her expectancy or probable duration of life." The plaintiff in error claims that the refusal to give this instruction was a material error prejudicial to his rights. In his brief occurs this statement: "Of course it will be pointed out that the jury, notwithstanding the court's instructions, in their findings claim to have allowed the plaintiff only such sum as he would have contributed to his mother from the time of his death until he would be twenty-one years of age; but if the court had properly instructed the jury it is probable they would not have allowed her anything; and the fact that the jury refused to obey the court's instructions is no justification or excuse for the court's error."

In the special verdict the jury found that the plaintiff below was entitled to \$250 for the value of the services of her son until he was 21 years of age. The other item of damages is not discussed in this connection.

It seems to us that the counsel for plaintiff in error is not consistent in his claim. He contends that the law is that the mother can recover for the value of the son's services until he is 21 years old, and that if the court had instructed the jury that such was the law they would not have given her even that, and that the fact that the jury refused to obey the court's instructions is no justification for the court's error. While it may not justify an error of the court, if the court committed error, we may also say that, if the jury found the plaintiff below entitled to the items allowed her under the law, the defendant below cannot complain that the court refused to so instruct the jury that they would not allow her what she was legally entitled to.

The court gave the jury the following instruction: "Every case must depend on its own circumstances, and the jury may take into consideration all the matters as shown by the evidence which go to make the life of the deceased of pecuniary value to his mother, and award such compensation therefor, not exceeding the amount claimed in the petition, as in the good sense and sound judgment of the jury would be right, in accordance with justice and equity, and warranted by the facts and circumstances of the case." We think this is sufficiently explicit, and under this instruction the jury adopted the theory of plaintiff in error as to the correct measure of damages. Surely he is in no condition to complain.

Instructions Nos. 3 and 4, asked for by plaintiff in error and refused by the court, read as follows: "(3) If you are satisfied from all the evidence that said switch was properly constructed, and that the defendant, his servants, agents, or employés, was reasonably careful in its construction, you will find for the defendant. (4) In case you find from all the evidence that said switch and switch connection was constructed with reasonable care, and that the same afterwards became out of repair, you will find for the defendant." The court instructed the jury as follows: "(13) If you should find from the evidence that the defendant's servants and agents exercised ordinary care and prudence in the replacing of the rails of said main track, and in the arrangement of the switch connection, so that, when they left the said track in a completed and finished condition, the said railroad track was reasonably safe for use of defendant's employés running and operating trains thereon, then, and under these circumstances, the defendant is not liable in this action, and the plaintiff would not be entitled to recover, unless you should find the defendant liable under the circumstances indicated in the following instruction: In connection with the foregoing instruction, and as modifying the same, you are instructed that if you find that the said

track and switch were constructed with ordinary care and prudence, and that the same, as completed, were in a condition of reasonable safety as before explained, but if you should find that intermediate the completion of said work and the derailing of the train said track and switch connection became out of repair so that the accident in question occurred, then, and under those circumstances, if they existed, the defendant would not be liable for the said switch and switch connections getting out of repair, unless the servants and agents of said defendant whose duties were to see to the condition of the track and switch connections had actual notice of the alleged defects, or in the exercise of ordinary care and prudence should have acquired such notice and should have remedied the same." We think the instructions given cover the same ground as those refused. The court can state the law in its own language.

Another reason why the court did not err in refusing to give instructions 3 and 4 is that they are predicated upon the theory that the switch connection was properly constructed, and that reasonable care was used in its construction. The jury specially find that the switch connection was not properly constructed, and that reasonable care was not used in its construction. It has repeatedly been held that it is not error to refuse to give an instruction when the jury find against the theory upon which it is predicated.

Instruction No. 6, asked for by the plaintiff in error and refused by the court, reads as follows: "If the jury believe from all the evidence in this case that the switch and switch connection at Bangor was constructed and made by the section men and work gang, said employés would be the co-employés of the deceased, Major W. Downs, and for any negligence of any of said co-employés the defendant herein would not be liable, and you must find for the defendant." It is claimed that the court erred in refusing to give this instruction. The pleadings put in issue the question of whether this work was done under the supervision, direction, and control of the vice principal and managing agents for that class of work for the company. The evidence is uncontradicted that division road master Fisher superintended the construction of the switch connection. In *Railroad v. Moore*, 31 Kan. 197, 1 Pac. 644, it was held that a road master is, in the line of his duty, the representative of the company. In special question 41, supra, it is assumed by the plaintiff in error that the switch was constructed under the supervision of road master Fisher, and the question seems to be whether it had been properly constructed. We think there was no evidence upon which to base instruction No. 6, and the court did not err in refusing to give it. The judgment of the district court is affirmed. All the judges concurring.

(5 Kan. App. 560)

**SCOTT v. BEARD et al.**

(Court of Appeals of Kansas, Southern Department, E. D. March 3, 1897.)

**FOREIGN STATUTES—PRESUMPTIONS—REVIEW ON APPEAL—REPLEVIN—JUDGMENT—EVIDENCE.**

1. Where the statutes of another state are not introduced in evidence, they will be presumed to be the same as the statutes of our own state upon the same subject.

2. Where the facts and circumstances surrounding an assignment and the evidence of the parties to it tend to show that the assignment was made with the intent upon the part of the assignor to hinder, delay, or defraud his creditors, and the trial court, upon the evidence introduced, finds that the assignment is void, we cannot disturb its findings.

3. Where the plaintiff has secured the property in controversy in a replevin action in which the defendant is found to have a special ownership, the judgment should be for a return of the property, or, in case a return cannot be had, then for an amount equal to the value of the special ownership, not to exceed the value of the property.

4. Where a company is sued as a partnership in an action to replevin attached property, and there is nothing to show that, at the time the suit was brought, it was not a partnership, or that at the time of the trial it had ceased to own and retain the right to collect its accounts as such, *held*, that the court did not err in rendering judgment in favor of the members of the partnership, although one of the members testified at the trial that the company was then incorporated.

5. It is not material error for the court to exclude testimony as to the expenses incurred by the plaintiff in caring for replevied property, or in defending the title to it, when the court finds against the plaintiff on the merits of the case.

6. The evidence objected to in this case has been carefully examined, and we think that the material rights of the plaintiff in error were not prejudiced by any undue influence the evidence complained of may have had upon the judge.

(Syllabus by the Court.)

Error from district court, Miami county; John T. Burris, Judge.

Action by William J. Scott, assignee of M. J. Fulkerson, against John Beard and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. F. Perdue and Wm. J. Scott, for plaintiff in error. Sperry Baker and Grant I. Rosenweil, for defendants in error.

**DENNISON, P. J.** This is an action in replevin brought in the district court of Miami county by William J. Scott, assignee of M. J. Fulkerson, as plaintiff, against John Beard, Robert E. Mathews, John Doggett, B. R. Bacon, G. B. Peck, R. B. Harris, and F. B. Heath, partners, doing business as the Doggett Dry-Goods Company, and Albert N. Church, as defendants, to recover the possession of one span of horses, one two-seated carriage, and one set of double harness alleged to be of the value of \$250, and for \$100 damages for the wrongful detention and expenses incurred thereby. An order of delivery was issued, and the property was delivered to the plaintiff, who retained and has since sold it. M. J. Fulkerson, on September 17, 1891, made a voluntary assignment of his property to Scott, as as-

signee, which was filed for record in the office of the record of deeds of Jackson county, Mo., the residence of the parties to the assignment being in Kansas City, Mo. Scott claims the property by virtue of the assignment, as the property of said Fulkerson. John Beard, as constable, by virtue of a writ of attachment duly issued to him by a justice of the peace, in an action in which the Doggett Dry-Goods Company was plaintiff and M. J. Fulkerson was defendant, did on the 19th day of September, 1891, levy upon the property in controversy, and claims the property under such levy. The validity of the assignment was the real question at issue in the court below, and is the main question to be determined by this court. The case was tried by the court below without a jury, and judgment was for the defendants.

The evidence shows that the defendant in the attachment suit, M. J. Fulkerson, was the proprietor of a laundry located at No. 1312 Main street, Kansas City, Mo., and also proprietor of a towel-supply establishment located at No. 1816 Main street, Kansas City, Mo.; and in the month of September, 1891, he made a bill of sale of the towel-supply establishment to his brother Alvin C. Fulkerson, the consideration named in the bill of sale being \$5,000; and he took from his brother Alvin C. Fulkerson 18 promissory notes, payable at intervals of 3 months apart, the first maturing 3 months from date of execution, and the last maturing 54 months from date of execution, amounting in the aggregate to \$4,500; and he took from his brother Alvin C. Fulkerson a mortgage upon the property mentioned in the bill of sale, to secure these promissory notes, and then transferred the notes to his wife; and he gave a deed of trust upon the laundry at No. 1312 Main street for the benefit of his wife and the National Bank of Kansas City, and then made the assignment to the plaintiff in this action. The bill of sale to Alvin C. Fulkerson and the chattel mortgage from him to M. J. Fulkerson and the deed of assignment to the plaintiff, William J. Scott, were all filed for record September 17, 1891, at 9 o'clock a. m., 9:02 a. m., and 11:12 a. m., respectively.

The contention of the defendants is that the sale of the towel-supply establishment to his brother Alvin, taking from him the notes and chattel mortgage, and the transfer of the notes to his wife, the execution of the deed of trust upon the laundry for the benefit of his wife et al., and the assignment to Scott, were all parts of one single scheme upon the part of M. J. Fulkerson to hinder, delay, and defraud his creditors, and that, therefore, the assignment is void, under paragraph 3102 of the Kansas General Statutes of 1889, which reads as follows: "3102. Every gift, grant or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond,

judgment or execution, made or obtained with intent to hinder, delay or defraud creditors of their just and lawful debts or damages, or to defraud, or to deceive the person or persons who shall purchase such lands, tenements, hereditaments, rents, goods or chattels shall be deemed utterly void and of no effect." Scott testified that, at the time of the making of the assignment, Fulkerson told him that two or three suits had been brought against him, and the parties were about to take judgment, and would levy upon his property, and he was afraid that, if they did, the property would be sacrificed. Fulkerson testified that he told Scott that he had some suits, and he did not know whether he could settle them or not, and that he would like to make an assignment to him. If the statutes of frauds of Missouri are the same as in Kansas, and the assignor made the conveyance of assignment for the purpose of hindering, delaying, or defrauding his creditors of their just and lawful dues, the assignment is void. The statutes of Missouri relative to frauds are not in evidence, and we must presume they are the same as the statutes of Kansas upon this subject. The question, then, is: Did M. J. Fulkerson make the assignment with the intent to hinder, delay, or defraud his creditors? There was considerable evidence tending to show that the assignment was fraudulent, and there was some conflict in the evidence. The testimony was partly by deposition, and partly by an oral examination of witnesses. The court, by its finding for the defendants, determined this question in their favor. We cannot inquire into the sufficiency of the evidence, except to determine that there is some evidence tending to establish fraud in this case. There is abundance of it, and we are bound by the finding of the trial court. Almost every volume of the reports contains one or more decisions of our supreme court that the verdict of a jury which has been approved by the judge cannot be questioned in this court if there is some competent evidence to uphold it. "The findings of a trial court, being based upon conflicting testimony, are as conclusive as the verdict of a jury, and therefore cannot be successfully assailed in this court." *Bentley v. Brown*, 37 Kan. 14, 14 Pac. 434.

The counsel for plaintiff in error argue that, to uphold the attachment, the assignment must upon its face show an actual personal intent upon the part of the defendant to defraud his creditors, and cite *McPike v. Atwell*, 34 Kan. 142, 8 Pac. 118, and *Cooper v. Clark*, 44 Kan. 358, 24 Pac. 422, to sustain this position. We do not so understand the authorities cited. In *McPike v. Atwell*, supra, the plaintiffs relied upon the deed of assignment to show fraud in its execution sufficient to sustain an attachment. There was no evidence introduced tending to show a fraudulent intent, and the supreme court held

that the mere fact that it was defectively executed, or that it contained provisions not authorized by the statute, is not sufficient to sustain an attachment upon the property assigned upon the ground of fraud, but that, where the deed of assignment was the only evidence introduced to show such fraud, it must upon its face show an actual personal intent upon the part of the assignor to defraud his creditors. In the case at bar there was an abundance of evidence tending to show that the deed of assignment was conceived in fraud, and the case of *McPike v. Atwell*, supra, is not for that reason a similar case, nor is the same question involved therein. In *Cooper v. Clark*, supra, the supreme court held that "where a deed of assignment for the benefit of creditors is executed in good faith, and without any wrongful intent, but is so defectively executed as to render it void, held, that the execution of such instrument in such manner is not sufficient of itself to authorize an attachment against property." We can see no application of that principle in this case. The judgment was for the return of the property, or, in case such a return cannot be had, for an amount equal to the judgment and costs in the attachment proceeding. The plaintiff in error contends that the judgment should have been for the value of the property, instead of for the amount of the judgment and costs. The judgment was correctly rendered for a return of the property, or, in case a return cannot be had, for an amount equal to the special ownership of the defendants therein. *Wolfley v. Rising*, 12 Kan. 535.

The plaintiff in error contends that the court erred in rendering judgment in favor of the individual members of the partnership, for the reason that it is an incorporated company. The attachment suit was brought by the *Doggett Dry-Goods Company*, and it declared as a corporation or a partnership in the action for attachment. This action is brought by the plaintiff against the individuals as partners, doing business as *Doggett Dry-Goods Company*. No issue was raised as to whether the company was incorporated or was a partnership. During the trial, B. R. Bacon, on cross-examination, in answer to the question, "Is this an incorporated company?" said, "Yes, sir." The company was sued as a partnership, and was called a "firm" by the attorneys and by several witnesses. The court finds they are partners as the *Doggett Dry-Goods Company*, and renders the following judgment (omitting the findings): "It is therefore by the court considered and adjudged that the said personal property be returned to the defendant John Beard; that, in case the return thereof is not made within ten days from the date of this judgment, the defendants John Doggett, B. R. Bacon, G. W. Peck, R. B. Harris, and F. B. Heath, partners doing business as *Doggett Dry-Goods Company*, have and recover of the plaintiff the sum of one hundred and

fifty-five dollars and fifty-one cents (\$155.51), being the amount due on said judgment, and the further sum of forty-four dollars and fifteen cents (\$44.15), the amount of the costs in said action heretofore pending before W. T. Shively, justice of the peace; and it is by the court considered and adjudged that the defendants John Doggett, B. R. Bacon, G. B. Peck, R. B. Harris, and F. B. Heath, partners as Doggett Dry-Goods Company, and John Beard, have and recover of the plaintiff the costs herein, taxed at \$—; and it is by the court ordered, in case of failure to pay the said sums of money so as aforesaid adjudged against the plaintiff, execution issue therefor." We do not think the court erred in treating the company as a partnership, nor do we know whether the company was a corporation or a partnership either when the suit was brought, or when it was tried. For all that appears from the record, the Doggett Dry-Goods Company may have been a partnership at the time the attachment suit was brought, and, as such, entitled to the attached property. The members may afterwards have formed a corporation under the same name, without including the debts or accounts of the partnership in the property to be owned or owing by the corporation. The partnership could, if they chose, settle their accounts as a partnership.

The only other question raised relates to the introduction and rejection of evidence. The plaintiff in error contends that the court erred in refusing to allow him to prove the amount of expenses he had been compelled to pay by reason of the property being attached. The court found that the attachment was good, and therefore the plaintiff is entitled to no damages or expenses. If the refusal was error, the plaintiff was certainly not prejudiced thereby. We cannot reverse a judgment for an error which is not material or prejudicial to the substantial rights of the plaintiff in error. We have carefully examined the evidence introduced which is complained of by the plaintiff in error. The objections and arguments are carried to such an extreme length that to consider them in detail, and write an explanation of our decision upon each one of them, would extend this opinion to an unwarrantable length. Each one is decided according to well-known rules for the introduction of evidence, and a repetition of them can serve no good purpose here. When we consider the fact that the case was tried by the court without a jury, and in the light of the statements made by the court at the time the evidence was objected to, it is clear that the material interests of the plaintiff in error were not prejudiced by any undue influence the evidence complained of may have had upon the judge. We see no reason to reverse the judgment because of the introduction of improper testimony. The judgment of the district court is affirmed. All the judges concurring.

(5 Kan. App. 569)

**CITY OF BURLINGTON v. STOCKWELL.**  
(Court of Appeals of Kansas, Southern Department, E. D. March 3, 1897.)

**ORDINANCES—RESTRAINING NUISANCE—STOCK YARDS.**

1. The council of a city of the second class has the power to prevent and remove nuisances by an ordinance which provides a punishment by fine or imprisonment, or both.

2. The council of a city of the second class has power to declare those annoyances peculiar to stock yards and hog pens nuisances whenever they become offensive to the public.

3. A nuisance which affects a place where the public has a legal right to go, and where the members thereof congregate, or where they are likely to come within its influence, is a public nuisance.

4. A nuisance which affects a single person or a determinate number of persons in the enjoyment of some private right, not common to the public, is a private nuisance.

5. If the facts are sufficient to constitute a public nuisance, it is not a question of the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights.

6. If the facts show that the stench from hog pens is a public nuisance, it is no defense to show that the pens are kept as clean as they could be under the circumstances.

7. The stench of a hog pen, to be a nuisance, must be offensive to a person of ordinary sensitiveness.

8. It is no defense to the charge of maintaining a nuisance that there are other nuisances in the same neighborhood.

(Syllabus by the Court.)

Error from district court, Coffey county; W.

A. Randolph, Judge.

John Stockwell was convicted of violating an ordinance of the city of Burlington, and brings error. Affirmed.

Geo. E. Manchester, for plaintiff in error.  
S. D. Weaver and E. J. Crego, for defendant in error.

DENNISON, P. J. This was a criminal prosecution in the police court of the city of Burlington, against John Stockwell, for the violation of a city ordinance. The defendant was convicted in that court, and appealed therefrom to the district court, in which, upon trial, he was again convicted, and sentenced to pay a fine of five dollars and the costs of the case. From this last judgment, he appeals to this court.

The complaint in this case reads as follows:

"State of Kansas, Coffey County—ss.: W. M. Venard, being duly sworn, on oath says that on or about the 1st day of August, A. D. 1894, in the city of Burlington, county of Coffey, and state of Kansas, one John Stockwell did then and there, ever since has, and does now, unlawfully keep and use certain yards and pens on the premises under his control, to wit, lots 11 and 12 and 13 in block 33 in said city of Burlington, in and upon which said yards and pens a number of swine, to wit, about twenty swine, were then and there, ever since have been, and now are, kept, in such manner that such yards and pens then and there became, ever since have been, and



now are, foul, injurious, and offensive, and did then and there, ever since have, and now do, cause and create a stench and noxious, disagreeable, and unhealthy smell, and thereby said yards and pens then and there became, ever since have been, and are now offensive to persons residing in the vicinity of said yards and pens, and annoying to the public, and is and was a nuisance, contrary to the ordinance of said city in such cases made and provided, and against the peace and dignity of said city. W. M. Venard.

"Subscribed and sworn to before me, this 9th day of August, A. D. 1894. G. N. McConnell, Police Judge."

Said complaint and subsequent prosecution thereunder were based on the following ordinance of the said city of Burlington: "Ordinance No. 12. An Ordinance Relating to Nuisances. Be it ordained by the mayor and councilmen of the city of Burlington: \* \* \* Sec. 5. Stock Yards, Etc. If any person or persons shall own, keep or use any yard, pen or place on his or her premises, or premises under his or her control, within this city, in or upon which any number of cattle, swine or other animals may be kept in such manner as to become offensive to any persons residing in the vicinity, or annoying to the public, he or she shall be deemed to maintain a nuisance in this city, and shall be fined in any sum not exceeding one hundred dollars." No question is raised as to the regularity of the passage of the ordinance. The contention is that the city authorities had no power, under the constitution and laws of the state, to pass such an ordinance. It is plain that the council of a city of the second class has the authority to prevent and remove nuisances by an ordinance which provides a punishment by a fine or imprisonment, or both. Paragraph 817 of the General Statutes of 1889 provides that "the council may \* \* \* prevent and remove nuisances." Paragraph 824, Id., provides that, "for any purpose or purposes mentioned in the preceding sections, the council shall have power to enact and make all necessary ordinances, rules and regulations; \* \* \* and all ordinances may be enforced by prescribing and inflicting upon inhabitants or other persons violating the same, such fine not exceeding one hundred dollars or such imprisonment not exceeding three months, or both such fine and imprisonment, as may be just for any one offense, recoverable with costs of suit, together with judgment of imprisonment until the fine and costs be paid or satisfied; and any person committed for the non-payment of fine and costs or either, while in custody, may be compelled to work on the streets, alleys, avenues, areas and public grounds of the city under the directions of the street commissioner or other proper officer, and at such rate per day as the council may by ordinance prescribe, until such fine and costs are satisfied."

The attorney for defendant contends that cities of the second class have not the power

to declare those annoyances peculiar to stock yards and hog pens nuisances, and to punish the keeper thereof for the maintenance of the nuisance, unless they are detrimental to the public health and general welfare of the city. This contention is based upon the fact that in the eleventh subdivision of paragraph 555, Id., the mayor and council of cities of the first class are given power to prevent and remove nuisances, and also to suppress hog pens, slaughterhouses, and stock yards, or to regulate the same, and prescribe and enforce regulations for cleaning and keeping the same in order. It is argued that as the legislature granted cities of the first class the same power to "prevent and remove nuisances" that it gave to cities of the second class, and that as it also gave to cities of the first class, in addition thereto, the power to "suppress and regulate hog pens," this is a legislative construction, determining that the power to "prevent and remove nuisances" does not include the power to "suppress and regulate hog pens." The legal principle claimed will be admitted, but the application made of it is not correct. Under these statutes, a city of either the first or second class has the power to prevent and remove nuisances. This will include everything that comes within the legal definition of a public nuisance. A city of the first class also has the power to suppress hog pens, or to regulate them, although they may not be legally a public nuisance. A city of the second class has no such power.

It is also contended that the statute gives cities of the second class power to "prevent and remove nuisances," but that it does not give such cities power to punish persons guilty of maintaining them, by criminal prosecution. This power is clearly conferred by paragraph 824, supra. The authority to fine and imprison is given for the purpose of enforcing the ordinance.

It is also contended that the ordinance is void for the reason that it undertakes to punish for the maintenance of a private nuisance. This contention is based upon the language of the ordinance in which it says "to be or to become offensive to any person or persons residing in the vicinity, or annoying to the public." It is argued that, if it is offensive to but one person, it is a private nuisance, and that, to be a common nuisance, it must affect the community at large. Admitting the thing complained of to be a nuisance, the test is tersely stated in 16 Am. & Eng. Enc. Law, 927: "A nuisance, to be a public nuisance, must be in a public place, or where the public frequently congregate, or where members of the public are likely to come within the range of its influence; for, if the act or use of property be in a remote and unfrequented locality, it will not, unless malum in se, be a public nuisance." And in Wood, Nuis., at page 76: "In order to constitute a public nuisance, the injurious results to the public must always be of such a character and extent that, if affecting the rights

of an individual only, they would form the basis of a private action. The only distinction between a public and private nuisance arises from the difference in effect. In the one case it is confined to a single individual or to an injury to individual rights, while in the other it affects the rights of individuals only as members of the public. It is not so much a question whether a large number of persons happened to be annoyed by the act or whether the act itself was such and in such a place as that the natural effects thereof would be to annoy or offend all who came within its sphere." If the nuisance affects a place where the public has a legal right to go, and where the members thereof frequently congregate, or where they are likely to come within its influence, it is a public nuisance. If the nuisance affects a single person or a determinate number of persons in the enjoyment of some private right, not common to the public, it is a private nuisance. If the facts are sufficient to constitute a public nuisance, it is not a question of the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. The ordinance is valid, and the court did not err in refusing to quash the complaint, nor in overruling the motion in arrest of judgment.

During the trial, the court gave, among others, the following instructions: "(5) If you believe from the evidence that the pig pens of the defendant gave forth a stench and a disagreeable odor, which was offensive to persons residing in the vicinity, or annoying to persons who passed near said pens, then you will find the defendant guilty; and it will make no difference whether the defendant keeps the pens as clean as the same could be kept under the circumstances, with the number of hogs in them that the evidence shows were there. (6) It is not necessary, in order to establish the guilt of defendant, that the pens should be offensive to every person residing in the vicinity, nor to every person who came near said pens. It is sufficient if the evidence shows that the pens were offensive to any one person of ordinary sensitiveness residing in the vicinity, or to some of the persons who passed so near said pens that the same were annoying to them. The pens would be annoying to the public even though a very small portion of the people were affected thereby. (7) Before you can find the defendant guilty as charged in this case, you must not only find that the pens of defendant were by him kept so as to have been offensive to certain individuals, but they must have been kept so as to have been offensive to the ordinary individual,—that is, it will not do to convict because some very sensitive person felt it to be offensive; it must have been kept in such a manner as to necessarily offend a person of ordinary sensitiveness. (8) If you find from the evidence that the defendant, at the time

and place charged, did keep some hogs in a pen, and such pen became foul, and from it offensive odors arose, which odors were annoying and offensive to persons living in the vicinity of such pens, then you will find the defendant guilty as charged; otherwise, you will find him not guilty."

The defendant claims that the court erred in instructing the jury that it would be no defense that the pens were kept as clean as they could be under the circumstances. The instruction given by the court upon this subject is clearly the law. "If the facts be sufficient to constitute a public nuisance, the defendant may not show that the business is carried on in the most approved manner. Care is not an element. The fact that injurious results proceed from the act will be sufficient." 16 Am. & Eng. Enc. Law, 931.

The defendant also claims that the court erred in giving instruction No. 6. Bearing in mind the distinction between public and private nuisances, and construing this instruction with the other instructions herein copied, we must hold that the court committed no error in the instructions. It is evident that the court was trying to impress upon the jury that, if the stench was offensive to an extremely sensitive person, it would not be sufficient to constitute a nuisance, but that, if the stench was not offensive to a person of blunted sensibilities, still it might be a nuisance. The true test is that the stench is offensive to any person of ordinary sensitiveness. This is the law.

The defendant requested the court to give the following instructions, and claims error in its refusal to do so: "If you find from the evidence that other causes than defendant's pens gave rise to an offensive odor in that vicinity, and materially contributed to the condition complained of by witnesses, then you cannot find the defendant guilty." No other nuisances were complained of in this action. It cannot matter how many nuisances were located in the neighborhood. The only way to rid the neighborhood of them was to remove and prevent them. It can be no defense to any one of them that there were others. If it were otherwise, they could all set up this defense, and the authorities would be powerless to prevent or remove any of them. The judgment of the district court is affirmed. All the judges concurring.

(5 Kan. App. 656)

SCHNITZLER v. GREEN, Constable, et al.  
(Court of Appeals of Kansas, Southern Department, C. D. March 5, 1897.)

SUBMISSION OF CONTROVERSY — REVIEW ON APPEAL — TRANSCRIPT.

1. Where a case is submitted to the trial court upon the pleadings and an agreed statement of facts, no motion for a new trial is necessary to procure a determination by this court of the correctness of the conclusions of law and the judgment rendered thereon in the court below.

2. The agreed statement of facts eliminates all issues of fact from the case. It supersedes the averments of the pleadings, setting aside those which are untrue, and recites the facts upon which the issues of law must be based, and the court could only err in rendering judgment for the wrong party.

3. A transcript cannot be attached to and filed with the petition in error when more than one year has elapsed since the rendition of the judgment or order complained of.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

Submission of controversy between Henry Schnitzler and George M. Green, constable, and another. From a judgment for the latter, the former brings error. On separate motions to dismiss and for leave to attach the clerk's certificate to the case-made. Motion for leave overruled; motion to dismiss sustained.

O. G. Eckstein and K. H. Harris, for plaintiff in error. J. V. Daugherty, for defendants in error.

DENNISON, P. J. This case is before the court upon a motion to dismiss, for the reason that no valid case-made or transcript of the record is attached to the petition in error. The case was submitted to the court below upon the pleadings and agreed statement of facts, and judgment rendered thereon for the defendants in error on December 31, 1895. The plaintiff in error filed a motion for a new trial on January 2, 1896, which said motion was heard and overruled on January 4, 1896, and on said day time was given the plaintiff in error to make and serve a case. The defendants in error contend: First, that no motion for a new trial was necessary; second, that the filing of an unnecessary motion would not extend the time within which a case-made must be made and served; third, that as four days had elapsed from the time the judgment was rendered before an extension of time was granted, and that no case made had been made and served within three days from the rendition of the judgment, the judge had lost jurisdiction to so extend the time for making and serving a case-made. In each one of these contentions the defendants in error are correct. The second and third propositions have been decided so often by the supreme and appellate courts of Kansas that no comment upon them is necessary. The first proposition is also settled by the decisions of our supreme court, but is not so well understood by the attorneys of the state as the other propositions. We presume that from abundance of caution the practice has been to file a motion for a new trial in nearly all cases, until it has become a settled conviction with many that it is necessary to do so. We will briefly present some of the reasons why a motion for a new trial is not necessary when a case is submitted to the court upon the pleadings and an agreed statement of facts. The agreed statement

of facts eliminates all issues of fact from the case. It supersedes the averments of the pleadings, setting aside those which are untrue, and recites the facts upon which the issues of law must be based. Suppose no motion for a new trial had been filed, could the errors complained of have been reviewed? If so, then a motion for a new trial is clearly unnecessary. Of course no objections were made to the pleadings or the agreed statement of facts, and no exceptions were saved as to any ruling thereon. The only objection or exception was to the conclusions of law and judgment of the court. The parties, in effect, say to the court: "These are the facts; apply the law to them, and render judgment accordingly." They now ask us to reverse that judgment, and we can only do so if we find that the judgment is not authorized and upheld by the agreed statement of facts. The only error the court below could commit would be to render judgment for one party when the law would require it to render judgment for the other party. To review this error no objection, exception, or motion for a new trial would be necessary. In the case of *Horn v. Bank*, 32 Kan. 523, 4 Pac. 1025, Chief Justice Horton, in delivering the opinion of the court, says: "No motion for a new trial was necessary to present the inquiry whether the findings of fact supported the judgment. Whether the judgment is authorized and sustained by the special finding is not involved in the determination of a motion for a new trial." If no motion for a new trial is necessary to determine whether the judgment is supported by the findings of fact made by the court upon the evidence introduced, surely no motion for a new trial is necessary to determine whether the judgment is supported by the agreed statement of facts made by the parties. This doctrine is clearly laid down in *Ritchie v. Railway Co.*, 55 Kan. 36, 39 Pac. 718. The first and second paragraphs of the syllabus read as follows: "(1) In order to review the decision of a district court in determining an issue of law, a motion for a new trial is not necessary. Section 306 of the Code of Civil Procedure defines a 'new trial' as a re-examination of an issue of fact. (2) An issue of law may arise either on the pleadings, an agreed statement of facts, the report of a referee, special verdict of a jury, or findings of fact by the court; and where no issue of fact has been raised, or where all issues of fact have been tried and determined, issues of law alone remain, and a decision of a trial court thereon can be reviewed here without a motion for a new trial having been filed below."

The attorneys for the plaintiff in error ask to be permitted to withdraw the record from the court, to have it certified by the clerk of the court below as a transcript of the record, and cite *Pierce v. Myers*, 28 Kan. 364, in support of their right to do so. In *Pierce v. Myers* the record was withdrawn with the

consent of one of the justices for the purpose of attesting and authenticating the case-made. In the case at bar the case-made is properly attested and authenticated. The objection to it is that it was not served in time and is invalid. Can the plaintiff in error be permitted to now file a transcript with the petition in error? To take the case-made, and transform the records contained therein into a transcript, could give them no more force and effect than to file a new transcript at this time. Upon the question as to whether a transcript can be added to the petition in error, when more than one year has elapsed after the rendition of the judgment or order complained of, we think there can be no doubt. Sections 546 and 546a of the Code of Civil Procedure provide that the plaintiff in error shall attach to and file with the petition in error the case-made or a transcript of the record. No proceeding in error can be commenced without the filing of such a petition in error as is required by the statutes. In this case the case-made filed with the petition in error is invalid because it was not settled within the statutory time. More than one year has elapsed since the rendition of the judgment or order complained of; hence, under section 556 of the Code of Civil Procedure, no proceeding to reverse or modify or vacate the same can be commenced. The motion to grant permission to attach the certificate of the clerk of the district court to the case-made is overruled. The motion to dismiss is sustained, and the case is hereby ordered dismissed. All the judges concurring.

(5 Kan. App. 652)

### SMITH v. POWELL.

(Court of Appeals of Kansas, Southern Department, C. D. March 8, 1897.)

#### PROCEEDINGS IN ERROR—ESTOPPEL TO PROSECUTE.

A party who excepts to an order of the court for the distribution of the proceeds of an execution sale in the hands of the clerk, and thereafter, and before proceedings in error are begun, withdraws the amount awarded him, giving his receipt therefor, is estopped to prosecute such proceedings in error; and, the facts being properly brought to the attention of this court, the petition in error must be dismissed.

(Syllabus by the Court.)

Error from district court, Sedgwick county; C. Reed, Judge.

From an order distributing the proceeds of a foreclosure sale between E. R. Powell and Frederick Smith, said Smith brings error. Dismissed.

Trimble & Bradley, for plaintiff in error. W. E. Stanley, for defendant in error.

MILTON, J. In a foreclosure action, Powell and Smith each obtained a money judgment against York, and a decree of foreclosure of his respective mortgage against real property, Powell's lien being declared prior to that of Smith. The proceeds of the sale

leaving a large balance due Powell, and Smith receiving no part of his judgment, after 18 months from such sale Smith caused a general execution to be issued, in the praecipe for which he named certain real property belonging to York to be levied on; levy and appraisement under the execution being made the day it was issued. The sheriff's return showed "No goods," and a regular levy and subsequent sale, for \$800, of the property named in the praecipe filed by Smith. The next day after this execution was issued, Powell filed a praecipe for execution, and the return of the sheriff showed a levy on the same real estate as under the first execution, and no sale, for want of bidders. The trial court, having confirmed such sale, made an order distributing the proceeds thereof pro rata between Smith and Powell, to which order Smith excepted. After so excepting, and on the same day, Smith, by his attorney of record, withdrew from the clerk of the court the part allotted to him, receipting therefor, and thereafter filed his petition in error, with a transcript annexed, in this court.

#### Party Accepting Benefits of a Judgment Estopped.

Defendant in error has filed a motion to dismiss these proceedings in error on the ground that plaintiff in error has voluntarily taken all of the benefits of the judgment of the court below which the plaintiff in error seeks to reverse. This motion is supported by the affidavit of S. D. Lieurance, who was attorney for plaintiff in error at the time said order of distribution was made, in which it is stated that, on the same day the court made this order, affiant, as the attorney for plaintiff in error, demanded of W. W. Ayres, clerk of the district court of Sedgwick county, the \$400 which had been found by the court to belong to plaintiff in error, and that said attorney then received from said clerk a check for \$400, as the money ordered and adjudged to be paid to plaintiff in error by the court, which check was subsequently paid in full. Said motion is further supported by the affidavit of W. W. Ayres, clerk of the district court of Sedgwick county, who testifies that on the 11th day of November 1891, the sheriff of said county paid him the proceeds of said sale of the property under the execution, and that on the same day he was ordered by the court to be distributed that, on the day said order was made, S. D. Lieurance, attorney for plaintiff in error, made demand of affiant for the sum of \$400 of said proceeds, and that affiant thereupon gave said Lieurance a check for \$400, which check was afterwards paid from affiant's account at the bank; and that said S. D. Lieurance placed upon the appearance docket wherein said case and execution are noted the following receipt, to wit: "Received \$400.00. Frederick Smith, by S. D. Lieurance, His Attorney,"—and that the sa

\$400 was the identical \$400 ordered to be paid to the said Frederick Smith by said district court. We have read the transcript and the briefs of counsel for both parties with great care, and have also read all the authorities which have been cited; and under the facts presented by the record itself, and by the affidavit in support of the motion to dismiss, we hold that plaintiff in error is not entitled to a decision upon the merits of the controversy, and that the case should be dismissed. On the day he excepted to the order of distribution, which gave him \$400 and the defendant in error \$365.40, plaintiff in error, by his attorney, who was named in the order of distribution, demanded and received the sum awarded. We think this was an action inconsistent with that of appealing from said order, and that plaintiff in error has thus estopped himself from prosecuting these proceedings in error. This conclusion is in line with the great weight of authority, and no case has been cited which announces a different rule. *Babbitt v. Corby*, 13 Kan. 612; *Hoffmire v. Holcomb*, 17 Kan. 378; *Rasure v. McGrath*, 23 Kan. 600; *Perkins v. Bunn*, 56 Kan. 271, 43 Pac. 230; *Bank v. Butler*, 56 Kan. 270, 43 Pac. 230. In the latter case the court quotes approvingly from *Albright v. Oyster*, 9 C. C. A. 173, 60 Fed. 644, as follows: "No rule is better settled than that a litigant who accepts the benefits, or any substantial part of the benefits, of a judgment or decree, is thereby estopped from reviewing and escaping from its burdens. He cannot avail himself of its advantages, and then question its disadvantages in a higher court." The petition in error will therefore be dismissed. All the judges concurring

(5 Kan. App. 644)

ATCHISON, T. & S. F. R. CO. v. LONG.  
(Court of Appeals of Kansas, Southern Department, C. D. March 5, 1897.)

CARRIERS—EJECTION OF PASSENGER—ACTIONS—DAMAGES.

1. The question as to whether an action is *ex contractu* or *ex delicto* is to be determined solely by the pleadings; and a petition which demands compensation for the wrongs committed upon the plaintiff, and not upon an implied promise to reimburse his estate, declares upon on action *ex delicto*.

2. An instruction predicated upon the theory that a ticket was from Topeka to Reading could not aid the jury when they find that the ticket was in fact from Topeka to Emporia.

3. Where a passenger is forcibly evicted by the agents of the railroad company from its train upon which he has a legal right to remain, and where the jury find that the said agents, in the examination of the ticket presented by the passenger, and in evicting him from the train, are grossly and wantonly negligent of the rights of such passenger, they may award exemplary damages.

(Syllabus by the Court.)

Error from district court, Butler county; C. A. Leland, Judge.

Action by John W. Long against the Atchison, Topeka & Santa Fé Railroad Company.

47 P.—63

From a judgment for plaintiff, defendant brings error. Affirmed.

The first count in the petition alleges that on the 4th day of March, 1888, said Long bought and paid for a ticket from said Atchison, Topeka & Santa Fé Railroad Company, entitling him to ride as a first class passenger over said road, in the cars of said railroad company, from Topeka to Emporia, and that he entered into the cars of said company, and took his seat therein, and conducted himself in a gentlemanly and proper manner; that after the train had passed Reading, and before it had reached Emporia, the agents and servants of said company did, on said 4th day of March, 1888, in the nighttime of a stormy night, wrongfully, forcibly, wantonly, and unlawfully force and expel him from the said cars, and refuse him permission to ride any further upon said ticket without his paying additional and illegal charges, thereby willfully and wantonly placing this plaintiff in the ignominious position of being put off the train, which was filled with passengers, and other wrongs, then and there and thereby wrongfully, forcibly, wantonly, and unlawfully did to said Long, to his damage in the sum of \$1,000. The second count of the petition alleges that the said company, by its collector, demanded from said Long 60 cents to permit him to continue his journey to Emporia, and, by the means and in the manner aforesaid, wantonly, maliciously, and unlawfully compelled him to pay said sum of 60 cents for the privilege of completing his journey on said cars to Emporia, to his damage in the sum of \$50. The prayer is for judgment for \$1,050. The answer is a general denial. The evidence is uncontradicted that just before the departure of the west-bound train, and between 12 and 1 o'clock in the nighttime of March 4, 1888, Long asked the agent of the company who was selling tickets at the Topeka passenger depot for a ticket to Emporia; that he paid \$1.85, the regular price therefor, and received a ticket; that he glanced at the ticket, and thought it was all right; that, if it had not been from Topeka to Emporia, he thought he would have noticed it; that he gave the ticket which he procured of the Topeka agent to the collector, when he came for it, after leaving Topeka; that, shortly after leaving Reading, the collector demanded of him 60 cents, as the fare from Reading to Emporia; that Long refused to pay the amount, and the collector went and got the conductor and brakeman, and the train was stopped, and the conductor took hold of Long, and ejected him from the car; that, when he had reached the steps of the platform of the car, he discovered that he was near no station or house, and, the night being cold and stormy, he paid the 60 cents, under protest, and rode to Emporia. There was some conflict in the testimony whether the ticket read to Emporia or Reading, and as to the conduct of the parties during the transaction. The jury, in their special

verdict, find that the ticket read from Topeka to Emporia, and that the conductor used no more violence towards Long than was necessary to evict him from the train. The verdict was in favor of Long for the sum of \$675.60, and the special findings show that \$25 was for injury to plaintiff's feelings; 60 cents was for pecuniary loss; \$475 was for exemplary or vindictive damages; \$25 was for expenses; and \$150 was for attorney's fees. The \$25 for expenses was remitted by the plaintiff, and judgment was rendered in favor of Long, and against the railroad company, for the sum of \$650.60. The railroad company alleges that there was error in the trial and judgment, and brings the case here for review.

A. A. Hurd, R. Dunlap, and W. Littlefield, for plaintiff in error. Redden & Schumacher, for defendant in error.

DENNISON, P. J. (after stating the facts). The plaintiff in error alleges and argues 10 assignments of error, but, as several of them depend upon whether this action is an action *ex contractu* or an action *ex delicto*, we will first consider this question, which is to be determined solely by the pleadings. The first count in the petition, after alleging such a state of facts as would entitle Long to remain in the car until it should reach Emporia, charges that the railroad company, by its agents, etc., disregarding its duty as a common carrier of passengers and its agreement with Long in selling him the ticket, did, in the nighttime of a stormy night, wrongfully, forcibly, wantonly, and unlawfully force and expel Long from its cars, refused him permission to continue upon his journey without his paying additional and illegal charges, thereby willfully and wantonly placing this plaintiff in the ignominious position of being put off the train, which was filled with passengers, and then, there, and thereby wrongfully, forcibly, wantonly, and unlawfully did to Long other wrongs, to his damage in the sum of \$1,000. To hold that this count is an action *ex contractu* is to construe this language to declare, in effect, that the railroad company demanded of Long an additional amount of fare, under an implied contract that it would pay it back again. This is not the correct construction to give to the language used. This count declares the things necessary to show Long's right to ride in the car to Emporia, and the illegal demands made upon him by the agents of the railroad company, and declares his damage to be \$1,000 for the wrongs committed against him in expelling him from the train, and placing him in the ignominious position of being put off the train. This clearly charges an action *ex delicto*. The second count of the petition reiterates the charges contained in the first count, and, in addition thereto, alleges that the railroad company, by its agents, demanded of Long 60 cents to permit him to ride to Emporia, and,

by the means and in the manner aforesaid, wantonly, maliciously, and unlawfully compelled Long to pay 60 cents for such permission, to his damage in the sum of \$50. This charges the railroad company with expelling him from the train, and placing him in the ignominious position of being put off the train, in order to wantonly, maliciously, and unlawfully compel Long to pay an additional 60 cents to continue his journey. This count demands compensation for the wrongs committed upon Long, and not upon an implied promise to repay the 60 cents, and is an action *ex delicto*.

Other errors are based upon the theory that the ticket which Long received and presented to the collector was from Topeka to Reading. Special stress is placed upon this point, because of the refusal of the court to give certain instructions asked for by the railroad company. The first answer to this contention is that the court instructed the jury that, "if plaintiff did not have a ticket entitling him to passage beyond Reading, he, of course, cannot recover, and your verdict should be for the defendant." The second answer is that the jury specially found that the ticket was from Topeka to Emporia. This finding is in the answer to the first special question requested by the plaintiff below, and the answer to the second special question requested by the defendant below. No objection was taken to the answers, and no exception saved, and these findings therefore stand as the facts in the case. The instructions refused, which were predicated upon the theory that the ticket was from Topeka to Reading, could not aid the jury when they find that the ticket was, in fact, from Topeka to Emporia. *Railroad Co. v. Hultt*, 1 Kan. App. 781, 41 Pac. 1051; *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262; *Railroad v. Bennett*, 35 Kan., on page 399, 11 Pac. 155.

The attorneys for the plaintiff in error contend that there was no evidence of gross negligence, wantonness, or a willful disregard of the rights of Long by the agents of the railroad company, and that there was nothing upon which to base exemplary damages. There was evidence tending to prove that Long gave to the collector a ticket entitling him to ride to Emporia. The finding of the jury establishes this as a fact. Long was therefore not a trespasser upon the train. He had paid his fare, and was entitled to remain in his seat, unmolested, until he reached Emporia. The most favorable view of the transaction in favor of the plaintiff in error is that the collector was mistaken as to who gave him the ticket to Reading, or was mistaken as to the destination printed upon the ticket he received from Long. If the mistake of the collector was due to such a reckless disregard of the rights of Long as established gross negligence, amounting to wantonness, and the jury so found, they might find exemplary damages. *Railway Co. v. Rice*, 38 Kan. 404, 16 Pac. 817. The jury found that the conductor and col-

lector acted in a wanton manner towards Long in compelling him to yield to their demands, without considering the place or surroundings of ejection. There is evidence upon which to base this finding. The forcible eviction of Long from the car in which he had a right to remain is certainly a wrong which is accompanied with great injustice and outrage; but to make such eviction at about 2 o'clock in the morning, when the weather was cold and stormy, at a place on the prairie, with no human habitation in sight, is, at least, such a reckless indifference to the rights of Long, and such an utter disregard of consequences to his life and health, as would justify the jury in finding that the agents of the railroad company were grossly and wantonly negligent of his rights and welfare. The interests of the traveling public demand that the agents of a common carrier of passengers shall carefully scrutinize the ticket presented to them by a passenger, and see that said passenger is permitted to ride unmolested to his destination, as stated in the ticket, provided the passenger conducts himself in an orderly manner. The consequences to the passenger might be so serious that it will not do to say that a conductor or collector can omit this duty without being guilty of gross and wanton negligence towards the rights of such passenger. Suppose, in this case, Long had been without the 60 cents to pay the additional fare, and having no acquaintance there to have loaned it to him, he would have been left on the prairie, away from any human habitation in the nighttime, in the midst of a snowstorm, during a cold March night. The safety and comfort of passengers require that such things must not be tolerated. Slight diligence upon the part of the collector would prevent such an eviction. The want of such diligence is gross negligence, and, under the circumstances of this case, it was a wanton disregard of Long's rights. Judgments for exemplary damages have been sustained in cases very similar to this, in *Railway Co. v. Rice*, supra, *Railway v. Kessler*, 18 Kan. 523, *Sawyer v. Sauer*, 10 Kan. 466, and other cases.

The remaining errors complained of relate to the introduction and rejection of evidence, to the conduct of the attorneys for Long in addressing the jury, and to the refusal of the court to require the jury to answer certain special questions. To analyze and discuss each of these questions would extend this opinion to an unreasonable length, and could serve no good purpose. Each of them is decided in accordance with well-established decisions of our supreme and appellate courts. We have made a careful examination of the record, and find that no error prejudicial to the substantial rights of the plaintiff in error was committed, either in the introduction or rejection of evidence, in the argument of counsel for the defendant in error, or in the refusal of the court to require the jury to return to the jury room, and make and return answers to questions 8, 15, 16, 17, 18, 19, 31,

and 32. The questions had either been sufficiently answered, or they were upon immaterial matters. The judgment of the district court is affirmed. All the judges concurring.

(19 Mont. 200)

NATIONAL CASH-REGISTER CO. v.  
BROWN et al.

(Supreme Court of Montana. Feb. 15, 1897.)

DISSOLUTION OF PARTNERSHIP—LIABILITY FOR  
DEBTS.

A retiring partner is liable for the debts of the firm to a creditor having actual knowledge that, under the terms of the dissolution, the other partner had assumed to pay the debts, though the creditor had attached the goods of such other partner, and subsequently had released the attachment.

Appeal from district court, Park county; Frank Henry, Judge.

Action by the National Cash-Register Company against J. A. Brown and R. D. Alton, doing business as J. A. Brown & Co. Judgment for plaintiff, and Alton appeals. Affirmed.

This is an action commenced in a justice of the peace's court in Park county, by the plaintiff, to recover judgment against the defendants on four promissory notes, described in the complaint. In the justice's court the defendant J. A. Brown defaulted, and judgment was entered against him. The defendant R. D. Alton appeared, and filed a separate answer, which is in substance as follows: It admits the execution of the notes sued on by the firm of J. A. Brown & Co., as alleged in the complaint. Defendant Alton, for a further and separate defense, alleges that on the 7th day of April, 1894, and for a long time prior thereto, he and the defendant J. A. Brown were partners, doing business under the firm name and style of J. A. Brown & Co., at Livingston, Park county; that, on said day, said firm was dissolved, by mutual consent, by an agreement in writing, by the terms of which agreement defendant Alton retired from said firm, and the defendant Brown continued the business conducted by said firm, took all the assets thereof, and agreed to collect the accounts due to, and pay all the indebtedness of, said firm of J. A. Brown & Co.; that, at the time of the dissolution of the firm, the notes in suit were outstanding against said firm; that thereafter, on the 19th day of November, 1894, the plaintiff commenced an action in the justice's court of Livingston township, in said county, against the defendants, upon the identical notes set forth in the complaint in this suit, by filing said notes in said justice's court, and procuring a summons to be issued thereon; that, at the time of the commencement of said suit, the plaintiff caused a writ of attachment to be issued out of said justice's court, which writ was delivered to the constable of said township, and which was served by said constable by levying upon sufficient property of the defendant J. A. Brown to fully pay off and sat-

isfy said notes and costs; that, at the time of the commencement of said suit in said justice's court, the plaintiff and its attorneys were informed and knew of the dissolution of said firm, and that said J. A. Brown had succeeded to all the assets of the firm, and had contracted to pay the plaintiff's said demands, together with all the other indebtedness of said firm. Defendant Alton further alleges that, at the time of the commencement of said suit and the issue and levy of said attachment, the said defendant Brown was insolvent, and that this fact was well known to the plaintiff and its attorneys; that after the commencement of said suit and levy of said attachment, and while the constable had sufficient property in his possession under said writ of attachment to satisfy the plaintiff's demand, this defendant notified the plaintiff and its attorneys that the said firm of J. A. Brown & Co. had been dissolved, that said Brown had all of the assets of the firm, and had agreed to pay all of its indebtedness, including the plaintiff's demand, and urged and requested and demanded the plaintiff to proceed with said suit, and make the amount of its claim out of the property of the defendant J. A. Brown, which was then held under attachment; that said plaintiff, notwithstanding the urgent requests and demands of this defendant, and contrary to his expressed wish, and with full knowledge of all the facts aforesaid, released the property of said defendant Brown which was held under said writ of attachment, and dismissed said suit; that, subsequent to the release of said attachment and the dismissal of said suit, the defendant Brown made an assignment for the benefit of his creditors, and at all times since has been, and now is, insolvent and irresponsible financially. To this answer of defendant Alton, the plaintiff filed a general demurrer, which was overruled by the justice; and, the plaintiff having elected to stand on his demurrer, judgment was rendered by said justice in favor of defendant Alton, from which judgment plaintiff appealed to the district court. In the district court the case was again heard on the demurrer of plaintiff to the separate answer of defendant Alton, and the same was sustained; whereupon defendant R. D. Alton elected to stand on his answer, and judgment was entered against him. From this judgment, defendant Alton appeals.

Campbell & Stark, for appellant. E. C. Day, for respondent.

PEMBERTON, C. J. (after stating the facts). The appellant contends that by the terms of the dissolution of the partnership firm of J. A. Brown & Co., as set out in his separate answer, he became a surety for the payment of the firm's debts, and that he was entitled to the rights of such surety from the creditors of the firm having actual notice of the terms of the dissolution; and, further, that the plaintiff, having brought suit by attachment against the firm, and having at-

tached sufficient property in the hands of Brown, the principal, to satisfy its demand, and subsequently, without the consent and against the protest of the surety, having released the attachment and dismissed the suit, thereby released appellant, the surety, from all liability on the notes sued on.

The questions raised by the contention of the appellant were fully discussed in *Rawson v. Taylor*, 30 Ohio St. 389, and the conclusion reached that "a retiring partner remains liable for all the existing debts of the firm, to the same extent as if he had not retired. An agreement between him and the remaining partners, or with the new firm that succeeds, that they will assume and pay all such debts, while valid as between the partners, has no effect upon the creditors of the old firm, unless they become parties thereto." In *Fensler v. Prather*, 43 Ind. 119, a case involving the question under discussion, it was said: "Two partners, owing debts and having assets, dissolved partnership; and, by agreement, one partner was to retain all the assets, and pay all the debts, and manage and close up the business. The partner who had withdrawn from the management of the business, desiring a discharge from further personal liability on a certain note made by said firm, and held by one of the creditors thereof, acquainted such creditor with the facts of the partnership arrangement, and proposed to pay him one-half the amount of said note, the creditor to relieve him from further liability, and look to the effects in the hands of the former partner and to such partner personally for the other half, which proposition the creditor accepted, and one-half the amount of said note was then paid accordingly. Held, that such part payment was not a sufficient consideration for the promise to release the party making it as to the remainder." In *Shriver v. Lovejoy*, 32 Cal. 575, a case almost exactly like the one at bar, the court said: "The plaintiff sued Lovejoy (the surviving partner of Lovejoy & Co.) and Grandvoinet upon a joint and several promissory note made by Lovejoy & Co. Grandvoinet relied for a defense mainly on the fact that Lovejoy & Co. were the principal debtors; that he was only their surety; and that the plaintiff, after having commenced this action and attached sufficient property of Lovejoy to satisfy the demand, released the property from the attachment, and the same was attached by other creditors of Lovejoy. The court gave judgment for the plaintiff. All the makers of a joint and several promissory note, whatever may be their true relation between themselves, stand, as to the payee, as principals. The promise of each is an absolute and primary promise, not a conditional or secondary promise. The creditor is not interested in knowing the relation of the makers with each other. In a suit on the note, he ought not to be delayed by an investigation into matters which do not concern him."



And it was held that the facts alleged constituted no defense. *Johnson v. Emerick*, 70 Mich. 215, 38 N. W. 223. This court, in *Smith v. Freyler*, 4 Mont. 489, 1 Pac. 214, fully discusses the questions here presented, and collates the authorities. In that case we said: "When a surety signs a promissory note, his promise is absolute and unconditional to pay the same when it becomes due; and there is no escape from this promise unless the payee or holder releases him. He does not promise that he will pay if the payee or holder fails to collect the note by an action against the principal. The payee or holder does not receive the note with an implied promise that he will exhaust his remedy against the principal before proceeding against the surety. The obligation of the surety is to pay according to the terms of his promise, and he may protect himself by paying, and then proceeding against the principal, and that is his remedy. \* \* \* The authorities are decidedly in favor of the proposition, in absence of any statutory provision controlling it, that if, after the debt is due, the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, the surety is not thereby discharged. And if there were no authorities on the subject, considering the nature of the obligation of a surety, we do not well see how the contrary could be maintained. The contract of the surety to pay is as absolute as that of the principal, and he cannot change his absolute promise into a conditional one to pay, providing the creditor cannot collect from the principal. The averment in the answer that the plaintiff theretofore agreed to, and did, release the defendant from all liability on the note, is the averment of a legal conclusion; and the further averment that the plaintiff then and there told the defendant to rest easy, that he would not look to him for the payment of the note, but that the principal was good enough for him, and that he would trust him for the payment thereof, is a promise without a consideration, and would not have prevented the plaintiff, the payee, from at once commencing action against the surety to collect the note." We are aware that there are some authorities which hold with appellant's contention; but recent authorities draw a marked distinction "between cases where the relation of principal and surety existed inter se at the time the obligation was entered into, of which the creditor had knowledge, and a case of joint principals inter se at the date of the obligation, and a subsequent agreement between the joint debtors by which, as between themselves, one becomes a surety for the other, of which subsequent arrangement the creditor had knowledge." *Rawson v. Taylor*, supra; *Swire v. Redman*, 1 Q. B. Div. 536.

We are firmly of the opinion that one obli-

gor cannot change his relation to his creditor by any agreement with his joint obligor without the creditor's consent. In view of the foregoing authorities, we are of the opinion that the answer of appellant did not state facts sufficient to constitute a defense, and that there was no error in the action of the court in sustaining the demurrer thereto. The judgment appealed from is affirmed.

HUNT and BUCK, JJ., concur.

(19 Mont. 245)

### MORRILL v. HERSHFIELD.

(Supreme Court of Montana. March 1, 1897.)

ATTORNEY—VALUE OF SERVICES—RESULT OF LITIGATION—HYPOTHETICAL QUESTION.

While the result of a litigation is a proper element for consideration in determining the value of an attorney's service therein, its omission from a hypothetical question to an expert does not render the question objectionable, as such element may be included in cross-examination.

Appeal from district court, Lewis and Clarke county; H. N. Blake, Judge.

Action by Fred B. Morrill against Aaron Hershfield. Judgment for plaintiff. Defendant appeals. Affirmed.

McConnell, Gunn & McConnell, for appellant. C. B. Nolan and R. R. Purcell, for respondent.

HUNT, J. Plaintiff and respondent brought this action to recover a balance due for legal services performed by him for the appellant. The appellant does not dispute the fact that the services were rendered. The action in which the plaintiff was employed was one for divorce, instituted in the district court at Fargo, N. D. The record shows that the suit was bitterly contested, and resulted in a judgment adverse to the appellant, who was the plaintiff in that action. To prove the plaintiff's allegation herein that his professional services were worth \$3,500, the plaintiff testified himself, and introduced several depositions of lawyers engaged in the practice of their profession at Fargo, N. D. Two of these lawyers, who gave their evidence by deposition,—W. F. Ball and John S. Watson, Esqs.,—testified that they represented the interests of the defendant in the divorce action, and were familiar with the case, its character and magnitude, and knew of the services and labor performed by the plaintiff herein (Morrill), who represented the plaintiff, Hershfield, in that case. They estimated the value of plaintiff's services at from three to five thousand dollars. The evidence of these two witnesses was uncontradicted. To the other lawyers who were called to give their depositions the respondent put a hypothetical question, in which were recited the nature of the action in which plaintiff had performed the professional services sued for, the time

devoted by him to the case, the trips taken by him to other places in connection with the business of this suit, the resisting of motions for alimony and suit money, the responsibility of the control, preparation, and management of the case, the time the trial lasted, and other matters apparently connected with the supposed lawsuit referred to. The answers to these questions put the value of the plaintiff's services at various sums from four to ten thousand dollars. The jury awarded the plaintiff \$1,194. To such hypothetical question asked the several witnesses who were called as experts the appellant objected, because the question propounded did not include one of the elements entering into the determination of the reasonableness of the compensation of an attorney, namely, whether or not the action in which the services were rendered was decided in favor of the defendant or against him. The court overruled the objection, and permitted the question and answers to be read to the jury, and it is this alleged error alone that appellant relies upon.

The better rule appears to be that in an action brought by an attorney to recover the reasonable value of his services in the conduct of a lawsuit it is proper that the result of the litigation be laid before the jury as one of the elements to be considered by them in arriving at a just valuation to be put upon his services. *Randall v. Packard*, 142 N. Y. 47, 36 N. E. 823; *Stevens v. Ellsworth* (Iowa) 63 N. W. 683. But, while it is one of the proper elements for consideration, we cannot say that it is so essential as to require us to conclude that its omission on direct examination was prejudicial to the appellant's rights. We must assume that the appellant had notice of the taking of the depositions and of the interrogatories that were to be propounded to the experts. He therefore had an opportunity to cross-examine them, and to include the element of the result of the litigation in his cross-examination, if he desired to do so. So far as the question propounded to the experts went, it is not complained of, and the rule is that when a witness has expressed an opinion based upon facts assumed by the one whose witness he is, the opposite party may cross-examine him by taking his opinion, based upon any other facts assumed to have been proved by the evidence, provided, of course, that such hypothetical state of facts is fairly within the scope of the evidence adduced on the trial. If the question asked of the witness is defective because it does not state enough, and in the opinion of the counsel there was evidence other than that included in the hypothetical question, which he believed it was proper for the witness to consider, the attention of the witness should be called to it upon cross-examination. *Davidson v. State* (Ind. Sup.) 34 N. E. 972; *Goodwin v. State*, 96 Ind. 350; *Railroad Co. v. Compton*, 75 Tex. 667, 13 S. W. 667;

*Rog. Exp. Test.* § 27. But the question put may not be improper because it includes but a part of the facts in evidence. *Stearns v. Field*, 90 N. Y. 640; *Mercer v. Vose*, 67 N. Y. 56; *Thomp. Trials*, § 625. Moreover, the jury were fully advised by the testimony of respondent himself of the result of the litigation in which plaintiff rendered his professional services. It is also to be noted that the uncontradicted testimony of the witnesses Ball and Watson, who gave their opinions, not upon a hypothetical case, but as a result of their own knowledge of all the facts, which necessarily included a knowledge of the results, conformed to the evidence given in response to the hypothetical question put to the other witnesses. The verdict, therefore, was fully sustained by this uncontradicted testimony of the witnesses Ball and Watson alone, and the appellant is in no condition to complain of harm done him. *Roraback v. Pennsylvania Co.* (Conn.) 20 Atl. 465; *Railway Co. v. Tabor* (Ky.) 32 S. W. 168; *Galvin v. Palmer* (Cal.) 45 Pac. 172. No complaint is made because of the instructions to the jury. We will therefore presume that they were in accord with the issues raised, and were warranted by the evidence given. Judgment affirmed.

BUCK, J., concurs.

(19 Mont. 236)

#### SANDERSON v. BILLINGS WATER-POWER CO.

(Supreme Court of Montana. Feb. 23, 1897.)

##### APPEAL—SUFFICIENCY OF PLEADING—RECORD.

1. Where no demurrer was interposed to a complaint, but issue was joined thereon by answer, it will not be held insufficient on the ground of ambiguities or uncertainties of statement.

2. Prior to the taking effect of the Codes of 1895, the instructions in a case were not a part of the judgment roll unless included in a bill of exceptions.

Appeal from district court, Yellowstone county; George R. Milburn, Judge.

Action by Charles Sanderson against the Billings Water-Power Company for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

This was an action, brought by respondent (plaintiff below) against appellant (defendant below) for personal injuries. The pleadings were a complaint, answer, and replication. A trial resulted in a verdict and judgment for plaintiff for \$2,500 damages. An appeal was taken from an order denying a motion for a new trial and the judgment. After the transcript was filed in this court, the respondent made a motion to strike out the statement on motion for a new trial therein, for the reason that the same was not prepared or served within the time required by law. This motion was granted, and the appeal from the order denying the motion for a new trial was at

the same time dismissed. The present status of the case in this court is an appeal from the judgment alone. The complaint in the action is as follows: "That during all of the times hereinafter mentioned the defendant was, and still is, a corporation organized under the laws of the state of Montana. That the defendant, on the 21st day of June, 1894, by its agents and servants, wrongfully, carelessly, and negligently excavated a deep and dangerous excavation and trench in and across the public street, road, and highway known as 'Twenty-Seventh Street North,' between First avenue north and Second avenue north, in the city of Billings, Yellowstone county, state of Montana, and said defendant, by its agents and servants, wrongfully, negligently, and carelessly, thus obstructing said highway, negligently left a large pile of earth in said road, street, and highway, and negligently suffered said pile of earth dug from said excavation and trench to remain therein and thereon, obstructing said highway during the nighttime of said day; and to remain therein and thereon openly exposed, and without any protection, fence, light, signal, or anything else to indicate danger, or give notice to travelers or passers along said highway against accidents. That by reason of said negligence, carelessness, and improper conduct of the defendant by its said agents and servants, in the nighttime of the said day, while the plaintiff was lawfully traveling on said highway and street, the two-wheeled cart of the plaintiff therein being then and there driven by plaintiff with one horse drawing the same, then passing through said street and along and over said road, street, and highway, the plaintiff being then and there wholly unaware of danger, was, without fault or negligence on plaintiff's part, accidentally driven against the said pile of earth, and was thereby overturned, whereof the plaintiff received great bodily injury. That one of his ankles was dislocated and badly sprained, and he is, as he is informed and believes, permanently injured. Plaintiff was made sick, sore, and lame, was put to great pain, and was and is still prevented from going on with his occupation and business of farming; to his damage in the sum of five thousand dollars. Wherefore plaintiff demands judgment against the defendant for the sum of five thousand dollars and costs of this action."

O. F. Goddard, for appellant. Glib S. Lane, for respondent.

BUCK, J. (after stating the facts). Appellant insists that the complaint in this action does not state facts sufficient to constitute a cause of action, and hence does not support the judgment. His counsel suggests in support of this only ambiguities and uncertainties in the averments of the pleading. The record fails to disclose that a demurrer was interposed to the complaint on any ground whatsoever, and

by answering appellant has waived the right to object to any such defects, if they exist. The complaint, in our opinion, states a cause of action.

We are also asked to examine certain instructions given by the lower court, which counsel for appellant claims are "inconsistent with, not justified by, and unsupported by the pleadings." At the time the judgment roll in this case was made up, which was before the Codes of 1895 went into effect, the instructions in a case were not a part of the judgment roll, unless included in a bill of exceptions. See *Kleinschmidt v. McDermott*, 12 Mont. 315, 30 Pac. 393, and especially the concurring opinion written by Mr. Justice De Witt. *Light Co. v. Morgan*, 13 Mont. 394, 34 Pac. 488, and *State v. Black*, 15 Mont. 143, 38 Pac. 674. The instructions in this case were never included in any bill of exceptions, and thereby made a part of the judgment roll. It is true, they were set forth in the statement on motion for a new trial originally in the record, but they were there merely as a part of said statement. When this court struck out that statement, it also struck out of the record the instructions in the case, and therefore they are not before us for any consideration whatsoever. The judgment is affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

(19 Mont. 249)

#### DICKERMAN v. GELSTHORPE.

(Supreme Court of Montana. March 1, 1897.)

##### ELECTION—MARKING BALLOTS—STATUTES.

1. Under Pol. Code, § 1361, providing that, if one desire to vote a straight party ticket, he may do so by making a cross at the head of the list representing his political party, and if he desire to vote for any candidates on any other list he shall make a cross opposite the name of such candidate; and section 1403, declaring void a ballot or parts of a ballot from which it is impossible to determine the elector's choice, but providing, if part of a ballot is sufficiently plain to gather therefrom the elector's intention, such part shall be counted,—a ballot with a cross at the head of the list representing a political party, and a cross opposite the name of a candidate in another list for an office for which there is no candidate in the first list, will be counted for such candidate and all candidates in the first list; as, while the provision for use of a cross to indicate choice is mandatory, that for putting cross opposite name of every candidate where a voter wishes to vote for candidates in more than one list is merely directory.

2. Where a cross is put at the head of one party's list of candidates and opposite the name of a candidate in another list for an office for which there is a candidate in the first list, the ballot will not be counted for either candidate for that office, but will be counted for all other candidates in the first list.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Proceeding by A. E. Dickerman against W. H. Gelsthorpe to contest an election.

Judgment for contestant. Contestee appeals. Reversed.

This was a proceeding instituted under the provisions of title 2, pt. 3, of the Code of Civil Procedure of Montana, to contest an election to the office of county treasurer of Cascade county. At the election held November 3, 1896, Dickerman was a candidate for the office on the Republican and Silver Republican tickets. Gelsthorpe ran on the Democratic and People's party tickets. The official returns as canvassed showed that Gelsthorpe had received 48 votes more than his rival. Upon the trial the district court found that 72 ballots had been erroneously counted for Gelsthorpe. Each of these 72 ballots was marked with a cross in the circle either under the designation "Democratic" or "People's Party," and contained a cross opposite the name of Hartman, the candidate for representative in congress, whose name appeared in the "Silver Republican" column. Neither the Democratic nor the People's party had a candidate for congress, and there was a blank in their respective columns for that office. Exception was saved to the rejection of said ballots. The lower court, over the objection of the contestant, Dickerman, counted for Gelsthorpe 66 ballots marked as follows: with a cross in the circle under the "Democratic" or "People's Party" designation, and with a cross or crosses opposite the names of some candidate or candidates other than Gelsthorpe's in the same list under the crossed circles. The lower court also refused to count for Dickerman eight ballots marked with a cross in the circle under either the Republican or Silver Republican columns, and with a cross opposite the names of candidates other than Gelsthorpe in the Democratic and People's party list. Dickerman was declared to have been elected by 14 votes. If Dickerman had been allowed the 8 votes aforesaid, and Gelsthorpe the 72 votes mentioned, Gelsthorpe's majority would have been 50 votes. Judgment was rendered for the contestant, Dickerman. The contestee, Gelsthorpe, has appealed therefrom.

The sections of the statutes under which the questions involved in the appeal must be decided, are as follows:

Section 1354 (Pol. Code; Codes 1895): "Ballots prepared under the provisions of this chapter must be white in color and of a good quality of printed paper, and the names must be printed thereon in black ink. The ballots used in any one county must be uniform in size, and every ballot must contain the names of every candidate whose nomination for any special office specified in the ballot has been certified or filed according to the provisions of this title, and no other names. The list of candidates of the several parties shall be placed in separate columns on the ballot, in such order as the authorities charged with the printing of the

ballots shall decide. As near as possible the ballot shall be in the following form:

REPUBLICAN.	DEMOCRATIC.	PEOPLES' PARTY.	PROHIBITION.
○	○	○	○
For Governor. John E. Rickards.	For Governor. T. E. Collins.	For Governor. Wm. Kennedy.	For Governor. J. M. Waters.
For Lieut. Gov. A. C. Botkin.	For Lieut. Gov. H. R. Melton.	For Lieut. Gov. H. H. Cullum.	For Lieut. Gov. J. C. Templeton.
For Sec. of State. L. Rotwitt.	For Sec. of State. B. W. Folk.	For Sec. of State. J. W. Allen.	For Sec. of State. E. M. Gardner.

—And continuing in like manner as to all candidates to be voted for at such election. Every ballot must also contain the name of the party or principle which the candidates represent, as contained in the certificates of nomination. Below the names of candidates for each office there must be left a blank space large enough to contain as many written names of candidates as there are persons to be elected. There must be a margin on each side of at least half an inch in width, and a reasonable space between the names printed thereon, so that the voter may clearly indicate, in the way hereinafter provided, the candidate or candidates for whom he wishes to cast his ballot. Whenever the secretary of state has duly certified to the county clerk any question to be submitted to the vote of the people, the county clerk must print in the regular ballot, in such form as will enable the electors to vote upon the question so presented in the manner in this title provided. The county clerk must also prepare the necessary ballots whenever any question is required by law to be submitted to the electors of any locality, and any of the electors of the state generally, except that as to all questions submitted to the electors of a municipal corporation alone, the city clerk must prepare the necessary ballots. The elector if he shall so desire, may vote his straight party ticket by making a cross within the circle at the head of the list representing his party."

Section 1361: "On receipt of his ballot the elector must forthwith, without leaving the

polling place and within the guarded rail provided, and alone, retire to one of the places, booths or compartments, if such are provided, and prepare his ballot. If he shall desire to vote a straight party ticket, he may do so by making a cross at the head of the list representing his political party. If he shall desire to vote for any candidate or candidates on any other list, he shall make a cross opposite the name of every candidate for whom he desires to vote; in case of a ballot containing a constitutional amendment, or other question to be submitted to the vote of the people, by marking an X opposite the answer of the question or amendment submitted. The elector may write in blank spaces, or paste over any other name, the name of any person for whom he wishes to vote. In marking a ballot, any elector is at liberty to use or copy any unofficial, sample ballot which he may choose to mark, or have marked, before entering the compartment or booth, but no elector is at liberty to use, or bring into the polling place, any unofficial, sample ballot printed in the exact style, manner, width or character of paper of the official ballot. After preparing his ballot the elector must fold it so that the face of the ballot will be concealed, and so that the endorsement stamped thereon may be seen. He must then vote forthwith, and before leaving the polling place."

Section 1403: "In the canvass of the vote any ballot which is not endorsed, as provided in this title, by the official stamp, is void and must not be counted, and any ballot or parts of a ballot from which it is impossible to determine the elector's choice, is void and must not be counted; if part of a ballot is sufficiently plain to gather therefrom the elector's intention, it is the duty of the judges of election to count such part."

Stanton & Stanton and Pigott & Veasey, for appellant. Ransom Cooper, Carpenter & Carpenter, and Jas. W. Freeman, for respondent.

BUCK, J. (after stating the facts). Counsel for respondent construe section 1361 in connection with section 1354 of the Political Code, as follows:

"How to Prepare Ballots. The law does not allow a voter in any case to erase any names on his ballot. The law requires voting to be by the X-mark. First, on receipt of his ballot, the elector must forthwith and alone retire to one of the compartments, and prepare his ballot as follows:

"How to Vote a Straight Ticket. (1) If the voter shall desire to vote a straight party ticket, he may do so by making a cross in the circle at the head of the list representing his political party. No other marks are necessary in such a case. Or (2) he may omit the cross in the circle at the head of the ticket, and make a cross opposite the name of each and every person on his party list for whom he desires to vote.

"How to Vote a Mixed Ticket. Omit the cross in the circle at the head of any list, and make a cross opposite the name of each and every person on any list for whom the voter desires to vote.

"How to Vote Where no Candidate's Name is Printed. If no name of a candidate appears on his political list,—as, for instance, if no candidate for congressman is printed on a party list,—the voter may vote for a person for any such office as follows: (1) He may paste the name of the person for whom he desires to vote in the blank space left for the candidate's name in such list, and always in such case must make a cross opposite such pasted name; or (2) he may write the name of the person for whom he desires to vote in the blank space left for the candidate's name in such list, and always in such case must make a cross opposite such written name."

The foregoing interpretation of the manner in which a voter should prepare the form of his ballot under said sections 1354 and 1361 is substantially correct. It is insisted, however, in behalf of respondent, that the provisions of section 1361 as to the manner in which a voter shall mark his ballot are mandatory, and that section 1403 does not justify or contemplate any other construction. Counsel for respondent ask, "What was the true purpose of section 1403?" and, answering, say: "It was this: When a voter has made an honest attempt to comply with the law, and has gone far enough to show his intention to comply with the law, in marking his ballot, then the aid of section 1403 may be invoked; as, for example, when the voter attempts to make a cross, and makes not a perfect one, \* \* \* and when the voter does not get his cross directly opposite the name of the candidate, but a little above or below. \* \* \* An intent expressed in a way not authorized by the law is not expressed at all. \* \* \* Section 1403 does not impose any additional duty upon judges of election or courts. If that section was entirely stricken from the statute books, the same duty rests upon those officers of the law [judges of election]. It would still be their duty to count any part of the ballot which expresses the intention of the voter in the way and manner the law directs it to be expressed, and no less a duty to refuse to count it when such intention is not so expressed." All this line of argument is controverted by counsel for appellant, who insist that section 1403 serves a much broader purpose, and that the provisions as to how ballots should be marked contained in section 1361 (however explicit and literally imperative the language considered by itself) are not mandatory when due weight is given to the general object of the statute, and particularly to section 1403 aforesaid. It is a general rule that election laws must be liberally construed. This court, in *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80, on page

57, 16 Mont., and page 85, 40 Pac., announces that "In the construction of election laws the whole tendency of American authority is towards liberality, to the end of sustaining the honest choice of the electors." The reason for this rule is that the paramount and ultimate object of all election laws under our system of government is to obtain an honest and fair expression from the voters upon all questions submitted to them. Underlying the Australian ballot system—embodied in the present election laws of this state—is the same principle. This new system was adopted because it was considered an improvement as to details on the old system adhered to in the preceding election laws of the territory. The primary object of both systems was to obtain an expression of the will of the people. The new system furnishes the latest and most modern safeguards evolved from practical experience to secure the individual volition and independence of the voter, and prevent fraud and coercion in any form. It is apparent that any form of voting prescribed by election statutes, while a natural and necessary incident, is still only an incident to the main object in the enactment of the same. In considering the details of any and all means by which an end is to be accomplished, the end itself must never be overlooked. Hence, it is our duty in this controversy—if we can, under the law—to count all ballots honestly cast; for, if the voter substantially complies with the prescribed statutory method for preparing and casting his ballot, the main purpose of the election law is complied with. The distinctive feature of the Australian ballot system is the use of the mark in connection with the names of the candidates and questions to be voted on; and, of course, unless the mark is employed to indicate the choice of the voter in his ballot, the ballot he casts is a nullity, however clearly that choice might otherwise be expressed. See *Martin v. Miles*, 46 Neb. 772, 65 N. W. 889. But if, from the marking of the ballot in substantial compliance with the law, the intent and choice of the voter clearly appear, then his ballot should be counted, unless the statute expressly or by clear inference forbids it; otherwise the true spirit of the election law might be violated by subordinating the essence to a mere element of detail, and substance might be sacrificed to form. The elective franchise is not conferred upon the citizen by the legislature, or by virtue of legislative enactments. The right to vote is a constitutional right, and is one of the bulwarks of our form of government and system of civil liberty. In *State v. Russell*, 34 Neb. 116, 51 N. W. 465, the question of when statutory provisions as to the manner of voting are mandatory and when directory, is clearly discussed. The opinion by Post, J., quotes first section 190 of the last edition of McCrary on the Law of Elections. That section is as follows: "If the statute expressly de-

clares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. Such a statute is imperative, and all consideration touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election." Section 448 of Paine on Elections is also quoted. The opinion then states: "The view expressed by these authors has the support of the great majority of cases in this country and England. In fact, we are not aware that there is to be found in the reports any diversity of opinion on the subject,"—citing numerous authorities. In the dissenting opinion of Chief Justice Andrews and one of the associate justices in *Talcott v. Philbrick* (Conn.) 29 Atl. 436, on page 439, we find this language: "Doubtless the legislature has the constitutional power to place any and all restrictions about a ballot, or about the act of voting, which, in its judgment, are necessary or proper to secure independent action by the voter, or to make intimidation, cheating, or bribery at the polls impossible, or as nearly so as can be done by legislative enactment; and when the legislature has in clear and explicit words said that a ballot shall be void for any cause, the courts must so declare, even though the cause seems to them unreasonable. But, on the other hand, no voter is to be disfranchised, and no ballot is to be declared void, on doubtful construction. All statutes tending to limit the exercise of the elective franchise by the citizen should be liberally construed in his favor; and, unless a ballot comes within the letter of the prohibition against a particular kind of a ballot, it should be counted. A great constitutional privilege, the highest under the government, is not to be taken away on a mere technicality, but the most liberal intendment should be made in support of the elector's action whenever the application of the common-sense rules which are applied in other cases will enable the courts to understand and render it effective,"—citing authorities. In a recent opinion of the New York court of appeals (*People v. Wood*, 42 N. E. 536) Andrews, C. J., says: "The object of election laws is to ascertain the popular will, and not to thwart it. The object of election laws is to secure the rights of duly-qualified electors, and not to defeat them. Statutory regulations are enacted to secure freedom of choice and to prevent fraud, and not by technical obstruction to make the right of voting inse-

cure and difficult." Wigmore on Australian Ballot System (2d Ed., p. 193) says: "Whenever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their requirements as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention; and if, in a given case, the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials,—that is, as objects in themselves, and not merely as means." The general rule is clear, then, that unless statutory provisions as to voting are expressly declared to be mandatory, or by clear inference were necessarily intended to be so, the courts should regard them as directory only.

Counsel for respondent urge that the provisions of section 1361 are so clear and plain that they cannot be misunderstood. We cannot agree with this statement. They are not so free from ambiguity that even an intelligent voter may not readily be misled by them. Nowhere in the election statutes of this state is there any express declaration that the said provisions of section 1361 are mandatory. The following cases have been cited as holding that "the provisions of the statute as to voting are mandatory": *Taylor v. Bleakley* (Kan. Sup.) 39 Pac. 1045; *Lay v. Parsons* (Cal.) 38 Pac. 447; *Parvin v. Wimberg* (Ind. Sup.) 30 N. E. 790. The Kansas decision, *supra*, was rendered under an election statute which directly declared that a vote not marked in the manner prescribed should not be counted. The California opinion, above, enunciates the doctrine more by way of dictum than decision. In the Indiana case, *supra*, the court cites as one of the reasons for its decision a section of the state's statutes which declared that when a stamp was placed upon a ballot so as not to touch a square thereon, the stamp should be held to be a distinguishing mark, and the ballot, in consequence, should not be counted. The decision in *Curran v. Clayton*, 86 Me. 42, 29 Atl. 930, does impress us as correctly stating the law. But it is unnecessary to comment upon the decisions of other courts, for most or all of them were rendered under statutes differing from the one before us. If we construe section 1403 as appellant claims it should be construed, then the question of whether the provisions of section 1361 are mandatory or not is readily answered. In *State v. Russell*, *supra*, the supreme court of Nebraska directly passed upon section 20 of the election laws of Nebraska; and said section 20 is almost identical with section 1403 of the Montana statute. It was contended by counsel in the Nebraska case that the scope of section 20 was of the same limited nature that respondent's counsel claim for section 1403. But the Nebraska court held otherwise, and construed it in a much broader sense. The decision in *Parker v. Orr* (Ill. Sup.) 41 N. E. 1002, is also directly in point. We are of opinion that sec-

tion 1403 was clearly intended to modify sections 1354 and 1361, and that the provisions of these two last-named sections must be construed in connection with section 1403. From the language of the last-named section it is clear to us that the provisions of section 1361 as to the manner of preparing a ballot are mandatory as to the use by the voter of the cross-mark to indicate his choice, but in other respects (so far as this appeal is concerned) are merely directory. Even if the ballot is not correct in form under the requirements of section 1361, if from the cross-marks placed upon it the intent of the voter as to the whole ballot, or any part thereof, clearly appears, then the whole ballot or such part thereof, as the case may be, should be counted.

In this view of the law, can it be said that it is impossible to determine from their ballots the choice of the 72 electors whose votes were rejected by the lower court? They were marked with a cross in the circle at the head of the Democratic or People's party list, and in each a cross was placed opposite Hartman's name in the Silver Republican list or column. The name of no candidate for congress appeared on the Democratic or People's party list. We think it is clear that the intent of these voters was to cast a ballot for their own straight party ticket and also for Hartman. These voters, counsel for respondent claim, by the use of a cross opposite Hartman's name, must be held, in the eye of the law, to have intended to vote only for a congressman. Upon this theory their votes by crosses in the circles for all the other candidates listed on the straight party tickets, even for presidential electors, were nullified. On the same principle, if a voter marks a cross opposite the name of an independent candidate for constable, standing alone in another list, his whole straight party vote would have to be sacrificed to his vote for constable. In our opinion, the cross in the circle at the top of the list is, under the statute, so far as the legal intent is concerned, equivalent to placing a cross opposite the name of each and every candidate in the list under said circle. The legal intent from the cross in the circle is not subordinate to the intent manifested by marking crosses opposite the names of particular candidates in other lists. If these 72 voters had omitted a cross in the circle, and had marked a cross opposite the name of each candidate in the list thereunder, no question would have arisen as to counting these ballots. By marking their ballots as they did, the same result was accomplished. *Whittam v. Zahorik* (Iowa) 59 N. W. 57, sustains this view. We do not agree with the doctrine in *Young v. Simpson* (Colo. Sup.) 42 Pac. 666, to the effect that a cross-mark opposite the name of a candidate evinces a particular intent which controls any general intent manifested by marking a cross at the top of the party list. It follows, therefore, that the lower court committed no error in counting for appellant the 66 ballots which were marked in

the circle at the top of the list, and also contained marks opposite the names of certain candidates other than appellant's in the same list. No objection, or even suggestion, is made that these 66 ballots were marked for the purpose of distinguishing them. The court rejected eight ballots marked with a cross in the circle at the top of the list in which respondent's name appeared. On these eight ballots marks also had been placed opposite the names of certain candidates other than appellant Gelsthorpe in another list. This was error. These votes should have been counted for respondent. If on these ballots appellant's name had been marked, then it would have been impossible to determine whether the voter intended to vote for respondent or appellant, and a mark in the circle at the top in favor of respondent would have neutralized the mark opposite appellant's name.

There is one other question discussed in the briefs of counsel. Testimony was offered by contestant for the purpose of showing that the respondent had not been properly nominated on the Silver Republican ticket, and for the purpose of throwing out votes which had been cast for him under that party list. It is unnecessary for us to pass upon that point here, as a similar question in another election contest is now pending before us. The judgment of the lower court is reversed, and the cause remanded, with directions to render judgment in favor of appellant in accordance with the views herein expressed. Remittitur forthwith. Reversed.

HUNT, J., concurs.

(19 Mont. 229)

STATE ex rel. YOUNG v. YATES.

(Supreme Court of Montana. Feb. 23, 1897.)

CITIES—CONFIRMATION OF OFFICERS—RIGHT OF MAYOR TO VOTE.

1. Laws 1893, p. 130, § 19, provides that "the corporate authority of cities shall be vested in a mayor and board of aldermen to be denominated the city council"; section 13 gives the mayor the right to vote in case of a tie; and section 347 requires a majority vote of all members constituting the council to confirm appointments of city officers. *Held*, that under such provisions the mayor is a constituent part of the city council, and is entitled to give the casting vote in case of a tie vote of the aldermen on the confirmation of an officer.

2. A city council consisted of a mayor and eight aldermen, all of whom were present when the roll was called on the confirmation of a city officer. Four of the aldermen voted in favor of the confirmation, while four did not vote, and the mayor then voted in the affirmative. *Held*, that the officer was legally confirmed.

Appeal from district court, Cascade county; C. H. Benton, Judge.

Proceeding on the relation of David H. Young against Sol. Yates to determine the right to a city office. Judgment for defendant, from which, and from an order denying a new trial, relator appeals. Reversed.

This action was brought by relator, Young, appellant here, to try the right of the defendant, Yates, to the office of city jailer of the city of Great Falls. The material and undisputed facts developed the following conditions: On June 24, 1895, at a regular meeting of the city council of Great Falls, the mayor nominated the relator, Young, as city jailer. All the aldermen, eight in number, were present at the meeting, and the mayor presided. Upon a vote for confirmation the clerk called the roll. Four aldermen voted "Yea," and the other four, though present, remained silent. The mayor voted "Yea," and thus sought to confirm the relator. Thereafter the relator duly qualified as jailer, and demanded the keys and papers of the defendant. Upon a refusal to surrender, this action was brought. The district court adjudged that relator was not legally confirmed. From this judgment, and an order denying a new trial, relator appeals.

Largent & Huntoon, Ransom Cooper, and Douglas Martin, for appellant. Leslie & Downing, for respondent.

HUNT, J. (after stating the facts). This case has been argued and briefed by both sides upon the single question of whether the relator was confirmed or not. And it is this question alone we shall decide. All the eight aldermen of the city were at the meeting of the city council on June 24, 1895. The mayor was also present. The council lawfully met. Comp. St. 1887, div. 5, c. 22, § 346. In case of a tie in any vote or proceeding of the city council, the mayor had a casting vote; not otherwise. Laws Mont. 3d Sess. p. 126, § 367. The mayor is declared by law to be the chief executive officer of the city, and, in addition to other duties imposed upon him, he is required to preside at all meetings of the city council. This duty the mayor was duly performing at the meeting when relator's name was submitted to the council for confirmation. The mayor and board of aldermen together constituted the city council, in whom, by law, was expressly vested the corporate authority of the city. "The corporate authority of cities shall be vested in a mayor and in a board of aldermen, to be denominated the city council, and in such other officers as are herein mentioned or authorized to be elected or appointed by the city council." Comp. St. 1887, div. 5, c. 22, § 385; Laws Mont. 1893, p. 130. Here is a plain statute declaring the mayor a part of the city council, with enumerated duties elsewhere defined, one of which is to preside over meetings of the council of which he forms a part. Considering the statutory provisions cited and others governing city authorities together, we cannot assent to the proposition that the city council is composed exclusively of the aldermen, and that they may ig-



nore the mayor or deprive him of his right to preside, sit, or vote therein in a case of a tie. The relations of the mayor towards the body of the council, the board of aldermen, are controlled by law. He has certain duties, rights, and powers granted to him of an executive nature, yet he presides over and is a constituent part of the whole council exercising its legislative powers, but withal he has no right to vote except where the body over which he presides, the board of aldermen, tie in a vote or proceeding. *People v. Harshaw*, 60 Mich. 200, 26 N. W. 879. A nomination to an office which requires confirmation by the members of the council, before becoming effective, necessarily demands a vote of the members constituting the city council who can vote. But, inasmuch as the mayor cannot vote unless there is a tie, the right to vote is necessarily restricted to the aldermen until that condition arises, when, by reason of a tie vote, the mayor may exercise his power, and confirm or reject.

We find no restriction in the law applicable to the matter of confirming officers. The provision (Laws 1893, § 347) requiring a majority vote of all the members constituting the council to confirm city officers, does not expressly or by implication restrict the mayor's right to vote when the aldermen, who alone can vote ordinarily, are equally divided. But if, in voting, a tie arises, the mayor may give the casting vote, for an instance is then presented where he may exercise his power to do so, and thus determine the question before the council. Upon some matters—notably passing an ordinance over the mayor's veto—the law has required a vote of two-thirds of the whole number of councilmen elected. In such a contingency the statutes have intentionally excluded the mayor from voting; and if the legislature had intended to deny him the right to vote where a tie arises upon a confirmation, the purpose of the legislature would have been easily expressed by similar language requiring for confirmation a vote of a majority of the whole number of councilmen elected. But it has not so provided, and by the manifest difference in the statutes in respect to the votes upon ordinances passed over the veto of the mayor and those respecting appointments, we are confirmed in the belief that the legislature purposely did not mean to exclude the mayor from casting his vote in case of a tie in a confirmation as well as in cases of a tie in other matters. *Carroll v. Wall*, 35 Kan. 36, 10 Pac. 1. The case of *State v. Gray*, 23 Neb. 365, 36 N. W. 577, relied on by respondent was decided upon an ordinance which expressly required a concurrence of a majority of all members elected. It, therefore, is inapplicable to this case.

In the foregoing reasoning we have proceeded in part upon the hypothesis that the four aldermen who remained silent when their names were called to vote upon the question of confirmation were not only properly count-

ed as present, but were also correctly regarded as voting in the negative, and so made a tie. Certainly the respondent cannot contend for any better position than is granted him by this assumption. It is an exploded notion that a member of a legislative body such as a city council can be present at a meeting, thus helping to make a quorum of the body, yet defeat the progress of legislation by refusing to vote when the roll is called. Experience has demonstrated that it is unreasonable to permit the physical to be disunited from the official being under such circumstances. Such practice oftentimes might give to one member, and frequently to an attending minority, an opportunity to accomplish by silence what could not be done by speech, and often render presence, though inactive, more powerful than entire absence. The courts, as well as law writers and parliamentarians generally, have adopted the more rational rule that if a member of such a body join in making a quorum, and sit, his duty is to vote (unless-excused for cause), and he will be counted as present whether or not he refuses to answer to the roll call. "What the propriety of giving to a refusal to vote more potency than to a vote cast,—of allowing a gain from violation of duty, in making the refusing to vote of more effect in governing the action of the body of which one is a member than voting?" *Launtz v. People*, 113 Ill. 144. Thus far the recent authorities are pretty well agreed. *Horr & B. Mun. Ord. § 43*; *Beach, Pub. Corp. § 289*; *Tied. Mun. Corp. § 99*. The supreme court of the United States, in the late case of *U. S. v. Ballin*, 144 U. S. 1, 12 Sup. Ct. 507, have also decided that when a majority of the house of representatives are present the house is in a position to do business. "Its capacity," say the court, "to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the constitution requires is the presence of a majority, and, when that majority are present, the power of the house arises." There is some divergence, however, among the cases upon how to exactly construe the action of such a present member who refuses to vote. It was apparently held in the case of *Launtz v. People*, supra (decided in 1885), under a city charter which gave the mayor a right to vote only in a case of a tie, that if four out of the eight councilmen voted in the affirmative, and the other four, though present, refused to vote either way, the mayor might treat those not voting as opposed to those who had voted, and decide the matter by voting in the affirmative. But in the later case of *Rushville Gas Co. v. City of Rushville* (Ind. Sup.) 23 N. E. 72, a somewhat different view was expressed, the court holding, after a review of cases, that the law is that the members present and not voting assented to the adoption of the matter then before the council. There are in some states some dis-

tinctions recognized between nominations for office and business proceedings, but it would seem that the statutes of this state do not make any such discriminations. We are inclined to the opinion that the proper rule is that those who remain silent shall be deemed to assent to the act of those who do vote. *Ang. & A. Corp.* § 127; *State v. Green*, 37 Ohio St. 227; *Willc. Corp.* § 546; *County of Cass v. Johnston*, 95 U. S. 360. This view accords with the tenor of the decision of the United States supreme court cited above, and is laid down by the authorities relied upon in their opinion. If this be correct, then it would seem the relator in this case was confirmed by the virtual consent of those who did not vote; and, there being no tie, the mayor's action was unnecessary. But we can safely rest our decision upon the assumption that there was a tie, and for the reasons heretofore given on that branch of the case the judgment and order appealed from are reversed, and the cause is remanded, with directions to the lower court to enter judgment in favor of relator and against respondent's right to the office of city jailer. Reversed.

PEMBERTON, C. J., and BUCK, J., concur.

(116 Cal. 120)

TOMPKINS et al. v. MONTGOMERY. (S. F. 799.)

(Supreme Court of California. Feb. 23, 1897.)

APPEALS—TRANSCRIPT—BONDS—JUSTIFICATION OF SURETIES—SUPERSEDEAS—DISMISSAL.

1. Notice of motion to dismiss an appeal from a judgment for failure to file a transcript having been given, the transcript was afterwards filed, and on the same day notice was given of an amendment of the notice of motion by including a motion to dismiss also an appeal from an order denying a new trial. *Held*, the transcript being sufficient for the latter appeal, that the amendment did not take effect as of the date of the original notice.

2. When the transcript is filed on the day on which notice is given to dismiss the appeal for failure to file a transcript, the burden is on movant, under Sup. Ct. Rule 5, to show that the notice was given before the transcript was filed.

3. A few days after appealing, appellant again appealed from the same judgment, and afterwards filed a transcript sufficient in substance. *Held* that, though the only notice of appeal in the transcript was the notice of the second appeal, the transcript was a "sufficient answer" (Sup. Ct. Rule 5) to a subsequent motion to dismiss the first appeal for failure to file a transcript.

4. The failure of the sureties in an undertaking on appeal to justify does not deprive the supreme court of jurisdiction so as to permit another appeal from the same judgment.

5. The fact that the sureties in an undertaking to stay execution on the judgment appealed from failed to justify before the county clerk does not preclude appellant from applying to the supreme court for leave to file another such undertaking. *Hill v. Finnigan*, 54 Cal. 493, followed.

6. Where a party appealed from a judgment and an order denying a new trial, his right to have execution stayed is not impaired by dismissal of the appeal from the judgment.

In bank. Appeal from superior court, Alameda county; A. L. Frick, Judge.

Action by one Tompkins and others against one Montgomery. From a judgment for plaintiffs, and an order denying a new trial, defendant appealed, and, after the failure of his sureties to justify, he again appealed. On motions to dismiss and on application for leave to file an undertaking to stay execution. Appeals from the judgment and second appeal from the order denying a new trial dismissed. Application granted.

E. M. Gibson and Welles Whittemore, for appellant. A. A. Moore, for respondents.

HARRISON, J. The defendant served and filed a notice of appeal from the judgment and from the order denying a new trial December 3, 1896, and on December 5th filed an undertaking on appeal in the sum of \$300, and also an undertaking to stay execution upon the judgment. The plaintiffs excepted to the sufficiency of the sureties, and on December 18th, upon notice that they would justify on that day before the county clerk, the sureties appeared, and, after examination, failed to justify, and were rejected by the clerk. December 21st the defendant served upon the plaintiffs and filed with the county clerk another notice of appeal from the judgment and from the order denying a new trial, and on the 23d of December filed a sufficient undertaking on appeal in due form of law. January 18th the respondents gave notice of a motion to dismiss the appeal from the judgment on the ground that no transcript of the record on appeal had been filed in this court. January 20th the appellant filed with the clerk of this court a transcript containing the judgment roll, statement on motion for a new trial, order denying a new trial, and a copy of the notice of appeal which was filed December 21st. On the same day the respondents gave notice to the appellant that they amended their notice of motion to dismiss the appeal by including therein a motion to dismiss the appeal from the order denying a new trial. February 4th the respondents gave notice of a motion to dismiss the appeals taken December 21st, upon the ground that at the time said notice of appeal was served and filed an appeal from the judgment and order was pending in this court and undetermined. February 6th the appellant made application for leave by this court to file an undertaking sufficient to stay execution upon the judgment appealed from. The several motions and applications have been heard and submitted together.

1. At the time the notice of the motion to dismiss the appeal from the judgment was served upon the appellant there had been no transcript filed in this court, and under the provisions of rule 5 the respondents are entitled to have this motion granted.

2. The motion to dismiss the appeal from

the order denying a new trial cannot be regarded as having been given until the notice by the respondents of their amendment to their motion, and, as the transcript was filed on that day, and the respondent has not shown that his notice was given prior to its filing (*Hoyt v. Railroad Co.*, 87 Cal. 610, 25 Pac. 160, 1066), it must, under the same rule, be considered "a sufficient answer to the motion." It is contended by the respondent that, as the only notice of appeal which is contained in the transcript is that which was given December 21st, the transcript so filed cannot be regarded as an answer to the motion to dismiss the appeal which was taken December 3d. The transcript, however, purports to contain a record of all the proceedings of the superior court which are sought to be reviewed on the appeal, and is therefore sufficient to avoid a dismissal under rule 5. *Hill v. Finnigan*, 54 Cal. 311; *Paige v. Roeding*, 89 Cal. 69, 26 Pac. 787; *Woodside v. Hewel*, 107 Cal. 141, 40 Pac. 103. The most that can be claimed by the respondents is that there was a defect in the transcript, which could be cured under rule 14 upon a suggestion of a diminution of the record; and by rule 15 any technical objection to the record in civil cases, which might be so corrected, must be notified to the appellant, who is allowed until the hearing of the cause in which to present the additional record. *Woodside v. Hewel*, supra.

3. The notice of appeal which was served and filed on the 21st of December was unauthorized. At that time the appeal which was taken December 3d was pending in this court, and there was no judgment or order pending in the superior court from which an appeal could be taken. The failure of the sureties to justify upon the \$300 undertaking did not render the appeal ineffectual, or take from this court the jurisdiction of the cause which was given by the appeal of December 3d. *Schacht v. Odell*, 52 Cal. 449; *Hill v. Finnigan*, supra; *Brown v. Plummer*, 70 Cal. 337, 11 Pac. 631.

4. The appellant is not precluded from applying to this court for leave to file an undertaking to stay execution of the judgment by reason of the failure of the sureties upon the former appeal to justify before the county clerk. A similar question was presented in *Hill v. Finnigan*, 54 Cal. 493, and it was held that an undertaking to stay execution may be filed after an appeal has been taken, but that, as the Code contemplates but one proceeding in the court below for that purpose, if the appellant has been unable to secure such stay by reason of the failure of his sureties to justify, this court has authority to permit such undertaking to be filed after an appeal has been taken. The right of the appellant to have the execution stayed pending the appeal from the order denying a new trial is not impaired by the fact that the appeal from the judgment is dismissed. *Ful-*

*ton v. Hanna*, 40 Cal. 278. The appeals taken December 21, 1896, and also the appeal from the judgment taken December 3d, are dismissed. The motion to dismiss the appeal from the order denying a new trial is denied. The application of the appellant for leave to file an undertaking to stay execution upon the judgment is granted, and upon the sureties in such undertaking justifying before the chief justice of this court, upon notice to the respondents, the said undertaking may be filed, and thereupon the execution of the judgment shall be stayed until the determination of the appeal.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

(116 Cal. 116)

CARVER v. STEELE et al. (S. F. 258.)

(Supreme Court of California. Feb. 23, 1897.)

RIGHTS OF JUNIOR MORTGAGEE—FORECLOSURE OF SENIOR MORTGAGE—RELEASE OF INDORSERS ON NOTE.

1. A junior mortgagee does not discharge indorsers on his mortgage note by failing to set up and foreclose the mortgage in a suit to foreclose the senior mortgage, to which he was made a party.

2. Code Civ. Proc. § 726, providing that there can be but one action on a mortgage debt, which must proceed first against the security itself, does not cause a junior mortgagee, who made default in a suit to foreclose the senior mortgage, to lose his remedy against the indorsers of his mortgage note, though he may have thereby lost his remedy against the maker.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by Minnie A. Carver against S. B. Steele and another. Judgment for defendants, and plaintiff appeals. Reversed.

William F. Gibson, for appellant. Warren Olney, for respondents.

BRITT, C. On March 18, 1889, one Staples borrowed of one Montgomery a sum of money. To secure its repayment, Staples and S. B. Steele executed their promissory note, payable in 90 days, to E. W. Steele, who indorsed the same to Montgomery. As between Staples and the Steeles, they were sureties for him in this transaction. As further security for the loan, Staples and his wife executed to Montgomery a mortgage, in form a bargain and sale deed, of a tract of land which was subject to a prior mortgage in favor of John and Louisa Bauerle. Finding that he would be unable to pay said note when due, Staples agreed with Montgomery for an extension of time of payment, and on May 27, 1889, pursuant to such agreement, he executed to Montgomery a new note for the same sum, payable August 27th after date, which was indorsed by the Steeles. Thereupon the first note was surrendered and canceled. Staples entered into no new

express engagement relative to the mortgage, though the court found an "understanding" that it should secure the new note. February 16, 1892, John and Louisa Bauerle commenced an action for the foreclosure of their prior mortgage against said land, making Montgomery a party defendant. He made default, and on October 31, 1892, the land was sold under judgment of foreclosure in that action to satisfy the debt due the Bauerles, and in due time a sheriff's deed was issued to the purchaser. Subsequently to this judgment, Montgomery assigned the said note of May 27, 1889, to the plaintiff here, Minnie A. Carver, who brought the present action to recover the amount thereof from E. W. and S. B. Steele as indorsers. The defense—sustained by the court below—is that Montgomery discharged Staples, the maker of the note, and consequently the indorsers, by failure to set up and foreclose his junior mortgage in the suit brought by the Bauerles to enforce their prior lien.

Conceding the point contended for by respondents, though without intimating any opinion on the subject, that the mortgage continued to be a security for the payment of the renewed note in the hands of Montgomery at the time of the Bauerle foreclosure, we yet fail to discern that he was under legal compulsion to assert the same in order to hold the indorsers. In general, unless some agreement or special circumstance imposes diligence upon the creditor as a duty, he does not, by mere failure to pursue the person primarily liable, discharge the guarantor, surety, or indorser; even though his passivity in this regard may result in barring his remedy against the original debtor. *Whiting v. Clark*, 17 Cal. 407; *Bull v. Coe*, 77 Cal. 54, 60, 18 Pac. 808. Accordingly the rule is that the creditor loses no rights against the indorser, whose liability has become fixed, by simple failure to enforce his lien against property mortgaged for security of the debt. *Bank v. Wood*, 71 N. Y. 405; *Hoover v. McCormick*, 84 Wis. 215, 54 N. W. 505; *Fuller v. Tomlinson*, 58 Iowa, 111, 12 N. W. 127; *Coleb. Coll. Sec. § 241*, and cases cited. It is a familiar provision of our statutes that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be first directed to the exhaustion of the security (*Code Civ. Proc. § 726*); and it is the theory of respondents that in virtue of this section the effect of Montgomery's default in the Bauerle suit was to preclude him from maintaining any personal action against Staples for the recovery of his debt, citing *Brown v. Willis*, 67 Cal. 235, 7 Pac. 682, where it was so held; and hence that the maker being released the indorsers are released. Admitting that *Brown v. Willis* was correctly decided, it does not reach respondents' case. Their contract to pay Montgomery was not the same as that of Sta-

ples. "The promise of the maker of a note is one thing and the promise of an indorser is another," and their promise was not secured by the mortgage held by Montgomery. *Vandewater v. McRae*, 27 Cal. 596, 603. And, as the authorities referred to above show, the loss of personal remedy against the maker, or of the lien upon the mortgaged property, following as a consequence of mere inaction on the part of the holder, is of no moment in the case. The court therefore erred in holding that the indorsers had been released, and the judgment and order appealed from should be reversed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

(116 Cal. 124)

KENNEDY & SHAW LUMBER CO. v. DUSENBERY et al. (S. F. 343.)

(Supreme Court of California. Feb. 25, 1897.)  
ENFORCING LIEN FOR MATERIAL—CONSOLIDATION OF ACTIONS—NONSUIT OF ONE CLAIMANT—FINDINGS AND JUDGMENT AFTER NONSUIT—DEFAULT JUDGMENT.

1. Where several suits to enforce liens were consolidated, and one plaintiff was nonsuited as to the defendant owners only, it was not error to render judgment that, as against the owners, such plaintiff should take nothing, and pay costs; since, after the nonsuit, he remained a party as against the other claimants, and they were entitled to have his claim to a portion of the contract price eliminated.

2. Nonsuiting one claimant in a consolidated suit to enforce liens for materials, in favor of the defendant owners only, does not affect his right to judgment against the contractor who had made default, as to such claimant's petition, before the nonsuit.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by the Kennedy & Shaw Lumber Company against Dusenbery and others to enforce a mechanic's lien. From a judgment entered after a nonsuit, plaintiff appeals. Affirmed.

William H. Jordan (H. M. Barstow, of counsel), for appellant. Napthaly, Freidenrich & Ackerman, W. H. Mahony, Stafford & Stafford, Fisher Ames, A. D. D'Ancona, W. C. Graves, T. J. Shackleford, E. H. Wakeman, and C. H. Herrington, for respondents.

HARRISON, J. Nine actions for the foreclosure of certain mechanics' liens, of which one was by the appellant, were commenced in the superior court, and, by the order of the court, consolidated, and thereafter tried. The plaintiffs in the several actions were material men, and claimed liens upon certain buildings of the defendants Dusenbery & Stencil for materials which had been furnished by them to one Green, by whom the building had been constructed under a contract therefor with

Dusenbury & Stencel. The defendant Green was a defendant in the several actions, but his default for want of appearance was entered in the action brought by the appellant. A nonsuit was granted against the appellant, in behalf of the defendants Dusenbury & Stencel. Findings of fact were thereafter made, and judgment rendered in favor of the other claimants, from which this appeal has been taken upon the judgment roll without any bill of exceptions.

It is recited in the findings that "the defendants Dusenbury & Stencel, at the close of the evidence introduced in support of the claim of lien of plaintiff the Kennedy & Shaw Lumber Company, moved for a nonsuit against said plaintiff, which motion was granted." No exception was taken to this ruling of the court, and we must assume that, upon the evidence before it, the nonsuit was properly granted. It does not appear that any evidence was afterwards presented to the court, and, as the appellant was nonsuited, there was no occasion for any findings upon the issues made upon the averments in its complaint. In its findings of fact, the court finds that, during the construction of the building the appellant furnished to the contractor certain lumber, which was used in the construction of said building, "but the evidence fails to show the quantity of lumber or the reasonable value of the lumber which was furnished," and, in its conclusion of law, finds that the appellant is not entitled to any judgment. It is contended by the appellant that it was error for the court, after having nonsuited it, to make these findings of fact, and render the judgment against it.

Upon the consolidation of the several actions, the plaintiffs therein became actors in the suit against each other, as well as against the owners, and each was entitled to reduce or avoid the lien of either of the others by any evidence that would have that effect. The nonsuit of the appellant was granted only in favor of the defendants Dusenbury & Stencel, and the judgment from which the appeal is taken merely determines that the appellant shall take nothing as against them, and that they shall have judgment against the appellant for their costs. After the nonsuit had been granted in favor of the owners, the appellant still remained a party to the consolidated action as against the other plaintiffs in the several actions, and the judgment which was finally entered is in the form which is proper to be entered upon a nonsuit. The foregoing statement in the findings may be treated as a reason for the order granting the nonsuit, but it does not strengthen or invalidate the judgment which was entered in the action. Neither the findings nor the judgment entered thereon purport to determine any right of the appellant, as against the contractor, but simply to determine that, as against the owners, the appellant is not entitled to a lien, and consequently is not entitled, as against the owners or the other lien

claimants, to any portion of the unpaid amount of the contract price.

As the nonsuit was granted in favor of only the defendants Dusenbury & Stencel, it did not affect the default of the contractor that had been previously entered, or the right of the appellant to the judgment authorized by that default. Unless, however, the plaintiff established a lien upon the property, it was not entitled to a judgment against the owners for the unpaid amount of the contract price. Whatever remained of this amount after satisfying the other liens was a simple debt of the owners to the contractor, and they could not be directed in this action to pay it to the appellant.

The provision in the decree giving to the owners judgment against the appellant for their costs is not on its face erroneous. It does not appear that any costs were taxed, and no amount is named in the judgment. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(116 Cal. 146)

PEOPLE v. BUCKLEY. (Cr. 76.)

(Supreme Court of California. March 1, 1897.)

CRIMINAL LAW—RIGHT TO SPEEDY TRIAL—APPEAL.  
—BILL OF EXCEPTIONS—ELECTIONS—  
ALTERING RETURNS—EVIDENCE.

1. When an exception is that the evidence failed to show that defendant committed the offense charged, the state must place in the bill of exceptions at least some of the evidence, if any there was, showing participation by defendant.

2. When, however, the only evidence of defendant's guilt consisted in the comparison of handwriting by the jury, it was sufficient for the state, in response to an exception to the sufficiency of the evidence, merely to specify, in the bill of exceptions, of what the evidence consisted; since it could not incorporate such evidence into the bill, or provide fac similes of the writings. Garoutte, J., dissenting.

3. In the absence of evidence of motive for altering election returns, and of opportunity for doing so, a conviction was not sustained merely by a comparison by the jury of the few words and figures alleged to have been altered, with the same words and figures written by defendant under abnormal conditions.

4. Information was filed December 27th, and defendant was arraigned January 4th, and demurred on the 11th. Demurrer was argued the 18th, and overruled the 25th, and defendant then pleaded not guilty. Case was called for trial February 12th, and defendant obtained a continuance of one day, but the trial did not occur until March 18th. Held, that defendant was entitled to a dismissal under Pen. Code, § 1382, enacted pursuant to the constitution, providing that the prosecution shall be dismissed, unless good cause to the contrary be shown, if a defendant whose trial has not been postponed at his own instance is not brought to trial within 60 days from filing of information. McFarland and Harrison, JJ., dissenting.

5. The mere statement of the judge, on denying the motion to dismiss, that during the time of delay the court had been wholly occupied with other cases, does not show good cause for the delay.

6. Nor was it good cause that a material

witness for the state was absent during the period of delay, where no diligence was shown to procure his attendance.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Jerome A. Buckley was convicted for altering election returns, and appeals. Reversed.

John O'Byrne and J. J. Guilfoyle, Jr., for appellant. Atty. Gen. Fitzgerald, Chas. H. Jackson, and Wm. S. Barnes, Dist. Atty., for the People.

TEMPLE, J. In this case, the department having failed to agree upon a judgment, a re-argument was had in bank. The defendant was a member of the board of election, in the Tenth precinct of the Thirty-Fifth assembly district, in the city and county of San Francisco, at the general election of 1894. The information charges that at such election the defendant and one L. M. Martinet altered the official returns, and returned and caused to be received as true and official returns certain false and fraudulent tally lists, etc. As presented here the transcript contains no evidence tending to show guilt in the defendant. It would appear that the only inculpatory evidence before the jury consisted of the comparison by the jury itself of certain handwriting, proven to be that of the defendant, with the altered portions of the tally lists. The tally lists are not in the record in any form, and neither the original nor any fac simile of either paper is presented here. The point is made that the evidence does not sustain the verdict. Of course, since the only evidence consisted in the comparison of handwriting by the jury, the record here does not show whether there was any probative force in the evidence. A motion for a new trial was made, on the ground of the insufficiency of the evidence; and, among the specifications of the respects in which it was insufficient, it was stated, in the bill of exceptions proposed by defendant, that the evidence failed to establish that defendant was the person who made the alterations.

The defendant contends that, in response to that specification, it was incumbent upon the prosecution to have put into the bill some evidence (if any there was) which would make it appear to this court that there was proof of the participation of defendant in the crime specified. This position is sustained by the cases of *People v. English*, 52 Cal. 211, and *People v. Fisher*, 51 Cal. 319. In the first-mentioned case, the court, speaking of an exception of this character, said: "It must be presumed, and always will be presumed, by this court, that such exception in a bill is preceded by all the material evidence actually given bearing on the point of the objection." In *People v. Fisher* it is said: "The presumption in this court is that there was no evidence introduced in support of a fact in issue, unless the bill of exceptions contains the substance

of the evidence introduced to prove the fact or states that the fact was proven, or that evidence was introduced tending to prove it." This is in accord with the rule constantly enforced in civil cases, and seems just and reasonable. These cases have never been expressly overruled or criticised, but the cases of *People v. Marks*, 72 Cal. 46, 13 Pac. 149, and *People v. Tonielli*, 81 Cal. 275, 22 Pac. 678, are cited as holding a contrary doctrine. A contrary view is stated in *People v. Marks*, but it does not appear that any such question was raised in the case. In *People v. Tonielli* it is expressly stated that the evidence found in the record is sufficient, and it is then added that it does not appear that the statement contains all the evidence. I see no reason why the rule should be different in civil and criminal cases, and the cases last cited are not sufficient to establish a new departure in criminal cases.

But, although it was incumbent upon the people to see that the bill of exceptions contained some evidence tending to establish every element of the crime, still they could not, under the statute and rules of the court, incorporate into it the original papers. Nor was it the duty of the prosecution—or, indeed, permissible under the Code—to provide photographs of the writing. It was only possible under the Penal Code for it to do just what it did do, to wit, state what evidence was submitted to the jury. It then becomes one of the numerous cases in which we are at a disadvantage in weighing the evidence. It cannot be represented or pictured here as the jury and the court saw it. Perhaps, upon a proper application, this court would have ordered the original papers sent up under rule 25; but, as this has not been done, still, if we can see that in the nature of things the evidence might have been sufficient, we must so hold.

What, then, does the record show in regard to the evidence? Defendant was a clerk of election at the precinct named, appointed as a Republican. He assisted in keeping tally as the votes were counted. There is no suspicion that he did not perform this duty properly. It was shown by the prosecution that, after all the ballots had been counted for the state ticket, defendant gave the result to a person who was employed by one of the candidates, and gave the correct result, and not according to the altered list. It is assumed that the lists had not been tampered with until after they had been certified and sealed up to be carried to the registrar. There was no evidence—other than the handwriting alluded to—which tends to show that after that time the paper, or the package including it, was ever in the hands or under the control of defendant. On the contrary, all the precinct officers who were sworn testified that they never saw him have it. Nor, aside from the handwriting, was there shown a single suspicious circumstance against the defendant. No motive was proven or al-

leged. It did not appear that he knew the person in whose interests the changes were made, or had any reason to desire his success. Witness after witness went upon the stand, and testified to his good character. They were not even cross-examined, and there was no counter evidence. The circumstances show no opportunity for defendant to have made the alterations except that, against his protest, he was ordered to accompany Martinet, who was an inspector at that precinct, when Martinet took the returns to the registrar. Martinet was a Democrat, and defendant was ordered to go along as a Republican. The package was sealed up when it was taken, and was sealed up when it was returned again to the precinct; and no one noticed that the seal had been tampered with, nor was there any evidence which tended to show that the alteration was made while the package was thus in the custody of Martinet. Both defendant and Martinet testified that the package was never in the hands of the defendant, and that the package was not opened, and that no alterations were made. The package was returned to the precinct because the tally list and the ballots were sealed up in the same envelope, whereas they should have been in separate envelopes. The canvas for the local ticket had not yet been concluded. The package was then locked up in a box, and kept until the next day, when the seal was broken by another officer of the election in the presence of the board. A new package containing this tally list was then taken by a Mr. Maher, who was an additional judge, to be delivered to the registrar. He took them away alone to his residence, where they remained while he had dinner. He was there met by some other members of the board, who accompanied him to the registrar's office. The alterations were not discovered until the returns came to be canvassed by the board of election commissioners. How long that was after the returns were delivered to the registrar is not shown. As to their custody in the meantime, the registrar merely stated that they remained in his office sealed. The opportunity which defendant is supposed to have had to make the alterations was while the package containing the list was being taken by Martinet to the registrar, and back again to the voting booth. As already said, there is no evidence tending even to raise a suspicion of any such thing, or that defendant ever had the package in his hands, and positive evidence that he did not. There was no testimony tending to cast suspicion upon Martinet, and there is, as in the case of Buckley, a total absence of proof of motive or of interest in the candidate in whose interests the alterations were made.

The writing by defendant, which was compared with the alterations in the tally list, was not made under normal conditions, but in a state of excitement upon the first charge of wrongdoing, and consisted in the figures

"60" and "135," the same numbers in long-hand, his name, a few other figures, and 40 tally marks. The record does not show what portions of the tally list were offered in evidence, save that the alterations were put in evidence, and it does not show that these were submitted to the jury for inspection. The bill of exceptions does not state that the jury did make the comparison, or that they took the documents to their room, when they retired to deliberate upon their verdict. But suppose they did so, what does the bill show they compared? Why, only the figures alleged in the information to have been made in altering the tally list,—the numerals "60" and "135," nothing more. Now, there was positively no other evidence save the supposed similarity of the few figures and words, written by defendant under abnormal conditions, with these figures, or, at most (and that is a supposition unsustained by the record), the same numbers written out in longhand, which tends to prove guilt or raise a suspicion against the defendant. Certainly, we all know how unsatisfactory is the evidence derived from the comparison of handwritings even when done by experts of the greatest skill. Rarely will such evidence alone satisfy a reasonable person beyond reasonable doubt, especially when, as in this case, the conclusion is against positive evidence, in addition to the presumption of innocence. To allow such a verdict to stand would, in my opinion, be an outrage upon justice.

The accused was not tried within 60 days after the filing of the information. He asked that the prosecution against him be dismissed for this reason. His motion was denied, and the ruling is relied upon here as error. The constitution and the laws alike guaranty a speedy trial, and section 1382 of the Penal Code prescribes that the prosecution shall be dismissed, unless good cause to the contrary be shown, if a defendant whose trial has not been postponed upon his application is not brought to trial within 60 days after the filing of the information. The motion was denied on three grounds: (1) The defendant himself applied for and obtained a postponement; (2) there was no opportunity to try defendant, as the court had been constantly occupied; and (3) a material witness for the prosecution was absent.

1. The case was postponed, on the application of defendant, from the 12th of February, 1895, to the 13th,—one day. Does the postponement of one day, on the application of the defendant, deprive him entirely of the constitutional guaranty of speedy trial? Certainly not, and any such construction of the statute would be unreasonable.

2. In denying the motion, it was stated by the court that at no time since the plea had there been an opportunity to bring the case to trial except the 12th day of February, on which day the defendant asked for and obtained a continuance of one day,

other cases having in the meantime occupied the attention of the court. Nothing is said about the nature of the other cases. They are not shown to have been cases of equal urgency, and then nothing is said of the other 11 departments of the same court. In my opinion, the constitutional guaranty imposes upon the state the duty of providing courts which, under ordinary conditions, can furnish a speedy trial. A speedy trial does not mean at once, but with all convenient dispatch, and implies courts in which a trial may be had. No doubt it also implies reasonable time for the state to provide courts and juries, and to procure witnesses. It imposes, however, a special duty upon the state with reference to such cases, and, if the duty is not performed, the prosecution should be dismissed. The legislature has seen fit to lay down a rule by which the constitutional provision may be interpreted, which seems reasonable. In my opinion, the mere statement of the judge that the court has been otherwise engaged does not show good cause.

3. No diligence was shown to procure the attendance of the witness. Certainly, the statement of the witness that it would be a hardship to require him to come from Sacramento was a poor excuse for continuing the case 33 days, while the defendant was in jail, and liable to lose his witnesses by the delay. It was not shown that the services of the witness were at all important to the legislature. The benefit of this constitutional guaranty cannot be denied on such flimsy showing.

Upon the showing made, I think the motion to dismiss the prosecution should have been granted, and the prosecution dismissed. Under the rule laid down in *People v. Houston* (Cal.) 40 Pac. 756, the information must be held good. The judgment and order are reversed.

We concur: VAN FLEET, J.; HENSHAW, J.

McFARLAND, J. I concur in the judgment of reversal, and in that part of the opinion of Mr. Justice TEMPLE which holds that there is no evidence in the record sufficient to warrant the verdict. I do not concur in that part of said opinion which holds that in this case the prosecution should be dismissed because the defendant was not tried within 60 days after the filing of the information.

HARRISON, J. I concur in the judgment of reversal upon the ground, as set forth by Mr. Justice TEMPLE in his opinion, that the evidence, as shown by the record, was insufficient to justify the verdict. I am of the opinion, however, that the court did not err in refusing to dismiss the cause. The information was filed December 27, 1894, and the defendant was arraigned January 4th, and, having taken time to plead, on the 11th of

January demurred to the information. Argument was had upon this demurrer January 18th, and on the 25th of January the court overruled the demurrer, and the defendant entered a plea of not guilty. This was the first point of time after the filing of the information at which the defendant could be brought to trial, and his trial was had on the 18th of March. Whatever time was consumed by him in dilatory motions or pleas which had the effect to postpone the time at which he could be brought to trial was "good cause to the contrary," upon his application, for the dismissal of the cause, under section 1382 of the Penal Code.

GAROUTTE, J. (concurring). The record presented to us in this case contains no evidence whatever indicating defendant's guilt; and wherever a defendant appeals to this court, upon the ground that the evidence is insufficient to support the verdict, we must assume that all material evidence introduced before the jury is in the record. Section 1944 of the Code of Civil Procedure provides: "Evidence respecting the handwriting may also be given by a comparison made by the witness, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered or proved to be genuine to the satisfaction of the judge." In line with the principle declared in this section, the people introduced the genuine handwriting of the defendant before the jury, for the purpose of comparison with the handwriting in which the altered returns were made. We have not before us either a fac simile of the genuine handwriting of the defendant, or of the altered returns. Neither have we the original writings, which might well have been brought here for inspection, under the rules of court. This evidence not being before us in any form, it must be assumed that it failed to establish defendant's guilt, and for that reason was deemed immaterial by the people in the preparation of the record on appeal.

Section 32 of the purity of elections act provides: "A person offending against any provision of sections \* \* \* of this act is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial hearing proceeding, or lawful investigation or judicial proceeding, in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying shall not thereafter be liable to indictment or presentment by information, nor to prosecution or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly in bar of such indictment, information or prosecution." St. 1893, p. 26. It is now claimed that the defendant, relying upon the aforesaid provisions of law, is exempt from prosecution, inasmuch as he gave testimony before the board of elec-



tion commissioners at a hearing held by that body for the investigation of these alleged election frauds. The hearing, proceeding, or investigation mentioned in this section must be a lawful one; that is, one authorized by law. And the attorney general insists that the board of election commissioners has no authority, under the law, to carry on such an investigation as was being conducted when this defendant made the aforesaid statements. I agree with his position. The board of election commissioners is purely a creature of the statute, and it may only do those things which the statute says it may do. The examination carried on by it was in excess of and beyond its power, and defendant cannot therefore invoke the exemption provided by section 32 of the act. I concur in the reversal of the judgment and order.

(116 Cal. 140)

AYRES v. THOMAS. (L. A. 191.)

(Supreme Court of California. Feb. 27, 1897.)

**BROKERS—COMPENSATION.**

An agent for the solicitation on commission of orders for the output of another's business was not entitled to compensation merely because he performed services which "tended" to obtain orders, or because he introduced to his principal parties, who subsequently gave orders. *Zeimer v. Antisell*, 17 Pac. 642, 75 Cal. 512, followed.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by E. S. Ayres against Albert Thomas. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

T. E. Gibbon, for appellant. Murphy & Gottschalk, for respondent.

SEARLS, C. This action was brought to recover \$1,584.69, with interest on \$831.48 thereof from July 28, 1893, and interest on the balance thereof from October 9, 1894. The cause was tried before a jury, and a verdict returned in favor of plaintiff for \$1,694. Upon a motion for a new trial, the court made an order granting a new trial unless plaintiff should consent to reduce the verdict by \$117.45, leaving the verdict to stand at \$1,576.55, to which deduction plaintiff consented; whereupon the motion for a new trial was denied and judgment entered for \$1,576.55. Defendant appeals from the judgment, and from the order denying his motion for a new trial. Plaintiff acted as an agent of defendant, a foundryman, in soliciting orders for the output of defendant's business on commission, and also to some extent as a collector for said defendant. There are five counts in plaintiff's complaint. The evidence shows that all of the five causes of action are based upon three several grounds: (1) A claim for services in obtaining orders for the products of defend-

ant's business as an iron founder; (2) a claim for money paid by plaintiff to defendant's use; (3) a claim for labor performed by plaintiff as collector for defendant. The services were rendered and the money paid out between May 15, 1892, and October 9, 1894.

Appellant attacks the ninth instruction given by the court to the jury at the request of plaintiff, and urges that it was erroneous and injurious to defendant. It is as follows: "(9) The jury are further instructed that to entitle the plaintiff to commissions from the defendant for work done by the defendant for third parties, that it is not necessary for the plaintiff to show that he did everything in connection with procurement of the work. If, at the request of the defendant, he performed any services which tended to obtain the work, or introduced the parties to the defendant or to the defendant's managers or superintendent, or if you should find from the evidence that the plaintiff, by means of his solicitations, brought the attention of any parties to the defendant or his manager or superintendent, and by reason thereof work was afterwards ordered by such third parties, then, in such case, the plaintiff should be entitled to his commissions, even though he did not do all of the work of soliciting whereby the work was given to the defendant; but it is enough for him to show that he did something in connection with any job or work given by any third person to the defendant which aided or assisted the defendant in any way in obtaining the said work, and which was the cause of inducing the purchasers or customers negotiating with defendant or contracting with defendant." There was evidence tending to show that plaintiff was, under an arrangement with defendant, entitled to receive 5 per cent. on all orders for goods which he secured in amounts exceeding \$50, and 10 per cent. on all orders for a less amount than \$50. Plaintiff furnished a bill of particulars, and, as to some of the items charged therein, there was a sharp conflict as to whether or not plaintiff had secured the customers upon whose purchases he had charged a percentage. Under this state of the case, the law in relation to the circumstances under which plaintiff became entitled to a commission became an important factor in the problem to be solved.

Brokers are of many kinds, the most important being enumerated and defined as follows: Exchange brokers, insurance brokers, note brokers, pawn brokers, real-estate brokers, ship brokers, stock brokers, and merchandise brokers. "Merchandise brokers are those who buy and sell goods and negotiate between buyer and seller, but without having the custody of the property." Black, Law Dict. tit. "Broker." All brokers are agents, and there are certain well-defined principles of law applicable to them as such, and as to the different classes certain other principles are applicable dependent upon the peculiari-

ties of the class. One of the distinguishing features of that class of agencies termed "brokerage" is that the transaction must be completed before commissions are earned. To this rule there is the exception that where the agent has completed his part in the transaction, and the failure of the negotiation be due to the interference of the principal or to causes outside of the agent, then the commissions are earned. Whart. Ag. § 325. The agent must be an efficient agent in or the procuring cause of the contract. *Tombs v. Alexander*, 101 Mass. 255; *Walker v. Tirrell*, Id. 257; *Barrett v. Johnson*, 64 Pa. St. 223; *Shanklin v. Hall*, 100 Cal. 26, 34 Pac. 636. As was said by this court in *Zelmer v. Antisell*, 75 Cal., at page 512, 17 Pac. 643, quoting from *Sibbald v. Iron Co.*, 83 N. Y. 382: "The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and, until this is done, his right to commissions does not accrue." The broker must be the "efficient agent or procuring cause of the sale." *McGavock v. Woodlief*, 20 How. 221; *Wylie v. Bank*, 61 N. Y. 415.

Tested by these rules, the foregoing instruction was too broad. As is claimed by appellant, the instruction indicated to the jury that plaintiff was entitled to recover his commissions upon sales (1) if, at the request of the defendant, he performed any services which tended to obtain the work; (2) if plaintiff introduced to defendant, or to his manager or superintendent, parties who subsequently ordered work; (3) if the plaintiff, by means of his solicitation, brought the attention of any parties to the defendant or his manager or superintendent, and, by reason thereof, work was afterwards ordered by said parties. The first and second of the foregoing propositions cannot be maintained. It was not for any services which tended to obtain work that the plaintiff was entitled to commissions, but for such services as constituted the proximate and efficient or procuring cause of the work being ordered. In the case of *Zelmer v. Antisell*, supra, the plaintiff, a broker, had performed some services which tended to bring about the sale. He had taken Levy, the subsequent purchaser, to see the property, etc., but, as nothing more was done until plaintiff's authority ceased, this was held insufficient. The second proposition is still more open to objection. It clearly stated to the jury, as law applicable to the case, that if plaintiff introduced to defendant, his manager or superintendent, parties who subsequently ordered work, he would be entitled to a commission thereon. The instruction isolates the fact of an introduction from all idea of any other duty on the part of plaintiff, and, without reference to its object or the surrounding circumstances, makes it the prime factor in the problem, provided always the party or parties so introduced should at any future time, and under any circumstances, order work from the defendant. The

remainder of the instruction, although proper, being connected with the portions indicated, disjunctively, in no wise qualifies the objectionable part.

We find nothing in the other instructions given calculated to dispel the effect of the error complained of. The sixth instruction, asked by the defendant and refused, was objectionable on account of the last clause therein, consisting of the words "without the intervention or aid of any other essential matter, thing, or influence." Aside from such last clause, the instruction contained a correct and clear exposition of the law applicable to the case. For the error indicated, we recommend that the judgment and order appealed from be reversed, and a new trial ordered.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

(5 Cal. Unrep. 630)

PEOPLE v. FOURNIER. (Cr. 203.)

(Supreme Court of California. Feb. 26, 1897.)

#### ARSON—EVIDENCE.

1. On a trial for arson, where the evidence is circumstantial, and a witness for the state testifies that she was awakened during the night by the smell as of burning rags, she may be asked on cross-examination whether there was not a great deal of rubbish in the back yard, near where the fire originated.

2. Where the fire was seen in rubbish in a yard near the building burned, evidence that the rubbish was on fire in the same yard the day previous was admissible.

3. Where a suspicious circumstance in the evidence against defendant was the removal of certain goods from the burned building the day before the fire, it was error to exclude evidence of defendant explaining the removal.

4. Where a suspicious circumstance against defendant was that his building was insured, evidence that the building of a third person in which the fire started was also insured was admissible.

Department 2. Appeal from superior court, Madera county; W. M. Conley, Judge.

Joseph Marie Achille Fournier was convicted of destroying by fire a certain building with intent to defraud an insurance company, and appeals. Reversed.

Raleigh E. Rhodes and John R. Kittrell, for appellant. W. F. Fitzgerald, Atty. Gen., and C. N. Post, for the People.

TEMPLE, J. The defendant was charged, under section 548, Pen. Code, with the offense of willfully destroying by fire a certain building, with the intent to defraud the Palatine Insurance Company, Limited, of Manchester, England, a corporation, in which company the property was then insured. A fire occurred in the town of Madera on the 27th of July, 1895, in which several buildings were consumed, one

of which belonged to the defendant, and was insured for the sum of \$600. The witnesses all agreed that the fire commenced either in the building occupied by the Tribune newspaper, between which and the defendant's building there was a space of 8 feet, or somewhere along the line of a fence running northerly from the rear of the Tribune Building some 20 feet to a shed adjacent to the dwelling occupied by the defendant and his wife. The defendant did not own the land upon which the building was, but occupied the same under a lease, and had built a small wooden house on the southeast corner of the lot, which he occupied as a saloon. On the rear of the lot, and some 40 feet from the saloon, northerly, was the dwelling spoken of. Some of the witnesses—and apparently those who were first at the fire—testified that when first discovered by them it was immediately in the rear of the Tribune Building, back of which was a little porch; others, that when they saw it it was upon the fence mentioned, and was spreading rapidly along the fence from the dwelling occupied by the defendant towards the Tribune Building. The fence partly divided the lot occupied by the defendant from the lot upon which the Tribune Building was situated. The evidence that the fire was of incendiary character, and tending to cast suspicion upon the defendant, was entirely circumstantial. That which tended to show that the fire was of an incendiary character, aside from that which cast suspicion upon the defendant, was the testimony of some of the witnesses that the fire was proceeding along the fence from the dwelling of the defendant to the Tribune Building rapidly, indicating that the fence might have been saturated with coal oil, and that they perceived the odor of coal oil.

The evidence which tended especially to raise a suspicion against the defendant was simply and only: (1) That he was a Frenchman, and had announced his intention of soon returning to France, and that he had an insurance upon the building, as stated. (2) On the very day of the fire he removed from the saloon to his dwelling a barrel of brandy and two cases of champagne. And (3) he and his wife were, shortly before the fire, sitting on the sidewalk by the saloon. The fire occurred shortly before midnight, and defendant and his wife claimed that they were both in bed at the time the alarm was given. The fire occurred in the middle of summer, and it appeared that in the rear of the printing office, which was first on fire, there was a great deal of rubbish, consisting of old rags, paper, straw, etc. A witness for the prosecution, who occupied one of the houses destroyed, testified that she was awakened during the night by mosquitoes, and immediately smelled fire, as of burning rags. She looked from her window, and saw the fire. She thought it was back of the Tribune office, nearer the office than the fence; and finally she stated that she was sure that it was under the porch, back of the Tribune Building. On cross-examination the witness was asked as to

the condition of the premises,—whether there was anything on the ground in the shape of rubbish, paper, or anything of the kind. The question was objected to as incompetent, immaterial, and irrelevant, and not cross-examination, and the objection was sustained. On like objection the court refused to permit an answer to the question whether at other times she had not perceived the odor of coal oil upon the premises, and the court also refused to permit the question whether, on the day before the fire, there had not been a pile of rubbish on fire, back of the Tribune office. These rulings were assigned as error here, and the attorney general hardly attempts a defense of them.

One question of interest at the trial was whether the fire ran along the fence from defendant's dwelling towards the Tribune Building, or was first discovered in the Tribune Building, or immediately at the rear of it. The attention of the witness was first aroused by the smell of burning rubbish,—rags. This first gave the alarm. The evidence was, therefore, quite material. The court sustained the objection to the existence of the burning rubbish on the 26th of July, on the ground that it was too remote in time. That was a question for the jury, and not for the court. No one would say that the time was so remote that it was absolutely impossible that a spark could be kept alive until the destruction of the building complained of. The ruling was clearly erroneous and injurious.

The court also erred in refusing to permit the defendant to show that the building owned by the witness Parsons was also insured. If the fact that the defendant's building was insured raised a presumption against him, it was competent to show that the person owning the building in which the fire first started had a like inducement to commit the crime.

A witness for the defendant (his wife) testified that the brandy and champagne were removed from the saloon because defendant expected certain persons who wished to buy the building and stock to inspect the same on the next day. Defendant offered to prove, in addition, the fact that two persons were expected to come upon that day, and did actually arrive upon the following day at Madera, pursuant to their appointment to inspect the building, with a view of making such purchase. The reason given why the removal was made under such circumstances was that whoever wished to buy the building and stock would want everything in sight thrown in, and would give no more for the property. The defendant should have been allowed to explain this act, which probably, more than any other, tended to cast suspicion upon him. It was for the jury to determine the truth and value of the explanation.

It is contended by the defense that the evidence was insufficient to justify the verdict, and it was certainly very weak. I doubt if an unprejudiced jury would have found a verdict of guilty upon it; but it is not necessary

to reverse the case for that reason, as there are other sufficient grounds. Judgment and order reversed.

We concur: MCFARLAND, J.; HENSHAW, J.

(116 Cal. 127)

HELLER et al. v. DYERVILLE MANUF'G CO. (S. F. 421.)

(Supreme Court of California. Feb. 26, 1897.)

JUDGMENT—ACTION TO MODIFY—FRAUD—PLEADING—ADEQUATE REMEDY AT LAW.

1. A complaint to modify a decree in a prior suit for injunction and damages alleged that the parties filed a stipulation for judgment enjoining defendants therein, but without damages; that afterwards plaintiff's attorney in that suit, "for the purpose of cheating and defrauding these plaintiffs," prepared a decree which he represented to the judge "was in accordance with the stipulation"; that the judge relied on the representation and signed the decree, which was then filed, but not entered till nine months afterwards; that the decree was prepared without the knowledge of defendants therein, and that no copy was submitted to them; that no steps were taken under it for more than six months; that it was prepared and filed "for the purpose of defrauding these plaintiffs"; and that "thereby the defendant herein did obtain relief it was not entitled to." Held insufficient to show that the decree was procured by fraud.

2. A complaint to modify a decree on the ground that, as made, it was procured by fraud, is bad, where it shows that plaintiffs knew of the decree within the six months allowed by Code Civ. Proc. § 473, for moving to modify or vacate judgments.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Action by M. Heller & Sons against the Dyerville Manufacturing Company. From a judgment for plaintiffs, and from orders refusing to vacate an injunction, and denying a motion for a new trial, defendant appeals. Reversed.

Edmund Tauszky, for appellant. Rothchild & Ach, for respondents.

VAN FLEET, J. This is a suit in equity brought in the superior court of the city and county of San Francisco to secure the modification of a judgment theretofore entered in that court, upon the ground that it had been procured by fraud. The complaint alleges that in March, 1891, the present defendant, the Dyerville Manufacturing Company, brought an action in said superior court against M. Heller & Sons, the plaintiffs here, to enjoin the latter from plating or infringing a certain trade-mark or label of said Dyerville Manufacturing Company, and for damages for an infringement already perpetrated; that thereafter, on August 3, 1891, the parties in that action entered into a stipulation in writing that judgment should be entered therein enjoining the defendants "as prayed for in the complaint," and for costs, but without damages; that afterwards, on

August 7, 1891, the attorney for the plaintiff in that action, "for the purpose of cheating and defrauding these plaintiffs," presented to the judge before whom said action was pending a decree prepared by said attorney, which the latter represented to the judge "was in accordance with the stipulation"; that the judge relied upon such representation and signed said decree; and that the decree was thereupon, on said 7th day of August, filed, but was not entered until April 26, 1892. It is alleged that Heller & Sons, the defendants in that action, had no knowledge of the filing of said decree "until subsequent to the 26th of April, 1892"; that the same was prepared without their knowledge or that of their attorneys, and no copy thereof was submitted to them; that no steps were taken under said decree by the plaintiffs in that action, the defendants here, until more than six months after the same had been signed and filed; and that it was prepared and filed by the plaintiff in said cause and its attorney "for the purpose of defrauding these plaintiffs, and that therein and thereby the defendant herein did obtain relief it was not entitled to, either by the terms of its complaint or by the terms of said stipulation." The said decree is set out in *hæc verba*, and the complaint in that action is attached as an exhibit, and made a part of the complaint in this. The complaint further alleges,—what we regard as largely if not wholly immaterial here,—in substance, that since August 3, 1891, said Heller & Sons have not infringed said trade-mark or label, but that, notwithstanding, they were on July 29, 1892, cited to show cause why they should not be punished for violating the said decree, and that thereafter, on December 5, 1892, they were adjudged guilty of a violation thereof; that on December 10, 1892, they applied to the superior court in said action to modify the said decree "so that the same should comply with the stipulation" upon which it was entered, and that on January 6, 1893, the court made an order so modifying the decree; that from this order the plaintiff in that action took an appeal to this court, where the order was reversed on the sole ground that the application was not made within six months from the entry of the decree. It is finally alleged that plaintiffs have no plain, speedy, or adequate remedy at law, and that, unless defendant is restrained from enforcing said decree, plaintiffs will suffer irreparable damage, etc. Upon the filing of the complaint a preliminary injunction was issued, restraining defendants from enforcing said decree in the particular wherein it is sought to be modified. Defendant demurred to the complaint as not stating facts entitling plaintiffs to any relief, and subsequently moved to vacate the injunction upon the same ground. The demurrer was overruled, and the motion to vacate the injunction denied. Thereafter defendant answered, and upon the trial the court found the facts substantially as alleged in the complaint, upon which find-

ings judgment was entered modifying said decree as prayed. Defendant appeals from the order refusing to vacate the injunction, and from the judgment and an order denying it a new trial.

The appeal from the judgment is the only one which we are called upon to consider, since we are satisfied that the complaint states no cause of action, or, in other words, no case for equitable intervention. In the first place, assuming for present purposes that the relief awarded by the decree sought to be modified transgressed that to which the plaintiff in that action was entitled under the stipulation of the parties, the averments of the complaint, taking as true all the issuable facts, fail to make out a case of fraud in its procurement. It is true, it is alleged, in general terms, that in procuring the decree certain things were done "for the purpose of cheating and defrauding these plaintiffs," and "that said decree was prepared and filed by the plaintiff in said cause and its said attorney for the purpose of defrauding these plaintiffs"; but the specific facts alleged to point and support these general assertions of fraud will not bear the construction thus sought to be put upon them. It is alleged that the representation was made to the judge that the decree was drawn "in accordance with the stipulation," but it is not alleged that such representation was made with intent to deceive, or that when made the attorney did not honestly believe it to be true. Since the pleading is to be construed most strongly against the pleader, it will be presumed, in the absence of an averment to the contrary, that the representation was without deceit, and with a belief in its truth. It is not even alleged in express terms, or otherwise than by implication or mere recital, that the representation was in fact false, and there is no pretense of any direct averment that the attorney knew or believed it to be so. It is averred that the judge, in signing the decree, relied on the representations of the attorney. But fraud cannot be predicated of a statement or representation made without knowledge of its falsity, or an intent to deceive thereby, however implicitly it may have been acted upon. In this case it appears from the decree that the precise words of the substantive part of the stipulation relied upon were recited therein, and also the fact that the stipulation itself was on file. There was thus presented to the judge the same means of knowing the truth of the representation made as that possessed by the party making it, and it must be presumed, the contrary not being averred, that the decree was read over and examined by the judge before attaching his signature thereto. The averment that the decree was signed on August 7, 1891, but not filed until April 26, 1892, is not pointed by any averment that this delay was intentional, or for the purpose or with the intent of concealing from plaintiffs any fact upon which their rights depended, or to thereby deprive

them of any such right, or for any similar purpose, and that fact is therefore without significance as tending to show fraud. It is alleged that the decree was prepared and filed without the knowledge of plaintiffs, and was never submitted to them; that they had no knowledge of the same until after April 26, 1892; and that no step was taken by defendant to enforce it until more than six months after it had been filed. But it is not alleged that knowledge of the filing of the decree was intentionally withheld from them, nor that there was any reason in fact, as there was none in law, why defendant was required to serve them with a copy of the decree, or to notify them of the filing. There was nothing in the stipulation, which is also set out in the complaint, requiring it. It is not alleged that defendant by any act prevented the knowledge of said filing from being acquired by plaintiffs. The decree was placed upon the public records, to which they had access, and it was as much the duty of plaintiffs as of defendant to keep track of the case, and to see that a proper decree was entered. They could not be permitted to indulge the presumption that the taking of their stipulation for a decree was a mere idle ceremony, and that nothing further would be done by defendant in the action. The significance of the fact that defendant delayed action under the decree, as tending to show fraud, is not disclosed, nor is it apparent. In the absence of averment to the contrary, it will be presumed that no earlier occasion arose for invoking its protection. There is therefore nothing in the facts alleged to sustain the general averments of a fraudulent purpose in the manner of procuring the decree; and such general averments, standing alone, and unaccompanied by facts which in themselves disclose fraud, are insufficient to give the transaction even a colorable aspect of that nature. Such general averments are to be regarded as merely the conclusions of the pleader, embracing no issuable character, and not the averment of substantive facts, which are admitted by the demurrer. *Harris v. Taylor*, 15 Cal. 349; *Oroville & V. R. Co. v. Supervisors of Plumas Co.*, 37 Cal. 363; *Bank v. Hynes*, 50 Cal. 202; *Pehrson v. Hewitt*, 79 Cal. 598, 21 Pac. 950. As said by the supreme court of the United States in passing upon the sufficiency of a bill of similar construction: "It is full of the words 'fraudulent' and 'corrupt,' and general charges of conspiracy and violation of trust obligations. Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisprudence, unless the transactions to which they refer are such as, in their essential nature, constitute a fraud or a breach of trust for which a court of chancery can give relief." *Van Weel v. Winston*, 115 U. S. 237, 238, 6 Sup. Ct. 22. See, also, *Fogg v. Blair*, 139 U. S. 127, 11 Sup. Ct. 476.

In the next place, we think the complaint

discloses a case in which plaintiffs had a plain, speedy, and adequate remedy at law, and in such case there is no occasion to resort to equity, and it will not be permitted. *Ketchum v. Crippen*, 37 Cal. 223; *Eldred v. White*, 102 Cal. 600, 36 Pac. 944. The judgment was entered April 26, 1892. Plaintiffs aver that they had no notice of this fact until "subsequent to April 26, 1892," but this, under a proper construction of the pleading, is equivalent to the averment that they had such knowledge immediately after that date,—as early as April 27th, if need be. *Collins v. Townsend*, 58 Cal. 614. Furthermore, it appears that they, at all events, had actual knowledge on July 29, 1892, on which date they were served with an order to show cause why they should not be held guilty of a violation of the decree. Even the latter date was well within the six months from the entry of the decree, within which, under section 473, Code Civ. Proc., they could have moved for its modification or vacation. The fact that, under a misapprehension of their rights, they failed to take advantage of this remedy until too late, affords no ground for equitable relief.

For these reasons, the complaint was bad, and it is unnecessary to consider the further objection that the complaint does not show that any excessive relief was in fact awarded by the decree. As the complaint stated no cause of action, it constituted no proper basis for the injunction, and the motion to vacate should have been granted, and the demurrer should have been sustained. The judgment and orders appealed from are reversed, with instructions to vacate the injunction and sustain the demurrer to the complaint.

We concur: HARRISON, J.; GAROUTTE, J.

(116 Cal. 136)

CALIFORNIA IMP. CO. v. BAROTEAU et al. (S. F. 35.)

(Supreme Court of California. Feb. 27, 1897.)

#### NEW TRIAL—TIME FOR MOTION.

1. Time for motion for new trial, which Code Civ. Proc. § 659, provides shall be within 10 days after filing of findings, is not extended by motion to modify and set aside findings; they not having been modified, changed, or added to.

2. An order staying judgment till determination of motion to set aside findings does not extend time to move for new trial.

3. Under Code Civ. Proc. § 659, declaring that a motion for new trial must be within 10 days "after notice of the decision," formal notice of the decision is not necessary, but it is enough that the moving party had actual notice thereof.

In bank. Appeal from superior court, Alameda county; F. W. Henshaw, Judge.

Action by the California Improvement Company against Mary Baroteau and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Chickering, Thomas & Gregory (Chas. Harding Tubbs, of counsel), for appellant. J. W. Goodwin, for respondents.

McFARLAND, J. This is an appeal by plaintiff from a judgment in favor of defendants, and from an order denying its motion for a new trial. The notice of the motion for a new trial is based alone upon "insufficiency of the evidence to justify the decision," and all the questions raised by the appellant rest upon the insufficiency of the evidence. Respondents contend that there can be here no review of the evidence, because (1) the appeal from the judgment was not taken until more than 60 days after it was rendered; and (2) that appellant's notice of intention to move for a new trial was not given in time. Both of these contentions must be sustained. As to the appeal from the judgment, it clearly appears, and is not denied, that it was not taken until more than 60 days after the rendition of the judgment. The facts as to the notice of intention to move for a new trial are as follows: The findings, which constitute the decision, were filed May 12, 1894. Three days afterwards, to wit, on May 15th, the appellant served and filed a notice of a motion, as follows: "That, the court having filed its findings in this case, plaintiff moves the court to modify and set aside the findings of fact and conclusions of law based thereon, to wit." The notice stated that this motion would be made on the 21st of May, 1894, or as soon thereafter as counsel could be heard. On the 4th of June, 1894, the said motion was heard by the court and denied. Thereafter, on the 11th day of June, 1894, the appellant served and filed his notice of intention to move for a new trial. This was, of course, much more than the 10 days prescribed by section 659, Code Civ. Proc., after the filing of the findings, and was clearly too late. The right to move for a new trial is statutory, and must be pursued in the manner pointed out by the statute. *Burton v. Todd*, 68 Cal. 489, 9 Pac. 663. The position of appellant, that the motion to modify and set aside the findings extended the statutory period within which a motion for a new trial must be made, is not tenable. If that were so, a party could always extend the time, at his own volition, by giving notice of motion to modify. In this case the findings filed on the 12th of May were never modified or changed in any respect, nor were any new findings ever made; and it is clear that the time for moving for a new trial commenced to run from the date of the filing of said findings. This same principle was applied in *Shinn v. Cummins*, 65 Cal. 97, 3 Pac. 133, where it was held that "the pendency of defendant's motion to dismiss, vacate, and set aside the pretended service of summons and copy of complaint" did not extend the time specified in the summons for answering the complaint. In the case at bar the judgment was not en-

tered until after the determination of the said motion to set aside the findings, and it is stated in plaintiff's brief that the entering of the judgment was stayed by an order of the court until after the determination of said motion to set aside the findings; and, although we do not observe any statement of that fact in the record, still, if it were so, an order suspending the judgment does not extend the statutory time within which a motion for a new trial must be made.

The appellant contends that there was no notice served on him of the filing of the findings, and that, therefore, the time for making a motion for a new trial had not expired when such motion was made; but section 659 provides now only that the motion must be made within 10 days "after notice of the decision," and it has been definitely settled that, where it appears affirmatively that the party moving for a new trial had actual notice of the decision, no formal service of a written notice is necessary. *Gray v. Winder*, 77 Cal. 525, 20 Pac. 47; *Mullally v. Society*, 69 Cal. 559, 11 Pac. 215; *Wall v. Heald*, 95 Cal. 365, 30 Pac. 551; *Dow v. Ross*, 90 Cal. 562, 27 Pac. 406. Of course, where a party in whose favor a decision is made has not given formal notice of such decision, and there is a conflict of evidence as to whether the other party had actual knowledge of the same, this court would not look very closely into such evidence; but where, as in the case at bar, a party makes formal written motion to set aside findings, reciting in his motion that the court had filed the same, he will not be heard to say that he had no notice of such findings. Appellant relies somewhat upon *Blagi v. Howes*, 66 Cal. 469, 6 Pac. 100. That case, however, seems to have been based upon the authority of cases where there was a statutory provision that there must be a written notice of the decision, and upon that ground it was distinguished from the other cases upon the subject in the opinion of the court in *Mullally v. Society*, 69 Cal. 559, 11 Pac. 215; and, if it cannot be so distinguished, it must be held as overruled by the later decisions above cited. The judgment and order appealed from are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.; TEMPLE, J.

(5 Cal. Unrep. 624)

Ex parte VINTON. (Cr. 263.)

(Supreme Court of California. March 2, 1897.)

HABEAS CORPUS—DISCHARGE OF PRISONER.

A prisoner not brought to trial within 60 days after commitment will be discharged on habeas corpus. *Garoutte and Temple, JJ.*, dissenting.

In bank. Application of John M. Vinton for discharge on habeas corpus. Granted.

Henley, Bigelow & Costello, for petitioner.

PER CURIAM. Petitioner discharged.

GAROUTTE, J. I dissent. The prisoner is discharged by the court upon the ground that he has not been brought to trial within 60 days after his commitment. I am well satisfied that the writ of habeas corpus cannot be invoked in a case of this character.

I concur: TEMPLE, J.

(116 Cal. 156)

HARRISON v. SUTTER ST. RY. CO. et al.  
(S. F. 499.)

(Supreme Court of California. March 2, 1897.)

DEATH BY WRONGFUL ACT—NEGLIGENCE—EVIDENCE—PRIVILEGED COMMUNICATIONS—INSTRUCTIONS—DAMAGES—MEASURE—EXCESSIVENESS—NEW TRIAL—APPEAL—REVIEW.

1. Whether a jury rendered their verdict through passion or prejudice is determinable from the evidence without any showing of extrinsic facts.

2. The fact that there was no conflict in the evidence as to the circumstances which the jury had a right to regard in fixing the damages for death by negligence does not preclude the verdict being set aside as excessive.

3. The measure of damages for the death of a man 69 years old, more or less debilitated, and without permanent employment, being the amount that he would in reasonable probability have earned during the rest of his life, minus his probable personal expenses, it was not an abuse of discretion to set aside as excessive a verdict rendered on the theory that deceased's life expectancy would be fully realized, that he would continue to the end with the same earning capacity he had at his death, that he would have constant employment, and that it would never be interrupted by sickness.

4. The rule that the court cannot set aside a verdict as excessive, except when it is so grossly disproportionate to the measure of damages as to raise a presumption of passion or prejudice, does not apply on appeal from the setting aside of a verdict as excessive.

5. Where a car stopped suddenly in the middle of a street intersection, and a wagon crossing at the intersection collided therewith, it was relevant to the question of negligence that in stopping where it did the car company violated an ordinance.

6. The result of an autopsy on the body of one for whose death an action is brought is not privileged (Code Civ. Proc. § 1881, subd. 4) as "information acquired in attending the patient which was necessary to enable [the physician] to prescribe or act for the patient."

7. The personal representative of a deceased patient cannot waive the privilege created by Code Civ. Proc. § 1881, subd. 4, providing that a physician "cannot, without the consent of his patient, be examined, in a civil action," as to information acquired in attending the patient.

8. A charge that the measure of damages was the amount which deceased would probably have earned in the nine years "which it appears he had yet to live," according to mortality tables in evidence, which the jury might take "into consideration, as they are part of the proof that he might have lived that long," did not virtually tell the jury that the tables established that deceased would have lived nine years.

9. A charge as to measure of damages that the jury should consider "(a) pecuniary loss, if any, suffered by the heirs of the deceased through his death; (b) also the relations proved as existing between the deceased and such heirs at the time of his death, and the injury, if

any, sustained by them by his death,"—might have misled the jury into the error of supposing that they could, on account of the widow and children being deprived of the comfort, society, and protection of deceased, include something more than pecuniary loss.

Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Joseph N. Harrison, administrator, against the Sutter Street-Railway Company and the National Brewing Company. There was a judgment for plaintiff, and from an order granting a new trial plaintiff appeals. Affirmed.

William H. Jordan, for appellant. Naphataly, Freidenrich & Ackerman, Marcus Rosenthal, and Dunne & McPike, for respondents.

VAN FLEET, J. Plaintiff had verdict and judgment against defendants for \$8,000, as damages suffered by the heirs of his intestate through the death of the latter, resulting from injuries received in a collision between a car of the railroad company, on which he was a passenger, and a wagon of the brewing company, occasioned by the negligence of the defendants. The court below granted defendants a new trial, on the ground that the verdict was excessive; and the plaintiff appeals from such order, urging that it was wholly unwarranted under the evidence, and was an abuse of discretion on the part of the trial court.

Certain preliminary objections are interposed by defendants, and reasons suggested why the order appealed from cannot be reviewed; but these objections, while possibly possessed of some merit, being purely technical, and the court being of opinion that the order must be affirmed on the merits, it will prove more satisfactory to both parties, and more in accord with the disposition of the court, to so dispose of the appeal.

That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed except upon the disclosure of a manifest and unmistakable abuse, has become axiomatic, and requires no citation of authority in its support. It is true that such discretion is not a right to the exertion of the mere personal or arbitrary will of the judge, but is a power governed by fixed rules of law, and to be reasonably exercised within those rules, to the accomplishment of justice. But, so long as a case made presents an instance showing a reasonable, or even fairly debatable, justification under the law for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action. More especially is this true where, as here, the question rests largely in fact, and involves the proper deduction to be drawn

from the evidence. The opportunities of the trial court in such instances for reaching just conclusions are, as a general thing, so superior to our own that we will not presume to set our judgment against that of the former where there appears any reasonable room for difference.

Appellant does not seriously question the correctness of these principles, but he contends that the record does not disclose a proper case for their application. He contends that there was no room for the exercise of discretion; that the evidence as to the amount of damages suffered was wholly without conflict; that there was nothing to indicate passion or prejudice, except the amount of the verdict itself; and that there was no showing, by affidavit or otherwise, of any improper conduct on the part of the jury. As to the last suggestion, it is impertinent to the inquiry. Granting a new trial for the misconduct of the jury, such as may be shown by affidavit, is something wholly different and apart from the right which the statute gives to grant such relief on the ground of excessive damages. The former contemplates some overt act of impropriety, such as receiving evidence out of court, reaching a verdict by chance, and the like; while an excessive verdict implies no misconduct of the jury necessarily, but simply that the result has been induced through excited feelings or prejudice, of which the jury may not, perhaps, have been even aware, but which has, nevertheless, precluded an impartial consideration of the evidence. Whether the verdict is excessive is to be determined solely from a consideration of the evidence in the case, and whether it will fairly sustain the conclusion of the jury,—a question which cannot be aided by the showing of extrinsic facts, by affidavit or otherwise.

As to the suggestion that the evidence touching "the amount of damages" was without conflict, we are not wholly certain that we appreciate exactly what counsel means. There was no evidence given as to the amount of the damages suffered. The damages sued for were in their nature unliquidated, and no witness pretended to fix the precise amount plaintiff should recover. We presume counsel means that the evidence as to the circumstances which the jury had a right to regard in determining the award of damages, such as age, condition in life, etc., of deceased, was without conflict. But, if this were true, which we do not think can be fairly said, the question as to the proper deduction and conclusion to be drawn from such evidence would still remain for the jury, and whether their consideration of the evidence for this purpose was influenced by passion or prejudice would not necessarily be affected by the fact that the evidence was without conflict. A jury, if excited by prejudice, might as readily award unjust damages where the evidence was uncontradicted as where it was



in sharp conflict. The evidence tended to show that deceased was about 69 years of age, but his physical appearance would seem to have indicated more advanced years. Dr. Dorr, one of his physicians, testified that he looked older, that he appeared between 75 and 80 years of age; while Dr. O'Brien, a physician who examined him on behalf of one of the defendants, after the accident and before his death, testified that he considered him a debilitated man; that in his judgment the result of the injury would not have been serious but for his age and debility. According to the testimony of his widow, his health was very good, but he had suffered all his life from sick headache, for which she had been required to nurse him. His income was about \$110 per month,—that is, it did not appear that he was in steady or permanent employment, but the evidence tended to show that he was an expert accountant, who straightened out books and tangled accounts when called upon, and that his earnings averaged that sum monthly. According to the Carlisle Mortality Tables, he had an expectancy or probable lease of life of a fraction over nine years and a half. He had dependent on him a wife and an adult unmarried daughter. Upon these facts the jury were instructed, as to the question of damages, in effect, that they should estimate and determine the amount that the deceased would in all reasonable probability have earned in the years yet remaining to him; and, deducting from this the amount which he would reasonably require for his own personal use and maintenance, give a verdict which would peculiarly compensate the heirs. It is conceded that this instruction gave the correct rule for the guidance of the jury.

In view of this evidence, and the rule of compensation by which the jury were to be governed, we think it quite manifest that we would not be justified in holding that there was an abuse of discretion in setting aside the verdict. The jury would seem to have proceeded upon the theory that the deceased's expectancy of life would be fully realized, and that he would continue to the end with the same earning capacity as that possessed by him at the time of his death, for their verdict implies that he would have earned, over and above the amount required for his personal needs, the large net sum of \$8,000. And this would necessarily contemplate constant employment, without interruption from sickness or other cause, and with a rate of earnings in no way diminished; since it will readily be perceived that, according to his income, his utmost gross earnings in the given time would not have exceeded \$12,000. Such a result does not accord with ordinary human experience. The deceased's expectancy of life was not a certainty, but a mere probability. It is true he might have lived longer, but the chances were much against it. He might also have retained his vigor and ability to labor to the last, but ordinary ex-

perience teaches that the weight of advancing years after the age attained by deceased bears strongly against such result. Under these circumstances we do not think it should be said that the conclusion of the trial judge was without support in the evidence. But appellant urges that it is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury; and that such an instance is not shown. The rule invoked is correct, as addressed to the function of the trial court, or when asking this court to set aside the verdict where it has been refused by the court below. But when we are asked to review the act of that court, where, in the exercise of its discretionary power, it has seen fit to set aside the verdict on this ground, a very different rule prevails. Every intendment is to be indulged here in support of the action of the court below, and, as elsewhere suggested, it will not be disturbed if the question of its propriety be open to debate.

Among the grounds urged by defendants in support of their motion was that of errors of law occurring at the trial. Some of the exceptions under this head we deem material, and, as they were not noticed by the court below, and the cause is to be retried, the parties are entitled to have them considered. The collision of the two vehicles occurred at a street crossing in the city of San Francisco. The street car was stopped suddenly in its progress, near the middle of the intersection, and the brewery wagon, coming rapidly down a grade on the side street, collided with the car. There was evidence having a tendency to show that, had the car not stopped where and when it did, the collision might have been avoided. This being the case, the defendant brewing company offered in evidence, as against its co-defendant, a municipal ordinance of said city forbidding the stopping of street cars upon any street crossing or cross walk so as in any manner to obstruct travel thereon, except where the grade of the street is such as not to admit of stopping at the further crossing. This evidence was objected to by the railway company, and excluded. The ruling was erroneous. Evidence that the party was acting in violation or neglect of a statute or ordinance regulating the mode of conducting vehicles is always admissible in such a case, as tending to show neglect in the one guilty of the omission. In this instance the evidence bore directly upon the one material question arising as between the defendants,—as to which one caused the collision; and its exclusion was, therefore, prejudicial error.

Plaintiff contends that the ruling did no injury, because it appeared that the stopping of the car was the best thing to do. But wheth-

er this was so was for the jury, since the fact was not admitted.

Dr. O'Brien was called by defendants, in rebuttal, upon the question whether the injuries to the deceased were the inducing cause of death. The witness had made a medical examination of deceased after the accident at the instance of the brewing company, and an autopsical examination of the body after death. The court permitted him to give the results of the medical examination, but excluded his testimony as to what was disclosed by the autopsy, upon the theory that the latter was not admissible, under subdivision 4 of section 1881 of the Code of Civil Procedure, which provides: "A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." The evidence does not fall within the inhibition of that provision. A dead man is not a "patient," capable of sustaining the relation of confidence towards his physician which is the foundation of the rule given in the statute, but is a mere piece of senseless clay, which has passed beyond the reach of human prescription, medical or otherwise. Moreover, the deceased had not, in life, been the patient of Dr. O'Brien. *Freel v. Railway Co.*, 97 Cal. 40, 31 Pac. 730. The evidence was competent, and, being relevant to the issue, should have been admitted. The testimony which the witness was permitted to give did not cover all that the defendants were entitled to show by the witness.

Defendants excepted to the admission of the testimony of the attending physicians of deceased, to the effect that in their opinion the injuries caused his death; that opinion being based upon facts ascertained by them during such medical attendance. It is contended by respondents that this evidence was within the rule of exclusion announced by the provisions of section 1881, above quoted, and was inadmissible. Under the principles announced in *Re Flint's Estate*, 100 Cal. 391, 34 Pac. 863, the evidence should have been excluded. While the precise question here presented—whether, after the death of the patient, his legal representative may waive the objection which the statute gives, in terms, to the patient alone—was not there directly decided, it was, nevertheless, fully considered and discussed, and the meaning of the statute in that regard very clearly indicated in the following language: "The question of waiver of the privilege by the personal representative or heir of the deceased is a new one in this state, but the statute of New York bearing upon this matter is similar to the provision of our Code of Civil Procedure, and the decisions of the courts of that state furnish us ample light in the form of precedent. The Code of Civil Procedure of New York (section 836) provides that the privilege is present unless 'expressly waived by the patient.' The California pro-

vision contains the words, 'without the consent of his patient.' It will thus be seen that the provisions are, in effect, the same. The courts of New York, under this clause of the statute, have uniformly held that the patient alone can waive the privilege, and when such patient is dead the matter is forever closed. *Westover v. Insurance Co.*, 99 N. Y. 56, 1 N. E. 104; *Renihan v. Dennin*, 103 N. Y. 573, 9 N. E. 320; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. 374. The decisions of the appellate courts of Michigan, Missouri, and Indiana support respondent's position in this regard. *Morris v. Morris*, 119 Ind. 341, 21 N. E. 918; *Groll v. Tower*, 85 Mo. 249; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510; *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882. But the statutes of those states regarding privileged communications vary quite materially from those of New York and California, and, as it said in *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510: "The difference in the statutes may well cause the difference in the rule laid down in New York and Missouri." This construction is not unreasonable in view of the peculiar terms of our statute, and is undoubtedly fully supported by the New York authorities referred to in the case just cited; and, since our statute seems to be framed largely after that of New York, the construction given the latter by the courts of that state should have great weight with us in interpreting the meaning of our own.

The court charged the jury that the plaintiff was entitled to "recover the reasonable amount which Mr. Harrison would probably have earned in the nine or ten years which it appears he had yet to live, according to these tables in evidence, and which are also a guide. You may take them into consideration, as they are part of the proof that he might have lived that long." It is objected by defendants that this was virtually telling the jury that the Carlisle Tables established the fact that deceased would have lived nine or ten years. We hardly think the instruction would be so understood, but yet the language is not as clear as it should have been. The jury should have been instructed that in determining the probable length of life the deceased would have enjoyed they were entitled to consider these mortality or expectancy tables as evidence bearing on that question and as tending to show the ordinary experience in like cases.

The jury were also instructed that in determining the amount of damages plaintiff should recover they should consider: "(a) The pecuniary loss, if any, suffered by the heirs of the deceased through his death; (b) also the relations proved as existing between the deceased and such heirs at the time of his death, and the injury, if any, sustained by them by his death." This instruction was too general and indefinite, and was calculated to confuse the jury. Such an instruction should be more carefully limited. *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 30 Pac. 601; *Pepper v.*

Southern Pac. Co., 105 Cal. 401, 402, 38 Pac. 974. While the jury have the right in such a case to consider the loss suffered by the widow in being deprived of the comfort, society, and protection of her husband, they can regard these things only for the purpose of fixing the pecuniary value of his life. The form of the instruction here was calculated to lead the jury into the error of supposing that they could, on this account, add something more than pecuniary loss. The instruction, while somewhat similar, is less guarded than in *Beeson v. Mining Co.*, 57 Cal. 37. Order granting new trial affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(116 Cal. 169)

FERGUSON v. SHERMAN et al. (L. A. 222.)

(Supreme Court of California. March 3, 1897.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—ENFORCING LIABILITY UNDER STATUTES OF ANOTHER STATE—DEFINITION OF "RAILROAD CORPORATIONS."

1. Const. Kan. art. 12, § 2, secures debts of certain corporations by the individual liability of the stockholders to an amount equal to their stock; and Gen. St. Kan. par. 1192, enacted to carry into effect such provision, provides that, after the return of an execution on a judgment against a corporation unsatisfied, execution may, on motion and notice, issue against any of the stockholders to the amount of their stock, together with any amount unpaid thereon, or "the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." *Held*, that the liability of a stockholder under such provisions is one of contract, and is not penal, and an action to enforce it may be maintained under the latter clause in the courts of another state having jurisdiction of such stockholder, without first obtaining a judgment against the corporation in such state, but based upon the judgment and return of execution in Kansas.

2. The provision of Const. Kan. art. 12, § 2, excepting the stockholders of "railroad corporations" from the individual liability for corporate debts thereby imposed on stockholders of other corporations for profit, does not include stockholders in street-railroad corporations.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by William Ferguson against M. H. Sherman and others to enforce a liability as stockholders in a corporation. Judgment for plaintiff, from which, and from an order denying a new trial, defendants appeal. Affirmed.

Bicknell & Trask, J. S. Chapman, and John D. Pope, for appellants. Wells, Monroe & Lee, for respondent.

HENSHAW, J. Appeals from the judgment, and from the order denying a new trial. Plaintiff pleaded that the defendant the Electric Rapid Transit Company was a corporation organized and existing under the laws of the state of Kansas, and that it was not a railway, religious, or charitable corporation. He further alleged a judgment ob-

tained against the corporation in the circuit court of the United States for the district of Kansas for the sum of \$7,717.50, together with costs; that he caused execution to be issued out of the court, to be levied upon the property of the Electric Rapid Transit Company, which execution was thereafter in due time returned wholly unsatisfied. Then follows, in appropriate language, an averment to the effect that, under the constitution and laws of Kansas, if any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid, or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment, and such plaintiff may maintain an action at law against any one or more of the stockholders of such corporation to recover a debt due by the corporation. The defendants other than the Electric Rapid Transit Company are sued as stockholders of that corporation. The action, then, is an effort upon the part of the judgment creditor of the Kansas corporation to enforce against California stockholders their statutory liability for the judgment debt.

1. On the trial the provisions of the Kansas constitution and statutes bearing upon the questions were introduced in evidence. Section 2 of article 12 of that constitution provides as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law, but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes." Paragraph 1192, art. 4, c. 23, of the Statutes of Kansas, under the title of "Corporations" and the subtitle of "Miscellaneous Provisions," is as follows: "If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or a charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judg-

ment." Plaintiff's action is admittedly an attempt to charge the stockholders under the italicized portion of the statute above quoted. Appellants' contention is that all of the provisions of this act contemplate special statutory remedies given by the laws of another state, and not consonant with the laws and procedure of this state, and that such liability cannot be enforced in this action. It is undoubtedly true that penalties and special remedies provided by the laws of a state will receive no extraterritorial recognition, and may not be imported into the courts of another state. That question has recently received careful consideration at the hands of this court, and it is necessary to do no more than refer to the case of *Russell v. Railway Co.*, 113 Cal. 258, 45 Pac. 323. Upon the other hand, it is equally true that when a statutory liability is not in its nature penal, and does not depend upon remedies whose enforcement is peculiar to the courts of the state which has created the law,—where, in short, the statutory liability is a simple personal liability growing out of the contract of the shareholder,—that liability may be enforced wherever jurisdiction over the particular shareholder may be obtained. It is to be considered, then, whether the statute of Kansas above quoted, in creating the specific liability, designates a mode for its enforcement which may not be exercised without the jurisdiction of its courts, or whether it merely provides for a personal liability, enforceable in an action at law in any of the courts of sister states possessing common-law jurisdiction. It will be noted that the statute in question offers a two-fold remedy to the judgment creditor of a corporation whose execution has been returned nulla bona. It first provides a remedy peculiar to the laws of Kansas and unenforceable in other forums. The second is embraced in the portion of the statute which has been italicized. That this language empowers the judgment creditor to maintain his action at law against a shareholder wherever he may be found, and to do this without first obtaining a judgment against the Kansas corporation in the courts of the state where the statutory liability of the shareholder is sought to be enforced, we entertain no doubt; and, if doubt were to be entertained, the numerous and uniform decisions of the supreme court of Kansas, of the federal courts, and of the courts of sister states, so interpreting this clause, would be sufficient to remove it.

In *Howell v. Manglesdorf*, 33 Kan. 194, 5 Pac. 759, the court had under review this statute, and, interpreting it, said: "It will be observed that two remedies for enforcing the individual liability of stockholders are prescribed in the statute above quoted. In the one case the judgment creditor of an insolvent corporation may proceed by a summary action on a motion in the court where the judgment was rendered against the corporation; in the other, by an ordinary ac-

tion, to be instituted wherever personal jurisdiction of the stockholders can be acquired. \* \* \* This ruling does not debar a creditor of the insolvent corporation of a remedy against the stockholder residing in another state, and upon whom service cannot be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder. *Flash v. Conn.*, 109 U. S. 371, 3 Sup. Ct. 263; *Dennick v. Railroad Co.*, 103 U. S. 11; *McDonough v. Phelps*, 15 How. Prac. 372; *Seymour v. Sturgess*, 26 N. Y. 134." To like effect are the cases of *Hentig v. James*, 22 Kan. 326, and *McClelland v. Cragun*, 54 Kan. 601, 38 Pac. 776. In the federal courts, also, the same statute, and the rights of litigants under it, have been frequently the subject of consideration. Thus, in *Bank v. Rindge*, 57 Fed. 279, the suit was an action at law by a judgment creditor of a Kansas banking corporation against the defendant, as a stockholder in that corporation, to enforce the stockholder's liability under the statute in question. It was held that the action would lie; that, under the interpretation given to the law by the Kansas courts, the stockholder's statutory liability was in the nature of a contract of guaranty; and that a judgment creditor might proceed against the stockholder accordingly. Such, also, was the decision of the federal courts in *Rhodes v. Bank*, 66 Fed. 512, and *McVickar v. Jones*, 70 Fed. 754. The same law has passed under the review of the supreme court of Missouri in the case of *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132. It was there held that the judgment creditor might proceed by an ordinary action at law against the stockholder wherever personal jurisdiction of the stockholder could be obtained, and that the statute of Kansas was the measure of the stockholder's liability. *Bank v. Rindge*, 154 Mass. 203, 27 N. E. 1015, is relied on by appellants as being in opposition to these authorities. In that case the supreme court of Massachusetts regretted that under the pleadings it was not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which might have been put upon it by the courts of that state; but, being unable so to do, it held that in the commonwealth of Massachusetts it was well settled that the courts had declined to exercise jurisdiction to enforce a liability imposed upon stockholders in corporations established in other states under statutes of those states. But in the later case of *Bank v. Ellis* (Mass.) 44 N. E. 349 (decided in 1896), the court, stating that the facts alleged in that case were different from those presented in *Bank v. Rindge*, supra, receded from its former position, and retained an action such as

the one here at bar, brought against a stockholder under the Kansas statute, and there declared "that the liability of the stockholders must be determined according to the laws of Kansas." It may therefore be concluded, with much certainty, that under the Kansas statute the liability is in contract, and is not penal; that the rights of the judgment creditor and the reciprocal rights and duties of the stockholder are measured by this statute, and that under the law the creditor who has obtained judgment in Kansas against a corporation, upon which judgment and execution has been issued and returned *nulla bona*, may pursue the stockholder in an action at law wherever jurisdiction of his person may be obtained, and secure judgment against him; that he may sue one or many of the stockholders; that he may take judgment against them without first having obtained judgment against the corporation in the state in which his action against the stockholders is commenced; and that the measure of the individual stockholder's liability is the face value of his shares, together with the amount of his unpaid subscription thereon. *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263; *Hoyt v. Bunker*, 50 Kan. 574, 32 Pac. 126; *Bagley v. Tyler*, 43 Mo. App. 195; *Aldrich v. Development Co. (Or.)* 32 Pac. 756; *Dennick v. Railroad Co.*, 103 U. S. 18; *Paine v. Stewart*, 33 Conn. 516.

2. It is next contended by appellants that the Electric Rapid Transit Company, organized under the laws of Kansas, is a railroad corporation, and that its stockholders are therefore relieved from all liability under the constitution of the state. The provision of the constitution bearing upon the question has been quoted. We approach its consideration with reluctance, for the provision has not received judicial interpretation in this regard from the supreme court of Kansas, and it must needs be embarrassing for the courts of another state to be called upon in the first instance to put their own interpretations upon the constitutional provisions of a sister state. There are certain considerations, however, which will go far towards the elucidation of the question, so far as affects this corporation. It may be safely said that the privilege held out to stockholders of railroad corporations organized under the laws of Kansas was not designed as an invitation to foreigners or citizens of other states to take advantage of the Kansas laws, and thus secure immunity to themselves, while equipping and operating railroads entirely without the boundaries of the state. Agriculture was and is one of the most important industries of Kansas. Cheap transportation and a ready market are essential to agricultural success. This the framers of the Kansas constitution well knew, and it is not unreasonable to infer that the exemption held out to stockholders of railroad corporations organized under the laws of Kansas was designed to prompt and

stimulate the building of railroads within the state, in aid of one of its greatest industries. It is not so easy to believe that the purpose of that constitution was to exempt from liability the stockholders of street railways, which are designed merely to facilitate travel and communication upon the public highways of a municipality, while at the same time the stockholders of mercantile, manufacturing, and banking corporations, which corporations certainly tend as much to the public convenience and welfare as do street-railroad corporations, should be held to strict accountability. We recognize that the word "railroad" or "railway," as used in a law, is broad enough to include street railroads, and that many cases have arisen where the courts have held that the word does, in its signification, include such corporations; but, when all has been said, each case has been determined upon its own facts, having in view the circumstances of the case, the context, the presumed intention of the lawmakers, and the general policy of the particular state in regard to the matter; and therefore, while a large number of cases may be cited in which the courts have held that the statutes under consideration dealing with "railroads" embraced in their provisions street railroads, an equal number could be instanced in which the courts have, under the facts of the case, narrowed and limited the application of the statute, and held that street railroads were not included. It would be difficult, if not impossible, to formulate any rule to govern the determination. In this state the difficulty is much relieved by the distinction which our Codes make between railroad corporations proper and street-railroad corporations. This consideration, however, is entitled to weight. The exemption from liability of stockholders of railroad corporations under the constitution of Kansas is an immunity in the nature of a grant or privilege. There is no rule of construction which make it mandatory upon a court to hold that "railroad" must include street railroads, and, upon the principle that all grants from the state are construed most strongly in favor of the grantor, it would certainly be proper in this case, no reason to the contrary being shown, to narrow rather than to broaden the meaning of the word, and to limit its applicability to the one class which is necessarily embraced within the term; and we therefore conclude that the provision of the constitution of Kansas here under consideration was not designed to apply to stockholders of street-railroad corporations. In consonance with this view, it is said by the learned authors of the *Law of Incorporated Companies* (1 Foote & E. Incorp. Cos. p. 668, note): "Whether any of the statutes relating to railways apply to street railways is an undetermined question. It is a question which arises again and again, as can readily be imagined, since the statutes have very little to say about street railways. Still, for

various reasons. It is believed that the great body of railroad legislation of this state does not apply to street railways." The judgment and order are therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

(15 Utah, 83)

**FRITSCH v. BOARD OF COM'RS  
SALT LAKE COUNTY et al.**

(Supreme Court of Utah. March 6, 1897.)

**COUNTIES—INDEBTEDNESS—CONSTITUTIONAL LIMITATION—REVENUE—WARRANTS—ESTOPPEL—BONA FIDE PURCHASERS.**

1. Section 3 of article 14 of the constitution, declaring that "no debt in excess of the taxes for the current year shall be created by any county" unless a majority of the voters qualified to vote thereon shall have decided to create it, at an election for that purpose, *held* to mean that no debt shall be created by any county during the year, without such vote, which the revenue of the year will not pay.

2. The language of section 3, art. 14, Const., that "no debt, in excess of the taxes of the current year, shall be created," cannot be held to mean that the county may expend the entire revenue of the year, and in addition thereto create indebtedness equal to the tax levy of the year. A debt cannot be incurred in one year, and floated over to the next, and paid out of its revenue, without a vote. The indebtedness of the year must be paid out of its revenues.

3. If official or other services are not paid for as they are rendered, or goods and chattels are not paid for on delivery, a "debt" is created, in the sense in which the term is used in the section mentioned, though there may be money in the treasury to pay it.

4. The language of the constitutional provision, "no debt in excess of the taxes for the current year shall be created" (article 14, § 3), means all debts which cannot be paid out of the revenues of the year. In determining when the limit is reached, liabilities imposed by the law should be taken into consideration, as well as those created by contract.

5. Not only the revenues arising from the tax levy of the current year, but those arising from licenses and other sources as well, must be paid upon the indebtedness arising during the year, whenever collected, so far as required; and, if an excess remains, it should become a part of the revenue of the following year.

6. With respect to the year 1896, the court held that the amount of the revenue of 1895 in the treasury on the first day of the former year not required to pay indebtedness which bonds had not been issued to pay, and the tax levy of 1896, and revenue from all other sources for which a liability to pay arose during the year, constituted the revenue, so far as it could be collected at any time with all reasonable diligence, to pay all the indebtedness of that year; the rule being that the revenue of the year so arising must alone be appropriated to the payment of the liabilities arising during the year.

7. The county will not be estopped to deny that any county warrant is beyond the debt limit, though the claim for which it was issued was duly audited, and the warrant was duly issued by the auditor, and certified to be within the debt limit. All persons receive warrants which may be above the debt limit at their peril.

8. County warrants or county bonds issued without authority of law are not valid in the hands of persons receiving them, or to whom they may have been assigned. Such persons, in a legal sense, cannot be innocent holders.

9. The court held the answer insufficient, because it did not show whether all the revenue of 1896 had been exhausted.

10. The fact that more warrants had been issued than there was revenue to pay furnished no excuse for not paying as far as it would go.

11. If any portion of the taxes assessed for any year are collected after its expiration, they should be applied to the payment of any remaining indebtedness of that year, so far as they will go; and, if not so required, they will become a part of the revenue of the succeeding year, and so on.

12. If any portion of the revenue of any year in the treasury on the first of the next year is applied to the payment of the indebtedness of the latter, an equal amount of its revenue should be applied to the payment of the indebtedness of the former year, if required.

13. Before reversing the case because the county treasurer was not a party, upon the request of the parties, and of the probability that the questions of law presented by the demurrer will arise for decision in the court below after amendments, upon a trial, the court considered and decided the questions arising upon the errors assigned.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Action by John A. Fritsch against the board of county commissioners of Salt Lake county and others. From a judgment for plaintiff, defendants appeal. Reversed.

Waldemar Van Cott, Co. Atty., for appellants. J. H. Hurd, Robt. Harkness, Frank B. Stephens, and C. O. Whittemore, for respondents.

ZANE, C. J. In his petition filed in the court below, the plaintiff asked for a writ of mandamus commanding the defendants to recognize and provide for the payment of 20 county warrants issued upon liabilities incurred in 1896. It was alleged that they were duly signed by the county auditor, and certified by him to be within the debt limit of that year, that they were duly delivered to him, and that he owned them. The defendants filed an answer to the petition, to which the plaintiff interposed a demurrer, which the court sustained, and, the defendants having elected to stand on their answer, the court ordered the writ as prayed. From this judgment the defendants appealed, and assigned the judgment of the court granting the writ, and the order sustaining the demurrer as error. Assuming the allegations of the petition to be true, the county treasurer should have paid the warrants upon presentation and demand, and, upon a refusal, he should have been made a party defendant to a petition for a writ of mandamus to compel payment. But the petition was not demurred to, and both parties desire us to consider the errors assigned. Therefore we will proceed to consider and decide the questions raised and discussed upon the demurrer to the answer, for the reason that after reversal and amendments of pleadings the same questions would arise upon trial.

The defendants rely upon the following statement of the revenue of the county, and

its liabilities for the year 1896, as a defense to the action:

Statement of Revenue of 1896.

Cash from 1895 account.....	\$ 40,244 52
Cash from licenses, fees, fines, pauper account, poll tax, rent, and miscellaneous items .....	51,541 12
Tax for year 1896.....	130,066 17
From the state, one-half salaries of attorney, assessor, and treasurer .....	2,837 50
Taxes of 1894 and 1895, collected in 1896 .....	29,280 97
Tax-sale redemptions paid into treasury in 1896 .....	11,889 12

Total revenue ..... \$265,859 40

Liabilities.

Appropriations made during the year 1896 .....	\$222,616 12
Appropriations January 2, 1897, for salaries, etc., for liabilities of 1896 .....	19,786 94
Amount due jury and witness fees, as per auditor's books, to December 22, 1896.....	4,390 95
Interest due on county warrants from January 1, 1891, to August 1, 1896 .....	20,496 30
Claims due the state of Utah and board of education, as audited by the auditor .....	12,860 88
Appropriations from January 1, 1896, to June 5, 1896, for claims previous to January, 1896.....	21,859 23

Total liabilities ..... \$302,010 42

Liabilities over revenue..... \$ 36,151 02

The following items of possible revenue, as shown by statement in answer, left out of above statement:

Amount due from former treasurer, Leonard, presumably uncollected taxes .....	\$25,559 60
Amount due from former treasurer, Spencer, presumably for like taxes .....	60,707 02

Total ..... \$86,266 62

The following items of possible indebtedness, as shown by statement in answer, left out of first statement above:

School-fund proportion of amounts due from Leonard and Spencer..	\$38,044 94
Interest on \$92,522.86, county warrants, incurred in 1896, due January 1, 1897.....	3,084 05
Due on warrants issued in 1896...	2,500 00
Claims presented to board, but not acted on .....	1,943 36

Total ..... \$45,572 35

Possible revenue over possible liabilities ..... \$40,692 27

The question is presented for our consideration and decision, do plaintiff's warrants constitute a debt in excess of the taxes of Salt Lake county for the year 1896, and would their payment be a violation of section 3 of article 14 of the constitution of this state, as follows: "No debt in excess of the taxes for the current year shall be created by any county \* \* \* in this state; unless the proposition to create such debt shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein in the year preceding such election, and a majority of those voting thereon

shall have voted in favor of incurring such debt." This section declares that no debt in excess of the taxes of the current year shall be incurred without a vote of the electors. The intention to limit the expenditures to the taxes appears to be clearly expressed by its language. We must infer that the members of the convention who framed the section, and the electors who adopted it, intended what its language, grammatically arranged, in its ordinary acceptation, expressed. For such an inference, in our opinion, does not involve any inconsistency, lack of sound judgment, or absurdity. Plaintiff's counsel insist, however, that the liabilities which the revenue was sufficient to pay during the year did not, in a legal sense, constitute indebtedness, and that, therefore, the expression, "no debt in excess of the taxes of the current year shall be created," means that a debt shall not be created in excess of the revenue of the year, and an amount equal to the tax levy of the year, or, in other words, that the liabilities of the year may equal the entire revenue of the year, including the tax levy, and in addition, a sum equal to the tax levy; that the county may expend the entire revenue, and in addition create indebtedness equal to the tax levy. The position, as applied to the case in hand, is, if the revenue of 1896, including the tax of \$130,066, amounted to \$265,859, the constitutional provision in question permitted the liabilities of the county to equal that amount, and \$130,066 in addition; that the county could float a debt, without a vote of the electors, over to 1897, of \$130,066, after having expended the entire revenue of 1896. The language of the provision does not warrant such an interpretation. Admitting there is room for construction, the one placed upon the provision by the plaintiff appears to be unreasonable, in view of its language, and the experiences and conditions in view of which it was adopted. The expression, "no debt in excess of the taxes of the current year," is used, not "no debt in excess of [a debt equal to] the taxes for the current year." It appears to be clear that a debt exceeds the taxes when it remains after they have been expended, and, if taxes are construed to mean the entire revenue, that the debt is in excess of it, if it remains after it has been expended. But we cannot concede that liabilities incurred during the year do not amount to indebtedness, so long as they do not exceed the revenue for the year, in the sense in which the term is used in the provision under consideration. The salaries of officers and employees of the county, if not paid as the official or other service is rendered, becomes county indebtedness, and the price of lumber or other material purchased, if not paid for on delivery, becomes indebtedness. If the county were sued for such indebtedness, it would be no defense for the county to say, "I have sufficient revenue in my treasury to pay you," or that "I have levied a sufficient tax to pay it." City



of *Springfield v. Edwards*, 84 Ill. 626, is cited in support of the proposition contended for by the plaintiff. The court held in that case that, though the corporate indebtedness may have reached the debt limit established, the corporation may give an order to an individual for material or other consideration furnished, for enough of the taxes when collected to pay him, provided no liability against the county is created. The court said: "The principle, as we understand it, is, there is in such case no debt, because one thing is simply given and accepted for another." This decision declares, in effect, that a debt within the meaning of the constitutional limitation is created if the corporation is bound to pay, though the tax levy for the year, or revenue in the treasury, may be sufficient to pay it. Such appears to be the rule adhered to by the supreme court of Illinois. In *City of Valparaiso v. Gardner*, 97 Ind. 1, the supreme court of that state held the limitation to indebtedness imposed upon political corporations by the constitution did not apply to payments for water to be furnished, provided the contract price could be paid from the current revenues as the water should be furnished, without increasing the corporate indebtedness beyond the constitutional limit, or encroaching upon the funds set apart for other purposes. In nearly all the cases to which we have been referred, the term "indebtedness" was considered as found in constitutional provisions laying down a general rule limiting all classes of indebtedness at all times, while the provision under consideration forbids a debt in excess of the taxes for the current year unless it is authorized by a vote of the electors. The general limitation in the Utah constitution is found in section 4 of the same article, and establishes 2 per cent. of the assessed value of taxable property as the limit. Dill. Mun. Corp. (4th Ed.) § 136a, states the rule in the states named as follows: "Under the constitutional provisions in Iowa, Illinois, Indiana, and Pennsylvania, referred to, it is held that a corporation may make a contract (at least for necessities), covering a series of years, upon which an obligation to pay may arise from year to year as the thing contracted for is furnished; and in such case the whole amount which may ultimately become due does not constitute a debt, within the constitutional prohibition. But in order to ascertain whether the corporation, by such contract, is transgressing the limit, regard is had only to the amount which may fall due within a certain year or other period; and if the revenues for that year or other period are sufficient, over and above the payment of the other expenses, to pay such amount, there is no debt incurred, within the constitutional prohibition." If all the liabilities of the county are paid as they arise, no indebtedness is created, but, if they are not, a debt exists; and if the revenue of the year is applied to the payment of county ex-

penses and liabilities incurred or arising during the year, and it is sufficient to pay them, the indebtedness can be no greater at the end of the year than at the beginning; but if the revenues are not so applied, and the indebtedness not so paid, the debt will be greater; and, if the debt was at the limit at the beginning, it will exceed it at the end, and the constitution will be violated, according to the rule expressed in Dillon.

The plaintiff also relies upon the case of *Penton v. Blair*, 11 Utah, 78, 39 Pac. 485. This decision was made under the limitations imposed by the organic act and the laws of the territory. Section 4 of an act of congress in force July 30, 1886, declared that no county should ever become indebted in any manner, or for any purpose, to an amount, in the aggregate, including existing indebtedness, exceeding 4 per cent. on the value of the taxable property within such county, to be ascertained by the last assessment for territorial and county taxes previous to incurring the indebtedness. In this way the provision fixed the amount of the indebtedness that the county might incur. And, subject to this provision, the territorial legislature provided "that no county should incur any indebtedness or liability in any manner, or for any purpose, to an amount exceeding in any year the total amount of its income and revenue for the two fiscal years immediately preceding the incurring of such indebtedness." 1 Comp. Laws Utah, p. 293, § 173. This section also fixed the amount, by a similar method, to which the county might become indebted. In its opinion the court said: "But we are clearly of the opinion that by no means of juggling with the figures and the financial statement of the county can the debt limit be increased at any time, in any year, exceeding the entire revenue for the two years immediately preceding the time such debt is created." The language used in the organic act of the territory, and its arrangement, differs widely from the language and its arrangement in the third section of the constitution. According to the latter, if we assume that the county may become indebted during the year, while its revenue exceeds its liabilities, then its indebtedness must not exceed its revenue. Or if, according to a legal fiction, we assume something as true which is false, but not impossible, and say that the county cannot be indebted when its revenue has not been exhausted, then the constitutional provision declares that "no debt in excess of the revenue or taxes shall be created,"—no debt whatever. In either case the indebtedness of the current year cannot exceed the revenue of the year, while the act of congress referred to fixes the "amount" to which, in the "aggregate," the county may become indebted by reference to the two preceding years, and in the same way the territorial enactment fixed the amount. It appears from the answer that the territory on the 31st day of December, 1895, had a floating debt outstanding, evi-



denced by interest-bearing warrants, the principal of which amounted to \$439,205.73. It is common knowledge that many of the persons who secured such warrants for services performed, or other consideration rendered or given, were compelled to stand enormous shaves in order to get the cash. When it becomes necessary to hawk the warrants of the county about the town in order to realize upon them, persons to whom they are issued get less than they contract for, and the county loses its financial standing, and is often required to pay more than it would if prompt payment could be relied upon. Besides, a bonded indebtedness can always be obtained at a lower rate of interest than a more temporary one, evidenced by a great number of discredited warrants. To remedy the above abuses and evils that had grown up under the territorial system, the section of the constitution under consideration was adopted, prohibiting any indebtedness which cannot be paid by the revenue of the current year. Such is our interpretation of the provision in question, and it is supported by the weight of authority. *Smith v. Broderick*, 107 Cal. 644, 40 Pac. 1033; *Book v. Earl*, 87 Mo. 246; *Appeal of City of Erie*, 91 Pa. St. 398.

It is also urged that only indebtedness arising from voluntary contracts should be included, in determining when the limit is reached. That indebtedness for salaries and liabilities for the negligence of the officers or agents of the county for which it may be liable should not be included. The language of the constitutional provision is, "No debt in excess of the taxes for the current year shall be created." That language includes all debts where the proposition to create has not been submitted to the electors. The number of officers of the county, and their salaries, are largely within the discretion of the county board. The commissioners, by the exercise of reasonable foresight and discretion, can avoid any lack of revenue for the payment of salaries or fees, or the payment of damages in consequence of torts, by taking such salaries and fees into consideration in estimating the amount of the tax levy, and by making a reasonable estimate for extraordinary demands for torts. They have the means of ascertaining, when making their estimate and assessment of taxes for the year, the precise expenditures of the preceding years, and, with the exercise of reasonable foresight, caution, and care, they can make an assessment sufficient to meet all just demands for the year.

The case of *Rollins v. Lake Co.*, 34 Fed. 845, is relied upon. This case afterwards came before the supreme court of the United States upon a writ of error, and by that court the decision relied upon was reversed. In that case a large number of warrants constituted the cause of action, and the contention was as to a constitutional provision of the state fixing the debt limit of county indebtedness, and as to what indebtedness should be included

in determining whether it had been reached. In its decision the supreme court said: "Neither can we assent to the position of the court below, that there is, as to this case, a difference between indebtedness incurred by contracts of the county and that form of debt denominated 'compulsory obligations.' The compulsion was imposed by the legislature of the state, even if it can be said correctly that the compulsion was to incur debt; and the legislature could no more impose it than the county could voluntarily assume it, as against the disability of a constitutional prohibition. Nor does the fact that the constitution provided for certain county officers, and authorized the legislature to fix their compensation and that of other officials, affect the question. There is no necessary inability to give both of the provisions their exact and literal fulfillment." *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651. We are of the opinion that the limitation embraced in the third section of the constitution quoted includes debts incurred by operation of law as well as those arising from express contract.

The defendants insist that the term "tax" used in the constitutional limitation under consideration means simply the revenue arising from the tax levy; that it does not include revenue arising from licenses and other sources. Licenses to keep saloons or dramshops are issued under the police power, while licenses to conduct some other classes of business do not need police regulation. Such licensing is used simply as a means of obtaining revenue. But, whether granted under the police power or the taxing power, the sums paid for them are a source of revenue, and, in effect, constitute a tax on the particular business. Again, it appears from the answer that the revenues of the county for the year 1896, from sources other than the tax levy, including \$40,244.64, in the treasury on January 1st of that year, amounted to \$91,785.64. We cannot assume that the authors of the constitution intended that this large sum should remain in the treasury from year to year, and that the revenue from the same source should continue likewise to accumulate. We cannot impute to the authors of the constitution such an unreasonable intent. We hold that the county was authorized to appropriate the revenue from the tax levy, and that from other sources as well, to the payment of the legitimate liabilities of the year.

The plaintiff also claims that the law will not permit the defendants to deny the legality of his warrants, because they were issued by the county auditor, and certified by him to be within the debt limit. The authority and duties of the auditor were defined by public law, and the debt limit was fixed by the constitution. Persons dealing with the county, or receiving its warrants, must be presumed to know the law, and by inquiry they can ascertain the amount of the liabilities incurred and expenditures

made. County warrants or county bonds issued without authority of law are not valid in the hands of the person to whom issued, or his assignee. Persons receiving them cannot, in a legal sense, be innocent holders. All persons receive them at their peril. *Mayor v. Ray*, 19 Wall. 468; *Clark v. City of Des Moines*, 19 Iowa, 200.

The plaintiff's claim against the county is evidenced by warrants, and they are valid as against the revenue of 1896. We are unable to determine from the facts stated in the answer whether all the revenue of 1896 has been applied to the payment of the liabilities of that year. The fact that more warrants were issued than there was revenue to pay furnishes no excuse for not paying as far as it will go. Payment should be made to the limit, and the limit is the revenue of that year. And, if revenue shall arise from the collection of taxes levied in 1896, it shall be applied to the payment of that year's indebtedness, as far as it will go; and, if any of such revenue remains after all the indebtedness of that year shall have been paid, it will become 1897 revenue. And, if any of the revenue of 1896 has or shall be paid on the indebtedness incurred in 1897, an equal amount of its revenue, if required, should be applied to the indebtedness of the former year, and so from year to year. For the reason that the answer does not show that all the revenue of 1896 has been applied to the payment of indebtedness of that year, we are of the opinion that the answer would have been demurrable, had the suit been brought against the treasurer. We reverse the judgment of the court below, granting the writ, because the plaintiff's complaint does not state a cause of action against the defendants. The cause is remanded, with directions to that court to permit the county treasurer to be made a party defendant, and to allow such amendments to the pleadings as will enable the case to be tried upon its merits.

BARTCH, J., and HILES, District Judge, concur.

(14 Utah, 458)

**MAYNARD v. LOCOMOTIVE ENGINEERS' MUT. LIFE & ACCIDENT INS. ASS'N.**

(Supreme Court of Utah. March 8, 1897.)

**MUTUAL BENEFIT INSURANCE—BY-LAWS—FINDINGS—JUDGMENT.**

1. M. was a member of the defendant association, and received an injury in June, 1893, which resulted in the loss of the sight of his right eye. One of the objects of the association is to transact the business of life and accident insurance. M. brought suit to recover on two of its policies, basing his action on a by-law which provides that "any member, while engaged in any lawful vocation, receiving any bodily injuries which will alone cause \* \* \* the total and permanent loss of one or both eyes, he shall receive the whole amount of his policy." This by-law was adopted on May 26, 1894, after M. received his injury. *Held*, that the by-law is not by its terms retroactive, and,

considered by itself, does not include a case where the injury which caused the loss of eyesight occurred prior to its passage; there being no reference in the pleadings to any other by-law which would authorize the inference that the one in question was to apply to such a case. *Held*, further, that the finding of the court that another by-law was in existence, when there was no reference to it in the pleadings, was a finding of fact outside of any issue, and that such finding cannot be considered, although, if the by-law had been properly pleaded, it would have an important bearing in the determination of the case.

2. Where a fact is found outside of any issue, it is nugatory and of no effect, and cannot be considered as supporting the judgment.

3. A finding of fact on a material issue should be express and distinct, whether it be as to an issue made by the denial of an allegation in the complaint, or by a denial presumed by law of an averment in the answer.

4. When the facts are found, it must affirmatively appear therefrom that they support the judgment, or else the judgment will be subject to attack on appeal.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by Charles Maynard against the Locomotive Engineers' Mutual Life & Accident Insurance Association. From a judgment for plaintiff, defendant appeals. Reversed.

Richards & Macmillan and Arthur E. Pratt, for appellant. H. H. Henderson, for respondent.

BARTCH, J. The plaintiff was a member of the defendant corporation, and brought this action to recover the sum of \$3,000, on two certificates of membership, in the nature of insurance policies, each for \$1,500, for the permanent loss of the eyesight of his right eye, caused by an injury received in the pursuit of a lawful vocation. The cause was tried by the court without a jury, judgment entered in favor of the plaintiff, a new trial refused, and thereupon the defendant appealed.

The only assignment of error which we deem it necessary to consider in this case is the one to the effect that the judgment of the court is not supported by the findings of fact. The court found that the defendant was incorporated on March 1, 1894; that, for a period of 25 years prior to that time, it had existed as an unincorporated voluntary association; that when it became incorporated it took all the property and assumed all the liabilities of the voluntary association; that its object at all times has been to transact the business of life and accident insurance on the assessment plan, for the purpose of mutual protection and relief to its members, and the payment of stipulated sums of money to the families, heirs, executors, administrators, or assigns of its members; that the plaintiff received the injury which caused the loss of his right eye in June, 1893; that the "loss of said right eye did not become permanent for about ten or twelve months after June, 1893"; and that the by-law of the association on which

the plaintiff founded his cause of action was adopted and took effect on the 26th of May, 1894. That by-law, so far as material here, reads, as follows: "Any member, while engaged in any lawful vocation, receiving bodily injuries which will alone cause \* \* \* the total and permanent loss of one or both eyes, he shall receive the whole amount of his policy." This is not by its terms retroactive, but prospective merely, and, considered by itself, does not include and provide for a case like the one at bar, where the injury which caused the loss of eyesight occurred prior to its passage. In form, it is present and future, and does not refer or apply to past occurrences. Whether or not there are other by-laws of the association, adopted either before or after the plaintiff received his injury, which would show that the one under consideration was intended to have a retroactive effect, we are unable to determine, in the absence of reference in the complaint to any such by-laws. Nor is there anything in the abstract or transcript, which we can legitimately consider, that authorizes the inference that the by-law in question was intended to apply to cases where the injury was received before its adoption. It is true, the court found that previous to its incorporation the defendant had a by-law as follows: "Any member, while engaged in a lawful vocation, receiving bodily injuries which alone shall cause the amputation of a limb, whole hand or foot, or total and permanent loss of eyesight, he shall receive the full amount of his policy." This, however, is a fact found outside of any issue raised in the pleadings; for nowhere in the complaint or answer does there appear any reference to such a by-law, nor is its existence shown anywhere in the transcript or abstract, except in the findings of fact. A fact found outside of any issue cannot be considered as supporting the judgment, because facts not in issue need not be found, and, if found, the finding is nugatory and without effect. It may be that the voluntary association had at the time of the plaintiff's injury such a by-law as the one last above quoted, and, if such should be the fact, and the by-law had been properly pleaded, it would doubtless have an important bearing in the determination of this case; but the manner in which it appears in the record precludes its consideration for any purpose, and therefore we cannot read it, in connection with that of May 26, 1894, to ascertain whether the respondent has a right to recover. Under the pleadings as they appear in the record, the respondent's right to recover is based on the by-law of May 26, 1894, which, as we have seen, is not by its terms retroactive; and, the court having found that the injury was received prior to its passage, it is clear that such finding does not support the judgment. Nor does it avail the respondent that the court found that the loss of eyesight did not become permanent "for about ten or twelve months after June, 1893." Such finding

leaves the fact as to the date of the loss of sight in doubt, and this would become a material issue if it were to transpire that the date of injury was immaterial, because, if the loss of sight occurred 10 months after June, 1893, it occurred before the passage of the by-law, and, if the loss occurred 12 months after that date, then it was after its passage. A finding on a material issue should be express and distinct, whether it be as to an issue made by the denial of an allegation in the complaint, or by a denial presumed by law of an averment in the answer. The facts are found for the purpose of disposing of the issues, and, when found, it must affirmatively appear that they support the judgment, or else the judgment will be subject to attack on appeal. *Haynes, New Trials & App. § 242; Railroad Co. v. Reynolds, 50 Cal. 90; Harlan v. Ely, 55 Cal. 340; Campbell v. Buckman, 49 Cal. 362; Johnson v. Squires, 53 Cal. 37; Elliott v. Peck, Id. 85.* While it is evident that the findings of fact do not support the judgment, and that it cannot stand, still we are not satisfied that the respondent cannot ultimately recover the amount of his policies, if the complaint be carefully revised by amendment so as to present the issues suggested by the record in a proper manner. The cause is therefore reversed and remanded, with directions to the court below to grant a new trial and permit the parties to amend their pleadings, if they so desire.

ZANE, C. J., and MINER, J., concur.

(14 Utah, 490)

#### McLAUGHLIN v. MULLOY.

(Supreme Court of Utah. March 10, 1897.)

CO-PARTNERSHIP—CONSTITUENT MEMBER—INTENT  
—POWER OF SINGLE PARTNER.

1. One firm may become a partner in another firm, and in that event such partner will be treated as a constituent member of the new firm.

2. K. & Bro., as a firm, became a constituent member of the firm of M., K. & Co., whose members then were M. and K. & Bro., each having an equal interest in the new firm. Both firms were engaged in the same line of business. The new firm manufactured and furnished lumber in which K. & Bro. as a firm were dealing. Profits made by M., K. & Co. inured to the use and benefit of K. & Bro. In transacting the business of M., K. & Co., debts were legitimately created. To pay these obligations, a loan was obtained by M., K. & Co., with the agreement that K. & Bro. and M. should sign the note to be given for the loan, as sureties for M., K. & Co. K., one of the members of K. & Bro., signed the firm name to the note as such surety. *Held*, that the firm of K. & Bro. was bound by such signature.

3. The acts of one partner in relation to the partnership business will bind the firm.

(Syllabus by the Court.)

Appeal from district court, Third district; M. L. Ritchie, Judge.

Action by David C. McLaughlin, receiver of the Park City Bank, against Thomas F. Mulloy. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action in the nature of an equitable proceeding, brought by the plaintiff, representing the Park City Bank, as receiver, against the defendant, who is the assignee of the firm of Kidder & Bro., for money had and received to the plaintiff's use, as such receiver. The cause was tried before a referee, and, after submitting his report to the court, judgment was entered in favor of the plaintiff. The facts found, so far as material to this decision, are substantially as follows: On and prior to July 21, 1892, George C. Kidder and Russell W. Kidder were co-partners, engaged in the lumber business at Park City, Utah, under the firm name of Kidder & Bro. This firm continued doing business until June 13, 1893, when it made an assignment to the defendant for the benefit of its creditors. On and prior to July 21, 1892, and thereafter until such assignment, Kidder & Bro. were co-partners with one H. P. Mason, and engaged in the business of manufacturing lumber in the state of California, under the firm name of Mason, Kidder & Co., and a large amount of their lumber was shipped to the firm of Kidder & Bro. In the new co-partnership, Kidder & Bro. constituted one partner, and Mason was the other, the two partners having equal interests therein. The co-partnership so formed, in the pursuit of its business, became indebted in California and elsewhere; and about July 21, 1892, for the purpose of paying these debts, it negotiated a loan of \$8,000, from the Park City Bank, it being understood and agreed that the note to be given for the loan should be signed by the individual members of the firm of Mason, Kidder & Co., as sureties for the firm. On July 21, 1892, the note was executed for \$8,000, and George C. Kidder, without the knowledge of Russell W. Kidder, in good faith, believing it to be for the best interests of the firm of Kidder & Bro., and that he had the legal right so to do, signed the name of Kidder & Bro. thereto, as surety for the firm of Mason, Kidder & Co., and Mason also executed the note as such surety. Five thousand dollars of the money obtained on this paper was paid on the debts of Mason, Kidder & Co., by its manager, George C. Kidder; and the remaining three thousand dollars was credited to the account of the firm of Mason, Kidder & Co. with the Park City Bank, and was drawn out from time to time, on the checks of that firm, in payment of its debts. On January 21, 1893, the note was renewed in precisely the same manner in which it was originally given. At the time of the assignment of Kidder & Bro., there was due on the note \$8,043.33, no part of which has been paid. The defendant, as assignee of the firm of Kidder & Bro., has received sufficient assets to pay 20 per centum upon the liabilities, but refuses to pay anything on the plaintiff's claim.

S. M. McDowall, for appellant. Brown, Henderson & King, for respondent.

BARTCH, J. (after stating the facts). It seems to be conceded on both sides that this action is in the nature of a suit in equity, to determine the plaintiff's right to money in the hands of the defendant, and is controlled by the principles governing the distribution of partnership funds in case of insolvency. Nor is there any dispute that, when a co-partnership becomes insolvent, its creditors have a preference, in the payment of their claims, over creditors of individual members, and that, in case of insolvency, the creditors of individuals have preference over claims against the co-partnership.

The principal contention of the appellant appears to be that the firm of Kidder & Bro. was not bound by the action of George C. Kidder in signing the firm name on the note as surety, without the knowledge of the other member of the firm, because, as is insisted, such action was not within the scope of the co-partnership. No doubt, one firm may become a partner in another firm, and in that event such partner will be treated as a constituent member of the new firm, and division of profits made to the constituent co-partnership, and not to its members, as individuals, unless the intention of the parties be otherwise. So, liabilities may attach to the constituent members of the new firm. *Bates, Partn.* § 150; *In re Hamilton*, 1 Fed. 800; *In re Gilbert (Wis.)* 68 N. W. 863; *Bullock v. Hubbard*, 23 Cal. 496. The firm of Kidder & Bro. having become a constituent member of the firm of Mason, Kidder & Co., which is conceded, it became a part of its business, and was to its interest, as such co-partnership, to sustain and promote the business of Mason, Kidder & Co. Therefore anything which the firm of Kidder & Bro. did to that end was within the scope of its business, and could be done in the usual manner of transacting partnership business. As a co-partnership, Kidder & Bro. had embarked in the business of Mason, Kidder & Co., both firms being in the same line of business. The new firm manufactured and furnished lumber, in which Kidder & Bro., as a firm, were dealing. The purpose was to make profits for Mason, Kidder & Co., which would inure to the use and benefit of Kidder & Bro. In transacting the business of Mason, Kidder & Co., debts were legitimately created; and, to pay these obligations, the loan was obtained by the firm through George C. Kidder, from the Park City Bank, with the agreement that Kidder & Bro. and H. P. Mason should sign the note to be given for the loan, as sureties for Mason, Kidder & Co. Under all these circumstances, we are of the opinion that George C. Kidder had the lawful right, he being a member of the firm of Kidder & Bro., to sign the firm name on the note as surety, and that the firm of Kidder & Bro. was bound by such signature. *Turnpike Co. v. Gulick*, 16 N. J. Law, 161, 169; *Gulick v. Gulick*, 14 N. J. Law, 578.

It is also insisted that, regardless of whether the firm of Kidder & Bro. is liable on the note in question, the respondent has no cause of action against the assignee, until it shall appear that he has funds in his possession, belonging to the insolvent firm, after all its firm debts have been paid. The firm of Kidder & Bro. being bound by the execution of the note, the amount thereof remaining due and unpaid constitutes a valid claim against that firm, and must be regarded and treated by the assignee the same as any other firm debt, in the payment of percentage on the firm's liabilities. The cases on which the appellant relies for a reversal do not appear to be applicable to the facts of this case. We find no reversible error in the record. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

(14 Utah, 482)

JOHNSON et al. v. TOOTLE et al.

(Supreme Court of Utah. March 9, 1897.)

MORTGAGES—SUBROGATION.

A purchaser of mortgaged premises, who agrees to pay the mortgage as a part consideration for the purchase price, upon the representations of the grantor that there are no judgments or liens standing against the grantor or the property, who pays the outstanding mortgage under a mistake of fact, relying upon such representations, and after the payment and discharge of the mortgage, and the execution of the conveyance to the grantee, it appears that there was a judgment standing against the grantor, which was recovered subsequent to the date of the mortgage, and it also appears that the position of the judgment creditor had in no way been changed or altered in any reliance upon the release of the mortgage,—*held*, that the grantee will be subrogated to the rights of the mortgagee, and may have the land sold first in satisfaction of the amount the grantee paid to satisfy the mortgage and costs, and the balance derived from the sale to be applied to the payment of the judgment. *Held*, also, that when the legal rights of the parties have been changed by mistake or fraud, equity will restore them to their former condition, when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to either party.

(Syllabus by the Court.)

Appeal from district court, Fourth district; W. M. McCarty, Judge.

Action by L. Johnson and others against Kate Tootle and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

It appears from the agreed statement of facts in this case: That on the 23d day of December, 1890, Lorenzo Hatch was the owner of the real estate in Vernal, Uintah county, Utah, described in the plaintiffs' complaint, which was subject to a lien of a certain trust deed made, executed, and delivered by Lorenzo Hatch and wife, on July 29, 1890, to one Little, to secure the payment of \$3,000, with interest at 12 per cent. per annum from date, to the Deseret Savings Bank, a corporation.

That on December 23, 1890, defendants Tootle, Hosea & Co. recovered judgment against Lorenzo Hatch for the sum of \$820 and \$75.50 costs in the district court for the First judicial district at Provo, Utah, said district embracing Uintah county, which was situated many miles from Provo. That on May 23, 1891, the predecessors in interest of the plaintiff the Farmers' Co-operative Association purchased a portion of the property described in the complaint from Lorenzo Hatch and wife, and agreed, in consideration for such purchase of said premises, and as a part of the purchase price, that said Farmers' Co-operative Association would pay the amount of said trust deed, and release and discharge Hatch from liability therein. That in pursuance of said agreement, and as a part of the consideration for the said premises, and as a part of the purchase price, the said amount due on said trust deed was paid to the Deseret Savings Bank, and the said bank thereafter caused a release and discharge of the said trust deed to be sent to and entered for record with the county recorder of Uintah county, where the premises are situated. That at the time of such purchase and contract made by plaintiffs and their predecessors in interest to which plaintiffs have succeeded in interest, said Hatch represented to said plaintiffs and their predecessors in interest that there were no judgments outstanding against him which were or might be liens upon said property, and no transcript of the judgment aforesaid or any judgment had ever been filed in the recorder's office of Uintah county, and, relying upon the representations of said Hatch that said premises were free and clear from all liens, judgments, and incumbrances, except said trust deed to the Deseret Savings Bank, and having no knowledge whatever to the contrary, the said predecessors in interest of the said plaintiffs purchased said property, and took a deed therefor October 7, 1891. It was further agreed and stipulated as facts in the case that the plaintiffs and their predecessors in interest by their acts had released from the lien of the trust deed all said lands described in plaintiffs' complaint except that part conveyed by Hatch to plaintiffs and their predecessors by deed dated October 7, 1891, which land is the subject of this litigation; that the balance of the land so released has been sold upon appellants' execution, but, outside of the exemption, did not satisfy said execution. It also appears from the testimony that a judgment docket kept in the First judicial district court, where such judgment was entered, contained the names of judgment debtors entered indiscriminately, without regard to any alphabetical order required by the statute. Execution was not issued upon the judgment until September, 1894. The court found the facts substantially as agreed upon. As a matter of law the court found the facts set forth constituted a fraud and mistake such as entitled the plaintiffs to equitable relief, and held, in consequence thereof, that plaintiffs

should be subrogated to the rights of the Deseret Savings Bank in and to the trust deed paid by them, and that as such equitable mortgagees the plaintiffs were entitled to have that portion of the premises described in the complaint, and purchased by them, and levied upon by the defendants, sold under such trust deed, and the proceeds thereof applied—First, to the payment of the costs and expenses of this proceeding; second, to the payment of the sum of \$3,000, due the plaintiffs; and that the balance, if any, be applied to the satisfaction of the execution of Tootle, Hosea & Co. against Lorenzo Hatch,—and a decree was entered accordingly. From this judgment and decree this appeal is taken.

Booth, Lee & Gray, for appellants. Thurman & Wedgwood, for respondents.

MINER, J. (after stating the facts). It appears that when the appellants procured their judgment against Hatch the trust deed was a valid lien upon the property in question for upwards of \$3,000, and the judgment was subject to this lien. The respondents purchased the land in good faith, relying upon the representations of Hatch that the trust deed was the only incumbrance upon it, and were in utter ignorance of the judgment. They purchased the land, and as a part of the purchase price paid off the trust deed for the benefit of the respondents, and not for the appellants. The position of the appellants in the meantime had in no way been changed. They did not take their judgment, part with any property, nor do any act in reliance upon the release of the trust deed. The respondents were not strangers, volunteers, or intermeddlers, within the rule which denies a remedy by way of subrogation. Under these circumstances, are the appellants in a position where they can take advantage of the mistake and fraud, and be placed in a better position because of it? If the lien of the trust deed is released for the benefit of respondents, the equities of both parties are preserved, and the appellants will have what they had when the judgment was obtained. The promise on the part of the respondents to pay the judgment was solely in consideration that they should obtain and acquire a clear title to the land purchased. As the consideration failed, the promise should not be enforced in equity in favor of appellants, when their position has been in no way changed because of the release of the trust deed. The general principle which runs through nearly all the cases of this character is that, "when the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new right acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons." To apply this principle in this case is to prevent manifest injustice and hardship, and its application will interfere with no superior inter-

vening equities. In *Matzen v. Shaeffer*, 65 Cal. 81, 3 Pac. 92, the facts are nearly identical with the facts in this case. In that case it appears that "a purchaser of land subject to a mortgage agreed with the owner and mortgagee to pay off the mortgage debt as part consideration for the purchase. The mortgage debt was paid by the purchaser, and the remainder of the purchase price to the owner, who thereupon conveyed the land to the purchaser. Satisfaction of the mortgage was entered on the record. It was held that the transaction operated as an equitable assignment of the mortgage to the purchaser, and was a lien paramount to that of a judgment entered after the mortgage and before the entry of satisfaction." In the case of *Barnes v. Mott*, 64 N. Y. 397, the court held in a similar case that: "So much of the judgment as restores the mortgage upon the premises now owned by the plaintiffs, paid off and satisfied by the devisees of Burr, the then owner, and reinstates the same as a lien upon the mortgaged premises, prior and paramount to the lien of the judgment recovered by Orchard and assigned to the defendant, is clearly right. Upon payment of the mortgage by the then owners of the premises, they were entitled to all the rights of the mortgagee, and to an assignment of the mortgage; and, having caused the same to be satisfied under circumstances authorizing an inference of a mistake of fact, equity will presume such mistake, and give the party the benefit of the equitable right of subrogation. To do so in this case is to prevent manifest injustice and hardship, and interferes with no superior intervening equities." This doctrine is sustained by the great weight of authority, although there are decisions to the contrary. *Barnes v. Camack*, 1 Barb. 392; *Pearce v. Buell* (Or.) 29 Pac. 78; *Emmert v. Thompson* (Minn.) 52 N. W. 31; *Gatewood v. Gatewood*, 75 Va. 407; *Young v. Morgan*, 89 Ill. 199; *Barnes v. Mott*, 64 N. Y. 397; *Smith v. Dinsmoor*, 119 Ill. 656, 4 N. E. 648; *Bryson v. Myers*, 1 Watts & S. 420, 425; *Hudson v. Dismukes*, 77 Va. 242, 247; *Yaple v. Stephens* (Kan. Sup.) 14 Pac. 222; 2 Warv. Vend. p. 858, and note 4; *Harris*, Subr. § 816; *Backer v. Pyne* (Ind. Sup.) 30 N. E. 21. Under the facts in this case we are of the opinion that the respondents are within the rule that whenever it is equitable that a security should be kept alive for the benefit of one advancing money to pay it off, and new rights have not attached in dependence of the apparent discharge of the prior security, subrogation will be allowed. In arriving at this conclusion, we have given due weight to the able argument on the part of counsel for the appellants to the effect that one who assumes a debt becomes primarily responsible for it; that payment operates as a discharge, and that the securities cannot be kept alive for his benefit. But, under the facts in this case, we cannot subscribe to a proposition that would work such hardship and injustice as such a holding would impose upon innocent parties where no new

rights have been created on the faith and strength of the altered condition of the legal rights. The judgment of the court below is affirmed, with costs.

ZANE, C. J., and BARTCH, J., concur

(9 Colo. App. 259)

BELL v. KAUFMAN et al.

(Court of Appeals of Colorado. Feb. 8, 1897.)

SALES—INSOLVENT BUYER—FRAUDULENT STATEMENTS—REPLEVIN—EVIDENCE OF INTENTION—INSTRUCTIONS.

1. Where a buyer is insolvent, and makes to the seller fraudulent statements as to his solvency, inducing a sale, the seller may rescind the contract and retake the goods.

2. In replevin for goods sold, where the proof of false representations by the buyer is not denied, and there is proof that such false statements induced the sale, the testimony of the buyer as to his intentions in making them is not competent.

3. Possible error in an instruction as to credibility of witnesses, applicable to both parties, is not ground for reversal unless prejudice is shown.

4. In replevin for goods bought under fraudulent representations, defendant cannot complain of an instruction which entitles him to a verdict if he got the goods on credit, without making any false statements as to his solvency, and in good faith, with the intention of paying for them.

Appeal from district court, Clear Creek county.

Replevin by Charles Kaufman and another against Josiah A. Bell. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

A suit of replevin of a lot of ready-made clothing, alleged to have been worth \$579, of which appellees were the original owners. Appellant was sheriff, and seized the goods upon a writ of attachment at the suit of I. L. Rachofsky against David Hepner. Plaintiffs filed the following replication to the answer of the appellant: "That said David Hepner was not the owner of the goods and chattels replevied at any time. Deny; that said goods and chattels were subject to levy under attachment of I. L. Rachofsky. That said Hepner, for the purpose of inducing plaintiffs to sell and deliver said goods to him, represented to plaintiffs that he was solvent, and worth the sum of \$9,000 over and above all his liabilities, and that all his debts and liabilities did not at that time amount to more than \$3,000, and that said representations were made for the purpose of obtaining said goods on time credit. That plaintiffs relied upon said representations, and were thereby induced to sell said goods to Hepner on credit. That said representations were false, and by Hepner known to be so at the time they were made. That Hepner was then insolvent, and knew himself to be so. That at the time when said representations were made the said Hepner was indebted to one I. L. Rachofsky in a sum exceeding \$4,500, and to one Alexander

Rittmaster in a sum exceeding \$3,995, and to divers other persons, unknown to plaintiffs, in a sum exceeding \$—, and that said representations were made with intent to deceive and defraud the plaintiffs. That plaintiffs rescinded the sale of the goods and chattels to Hepner immediately upon the discovery of the fraud practiced upon them, and did immediately bring their action to recover possession of said goods and chattels, and that the purchase price of the same nor any part thereof has been paid to plaintiffs."

The case was tried to a jury, to whom the following instructions were given (Nos. 6 and 8 being the only ones that require attention): "The court instructs the jury that you are the judges of the credibility of the witnesses, and the weight to be attached to the testimony of each and all of them, and you are not bound to take the testimony of any witness as absolutely true; and you should not do so if you are satisfied from all the facts and circumstances proved on the trial that such witness has testified falsely in any matter testified to by him, or if his testimony is contrary to the experience of men under like circumstances." "If the jury believes from the evidence that Hepner obtained the goods in question from the plaintiffs upon credit, without making to them any false statements or misrepresentations as to his financial worth or ability to pay for said goods, but honestly and in good faith, and with the intention of paying therefor, then your verdict should be for the defendant. (Excepted to by defendant.)" The following instructions were asked by the defendant and refused by the court: "The jury are instructed that they cannot find for the plaintiffs in the case unless they believe from the evidence—First, that Hepner purchased the goods from plaintiffs upon false and fraudulent representations made to them for the purpose of obtaining the same, and without any intention of paying for them; and, second, that Rachofsky and Rittmaster, his attaching creditors, had knowledge of such fraudulent purpose upon the part of Hepner at the time they caused their writs of attachment to be levied. And, if the jury find that both of these conditions do not concur, their verdict must be for the defendant. (Refused and exception taken.) The court further instructs the jury that in this case, before the plaintiffs, under the law, would be allowed to rescind the contract of sale of the goods replevied, they must believe from the evidence that Hepner purchased the goods with the intent never to pay for the same; and this intent is a question of fact, to be found by the jury from all the circumstances and surroundings of Hepner at the time when he made the purchase. (Refused and excepted to.) The court instructs the jury if they believe from the evidence that Hepner purchased the goods from the plaintiffs, and at the time of such purchase he had an honest belief that he had the financial ability to

pay the purchase price thereof, and that he fully intended at the time of such purchase to pay the purchase price of the same, then the jury may take these facts into consideration in determining the character of the representations made, if you believe from the evidence any such representations were made at the time of such purchase. (Refused and exceptions taken.) The jury are instructed that if they believe from the evidence that Rachofsky and Rittmaster, the attaching creditors of Hepner, had no notice of the misrepresentations of Hepner (that is, if they believe such misrepresentations were made to the plaintiffs in this suit) concerning his financial standing and the conditions of his assets and liabilities at the time they caused their writs of attachments to be levied upon the goods so purchased, then they cannot be affected by such representations, and your verdict should be for the defendant. (Refused and exception taken.) The jury are instructed that the plaintiffs admit in their pleadings the indebtedness claimed by the attaching creditors against Hepner at the time of the commencement of their action in attachments, and, further, the plaintiffs do not charge any fraud or collusion, as between said attaching creditors and Hepner, in the commencement of their suit, or charge any knowledge upon the part of said attaching creditors of the fraudulent character of Hepner's purchase from the plaintiffs, and no issues are made up between the parties to this action concerning the same. You are therefore to consider in your deliberations said indebtedness as bona fide, and said attaching creditors as innocent of any fraud upon the part of Hepner, if you believe there was such fraud." The jury found for the plaintiffs, and the value of the property to be \$293.50. Judgment upon the verdict, and an appeal to this court.

C. C. Post and Alvin Marsh, for appellant.  
A. D. Bullis, for appellees.

REED, P. J. (after stating the facts). A great mass of testimony was taken, covering nearly 100 pages of printed abstract, and part of which was depositions and documentary. The evidence shows conclusively that, at the time that Hepner purchased the goods in question from appellees, he was hopelessly insolvent, and that within about 30 days after the last purchase he was closed up by the sheriff; also, that Hepner made to appellees and their agent false and fraudulent statements in regard to his solvency, the amount he was worth, and his liabilities. It was also testified by appellees and Metz, their agent, that the sale was induced and made by appellees upon the false statements of Hepner. It was also shown that the goods were delivered, went into the general stock of Hepner, upon his shelves, and were identified and taken out of the stock upon writ of replevin. The questions presented are of

law: (1) Whether appellees could, under the conditions and circumstances, rescind the contract of sale and retake the goods; (2) in regard to the instructions of the court given and refused. There are several minor questions presented by assignments of error based upon the admission and refusal of evidence. Although, perhaps, the rulings, in some minor respects, were open to criticism, we can find no serious error that could have prejudiced appellant or changed the result.

One supposed error may be briefly examined: Hepner was asked: "Q. At the time you made this purchase of Kaufman Bros. you may state, at that time, what, if anything, was your ability to pay whatever you purchased of them? (Objection sustained.) Q. State why you did not continue business? (Objection sustained.) Q. State if you expected to go on and continue business? A. Yes. (Stricken out.)" It is claimed that, for the purpose of rebutting the presumption of fraud, the explanatory statements should have been received. We cannot see that any answers that might have been given to the questions asked would have had that effect. The statements made to Kaufman were in regard to his financial condition,—that he had a stock worth \$12,000, and \$2,000 or \$3,000 in available book accounts; that he only owed \$3,000. The figures were given by Hepner, stated as facts. If absolutely untrue, the fact must have been known to him. The rebuttal could not be explanatory or apologetic. Rebuttal could only have been by evidence that he never made such statements, or that they were true. If false, they must, of necessity, have been so known at the time. If insolvent, as shown, at the time, the law presumes, and the jury had the right to presume, that the statements were made fraudulently for the purpose of obtaining the goods. In support of the contention, counsel cite 1 Benj. Sales, § 630, and *Pope v. Hart*, 35 Barb. 630. In the first, in section 636, the broad general rule is stated as follows: "Fraud renders all contracts void ab initio, both at law and in equity. No man is bound by a bargain into which he has been deceived by a fraud, because assent is necessary to a valid contract, and there is no real assent where fraud and deception have been used as instruments to control the will and influence the assent." See, also, *Bank v. Higginbottom*, 9 Pet. 48; *Duncan v. McCullough*, 4 Serg. & R. 483. The rule is also stated to be that the fraud that warrants the rescission, and renders it voidable ab initio, was believed, acted upon, and was successful in deceiving; in other words, that without the fraud the transaction would not have been made. See 1 Benj. Sales, § 637. In *Pope v. Hart*, supra, it is held that a party charged with an intent to deceive or cheat or defraud, or with fraud and deceit, has a right to testify in his own behalf that he did not intend to cheat, deceive, or defraud, and that the weight of such testimony was for the jury;



but, on examining the case, it is found to be a criminal prosecution. No question of the ownership of property or rescission of a contract of sale was involved. If such a rule is to prevail in cases of this character, a party may fraudulently obtain possession of property, swear afterwards as to his intention, and, if believed, establish title, when a different intention was clearly deducible from the facts proved. The most comprehensive and concise statement of the law of this case is at article 1116 of the Civil Code of France: "Fraud is a ground for avoiding a contract when the devices practiced by one of the parties are such as to make it evident that without these devices the other parties would not have contracted." The decisions in Pennsylvania and Indiana are of the extreme in favor of appellant. In *Smith v. Smith*, 21 Pa. St. 367, and *Rodman v. Thalheimer*, 75 Pa. St. 232, it is said: "The fraud, to avoid a sale, must be actual artifice intended and fitted to deceive." In *Gregory v. Schoenell*, 55 Ind. 101, the court said: "In such a case, to establish fraud and authorize a rescission of the contract for that cause, the representations made must have been such as were calculated to deceive a person of common prudence. They must have been false, and known to be false at the time by the person who made them; and the person to whom they were made must have believed them to be true and relied upon them, and they must have been the inducement which caused him to part with his property. A fraud by which no one is deceived is harmless in law. Artifices which do not deceive do not warrant an avoidance of the contract." Tested by these, the case made by appellees brought it within the rule. As before stated, these are the strongest decisions that can be found to support the contention of appellant. That "it is not necessary that the false representations should have been the sole cause, or even the predominant motive, and that it is enough if they had material influence upon the plaintiff, though combined with other motives," see *Safford v. Grout*, 120 Mass. 20; *Matthews v. Bliss*, 22 Pick. 48; *Ruff v. Jarrett*, 94 Ill. 475; *McAleer v. Horsey*, 35 Md. 439; *Hersey v. Benedict*, 15 Hun, 282; *Add. Cont.* 1173; *Load v. Green*, 15 Mees. & W. 216; *White v. Garden*, 10 C. B. 919. In *Pars. Cont.* \*773, it is said: "It is clear that if a purchaser makes false representations of his ability to pay, his property, or credit, the sale is void, and no title passes, as between the original parties to the contract,"—citing *Cary v. Hotelling*, 1 Hill, 311; *Andrew v. Dieterich*, 14 Wend. 31; *Johnson v. Peck*, 1 Woodb. & M. 334, Fed. Cas. No. 7,404; *Lloyd v. Brewster*, 4 Paige, 537. In addition to what has been before said, I may add that where there is direct proof of false representations, and they are not denied, but tacitly admitted, and also proof that such false statements induced the sale, the testimony of the party as to his intentions in making

them could not be competent to divest the injured party of ownership of the goods. The facts established were such as to avoid the sale and warrant a rescission.

Error is assigned upon the sixth instruction given by the court. It is contended that it is not the law, and counsel say: "The proposition that the jury has the right to disbelieve such witnesses as in their judgment, under all the circumstances in the case, are unworthy of belief, is not the law." This is certainly very ambiguous. There is no attempt to apply it to any witness of appellant, or to the testimony of any particular fact, and the instruction is so general that it applies equally to the witnesses of appellees; and, if erroneous, it is not shown that it in any way prejudiced appellant. Counsel, in support of their contention, cite *Gottlieb v. Hartman*, 3 Colo. 53, and *Insurance Co. v. Gray*, 80 Ill. 28. We do not consider those cases applicable. In both the inference from the instruction was that the jury might willfully disregard the testimony of any witness, on their own judgment as to his veracity. We do not so construe the instruction in question. Though amplified and elaborated, it only amounts to the well-established rule that the jury are judges of the credibility of witnesses, and, in determining it, were to consider the situation of the witness in regard to the controversy and the circumstances "which in human experience are known to affect perception, memory, and judgment."

Error is also assigned upon the eighth instruction, but upon examination it appears to have been clearly in favor of appellant, and fully as strong if not stronger than warranted. The instructions asked by appellant were properly refused. Some of them were clearly objectionable. Those given were sufficient to inform the jury in regard to the law of the case. The judgment should be affirmed. Affirmed.

(9 Colo. App. 202)

# FILBY v. TURNER.

(Court of Appeals of Colorado. Feb. 8, 1897.)

LOST INSTRUMENTS—TRIAL—ARGUMENT—EVIDENCE—RELEVANCY—HARMLESS ERROR.

1. A note destroyed after maturity may be sued on without indemnity being given.

2. Where plaintiff's case was not admitted in its entirety, and she was consequently compelled to offer proof in order to entitle her to the full amount claimed, defendant did not have an absolute right to open and close the argument.

3. Defendant having pleaded want of consideration for the notes in suit, plaintiff attempted to show advances. Defendant testified that plaintiff was without means, and plaintiff, in denial, stated that she owned a house from which she received a rental. *Held*, that it was harmless error to permit her to testify, for the purpose of showing the value of the house, what she received on selling it, long after the occurrence of the transactions in suit.

4. It was irrelevant on the plea of want of consideration that, after the execution of the notes, defendant had made wills in which he provided liberally for plaintiff.

Appeal from district court, Arapahoe county.

Action by Agnes Turner against Alfred A. Filby on notes. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas Ward, Jr., John H. Reddin, Fred T. Baker, T. B. Stuart, and Chas. A. Murray, for appellant. Thos. W. Lipscomb, George W. Taylor, and George L. Hodges, for appellee.

BISSELL, J. This judgment rests on a verdict. For this reason the outlines and salient features of the case will serve to indicate the legal errors asserted, and afford an ample basis for their disposition. In many of its aspects it is the most extraordinary case which has ever come under my observation. No evidence can be found in the record which discloses the origin or motive of the plaintiff's case, and it is equally barren of testimony which serves to illustrate and explain the defendant's theory. I am very far from a state of conviction respecting the truth of either story. The relations of the parties are left unexplained, and yet the odor which exudes from the record suggests, rather than discloses, what is the evident situation. The only excuse I have to offer for these preliminary suggestions is to explain the difficulty which I have in stating the testimony and our conclusions concerning it, and in assigning reasons for the affirmance of the judgment.

Agnes Turner came to Denver from Montreal early in the year 1884. In April she made the acquaintance of the appellant, Filby. She was at that time married, and lived with her husband in a somewhat moderate way, until his death, which occurred a year or so afterwards. The acquaintance between Mrs. Turner and Filby continued from its commencement until the happening of the events which will be narrated. After her husband's death, which occurred a year or so after she arrived, her acquaintance with Filby grew, and they remained on somewhat intimate terms until the disagreement, in 1893. The radical differences between the statements of the two parties to the transaction, who were the principal witnesses in support of the main facts, will readily appear from a statement of the issues. The suit was brought on two promissory notes alleged to have been made in June and October, 1888, for the sums of \$500 and \$2,000, respectively, and due two years and three years from that date, with interest, together with two causes of action which alleged loans of \$100 and \$105 at different dates, which remained unpaid. This was what the plaintiff sued for. The defendant, who is the appellant, Filby, admitted that he gave a note for \$500, which he had not paid, though he could not state the date of it, nor answer whether it was correctly described in the complaint. He then set up that the

note was given without consideration, and as a gift from him to the plaintiff. As a defense to the second cause of action, he admitted the making and delivery of a note for the sum of \$2,000, though he was unable to state whether the description in the complaint was correct; denied that it was given for value; and, as a special defense, averred a want of consideration therefor. For a third defense, he set up a demand by Mrs. Turner that he pay his note, alleged a refusal, and then set up a compromise whereby he paid \$700 to get rid of his paper, and then averred that the plaintiff destroyed the notes. A compromise resulting from the same facts was set up in a different form. He denied the third cause of action, with reference to the loan of \$100 in May, 1893, but admitted the loan of \$105 in July, 1893, and averred payment. The defendant then proceeds to set up a counterclaim, consisting of a great many items, and aggregating \$3,443.25, which he seeks to offset, and likewise to recover a judgment for, against the plaintiff.

This statement of these two causes of action and these defenses hint at what is otherwise hidden in the record. The plaintiff went on the stand to support her complaint. She was unable to produce the notes, but undertook to describe them, state their terms, and on this proof obtain a judgment. It is highly probable she would have been totally unable to recover on the proof which she made but for the admissions contained in the defendant's answer and his statements on the stand. Significant as it is, and unusual as it may be, the defendant admitted giving Mrs. Turner two notes of the sums which she said these notes called for, and running for the time and with the interest which she stated. In the face of this admission, Mrs. Turner was entitled to judgment for the amount of the notes which was her cause of action, unless they were defeated by his testimony. In stating the case we are pursuing very much the line adopted on the trial. The plaintiff offered very little proof, although she was compelled to offer some in order to obtain a judgment, and the defendant then undertook to establish his plea of a want of consideration. According to his testimony, from a very early date after the commencement of their acquaintance Filby furnished Mrs. Turner money. It was in various amounts and items, and at different times, sometimes in considerable sums, and other times in small amounts. The financial situation between the parties continued until the execution of these notes, in 1889. Mrs. Turner denied that Filby gave her any money as he stated it, and would endeavor to convey the impression that she was the financially responsible person, and loaned him money. Filby denied there was any consideration for the notes, and Mrs. Turner attempted to show advances. As we read the testimony,—and we have taken the trou-

ble to read the bill of exceptions,—we are unable to find in Mrs. Turner's testimony anything that convinces us that she advanced Filby \$2,500. Yet we are not at liberty to reverse this case on our conclusions in this respect, because the jury found otherwise. All we are permitted to say is that we shall accept the verdict of the jury as conclusive, and assume that there was a consideration which warranted a recovery on the notes, unless the defendant succeeded in establishing his counterclaim or his defense of a settlement.

Filby's testimony respecting his various advances and payments was neither coherent, consistent, nor clear. We are not greatly surprised that the jury refused to accept his statements. He certainly lacked the exact, precise, and accurate methods which characterized the records produced by the plaintiff, and he seems not to have exercised that wise forethought which is a distinguishing characteristic of a calculating, prudent person. In other words, Filby lacked books and proof, and he was entirely unable to convince the jury that he had advanced the various sums to Mrs. Turner by way of loans or advancements, as he contended. The only remaining thing in the testimony with which we are at all concerned is the destruction of the paper on which the suit was brought. The notes were not produced. We must account for their nonappearance. There are two ways in which this might be done, either one of which could be adopted, and neither one of which is probably in exact accord with the facts. One is the story told by the plaintiff, and the other is the story told by the defendant. According to the defendant's story, before one of the notes fell due, Mrs. Turner had borrowed some money from the People's Bank, and put up Filby's \$2,000 note as collateral. This was adequate banking security, because at that time Filby was reported to be worth a good many thousands of dollars, and in receipt of a rental income of four to six thousand dollars a year, and the banks were quite ready to accept his paper. This was what led to this litigation. When Mrs. Turner's note fell due in the bank, a notice of that fact, and that his note for \$2,000, as security, was hypothecated, was sent to Filby's house, and fell into his wife's hands. It led to a slight family jar, and the conveyance of all his real estate to his wife. On the receipt of this notice, for some reason which it is impossible for us to explain or understand, Filby consulted with the present counsel for the plaintiff, who advised him to pay the note. He accepted the advice, went to the bank, and paid \$500 in cash, and gave his note for the difference, and then requested the cashier to deliver to him his own note. This the bank officer declined, because it appeared to be Mrs. Turner's property, and she took it. Afterwards the parties met at Mrs. Turner's house. Filby says he went there to

get the notes which Mrs. Turner had agreed to surrender. She says, on the other hand, that he came there both to get the notes and to execute a new note of \$1,800, which would represent the difference between the amount which he paid and the sum represented by the paper. Filby's version does not accord with the verdict. When he arrived, Mrs. Turner produced the notes, and delivered them to Filby. So she says. Filby states that she destroyed them, and threw them in the grate. Both agree that the notes were torn in pieces, put in the grate, and burnt up by a match which Filby struck. This inclines us very much to believe that the \$700 was paid under the agreement for the surrender and cancellation of the original paper. At that time the parties seem to have quarreled. Filby declined to do anything further, and left the house. He started to have a conference with the attorney, but discovered that he was employed for Mrs. Turner, and he proceeded to obtain other counsel. Acting on their advice, he declined to pay the notes, and Mrs. Turner, as she threatened, brought suit. She obtained this judgment, and we have been unable to discover any legal reason why she should not garner the harvest.

The errors assigned on this record are of the most meager proportions. There were some objections to the introduction of testimony, and some questions were asked which it would not have been error to permit the witnesses to answer, but the refusal to admit the testimony constitutes no serious error which warrants the reversal of the case. We are not called on to state the entire case, the questions asked, or the testimony offered in order to demonstrate this fact. The rulings as to the greater part of it, in any event, constitute immaterial error, and such errors we seldom feel compelled to discuss.

The appellant insists that the procedure to recover on the lost note was inaccurate, and cannot be maintained. We do not agree with appellant's theory on the law respecting commercial paper. At the common law, suit could not be brought on a lost note, regardless of its circumstances or conditions, because, as a general proposition, the plaintiff must give indemnity in order to become entitled to judgment, and the court, at the common law, was powerless to enter the proper decree or make the proper order to protect the defendant. The reason for the rule no longer exists. All cases, both law and equity, are tried by the same court, and before the same judges, who have full power to enter any order or any decree which may be necessary for the enforcement of the rights of one or the protection of the interests of the other. Under these circumstances, we would certainly be inclined to disregard the common-law rule if it was applicable to a case of this description. But we do not so read the law. Wherever a note is past due, so that no action can be brought

by an innocent holder against the defendant, or where it is shown to have been destroyed or to have been indorsed after maturity, the modern authorities seem to recognize the right of the owner to bring suit on the lost paper, without giving a bond of indemnity. *Mackey v. Mackey*, 16 Colo. 134, 26 Pac. 554; 2 Daniel, Neg. Inst. §§ 1481, 1482; Pars. Notes & B. (2d Ed.) c. 9, § 3.

According to the evidence of both parties in this case, the notes were burnt up. They never could rise in judgment against the maker. They were past due, and the rule requiring indemnity before bringing a suit on a lost note was not applicable. There was a difference between the stories told by the plaintiff and defendant respecting the destruction. According to the defendant's story, the plaintiff destroyed them; according to the plaintiff's story, the defendant destroyed them. If the last were true, the plaintiff might recover. If the other, there are several cases in this country which hold that she could not recover, having voluntarily destroyed the promise. In any event, it would require most extraordinary proof of good faith on the part of the plaintiff to permit her to recover on a note which she had herself destroyed. The jury were correctly instructed on this subject if the question is preserved. In any event, it does not appear in the record to have been called to the attention of the court, and it is utterly unavailable for the purpose of this appeal.

On the conclusion of the testimony, the defendant asked the privilege of opening and closing the case. The right was refused him, and this is assigned as error. We do not believe the court erred. The plaintiff's case was not admitted in its entirety; hence she was compelled to offer proof in order to entitle herself to a judgment for the amount which she claimed. Having left the onus on her as to any one of her causes of action, the defendant did not acquire the absolute right to open and close the case to the jury.

The only two questions of evidence which have occasioned the court any difficulty are those which relate to the proof offered by the plaintiff concerning the sale of a house at Montreal. During the progress of the trial, and in order to show a reason for the advancements of money which Filby claimed he made from time to time, he stated that the plaintiff was without means, and required assistance, which, according to his testimony, was the real motive which influenced this benevolent gentleman to advance considerable sums to his friend. To counterbalance this testimony, the plaintiff undertook to prove that she came here with a good deal of money, and that quite a considerable sum of money had been received afterwards from Canada. Her stories are marvels of ingenuity, but they lack some elements which commend themselves to people familiar with business affairs. She had a financial agent here by the name of Heinrichs, who is dead, and with

whom she deposited a good deal of money. In 1889, however, when she received, according to Filby's testimony, considerable sums from him, she opened a bank account, and became a business woman. We do not find it necessary to discuss where the truth lies with reference to this matter, because the only inquiry is as to the admissibility of this particular testimony concerning her ownership of property in Montreal. She testified that she owned a house there, from which she was in receipt of rents, and was otherwise a woman of means. We think this testimony entirely legitimate to overcome the proof which Filby offered concerning her pecuniary condition. In the progress of her case, the deed to the Montreal property, which she executed in the sale of it, was offered in evidence, and she was asked to state the sum which she received for the property. The deed was properly produced and offered, and the only thing open to objection was the proof respecting the consideration paid. There is some doubt about this, because the sale was made long after the notes were executed, and long after the various advancements testified to by Filby. Since the deed itself and the proof respecting her ownership were admissible, we are not of the opinion that this proof respecting the sum received worked any injury to the defendant, or was prejudicial to his case. If it be conceded she had the right to show that she owned property, and the rent she was getting from it, this concession renders the proof of its sale of very little consequence. The evidence that it brought \$4,500 was perhaps not the best way of proving the value, but it did not so far operate to the prejudice of the defendant as to compel us to reverse the case.

The other evidence to which we have adverted is that which was offered to prove that after the giving of the notes, and once to Mrs. Turner's knowledge, Filby made a couple of wills, by which he attempted to provide for his neighbor. In one he left her \$5,000, and in the other provided her with a more substantial competence of \$10,000. The evidence was excluded, and this rejection is complained of. We do not discover the relevancy or pertinency of this testimony under the issues. The defendant did not admit the making of the notes, and aver that they were given as a protection for Mrs. Turner's benefit in case of his death; nor did he plead any other defense to the paper than a simple lack of consideration. If the wills had been produced and received, this would in no manner have tended to support his plea. The fact that he had made a will or two wills in favor of Mrs. Turner, by which she was devised to a very considerable sum, would in no manner tend to show a want of consideration for the giving of the notes. The notes were executed and delivered. They matured at very short intervals, according to the life of commercial paper, and bore interest. Paper of this sort is not set afloat without sub-

stantial reasons, and, when such paper is given, the person who makes it and delivers it, if he wants to defend because there is a lack of consideration for its delivery, must be prepared with proof which shall convince the jury to whom the issue is submitted.

We are unable to discover any errors which inhere in the record of sufficient consequence to compel or justify the reversal of the judgment, which will accordingly be affirmed. Affirmed.

(9 Colo. App. 169)

COOPER v. GERMAN NAT. BANK OF DENVER et al.

(Court of Appeals of Colorado. Feb. 8, 1897.)

NEW PARTIES—RULE FOR MAKING—PROMISSORY NOTE—EVIDENCE.

1. Where the indorsee of a note sued the makers thereon without joining the indorser as a defendant, as he may do under Civ. Code, § 13, there is no authority for making such indorser a party, at the instance of the defendants, under a pleading setting up matters creating equities between defendants and the indorser which render him liable for one-half of the note, but which constitute no defense as against the plaintiff.

2. A note cannot be impeached by an oral agreement, contrary to its terms, alleged to have been made at the time of its execution.

Appeal from district court, Arapahoe county.

Action by the German National Bank of Denver against James M. Patrick and W. F. Patrick on a note. At the instance of defendants, Job A. Cooper was made a defendant. From a judgment against him, defendant Cooper appeals. Reversed.

June 21, 1888, James M. and W. F. Patrick made their joint promissory note, payable to the order of appellant 90 days after date, for \$2,500 and interest. Some time after its maturity it was indorsed by appellant, and became the property of the German National Bank. In August, 1890, the bank brought suit against the makers to collect the money. The complaint is in the ordinary form. Only one allegation requires notice, which is that the note was indorsed and became the property of the bank before its maturity. It was conceded that such was not the fact, the transfer having been made long after maturity. Defendants answered, admitting the making, delivery, and indorsement of the note, after which appears the following: "And for a second defense, and as well by way of cross complaint against Job A. Cooper and the Little Granger Ditch Company, whom the defendants now here ask may be made parties to this suit, the defendants allege: That at the time of the execution of the said promissory note, and for a long time before and afterwards, the said Job A. Cooper, in the complaint herein described as the payee in the said promissory note named, was the cashier of the plaintiff, and as such, and by virtue of the authority conferred upon him by the said office, and as well by the assent and action of the stockholders and directors

of the plaintiff, had general management and charge of the affairs of the plaintiff, and managed and conducted its business in all respects. That, prior to and at the time of the giving of the note in the said complaint mentioned, the said Cooper and these defendants were interested in a certain irrigation ditch situated in the counties of Jefferson and Arapahoe, in the state of Colorado, known and called the 'Little Granger Ditch,' which said ditch was owned by a certain corporation called the 'Little Granger Ditch Company.' That the interest of said defendants and said Cooper in said ditch was as stockholders in said company, and through the fact that said Cooper and these defendants were the owners of lands under said ditch. That at about the time of the date of said note, and for some time prior thereto, the said Little Granger Ditch Company was in embarrassed circumstances, and had a large number of debts outstanding, and had no funds to pay the same, and, in order to procure water to be carried in the said ditch, it was necessary to make divers expenditures for improvements therein and thereupon. That said Cooper, being the largest stockholder in the Little Granger Ditch Company, and as well one of the largest landowners under the said ditch, and these defendants being likewise interested in said company, and owners of land under the said ditch, and these defendants and the said Cooper being desirous that the said improvements might be made upon said ditch, and the said debts paid, in order that water might be run through said ditch to irrigate and water the lands of said Cooper, and these defendants and the said ditch company having prior to that time voted to issue, and having issued, in due form of law, its certain bonds and obligation, secured by mortgage upon the said ditch, to the extent and sum of fifteen thousand dollars, which said bonds it was offering for sale, but was then unable to sell, the said Cooper did propose to these defendants that he and the said defendants should and would give their promissory note to said bank, and procure thereon from said bank the sum of twenty-five hundred dollars, and advance the same to the said Little Granger Ditch Company, for the purpose of enabling it to pay off said debts and make said improvements. Thereupon, these defendants having accepted said proposition, it was agreed that the said bonds should be placed in the hands of the said Cooper as security for the payment of the said note, and thereupon the said bonds were placed in the hands of said Cooper as security for the payment of the said note. That when these defendants came to join with the said Cooper in the making of said note, as proposed by him, the said Cooper represented and pretended unto the said defendants that, owing to his being cashier of the said bank, it would be improper for him to join with them in making said note, or as one of the makers thereof, and suggested to and requested of and procured

these defendants to make the said note to his order, he, the said Cooper, then and there undertaking, promising, and agreeing that he, the said Cooper, notwithstanding he should appear in the said note as the payee thereof, and would to all appearances be merely an indorser, would be liable to the said bank as a maker of the said note, and that the said bank should take and hold said note, as against him, the said Cooper, and these defendants, with full knowledge and upon the understanding that the defendants would only be called upon to pay one half of the said note, and that the said Cooper was to pay the other half of said note, and that these defendants executed and delivered said note only upon the said understanding and agreement, and that said bank had full knowledge thereof through the said Cooper, its cashier, who acted for it in that behalf, and that these defendants are only liable to pay one half of the said note, and that the said Cooper is liable for the other half thereof, and should be made a party defendant in this action. That the said Cooper has not made or given to these defendants any account of the said bonds, and that the amount due upon said note is a lien upon the said bonds in the hands of the said Cooper or the said bank, whichever holds the same. And these defendants say that the ends of justice require that the said Cooper and the Little Granger Ditch Company should be made parties to this action, and that the judgment herein in favor of the said bank, if it be now the owner of said note, should be as well against the said Cooper as against these defendants, and should be against these defendants for only one half of the said note, and should be against the said Cooper for the other half. And these defendants say that they now are, and at all times have been, ready and willing to pay to the said bank their one-half the said note, and have offered to pay the same, and now offer to pay the same. Wherefore these defendants pray judgment that they may be declared to be liable for only one-half of the amount due upon the said promissory note, and that, if found liable for the whole thereof, that they have judgment over against the said Cooper for one-half thereof, and that the amount found due upon the said note may be adjudged and decreed to be a lien upon said fifteen thousand dollars' worth of bonds of the Little Granger Ditch Company, and that the same may be required to be by the said Cooper or the said bank brought into court, and be sold and disposed of, under the order of the court, to pay the amount for which judgment may be rendered against these defendants in this action; for all other proper relief, and for their costs."

An order was made by the court making appellant and the Little Granger Ditch Company defendants. Summons was issued and served upon appellant. The proceeding making appellant a defendant was resisted, and an exception taken. Nothing appears in the rec-

ord to show what, if any, proceeding was taken against the ditch company. Counsel then moved the court to dismiss the proceeding against appellant, the motion containing the following grounds: "First. Because he, the said Cooper, is not a proper party to the said action, and was erroneously and irregularly brought into the said action on the application of James M. Patrick and W. F. Patrick, defendants herein, without authority of law. Second. Because no cause of action, and no ground of recovery, of whatever kind or character, is set forth or alleged against him, the said Cooper, by or in the plaintiff's complaint in this action, and no right of recovery or right of action is shown to exist against him in favor of the said plaintiff. Third. Because he, the said Cooper, is not in any sense a necessary or proper party to the said action, either by anything appearing from the complaint in the said action, or from anything appearing in the answer or petition of the defendants James M. Patrick and W. F. Patrick. Fourth. Because, upon the face of all the pleadings on file in this cause, it appears that the said Cooper is not in any manner interested in the said action, nor is he in any sense a proper party herein, and, if there be any claim or demand against him in favor of the said defendants James M. Patrick and W. F. Patrick, it is a matter wholly between them and the said Cooper, to be settled between them only in appropriate proceedings for that purpose."

The motion was denied, and an exception taken. Appellant then answered as follows: "Now, on this day, comes Job A. Cooper, who, pursuant to an order of the court herein, issued at the instance of the defendants in the above-entitled cause, hath been summoned herein," etc., "and, answering herein, denies that he is in any manner liable for any part or portion of the note sued on in said action. Denies that he, as cashier of the plaintiff bank, or by virtue of any authority conferred upon him by the office of cashier, or by the assent of the stockholders or directors of said bank, acted in any respect whatever in taking or receiving the note mentioned in the plaintiff's complaint herein. Denies that he ever proposed to the defendants that he and the defendants should give their promissory note to the bank, or procure from the bank the sum of \$2,500, or any other sum. Denies that it was ever agreed that the bonds of the Little Granger Ditch Company should be placed in the hands of him, the said Cooper, as security for the payment of any note. Denies that any such bonds were ever placed in his hands. Denies that he, the said Cooper, ever represented to said defendants that, because of his being cashier of the bank, or for any other reason, it would be improper for him to join with them in making the said note. Denies that he ever suggested or requested of the said defendants or procured them to make the said note to his order; he undertaking, promising, and agreeing—notwithstanding he appeared as the payee of the note—to be liable to the bank as a

maker thereof. Denies that the said bank took the said note with knowledge or understanding that the defendants would only be called upon to pay one half of the same, and that he, the said Cooper, was to pay the other half. Denies that said defendant executed or delivered said note upon any such understanding or agreement. Denies that he, the said Cooper, acted for the bank with respect to the said transaction in any manner or form whatsoever. Denies that said defendants are only liable to pay one half of the said note, and denies that he, the said Cooper, is liable for the other half thereof. Denies that he should have been for any reason made a party to this action. Denies that, in respect to the said transaction, he in any manner acted for the said bank, or acted in his capacity as cashier, but avers that the said transaction was a personal transaction between himself and the said defendants, wholly outside of any connection of his with said bank, and denies that he, the said Cooper, is liable either to the said bank or to the said defendants for any part or portion of the said note. And the said Cooper, further answering, admits that prior to, and at the time of, the giving of the said promissory note, he, the said Cooper, and the said defendants, were stockholders in the Little Granger Ditch Company, and were also owners of land under said ditch, and said company was then under the necessity of raising money to make improvements upon the ditch, and he, the said Cooper, and the said defendants, were, as he is informed and believes, about equally interested as stockholders in the said ditch, and he and they, together with other parties interested in the said ditch, were desirous to raise the money necessary to be raised in order to enable the said company to put its ditch in condition, and be prepared to furnish water for irrigation. The said Cooper, further answering, says that, this being the condition of affairs, the real transaction between himself and the said defendants was as follows: That said company was about to issue its bonds for \$15,000, secured by deed of trust upon its property, and that said bonds were to be sold for the purpose of obtaining the necessary money required for the company's operations, and a deed of trust was actually executed and placed upon record; that the deed of trust named George Tritch as trustee therein; that the said trustee has never consented to act, and afterwards refused to act for the reason that said ditch was not free from other incumbrances, and the said trustee declined to act as such trustee; but he, the said Cooper, saith that said bonds aforesaid were never in fact signed by the officers of the company, and were never put upon the market, or placed in condition to be sold or handled, although at the time of the giving of said note by the said defendants it was intended that they should be. That at this time it was known that some considerable period must elapse before said bonds could be negotiated and sold, and in

consideration thereof it was proposed that he, the said Cooper, and the said defendants, should raise the money then temporarily needed, amounting to the sum of about \$1,000,—\$2,500 of which amount should be raised by the said defendants, and the balance by him, the said Cooper,—but, said defendants being then short of funds, he, the said Cooper, offered to loan them that amount upon their note, to be turned over to the company, and to advance for himself the further sum of \$1,200 to \$1,500, making together the amount required; and thereupon the said defendants agreed to the arrangement, and executed to the said Cooper the promissory note sued upon herein, and delivered the same to him, not as an officer of the plaintiff, nor as representing the plaintiff, but simply as a personal matter between him and them. That thereafter he, the said Cooper, paid to said company for said defendants, according to the said arrangement, the full sum of \$2,500 called for by said note; he, the said Cooper, also paying to the said company, under the same arrangement, more than \$1,250, for the like purpose, to wit, the sum of more than \$1,400, and thereby complied fully with the agreement upon his part, and contributing more than his full proportion according to said agreement. He, the said Cooper, further avers that, in addition to doing more than all that he has agreed to do, he afterwards took up, and paid to the plaintiff bank aforesaid, an overdraft of said company for moneys obtained by it from said bank, and carried on its operations, etc., aforesaid, to the amount of nearly \$8,000, which hath never been paid to him, and which he still holds as a claim against the company, a large part of which, in equity and good conscience, he ought to be repaid and reimbursed for by the said stockholders until such time as said obligation shall be met and discharged by said company."

Defendants, by leave of court, then amended their pleading by denying that the note was transferred to the bank before maturity. On December 13, 1892, an order was entered requiring defendants Patrick to reply to appellant's answer in 10 days, which was filed as follows: "And, for reply to the answer of said defendant Job A. Cooper to the cross complaint filed herein, deny each and every material allegation of new matter therein contained." Nearly a year after, on December 21, 1893, defendants Patrick, apparently being dissatisfied with their former replication, filed a new one, of their own motion, specifically denying the allegations of new matter contained in appellant's answer. Appellant's counsel moved to strike the new replication from the files because it was filed without notice or leave of the court. The motion was denied. The case was then tried to a jury, the verdict being as follows: "We, the jury, find in favor of the plaintiff and against the defendants James M. Patrick and William F. Patrick in the sum of two

thousand and forty-nine dollars and sixty-five cents, and against the defendant Cooper in the sum of two thousand and forty-nine dollars and sixty-five cents,"—upon which separate judgments were entered in accordance with the verdict. From the judgment against him, appellant prosecuted an appeal to this court.

Benedict & Phelps, for appellant. C. C. Parsons and Edwd. T. Patrick, for appellees.

REED, P. J. (after stating the facts). This case presents novel and troublesome questions, not upon the points involved on the merits, but upon questions of practice under the Civil Code. The first is whether appellant could properly be made a party to the suit, and defendant, at the instance of the Patricks, the defendants against whom the suit was brought. The provisions of the Code in regard to parties are as follows:

"Sec. 11. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

"Sec. 13. Persons jointly or severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff."

"Sec. 16. The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in."

Section 17 provides "that a person not made a party, who has an interest in the subject matter of the controversy may be made a party upon his own application."

The plaintiff had exercised its option and made its election as provided by section 13, and had proceeded only against the makers. Nor is it covered by section 11. He had and claimed no interest in the controversy adverse to the plaintiff, and, under the law of commercial paper, he was not a necessary party "to a complete determination or settlement of any question involved therein," as between the holder and the makers. The appellant was made a party by reason of the allegations and matters set up in what is termed a "second defense and cross complaint," and, upon a careful examination of it, it will be found to contain no defense against the plaintiff that could be available to either the makers or appellant to prevent a recovery upon the note. It was of matters purely personal between the defendants, as to equities alleged to have existed between them in regard to their respective lia-

bility. In other words, the liability to the plaintiff was admitted, and the only controversy was one between the defendants, as to who should pay it,—questions presenting no defense against the plaintiff, and in which it could have no interest. In cases of this kind a person necessarily a party defendant must be one whose interests are adverse to the claims of the plaintiff,—who can be joined for the purpose of interposing some defense to impeach the note in the hands of plaintiff and prevent a recovery. I can find no authority in the Code for the making of defendants in this way in this kind of a case, and under the circumstances, and without express authority, or authority clearly implied. There was no warrant for it, and the court erred in making appellant a defendant, and in overruling the motion of appellant's counsel to dismiss. See *Waddell v. Darling*, 51 N. Y. 327; *Hopkins v. Lane*, 87 N. Y. 501; *Belleau v. Thompson*, 33 Cal. 495; *Carr v. Collins*, 27 Ind. 307; *Fischer v. Holmes*, 123 Ind. 525, 24 N. E. 377; *Tyler v. Trustees*, 14 Or. 485, 13 Pac. 329.

The paper filed by the defendants Patrick in which it is asked that appellant be made a party defendant is called a "second defense and cross complaint." I can find no authority for a cross complaint. By section 48, Civ. Code, it is provided that the pleadings on the part of the defendant shall be a demurrer to the complaint, or a demurrer to the replication, or an answer to the complaint. In section 56, in speaking of what the answer shall contain: "Second, a statement of any new matter constituting a defense or counter-claim, in ordinary and concise language." The defense spoken of must, of necessity, be a defense against the claim of the plaintiff. In section 57 it is said "that the counter-claim mentioned in the last section, shall be one existing in favor of the defendant or plaintiff and against a plaintiff or defendant," etc. It will, upon examination, as before stated, be seen that the paper filed was neither a defense to the action, nor a counterclaim, nor in any manner came within the Code provisions. In section 47 it is said, "The mode of pleading in civil actions and the rules by which the sufficiency of the pleadings shall be determined, shall be as prescribed in this act, and not otherwise." The pleading was without warrant, and should have been disregarded. A cross complaint in the very nature of things, if allowable, must be against the plaintiff. An original complaint against an outsider, that in no way opposed the right to recover by the plaintiff, and interposed no defense, could not be denominated a "cross complaint," and it certainly was neither a defense nor counterclaim. See *McMahon v. Allen*, 12 How. Prac. 39; *Webster v. Bond*, 9 Hun, 437; *People v. Albany & V. R. Co.*, 15 Hun, 126. The note having been assigned by appellant after maturity, the Patricks, defendants, could interpose any legal defense they had against the payee; but it must have been against the note itself, not an oral



contract made at the time or prior to the making of the note, the effect of which was to impeach, invalidate, and destroy the note. See 2 Rand. Com. Paper, § 678; Byles, Bills, 169; 1 Daniel, Neg. Inst. §§ 724, 725a; Burrough v. Moss, 10 Barn. & C. 558; Tied. Com. Paper, § 295. The effect of the so-called "second defense and cross complaint" was to impeach and destroy the note. The issues presented and tried were those arising out of an alleged verbal contract made between the defendants at the time of making the note,—issues in which the plaintiff was not a party, and in which it had no interest, and which were no defense to the note against the plaintiff. The authorities are conclusive and innumerable that negotiable commercial paper, like any other written contract, cannot be impeached or vitiated by an oral agreement preceding or contemporaneous with its execution. See, in our own state, *St. Vrain Stone Co. v. Denver, U. & P. R. Co.* (Colo. Sup.) 32 Pac. 827; *Dunn v. Ghost*, 5 Colo. 134; *Randolph v. Helps*, 9 Colo. 29, 10 Pac. 245; *Peddle v. Donnelly*, 1 Colo. 421. See, also, *Hoyt v. Mead*, 13 Hun, 327; *Forsythe v. Kimball*, 91 U. S. 291; *Smith's Adm'rs v. Thomas*, 29 Mo. 307.

The court erred in allowing two judgments for the same cause of action. There was no defense made to the judgment in favor of the plaintiff. It was unaffected by any equities existing between the defendants. If appellant was not properly made a party, there must have been a judgment against the Patricks, for the full amount of the note. If properly made a party defendant, there could have been a judgment against all. There could be but one judgment. Unless a defense was sustained against the note in the hands of the plaintiff, the law fixes the liabilities of the parties, and there can be but one judgment. Neither court nor jury can divide the cause of action and parcel out the liability. Each and all are liable upon the note, in solido, for the whole amount. By entering separate judgments a defendant would be released by payment of one-half that he owed, and would be discharged. The other defendant might be insolvent or irresponsible. The result would be the loss by the plaintiff of one-half of the money secured by the note. The judgment of the district court will be reversed, and the cause remanded for a trial de novo on the lines above indicated. Reversed.

(5 Okl. 265)

WILBOURNE v. BALDWIN et al.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

INTERIOR DEPARTMENT—JUDGMENT—CONCLUSIVE-  
NESS.

In the officers of the interior department is vested the judgment and discretion of determining, when applications for public lands are presented, whether the lands applied for are public lands, open to settlement, or whether they are Indian lands, or whether, for any other reason, they are not open to settlement; and the determination of this question will not be

interfered with by the courts, by injunction, in behalf of a homestead applicant, prior to the time the question has gone beyond the control of the interior department by the disposal of the lands, and their becoming the subject of private, instead of governmental, ownership.

(Syllabus by the Court.)

Appeal from district court, Canadian county; John H. Burford, Judge.

Action by Thomas A. Wilbourne, for himself and others similarly situated, to restrain Frank D. Baldwin, as Indian agent, and Frank Farwell, as Indian policeman, from removing plaintiff and such other persons from land. Temporary injunction was granted, and on motion of defendants, presented by the United States attorney, the temporary injunction was dissolved. From this order, plaintiff, Wilbourne, appeals. Affirmed.

Blake & Blake, for plaintiff in error. C. R. Brooks, U. S. Atty., for defendants in error.

BIERER, J. Plaintiff in error, Thomas A. Wilbourne, brought his action in the district court of Canadian county to enjoin the defendants Frank D. Baldwin, as Indian agent of the Kiowa and Comanche Indians, and Frank Farwell, as Indian policeman for such Indians, from removing the plaintiff and others who, he alleges, were similarly situated, from a tract of land which it is claimed by him is a part of the Cheyenne and Arapahoe country, and opened for settlement by proclamation of the president on April 19, 1892. A temporary injunction was by the judge of the district court allowed on the 22d day of February, 1895. A motion was made by the United States attorney, on behalf of the defendants, on November 30, 1895, to dissolve this temporary injunction, and presented to the court, and taken under advisement. On the 1st day of May, 1896, this motion was sustained, and the temporary injunction vacated and discharged. From this action the appeal is taken. There is no law authorizing the plaintiff, in this character of a case, to bring suit for any other person than himself; so the case will be considered as if brought for himself alone.

The contention of the plaintiff is that certain lands which lie north of the Washita river, and in a bend thereof, in township 7 N., and in ranges 14 and 15 W. of the Indian meridian, were a part of the Cheyenne and Arapahoe country, and have been, by the president's proclamation, opened to settlement; that he selected and settled upon 160 acres of this land, and made application to enter the same at the land office, which application was rejected, and his right of entry denied. The defendants in this case are officers of the government, and representing the government in the discharge of its duties to the Kiowa and Comanche Indians, so that in this case it is proper to state the contentions of the defendants as to the claims of the government, for these parties, as individuals, have

no interest whatever in the matter, but are purely representative in their capacity. The government contends that the lands in controversy are a part of the Kiowa and Comanche reservation, and no part of the Cheyenne and Arapahoe country. The history of the case, out of which these contentions have grown, is as follows: By treaty with the Kiowa and Comanche Indians of October 21, 1867, proclaimed August 25, 1868 (Revision of Indian Treaties, p. 318), a district of country was set apart for the absolute and undisturbed use and occupation of these Indians, the portion of the boundary as it applies to this case being as follows: "Commencing at a point where the Washita river crosses the 98th meridian west from Greenwich; thence up the Washita river, in the middle of the main channel thereof, to a point thirty miles, by river, west of Fort Cobb, as now established; thence due west, to the North fork of Red river," etc. By an executive order dated August 10, 1869 (see Executive Orders relating to Indian reservations, issued prior to April 1, 1890, p. 31), the Cheyenne and Arapahoe Indians were assigned to a tract of land set apart for their use and occupancy, the boundary thereof commencing at the initial point of the reservation assigned to the Kiowa and Comanche Indians, the boundary then being extended north and west to the 100th meridian and then completed as follows: "Thence south, on the line of said one hundredth degree, to the north boundary of the country set apart for the Kiowas and Comanches by the second article of the treaty concluded October 21, 1867, with said tribes; thence east, along said boundary, to the point where it strikes the Washita river; thence down said Washita river, in the middle of the main channel thereof, to the place of beginning." By act of congress of March 3, 1891 (26 Stat. 989, 1023; Acts Cong. 2d Sess. 51st Cong.), the Cheyenne and Arapahoe Indians ceded all their claim, right, title, and interest, of every kind and character, in and to their reservation, to the United States, the portion of the description of this reservation as pertains to this case and as contained in this act being as follows: "Thence south, on the line of said one hundredth degree to the point where it strikes the North fork of the Red river; thence down said North fork of the Red river, to a point where it strikes the north line of the Kiowa and Comanche reservation; thence east, along said boundary, to a point where it strikes the Washita river; thence down said Washita river, in the middle of the main channel thereof, to the place of beginning," etc. Under and in pursuance of this latter act of congress, the president, on April 12, 1892 (see 27 Stat. 1021; 1st Sess. 52d Cong., 1891-93,—list of proclamations of the president contained in said volume, at page 40 of such proclamations), opened all the lands acquired from the Cheyenne and Arapahoe Indians for homestead settlement,

except the lands therein described as claimed by the Wichita and affiliated bands of Indians, or otherwise reserved from settlement, there being attached to the proclamation a schedule of the lands mentioned in the following language: "The lands to be so opened to settlement are for greater convenience particularly described in the accompanying schedule, entitled 'Schedule of Lands within the Cheyenne and Arapahoe Indian Reservation, Oklahoma Territory, Opened to Settlement by Proclamation of the President.'" Following that, the proclamation contains this language: "Each entry shall be in square form as nearly as practicable, and no other lands in the territory of Oklahoma are opened to settlement under this proclamation, the agreement with the said Cheyenne and Arapahoe Indians, or the act ratifying the same." Now, it is admitted by the government that under the description contained in the executive order assigning lands to the Cheyenne and Arapahoe Indians, and their cession to the government, and the act of congress and the president's proclamation opening these lands, the lands in controversy would be within the Cheyenne and Arapahoe country. But it is claimed by the government, that the point on the Washita river from which the north line of the Kiowa and Comanche reservation extends due west to the North fork of the Red river is very near the S. W.  $\frac{1}{4}$  of section 35, in township 8 N., range 14 W. of the Indian meridian, so that all the lands south of it, and in the bend of the Washita river, adjacent thereto, are in the Kiowa and Comanche reservation; while it is claimed by the plaintiff that this point, 30 miles west of Ft. Cobb, on the Washita river, is further west, so as to, in fact, place all the lands north and east of the point from which the north line of the Kiowa and Comanche reservation extends due west from the Washita river to the North fork of the Red river, in the Cheyenne and Arapahoe reservation. It is claimed by the plaintiff, also, that no survey fixing this 30-mile point has ever been made, so that its location is a disputed question of fact, and must be determined by survey; while it is claimed by the government that the survey has been made, and the point located as before stated. The plaintiff contends that, even though these lands were originally set apart for the Kiowa and Comanche Indians, the subsequent executive order assigning the Cheyenne and Arapahoe Indians thereto, and the subsequent treaty with these latter Indians, and the act of congress, and the president's proclamation opening these lands for settlement, has had the effect of repealing the treaty with the Kiowa and Comanche Indians, and that the title to these lands is entirely in the United States, and that they are public lands, opened to homestead settlement, and not a part of the Kiowa and Comanche reservation, and that the government, through its officers, the de-

endants in this case, has no authority whatever to remove the plaintiff from these lands, and they should therefore be enjoined.

Able briefs are presented by counsel on both sides of this case, and the question of title is strenuously asserted and opposed in these briefs, and presented to us for our consideration. To decide this question of title would, indeed, be a very interesting, as well as exceedingly important, task; but we cannot accept the invitation of counsel, ably as it is presented on both sides, to do so, for, from our view of the case, this is not the proper time and place for that determination. The title to these lands is yet in the government of the United States, and it is either, under plaintiff's contention, public lands of the United States; or, as he further contends, public lands of the United States, open to homestead settlement and entry; or, as claimed by the government, lands of the United States which, by grant and treaty with the Kiowa and Comanche Indians, these Indians have been vested with the use and occupation of. The plaintiff has no title therein. He has not even an entry upon a part of these lands. His settlement has never been recognized by the government. The conflicting questions concerning these lands are matters within the province of another branch of the government than that of which we compose a part; and, until the title to these lands shall have passed beyond the control of the executive branch of the government, the secretary of the interior, with his various subordinate officers, consisting of the commissioner of the general land office and the officers of the local land offices, is clothed with the power and authority of determining these questions, and with which determination the courts should in no way interfere. Rev. St. U. S. § 441, provides: "The secretary of the interior is charged with the supervision of public business relating to the following subjects: \* \* \* Second. The public lands, including mines." Id. § 453, provides: "The commissioner of the general land office shall perform, under the direction of the secretary of the interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all [agents] [grants] of land under the authority of the government." The question as to the status of these lands came before the secretary of the interior, and was decided by him, in the case of J. M. Johnson (reported in 15 Land Dec. 87), on the 21st day of July, 1892, where he held that this tract of land was within the tract reserved and set apart by treaty to the Kiowa and Comanche Indians under treaty proclaimed August 25, 1868, and that it could not legally be included within the tract of land reserved by the executive order assigning lands to the Cheyenne and Arapahoe In-

dians. He also held, in construing the proclamation of the president of April 12, 1892, opening the Cheyenne and Arapahoe Indian lands to settlement, that, as these lands in controversy were not particularly described in the schedule attached to the president's proclamation, they were not opened to settlement thereby, and also decided that they were not opened by operation of law, because there had been no law excepting that on which the president had acted in the issuance of his proclamation opening the lands to settlement. This determination was concluded in the following language: "Therefore, in reply to your request to be advised as to the status of these lands, I would say that, waiving the question as to whether or not they actually remain a portion of the reservation set aside by treaty with the Kiowa and Comanche Indians, it must be held that none of the lands in question which are situate south of the line of the north boundary of said reservation, as indicated on the official plats of survey, and as recognized by the land department, are subject to settlement or entry, but said lands will be considered by this department as reserved for the use of the Kiowa and Comanche Indians until such time as congress shall take action in the premises." Now, this was a judicial determination by that branch of the government—the secretary of the interior—charged with the disposal of public lands; and until these lands have passed from the government, and have become the subject of private ownership, this court has no right or authority whatever to disturb this determination by an injunctive proceeding, or, in fact, by any other. This conclusion has many times been reached by the decisions of the federal courts, and particularly by those of the United States supreme court, and is not opposed by a single judicial determination, at least not so far as we have been able to find, or as has been cited by counsel.

In the case of Sioux City & St. P. R. Co. v. U. S., 34 Fed. 835, the railroad sought to enjoin the local land officers and the commissioner of the general land office from allowing proof to be made and acted upon for the completion of entries upon land which the railroad company had selected as its indemnity lands, and which it alleged it was the owner of, under an act of congress granting it certain lands. In its determination of the case, the court said: "The ultimate question presented for determination by the averments of the bill is whether the lands in question passed, under the act of congress and of the general assembly of Iowa, to the complainant, or whether they still remain part of the unappropriated lands of the United States, and therefore open to entry by pre-emption and homesteaders. This is a question which requires for its determination the examination and construction of the act of congress, of the acts of the general assem-

bly of the state of Iowa touching these lands, and of the acts done and work of construction performed by complainant; and the examination of the question calls for the exercise of judicial power on part of the officers of the land department. Unless the act of congress of March 3, 1887, confers the right upon the court to control in advance and direct the action of the land department when called upon to act judicially, it is well settled that the power to do so, either by mandamus or injunction, does not exist." Numerous decisions of the United States supreme court are then cited in support of this conclusion; and the court then proceeds to determine that the act of March 3, 1887, did not extend the jurisdiction of the courts in respect to cases involving the rights of parties to public lands where the title still remained in the government. In the case of *Gaines v. Thompson*, 7 Wall. 347, the plaintiff sought to enjoin the secretary of the interior and the commissioner of the general land office from canceling plaintiff's entry on a tract of land. The court held that the act of the officers in canceling the entry was one calling for the exercise of judgment and discretion, and could not be controlled by the courts. In the opinion, Mr. Justice Miller quoted this language of Chief Justice Taney in the case of *Decatur v. Paulding*, 14 Pet. 497: "In general, such duties, whether imposed by act of congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of congress under which he is required to act." "If," he says, "a suit should come before this court, which involved the construction of any of those laws, the court certainly would not be bound to adopt the construction given by the head of the department. And, if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But this judgment, upon the construction of the law, must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the acts of congress, in order to ascertain the rights of the parties before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise judgment or discretion. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary exercise of his official duties. \* \* \* The interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief, and we are quite satisfied that such a power was never

intended to be given to them.'" The case in which Chief Justice Taney used this language, as stated by Mr. Justice Miller in *Gaines v. Thompson*, was as follows: "The case of *Mrs. Decatur* arose under an act of congress, and also a joint resolution of that body of the same date, both providing compensation for the services of her deceased husband; but the measure of this compensation (which was to be paid to her by the secretary of the navy) was in the act different from what it was in the resolution. The secretary held that but one of these was intended by congress, and gave her the election. She brought suit to compel him to give her both. It is clear she had no other legal remedy. The United States could not be sued. The secretary could not be sued in any other form of action than mandamus. But, on the ground that the action of the secretary involved the exercise of judgment and discretion, the order of the circuit court refusing the writ was sustained." Further on in this important case of *Gaines v. Thompson*, Mr. Justice Miller, in speaking of the power conferred upon the secretary of the interior and the commissioner of the general land office in the administration of laws relating to the public lands, said: "Certain powers and duties are confided to those officers, and to them alone; and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer, so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine therefore is as applicable to the writ of injunction as it is to the writ of mandamus." The doctrine announced in *Gaines v. Thompson* has been followed by the supreme court of the United States ever since, and its force and effect never lessened by a single utterance. In *Litchfield v. Register and Receiver*, 9 Wall. 575, the plaintiff brought his action in injunction to restrain the defendants, as officers of the local land office, from entertaining and acting upon applications to prove pre-emptions upon certain lands, which the plaintiff claimed, by virtue of certain acts of congress, had become his property. The right to enjoin these officers was again denied, Mr. Justice Miller using this forcible and direct language: "The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of congress or of the proper department? Has it been

granted by any act of congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the departments, and the acts of congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and pre-emption; and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them. He says the court below erred, because it did not require them to come in and answer to his claim of title; and, at their own expense, to put the court in possession of their views, and defend their instructions from the commissioner, and convert the contest before the land department into one before the court. This is precisely what this court has decided that no court shall do. After the land officers shall have disposed of the question, if any legal right of the plaintiff has been invaded, he may seek redress in the courts." This language, we think, is particularly applicable to the case at bar, and all the questions asked by the supreme court in that case might be asked in this; and if we attempted to determine them, and that determination should be in favor of the plaintiff, our decision would be squarely opposed to that of the secretary of the interior, who still retains, and has in no way lost, jurisdiction of the subject. The question will remain one before that department until some further action is taken by its officers, upon its own motion, or on the application of some person interested, or in pursuance to some further act of congress, which the secretary, we think not inappropriately, holds to be necessary. Such a determination, too, would place us in the attitude of enjoining and prohibiting this defendant Indian agent from the enforcement of a law which the secretary of the interior has called upon him, who is a subordinate of his department, under his supervisory jurisdiction, to enforce. This will be seen by an examination of another portion of the statutes.

Sections 2147, 2148, and 2149, Rev. St. U. S., provide:

"Sec. 2147. The superintendent of Indian affairs, and the Indian agents and sub-agents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the president is authorized to direct the military force to be employed in such removal.

"Sec. 2148. If any person who has been removed from the Indian country shall thereafter at any time return or be found within the Indian country, he shall be liable to a penalty of one thousand dollars.

"Sec. 2149. The commissioner of Indian affairs is authorized and required, with the ap-

proval of the secretary of the interior, to remove from any tribal reservation any person being therein without authority of law, or whose presence within the limits of the reservation may, in the judgment of the commissioner, be detrimental to the peace and welfare of the Indians; and may employ for the purpose such force as may be necessary to enable the agent to effect the removal of such person."

On October 31, 1894, the department of the interior, under the authority of section 2149, directed a communication to Special Agent Able, the predecessor of the defendant Baldwin in office, and who was then in charge of the Kiowa and Comanche agency, which contained the following: "You will observe that, under the provisions of section 2147 of the U. S. Rev. Stat., you are authorized to remove from that reservation all persons found therein contrary to law; and, should occasion arise for you to take such action, I would suggest that you call the attention of the person or persons so removed to the provisions of section 2148 of said statute; and, should he or they be found a second time within the boundaries of that reservation contrary to law, you will lay all the facts in the case before the proper U. S. district attorney, for such action as he may deem proper in the premises. Should he decline for any reason to take action, the fact should be promptly reported here." On November 27, 1894, the department of the interior called the attention of the defendant Capt. Frank D. Baldwin to the above communication, and directed him to give it attention, and carry out its suggestions; and orders for the removal of the plaintiff and other settlers on these lands, and which the plaintiff, in his brief, states are about to be enforced, and which he seeks to have enjoined, were made by the Indian agent, in pursuance of these directions of the interior department. It will thus be plainly seen what an anomalous situation might result by the assumption at this time, by the courts, of jurisdiction over the question sought to be presented by the plaintiff. The defendant has been directed by the highest officer of the government having supervision and control over him, and by the officer empowered with the judgment and discretion, and burdened with the duty, of determining, until the title to these lands has passed from the government, whether they are Indian lands, or whether they are lands open to homestead settlement, to remove parties settled upon these lands, because they are lands which constitute a part of an Indian reservation. The defendant has not only been so directed, but he, in his own official capacity, is so directed by the plain provision of the statutes; and we are asked to interfere by injunction with the performance of this duty so imposed upon the defendant by law, and by the judgment of his superior officer in his department. The mere suggestion of such a situation seems to us

proof conclusive that congress, in the delegation of judicial powers to the secretary of the interior, and also to the courts, meant, as the supreme court has held, that the exercise of that power should be exclusively confined to the officers of the interior department, while the subject of it was still within its control; and, after it has passed beyond such control, then, and not until then, to pass to the courts. This construction of the law makes all harmonious. A contrary one would make interminable conflict and confusion, not preservative, but destructive, of the rights of the government and of the citizen.

Other cases in which the supreme court of the United States has held that the courts will not interfere with the officers of the government in the exercise of the judgment and discretion vested in them in the supervision of the business relating to public lands, or the disposal thereof, either by mandamus or injunction, are *The Secretary v. McGarrahan*, 9 Wall. 298, and *Marquez v. Frisbie*, 101 U. S. 473. And this doctrine of noninterference by the courts with the determination of any and all questions of fact and of law involved in the disposal of the public lands, or of the administration of the affairs of the government pertaining thereto, prior to the time the government has parted with the title, and the land become the subject of private ownership, is also recognized in *Johnson v. Towsley*, 13 Wall. 72, *Shepley v. Cowan*, 91 U. S. 330, and *Moore v. Robbins*, 96 U. S. 530. It is true that, in all these cases passed on by the supreme court of the United States, the question presented was whether the action of the officers in determining the title to the lands should be controlled by mandamus or injunction; while in the case at bar the possession of the land is the direct matter involved. This difference, however, does not lessen the force of these adjudicated cases. The principle is the same, whether the controversy relates directly to the title to the lands, or indirectly to a controversy over the possession. The rightfulness of the possession in this case cannot be determined without a determination of the controverted question of title; and under the statutes presented, so long as the interior department has jurisdiction of the question of title, it has jurisdiction, as between the plaintiff and the government, to determine who shall possess the lands also. We think that for the courts to take jurisdiction of the question involved, in the determination of the right to the possession of the land, would appear little less embarrassing to the interior department than to determine it directly in relation to the title; and, if the courts should not entertain an action of injunction for the determination of the question in one form, it should not do so in the other. Whether, as between a litigant who is an applicant to make entry upon land, and who claims his right to the possession of the land by virtue

of his asserted right to make homestead entry thereon, and the government, it affects the question of title or possession, the question involved is equally one of cognizance by the interior department, and the principle governing the court's consideration of it is the same. In the language which we have used with reference to the time when questions relating to the public lands may be presented to the courts, we do not mean to be understood as holding that this can be done only after the legal title has passed from the government. The title vested in the individual, and which will warrant his bringing an action in the courts to determine his rights, must be determined by the character of the relief sought, and the forum which he enters; and his action may be brought on either the legal or equitable title, as the nature of the particular case, thus guided, may determine.

In concluding this case, we do not consider it out of place to state that while the question involved, in the determination of the status of these lands,—as to whether it was land opened to settlement, or land set apart for the use of the Indians,—was one, so far as the rights of the plaintiff now presented to us are concerned, exclusively for the determination of the officers of the interior department, before whom, at various times, and in its various phases, the matter might be presented, and with whose determination we cannot interfere until the department has lost jurisdiction of the question, by reason of the subject-matter passing beyond its control, we consider that the determination of this question by the department was a very wise one. It certainly would have greatly complicated matters to have permitted the plaintiff and other settlers to acquire rights in these lands while this question of the Indian title thereto remained undetermined, and would have been hazardous both to the interests of the government and the settlers. The opposite policy from that which the department of the interior is wisely pursuing in this case was ably criticised in the opinion of Mr. Justice Shiras in the case of *Sioux City & St. P. R. Co. v. U. S.*, supra, in the following language: "The fact that great injury may be caused, not only to the complainant, but to the settlers upon these lands, and to the region in which the lands are situated, by throwing them open to settlement while the title thereto is in dispute, cannot be considered in determining the question presented by this motion. It might not be difficult to convince any one who has any knowledge of the lamentable evils entailed upon the community and the settlers themselves, by the action of the land department in throwing open the lands upon the Des Moines river to settlement when the title was in dispute, of the unwisdom of inviting settlers to occupy lands which are claimed under specific grants from the government, without first having the question of title determined by the supreme court; but the cer-

tainty of the evils resulting from such action on the part of the department cannot be urged as a reason why the court should usurp a jurisdiction not conferred upon it." The title to these lands cannot be settled in an action of injunction between the plaintiff and these defendants. The temporary order of injunction in this case should not have been allowed, and the judgment dissolving it was proper, and is affirmed. All the justices concurring.

(5 Okl. 371)

**MAHARRY et al. v. MAHARRY.**

(Supreme Court of Oklahoma. Feb. 12, 1897.)

**CHANGE OF VENUE—WHEN MAY BE HAD—APPLICATION—DIVORCE—ALIMONY—DEFENDANT.**

1. A party who is entitled to a change of venue may present his application at any time before the trial; and the fact that he may have failed to comply with an order of the court to pay alimony pending the suit is not sufficient ground upon which to refuse his application; but an improper refusal to an insufficient application for a change of venue is not reversible error, and, where it would not have been reversible error for the court to have refused the applicant's application for a change of venue, the cause will not be reversed because the court improperly refused to consider the application because the defendant applying for the change had failed to comply with an order of the court requiring the payment of temporary alimony.

2. An application for a change of venue must state the facts on which it is based, and not conclusions of the mere belief of the party.

3. The answer of the defendant may be stricken from the files, and he be held in default, where it is shown that the defendant had ample means to comply with an order for the payment of temporary alimony, and refused to pay it.

4. A party who is alleged by the plaintiff to have entered into a conspiracy to cheat and defraud plaintiff out of the collection of any judgment for alimony which she may obtain in the case, and who has, in pursuance thereof, received or purchased valuable property from the husband, the defendant in the divorce suit, may be joined as defendant, and judgment entered against him to pay, out of the moneys due the principal defendant on such transfer of property, the plaintiff's judgment for alimony.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Justice Frank Dale.

Action by Mary S. Maharry against William J. Maharry for divorce and alimony, in which Teague Ray was subsequently joined as the fraudulent transferee of the property of the defendant. From the judgment, defendants appeal. Affirmed.

Saunderson & Thomas, Teague Ray, and J. W. Scothorn, for plaintiffs in error.

**BIERER, J.** At the time the plaintiff commenced her action for divorce and alimony against the defendant William J. Maharry she procured a restraining order enjoining the defendant from the disposition of his property, and also an order for \$50 attorney's fees, and for suit money in the sum of \$50, and for \$20 a month for her support.

The order for temporary alimony was subsequently modified so as to require the payment of \$25 attorney's fees, and \$25 alimony pending the litigation. The defendant presented a motion to dissolve the restraining order, and also to set aside the order for temporary alimony. At the time this motion was presented he made an application for change of venue on account of the bias and prejudice of the judge. The defendant, without complying with the order for the payment of temporary alimony, excepting the payment of \$25 attorney's fees, filed his answer and cross petition, which the plaintiff moved to have stricken from the files for the reason that the defendant had failed to comply with the order for temporary alimony. On the presentation of this motion the defendant Maharry asked the court to pass upon his motion for change of venue, which the court refused to consider until after the defendant should have complied with the order of the court by paying into court the plaintiff's suit money. This action of the court is assigned as error.

We think this conclusion of the court was erroneous. The statute gives a party the right to a change of venue in all cases when it shall be made to appear that the judge of the court is interested or has been of counsel in the case, "or is otherwise disqualified to sit"; and we have held that the words "otherwise disqualified to sit" mean that the party is entitled to a change of venue when the judge is biased or prejudiced against him. In *re Brown*, 2 Okl. 590, 39 Pac. 469. Our statute imposes upon a party no conditions whatever as to his right to ask for a change of venue. He may do it at any time up to the time of the trial, whether the issues are made up or not. He has a right to demand a change of venue for the purpose of making up the issues, in order that a trial may be had. *Sumner Co. v. Wellington Tp.* (Kan. Sup.) 17 Pac. 787. The fact that the party may have been in contempt of court could not deprive him of the right to a change of venue, if his showing entitled him to it. The fact of his contempt, if it existed as a fact, would have to be made to appear to the court by some proper proceeding, and he would have as much right to a change of trial judge upon the determination of this question as upon any other question in the case. Whether he was in contempt of court or not might, and usually would, depend upon the facts of the case as they existed. His being in contempt of court for failure to pay alimony in a divorce suit would depend upon his ability to pay, his means of procuring the money wherewith to comply with the order of the court; and this issue of fact he would have a right to have determined by an impartial judge. So, too, likewise when the charge of contempt was before the court on the application to strike his pleading from the files because of his

failure to comply with the order of the court, he would have a right on that hearing to have the issue determined by a court presided over by the same impartial and unprejudiced judge. So we would hold that the conclusion of the court in refusing to consider the defendant's application for a change of venue was erroneous. We do not hold, however, in this case, that the error was reversible, for we do not consider that the application for change of venue was such as entitled the plaintiff to the relief asked for.

The only affidavit made in support thereof was the following:

"Territory of Oklahoma, Logan County—ss.: William J. Maharry, being duly sworn according to law, says: That he has reason to believe, and does believe, that he cannot have a fair and impartial trial before Frank Dale, judge of the district court of Logan county, Oklahoma Terr., and therefore asks that a change be granted to some other judge, for the purposes of trying all questions that may arise in said cause, and for the purposes of trying the motion to dissolve the injunction and set aside the order already made in said cause. Affiant says that he had a personal altercation difficulty with said judge, and that on account of said difficulty he believes that said judge has an unkindly feeling toward him, and that by reason thereof is prejudiced against him, and that said prejudice would affect the judgment of said court, and by reason thereof he cannot have a fair and impartial trial. [Signed] William J. Maharry.

"Sworn to before the undersigned this 3rd day of July, 1894. [Signed] L. J. Pitts, Dep. Clerk."

This affidavit contained no statement of facts which made it "appear to the court that a fair and impartial trial cannot be had," and this situation must, under the statute, exist before the supreme court can say that the district court committed reversible error by its failure to sustain the application. The alleged bias and prejudice of the trial judge, as will be seen by the affidavit, is shown only by the belief of the applicant, which may have existed in this case much more in desire than from any fact stated. The only fact stated is that the applicant "had a personal altercation difficulty with said judge." What was the altercation? What was the difficulty? What did it amount to? And what evidence had the judge exhibited as to whether or not this slight or trivial, serious or otherwise, difficulty, had biased or prejudiced the judge against the defendant? There is nothing whatever appearing in the affidavit from which a conclusion can be reached that the judge was in fact biased or prejudiced against the applicant. And, if the bias or prejudice did not exist, then it did not appear to the court that the judge was disqualified to try the case. In *De Walt v. Hartzell* (Colo. Sup.) 4 Pac. 1201, it is said

of an application for a change of venue: "We think the petition fails to set forth facts sufficiently, either in respect to the alleged prejudice of the judge or of the inhabitants of the county, to warrant us in interfering with the ruling of the court, under the discretion vested therein by the statute touching applications of this character. Beyond the bare allegation of prejudice, sufficient facts should be set out by the petitioner from which the court may be able to judge of the probable truth or falsity of the averments; otherwise a change of the place of trial, with its involved expense and delay, might go as a matter of course, upon the mere petition therefor, supported by an indefinite affidavit, as in this case." In the state of Kansas, from whence we received our Code, of which the provision allowing changes of venue is a part, it has been held, as in the state of Colorado, from the decision of the supreme court of which state we have just quoted, that the trial court is vested with a discretion in granting changes of venue in civil cases. *Waterson v. Kirkwood*, 17 Kan. 9. It does not, therefore, appear that the defendant has been in any way prejudiced by the refusal of the court to pass upon his application, for, had he passed upon it, under the law it would not have been his duty to sustain this application, and it therefore makes no difference whether the reason for failure to pass upon the application was good or not.

Plaintiff in error Maharry contends that the court erred in sustaining the motion of the plaintiff to strike his answer and cross petition from the files. The contention is that the record shows an absolute inability to comply with the order to pay alimony, and cases are cited by the plaintiff in error to support his claim that it is erroneous to strike a party's pleadings from the files where his failure to pay alimony has resulted from inability and poverty. On the consideration of this motion the court heard evidence, consisting of the testimony of Teague Ray, attorney for the defendant. In this testimony Ray swore that subsequent to the bringing of the action he had paid the defendant \$250 in money, and had delivered to him notes to the amount of \$2,000. This furnished the defendant ample means with which to comply with the order of the court. The testimony of the defendant's own attorney also showed that he had absconded, left the territory and the jurisdiction of the court, and was, when last heard from, in another state, evading any further proceedings that the plaintiff might take to enforce the order of the court, excepting the remedy proposed. The plaintiff had, under such circumstances, the right to have the defendant's answer and cross petition stricken out. 2 Bish. Mar., Div. & Sep. § 1095; *Walker v. Walker*, 82 N. Y. 260.

It is also contended that Teague Ray was



improperly joined in this action with the defendant. The original petition alleged that the defendant William J. Maharry was the owner of a quarter section of land, describing it, in Logan county, of the value of \$7,000. And there appear in the record two amended petitions, the first being by reference made a part of the second, in which it is alleged that subsequent to the commencement of the action the defendant Maharry and his attorney, Teague Ray, entered into a conspiracy to cheat and defraud the plaintiff out of the allmony which she might recover in the action, and that, in pursuance of such purpose, the defendant Maharry had relinquished the title to the tract of land, which was then in the government, and permitted Ray to make a filing thereon; that the defendant Ray promised to pay the defendant Maharry for this land, at some future time, a large sum of money, to wit, the sum of \$2,500. There were other allegations in these pleadings not material to state here. Such allegations made it proper to join Ray as a defendant. *Damon v. Damon*, 28 Wis. 510; *Busenbark v. Busenbark*, 33 Kan. 572, 7 Pac. 245; *Gardenhire v. Gardenhire*, 2 Okl. 484, 37 Pac. 813.

We think the amended petitions, considered together, as was asked by the plaintiff, and as was evidently done in the trial of the case, fully state a cause of action against Ray, and that the judgment rendered against him was within the prayer of the plaintiff. This disposes of all the questions in the brief of plaintiffs in error, excepting the contention that the court had no jurisdiction to issue the restraining order against Maharry's disposing of the tract of land on which he and his wife had lived and had improvements, and were in possession under the homestead law. The deceased mother of the defendant Maharry had made entry thereon. We do not consider that a determination of this question one way or the other would in any way affect this case, and therefore decline to pass upon it. Long prior to the determination of the case Maharry had disposed of the land, and had received therefor money and notes from Ray, and the court adjudged that Ray should pay into court, for the satisfaction of the plaintiff's judgment, \$1,000 of the money which was due Maharry from the sale of this land. It makes no difference in the determination of this case whether the court had jurisdiction to enjoin the disposal of this land or not. It certainly had jurisdiction to render a judgment for allmony against Maharry, and it certainly had jurisdiction to require a person who was within the jurisdiction of the court, and who was made a party to the case, and who had received property of any kind or character from Maharry to defeat the payment of this allmony, as was alleged by the plaintiff, and who was then largely indebted to his co-defendant, against whom judgment for all-

mony was rendered, to pay of the amount owing to Maharry the amount of the judgment for allmony against him. The judgment of the court below is affirmed. All the justices concurring, excepting DALE, C. J., who tried the case below, not sitting.

(5 Okl. 300)

## BURCHETT, Sheriff, v. HAMILL.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

REFEREE—REPORT — REPLEVIN — OWNERSHIP OF CROP—EVIDENCE.

1. On consideration of a motion by a party to confirm the report of a referee, where the party has made no exceptions to the facts found, the facts must be taken, as to the party making the motion, as found by the referee; and it is the duty of the court to apply the law to those facts, and the court is not bound by the conclusions of law of the referee, but may render such judgment as the law warrants; and if the conclusions of law of the referee are erroneous, or are made in favor of the party to such motion, when they should have been rendered in favor of the other party, it is not erroneous to overrule such motion to confirm the referee's report.

2. In an action of replevin to recover wheat which was grown by the plaintiff upon land on which the plaintiff's husband had a homestead entry; and where it was shown that the plaintiff had entered into a written lease with her husband, in consideration of the sum of \$600 duly paid, whereby she was to hold and use the land for something over five years; and where, in pursuance to this lease, the plaintiff did break out, cultivate, and otherwise improve the land, and did plant and harvest the wheat, she paying the expenses of the same from her own means; and where the action is against the sheriff, who levied upon the wheat under an execution against the plaintiff's husband,—it is entirely immaterial whether this lease was valid or void, on the ground contended for, that it was not acknowledged and filed, or because the homestead entryman could make no lease or conveyance of his homestead. She had tilled the soil, planted the wheat, and harvested and threshed it, with her own means, and by her own servants; and her title thereto did not depend upon her right to cultivate the soil, at least when it was attacked by a person who showed no claim to the land on which the wheat was raised.

3. Where the report of a referee is entirely set aside, there is no finding of fact or evidence upon which the court can act; and the effect of setting aside the report is to grant a new trial, and it is erroneous for the court, after entirely setting aside the referee's report, to proceed to render judgment upon it.

(Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice John L. McAtee.

Annie M. Hamill brought her action in replevin in the district court of Kingfisher county, to recover the possession of 400 bushels of wheat which the defendant, as sheriff, had levied upon under an execution upon a judgment against the plaintiff's husband, James M. Hamill. The cause was submitted to a referee for trial, and the referee made findings of fact and conclusions of law, and reported the same to the court. The findings of fact are quite brief, and, treating them as they are considered by counsel for both sides

in their briefs, the facts are these: That on the 20th day of June, 1890, James Hamill leased to his wife a quarter section of land, which he was claiming under the homestead law, and which, on April 22, 1891, he entered under the homestead law, and had not yet proved up at the time this action arose, until the 1st day of October, 1895, for the sum of \$600, paid by the plaintiff to James M. Hamill. This lease was in writing, signed by both parties, and witnessed by one E. V. Hamill, but not acknowledged or recorded. Acting under this lease, the plaintiff from time to time broke said land, until all the tract, except about 30 acres, was broken and put into cultivation. The cultivated land was sown to wheat from year to year, until, in 1894, there was harvested 1,783 bushels of wheat. The \$600 paid by plaintiff to her husband for said lease was mainly expended in making improvements upon the land, in fencing the same, and erecting buildings thereon. The plaintiff mainly attended to hiring the hands, and paying the expenses of farming the land and raising the wheat, and, out of the proceeds thereof, provided for the family. On July 6, 1894, the defendant, as sheriff of Kingfisher county, held in his hands for execution an execution issued upon a judgment for principal, interest, and costs in the sum of \$120, given in favor of the Burden Bank against J. M. Hamill, and by virtue of this execution levied on the 400 bushels of wheat then in the granary on this land. The wheat was valued at \$150. The referee found, as a matter of law, that the lease of J. M. Hamill to the plaintiff was void as to the execution creditor, the Burden Bank; and that, as to the execution creditor, the 400 bushels of wheat so levied upon by the defendant was subject to such levy, and the wheat was rightfully held by the defendant at the time of the commencement of the action of replevin; and that the defendant was entitled to judgment for the return of the 400 bushels of wheat, or \$150, the value thereof. The plaintiff excepted to each finding of fact of the referee, and to each conclusion of law thereon, and on such exceptions moved the court to set aside the report of the referee. The defendant moved the court to confirm the report of the referee, and render judgment, upon the findings of fact and conclusions of law, in favor of the defendant, for the return of the property in controversy, or the value thereof, and for the costs. On consideration of these motions, the court sustained the exceptions of the plaintiff to the report of the referee, and set aside and held the same for naught, and also overruled defendant's motion to confirm the report of the referee, and then proceeded to find upon the referee's report for the plaintiff, adjudging her entitled to the possession of the wheat, and giving her judgment for costs. The defendant excepted to the action of the court in overruling his motion to confirm the report of the referee, and also moved for a new trial;

and, this being overruled, exception was duly saved. Reversed.

Boynton & Smith, for plaintiff in error. W. W. Noffsinger, for defendant in error.

BIERER, J. (after stating the facts). Two questions of law are presented upon the record for our determination. First. Did the court err in overruling defendant's motion to confirm the report of the referee, and render judgment in his favor thereon? Second. Did the court err in rendering judgment for the plaintiff after the court had sustained the plaintiff's exceptions to the report of the referee, and, on her motion, had set aside and held the report for naught? The defendant had filed no exceptions to the findings of fact of the referee; so, on determining his motion, the facts, so far as his motion is concerned, must be taken as found by the referee. *Martsof v. Barnwell*, 15 Kan. 612. The district court, however, was not bound by the conclusions of law as made by the referee, and on such motion should have entered such a judgment as the law would warrant when applied to the facts as found. *Martsof v. Barnwell*, supra.

The question is, then, on the facts as found: Was the defendant entitled to judgment? This question is presented by counsel for both parties, in their briefs, from a discussion of the proposition as to whether or not the lease made by J. M. Hamill to the plaintiff was void. It is chiefly contended that it was void under the Nebraska statute in force in this territory at the time the lease was made, because that statute required all conveyances of real estate, except leases for a term of not exceeding one year, to be acknowledged and filed of record. It is also argued by plaintiff in error that the lease is void, because it is against public policy, under the laws of the United States, for a homestead entryman to lease his homestead, and because a conveyance of the land before patent is void. In our judgment, none of these propositions have any relevancy to the case in hand. No levy was made upon any land, and no leasehold interest of the plaintiff was sought to be defeated by the execution creditor. The question was not as to whether the sheriff could have levied on the land, but the question was, did the plaintiff own the wheat? And a determination of that question did not, and does not, require a determination as to whether this lease was void or valid on account of any matters stated. There is no finding of fact—and, if we could go into the evidence, there is no evidence tending to show—that these parties were perpetrating, or attempting to perpetrate, any fraud upon the creditors of J. M. Hamill. Whether the lease was void or valid makes no difference. The fact appears that the plaintiff did farm this land; that she did break up the prairie, and reduce the land to cultivation; that she hired the men, and paid the expenses

of planting and harvesting the wheat, and the wheat was raised from seed formerly raised by her. Whether or not she had a right to the possession of the land on which the wheat was raised, where the defendant shows no claim of right to the possession of such land, or any title whatever therein, is a question entirely too remote to merit any consideration whatever. If she had no right to the possession of the land, that would give the defendant no right to levy on her wheat under an execution against her husband or any other person. The question, also, as to whether or not a homestead entryman may lease his homestead for farming purposes, while he resides thereon, cannot be considered here. Even if we were to concede that that would be a debatable question as between the government and the entryman, or a contestant and the entryman, it would in no way assist the plaintiff in error. Neither he nor the creditor whom he represents is in any position to raise it. As long as these parties have no right to the land, it makes no difference to them whether the entryman is complying with the homestead law or not. The conclusions of law of the referee were therefore erroneous, and the court properly overruled the defendant's motion to confirm the report, and for judgment.

The record of the case shows that the plaintiff made his exceptions before the referee to each finding of fact and conclusion of law contained in his report, and in the district court renewed his exceptions specifically, and asked the court to set aside the referee's report; that, upon consideration of the plaintiff's exceptions and application to set aside the report, the journal shows: "The court sustains said exceptions to the report of the referee, and sets aside and holds for naught the same." The court, then, after overruling the plaintiff's motion to confirm the report of the referee, proceeded to render judgment for the plaintiff. It is contended by plaintiff in error, without the citation of any authorities, that this was erroneous. Was there anything upon which to render judgment after the report of the referee had been entirely set aside and held for naught? The trial was not before the court, although it was, indeed, before an officer of the court, and the evidence was not submitted to the court except through the report of the referee; and, when this report was set aside, the case then stood in the same situation exactly as it was in when submitted to the referee. The entire setting aside of the report carried everything connected with the report down with it, and left the case open, and without any trial upon the issues formed. With the report of the referee set aside, the case stood in the same situation as if it had been tried to a jury, and submitted to the jury, a verdict rendered, and, on application of one of the parties, set aside, or as if it had been tried by the court, and judgment rendered, and this judgment set aside on motion. The nec-

essary result in any one of these cases is a new trial. The principle is not different when applied to the complete vacation of a report of a referee from the same action upon the decision of a court or the verdict of a jury. As to the result of setting aside the report of a referee, Mr. Justice Brewer, in speaking for the supreme court of Kansas, in the case of *Owen v. Owen*, 9 Kan. 91, said: "The effect of setting aside the report is a new trial. The rights of neither party are concluded. Each has full opportunity to establish his claim or defense." A case on all fours with this one is the case of *Rice v. Benedict*, 18 Mich. 75. The opinion is very brief, and entirely upon this question; so we give it in full here: "In this case, the suit having been referred under the statute, and the report of the referees having been excepted to, the circuit court, instead of confirming it in whole or in part, set it aside altogether, and then, without any further trial or reference back, gave judgment for plaintiffs for \$646.32 damages, with costs. This was unauthorized by law. As soon as the report was set aside, the case stood in the same predicament as if the verdict of a jury had been vacated; and, until a new trial should be had before the court or a jury or referees, there was nothing left to act upon. A report set aside leaves the cause as if it had never been tried, and there is left neither evidence nor finding, but merely an issue of fact requiring trial before any judgment can be given. Until some competent body has retried that issue, the court cannot have any basis for determining which party should prevail, or what amount, if any, was due from one to the other. Every judgment must be based upon some finding, and here there is none whatever remaining in force. The judgment must be reversed, and the cause be remanded for a new trial."

Defendant in error contends, however, that the action of the court in rendering judgment on the case after the report of the referee had been set aside was not erroneous, but is warranted by our Code, and particularly by the decisions upon it by the supreme court of Kansas. The case cited is that of *Martsof v. Barnwell*, supra, the opinion being written by Mr. Justice Brewer. The part of the case referable to this question is as follows: "The matter was tried before a referee, who filed his report, with findings of fact and conclusions of law. He gave plaintiff in error priority over Barnwell, defendant in error. The district court, however, upon the facts as reported by the referee, awarded priority to Barnwell. No objection was made by plaintiff in error to the referee's report, and no motion made by him to set it aside. The facts therefore, as found by the referee, are beyond question, and the only matter for consideration is the judgment required upon such facts. The district court was not bound by the conclusions of law of

the referee, any more than this court is bound by the conclusions of the district court. It was the duty of that court, upon examination of the facts found, to see that the proper judgment was entered upon them, whatever might have been the conclusions of the referee, as is the duty of this court, upon a re-examination, to see if there has been any error in the conclusions and judgment of that court, and, if so, to direct the entry of the proper judgment." We cannot take this case as being any authority whatever in support of the contention of plaintiff below (defendant in error here), particularly so in view of the decision just before cited, wherein the same learned judge held that the effect of the action of the court in setting aside the report of a referee was to grant a new trial. In the case reported and cited as authority the plaintiff made no objections to the report of the referee, and made no motion to set it aside. The case therefore stood for judgment of the district court on the report of the referee, and not upon a case where the report of the referee had been set aside and held for naught. It had already been held by the supreme court of Kansas in *Walker v. Manufacturing Co.*, 8 Kan. 397, that "the findings of fact by a referee have equal force with the findings of fact by a court or the special verdict of a jury"; and, of course, so long as the case stood upon the findings of fact of the referee, the court, as we have seen, might render judgment thereon as the law would require, no matter what the conclusions of law of the referee might be in the case. But the plaintiff in this case, by his own motion, had the report of the referee entirely set aside and held for naught. He was then not only in no position to except to such action, but he was in no position whatever to ask for a judgment upon the report which was then a nullity, and made so by his own application. Had the plaintiff made a motion for judgment in his favor upon the findings of the referee, notwithstanding the referee's conclusions of law, and judgment had been rendered in accordance therewith, then the case of *Martsof v. Barnwell* would be in point. As it is, it does not in any way assist the claim of defendant in error.

We do not mean to be understood as saying that the court may not modify the report of a referee so that judgment may be entered in accordance with the law; nor do we mean to be understood as saying that the court may not direct the referee to modify his own report. What we hold is that, when the report is entirely set aside, the effect of the action of the court is to grant a new trial, and no judgment can then be entered without trial before the same or another referee or the court or a jury. Nor do we mean to be understood as saying that the parties might not agree that the court proceed to try and determine the case upon the evidence as reported by the referee; but without such con-

sent, on the report of the referee being set aside, the court could not render judgment without a trial. The cause is therefore reversed, and a new trial granted. All the justices concurring, excepting McATEE, J., who tried the case below, not sitting

(5 Okl. 132)

DUCK et al. v. ANTLE.

(Supreme Court of Oklahoma. Feb. 12, 1907.)

NOTE—CONSIDERATION—COMPROMISE OF FOUNDATIONLESS CONTEST.

1. The dismissal of a contest which the party asserting it knew was groundless and was without any cause, and which was being prosecuted for the sole purpose of extorting money from the homestead entryman, could be no consideration for a contract; and where it was alleged, in answer to a suit upon a promissory note and to foreclose a chattel mortgage given to secure the same, that the note was given as part of the consideration to dismiss a contest against the homestead entry of the defendant, which the plaintiff knew he had no right to maintain, and which was being prosecuted only for the purpose of extorting money from the defendant, it is held error to sustain a demurrer to this answer.

2. Also, where it is alleged that a contest, the dismissal of which formed the sole consideration of the note, and it appears from the answer that the contract of compromise provided for the giving up of the possession of the land, and where no other right to such possession appeared than that which was asserted by virtue of the alleged foundationless and extortionate contest, an agreement to give up such possession of the land would be no consideration for the note.

(Syllabus by the Court.)

Appeal from district court, Payne county; before Justice Frank Dale.

Suit by one Antle against Charles Duck, as principal, and J. W. Duck and A. T. Neill, as sureties, upon a promissory note, and to foreclose a chattel mortgage given to secure the same. Judgment for plaintiff, from which defendants appeal. Reversed.

King & Hutto and Neill & Clark, for plaintiffs in error. Robert A. Lowry, for defendant in error.

BIERER, J. Antle brought his suit in the district court of Payne county to recover judgment against J. W. Duck, Charles A. Duck, and A. T. Neill, upon a promissory note given on April 3, 1895, for the sum of \$85, due in 10 days after date, with interest at 10 per cent. from maturity, and to foreclose a chattel mortgage given by J. W. Duck to secure this note. The defendants filed their answer, alleging that in the month of November, 1893, the plaintiff, for the purpose of defrauding the defendant Charles A. Duck, and compelling him, the said Duck, to pay the plaintiff a sum of money, filed a contest against defendant's homestead entry on the S. W.  $\frac{1}{4}$  of section 34, township 21 N., of range 2 E., of the Indian meridian. A copy of the contest affidavit was attached, showing that it was one made on the ground of prior settlement.

The answer alleged that this contest was absolutely groundless, and without any cause therefor, and that the plaintiff knew he had no cause for filing said contest, but filed it for the purpose of extorting money from the defendant Charles Duck; that the defendant, having been annoyed by this contest for a long time, and put to great trouble and expense, entered into a written contract with the plaintiff, which is set out as an exhibit to the answer. This contract provides that, in consideration of the sum of \$125, Antle should dismiss his contest on the land covered by the defendant Duck's homestead entry, and give Duck immediate possession of the land; that Antle should be permitted to harvest the crop of oats planted by him, and then growing on the land, and further permitted to remove a small house then upon the land, on or before the 15th of April, 1895, and to occupy the house until plaintiff should first pay a note of \$85, executed the same day as the contract. The defendant alleged that he had paid on this contract the sum of \$50, and that the note and mortgage sued on were given to secure the payment of the balance under the contract, and that the only consideration for the note and mortgage was the dismissal of plaintiff's contest, and that the defendant only agreed to pay plaintiff said sum in consideration of having his said land free and clear, and of having the quiet and peaceable possession thereof; that the plaintiff had no right whatever to the land, and the only object defendant had in paying the plaintiff to dismiss his said contest was to avoid litigation over the land, and to have his land free from contest, and to have the quiet and peaceable possession thereof, and that defendant informed plaintiff of his said object in making the contract; that, notwithstanding the contract between the defendant Duck and the plaintiff, the plaintiff conspired with one William Gibson and John Antle to file a contest against defendant's homestead entry as soon as the plaintiff's contest was dismissed, and that in pursuance of this arrangement, and for the express purpose of forcing the defendant to pay them money to dismiss such contest to be filed on the dismissal of the plaintiff's contest, or submit to great annoyance, vexation, and expense in said second fraudulent contest, William Gibson did, on the 3d day of April, on the dismissal of the plaintiff's contest, file another contest against the defendant's homestead entry, this second contest being on the ground of abandonment for more than six months next preceding that date. The defendant alleged that it was the agreement between the plaintiff and John Antle and William Gibson that they should divide the money received by plaintiff from defendant for the dismissal of the plaintiff's contest, and all assist in the contest thereafter to be filed against the homestead entry of the defendant; that the second contest was as groundless as the first one; and that it would

cost the defendant as much to defend against it as would have the first contest, and defendant had therefore received nothing by virtue of his contract with the plaintiff; and that the plaintiff should dismiss his contest. The defendant then asked for judgment against the plaintiff for \$50 and costs. To this answer a demurrer was filed, on the ground that it did not state facts sufficient to constitute a defense to plaintiff's cause of action. This demurrer was sustained, and judgment rendered for the plaintiff in the sum of \$89.97, and for costs, and for the foreclosure of the chattel mortgage.

The sole question for our consideration is, did this answer state a good defense? The contention of plaintiffs in error is that it did contain a good defense, because it alleged that the only consideration for this note was an agreement to compromise and dismiss a suit which was absolutely groundless, and without any truth or merit in it, and which the plaintiff knew was without foundation and merit; and that the compromise was not a compromise made in good faith, and therefore could not be a good consideration for a promise. The defendant in error does not oppose the contention that a compromise of a claim or suit, in order to be a good consideration for a contract, must be of a disputed claim or suit, which the party asserting it believed, in good faith, he had a right to maintain; so it will not be necessary for us to review this question at great length. It is sufficient to say that we have found no case and no text-book which asserts that a contract the sole inducement for which is the compromise of a foundationless and meritless claim or suit—a claim which has no foundation in either law or fact, and which the party asserting it knew he had no right whatever to assert or maintain, and could not establish by a suit—has any consideration to support it. The following cases, where compromises have been upheld, recognize the doctrine that, while the compromise of a controversy or claim is a good consideration for a contract, such compromise must be of a bona fide controversy or disputed claim: *Railroad Co. v. Starkweather*, 21 Kan. 322; *Feeter v. Weber*, 78 N. Y. 334; *Grasselli v. Lowden*, 11 Ohio St. 349; *Bank v. Geary*, 5 Pet. 98; *Jeffries v. Insurance Co.*, 110 U. S. 305, 4 Sup. Ct. 8; *Hennessy v. Bacon*, 137 U. S. 78, 11 Sup. Ct. 17. In deciding the case of *McKinley v. Watkins*, 13 Ill. 140, Mr. Justice Trumbull used this clear and forcible language on this proposition: "The instruction in other respects is very nearly, if not quite, correct. It assumes that, in order to support the promise, there must have been a horse trade between the parties, out of which a difficulty had arisen, and that the plaintiff was threatening to sue the defendant, and not deceiving him by any misrepresentations. If by this is to be understood that the plaintiff must be in good faith have supposed that he had a good cause

of action against the defendant, growing out of the horse trade, the instruction is strictly proper. It is immaterial whether the plaintiff could have recovered in such action or not. If he honestly supposed that he had a good cause of action, the compromise of such right was a sufficient consideration to uphold a contract fairly entered into between the parties, irrespective of the question as to who was in the right. It has often been decided that the compromise of a doubtful right is a sufficient consideration for a promise; and it is immaterial on whose side the right ultimately turns out to be, as it must always be on one side or the other, because there can be but one good right to the same thing. *Taylor v. Patrick*, 1 Bibb, 168; *Russell v. Cook*, 3 Hill, 504; *Moore v. Fitzwater*, 2 Rand. (Va.) 442; *O'Keson v. Barclay*, 2 Pen. & W. 531. If the plaintiff was threatening to sue on a claim which he knew was wholly unfounded, and which he was setting up as a mere pretense to extort money from the defendant, a contract founded on a promise not to sue in such a case would be utterly void. In order to support the promise, there must be such a claim as to lay a reasonable ground for the defendant's making the promise, and then it is immaterial on which side the right may ultimately prove to be. *Edwards v. Baugh*, 11 Mees. & W. 641; *Perkins v. Gay*, 3 Serg. & R. 331. The judgment of the circuit court is reversed, and the cause remanded." In the case of *Long v. Towl*, 42 Mo. 545, the law is stated thus: "Dismissal of suits palpably unjust forms no adequate consideration for a promise. To make the settlement of assumed rights a sufficient consideration for a promise, there must be, at least, an appearance of right sufficient to raise a possible doubt in favor of the party asserting the claim." In the case of *Association v. Wickham*, 141 U. S. 564, 12 Sup. Ct. 84, where a previous compromise and settlement was set up as a defense to plaintiff's claim for insurance, the court, upon the principle which underlies the validity of all contracts as a result of the compromise of disputes, said: "If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim; but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration, and void."

Now, in the case at bar the defendant alleges that the case which was compromised between the plaintiff and the defendant Charles Duck, and which compromise he alleges was the only consideration for this note, was known by the plaintiff to be absolutely groundless, and without any cause therefor, and was being prosecuted by the plaintiff for

the purpose of extorting money from the defendant. The compromise of such a suit as that could certainly be no consideration for a promise. The courts are not open for the assistance of bloodsuckers and extortioners, which the plaintiff by his demurrer to this answer, and for the purposes of this case, admits himself to be.

The defendant in error, however, contends that the giving up of the possession of the land, and the conveyance to Duck of the improvements on the land, were a sufficient consideration for the note. In answer to this, in the first place, it is to be observed that the answer alleged that the dismissal of the contest was the only consideration for the note. In the second place, if the terms of the contract are considered most strongly against the pleader, then, although the contract does provide for the plaintiff's giving to Duck the immediate possession of the land, yet, if the other allegations of the answer are true,—and, for the purposes of the consideration of the demurrer thereto, they must be considered as true,—then the defendant had no more right to the possession of the land than he had to maintain the contest. If he had no contest against the entryman which gave him a right to the occupancy of the land, then he was a mere trespasser. *Sproat v. Durland*, 2 Okl. 24, 35 Pac. 682, 886. And we might further say, and within the allegations of the answer if they are to be taken most strongly against the defendant, and keep within the legitimate terms thereof, he was a trespasser for the mere purpose of extorting money from the defendant to get him to quit and leave the land. While the giving up of a right of possession of land, whether it be held under homestead entry or by perfect title, may undoubtedly constitute a sufficient consideration for a contract, we cannot assent to the proposition that a trespasser could go upon the land of another for the mere purpose of extorting money from the rightful possessor, as an inducement to give up such wrongful possession, and enter into a contract to receive money for quitting such possession, and then have such a contract enforced in a court of law or equity. This claim must fall under the strong and irresistible allegation made in the answer as to the character of the plaintiff's claim to this land, for the part of the contract to give up the possession of the land on the compromise could carry with it no more force than the part of the contract relating to the dismissal of the contest.

Lastly, as to the claim that the conveyance of the plaintiff's improvements on the land constituted a good consideration for this contract, it is sufficient to again observe that the answer alleges that the dismissal of the contest was the only consideration for the compromise, and that the contract itself, considered in the same manner as to the last proposition, contains no condition whereby

the defendant was to receive any improvements, but the only improvements mentioned in the contract were by the plaintiff to be removed from the land. In our judgment, this answer does state a good defense to this note and mortgage, and the demurrer to it should have been overruled. The judgment is therefore reversed, and remanded for further proceedings. All the justices concurring, excepting DALE, C. J., who tried the case below, not sitting.

(5 Okl. 222)

SYMNS GROCER CO. et al. v. BURNHAM et al.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

APPEAL—SETTLEMENT OF CASE-MADE—NOTICE.

The reason why attorneys of record are entitled to notice to appear before the judge at the time of settling a case-made, upon appeal to the supreme court, is in order that their suggestions may be considered, and, if approved, adopted. But where the case-made has been served upon the attorney of record for the defendant in error, and he has made suggestions, and such suggestions have been adopted by the plaintiff in error, and incorporated into the case-made, and the defendant in error has waived notice to appear, he can have no cause to complain, and the case cannot be dismissed here on account of the absence of such notice from the record.

(Syllabus by the Court.)

Error to Logan county court; before Justice Frank Dale.

Action by the Symns Grocer Company and others against Burnham, Hanna, Munger & Co. From the judgment the grocer company brings error. Motion to dismiss. Overruled.

R. Wooldridge and Green & Strang, for plaintiff in error. Cotteral & Horner, for defendants in error.

McATEE, J. On January 6, 1897, the defendant in error the McCord Commerce Company filed its motion to dismiss the petition in error. The only ground argued to the court in support of the motion was that the case was settled and signed without notice to the defendant in error. It appears from the record that orders extending the time within which the case should be made and served for the supreme court were made upon the 30th day of July, 1895, and the 25th day of September, 1895, and that on the 28th day of October a further extension of 30 days from the expiration of the time theretofore given was made. The extensions of time in the several orders were for 60, 30, and 30 days, respectively, beginning from the time first given. On the 11th day of November the attorney for the defendant in error making this motion "accepted service of the above and foregoing case-made." Thereafter, on the 29th day of May, 1896, the case was settled and signed. It does not affirmatively appear from the record that the

defendant in error was present, and it is said in the argument that he was absent, and that he had not had notice of the time when the case would be settled and signed. It does appear, however, from an affidavit of Hon. J. R. Keaton, one of the judges of this court, which accompanies, and is annexed to and filed with, the brief of the plaintiffs in error upon this motion, that the affiant, who was of counsel in the case, had, on the 11th day of November, when the case-made was served upon the attorney for the defendant company, left the said case-made with him for several days, and that afterwards the attorney for the defendant in error informed the affiant that he "went through the record, as he informed me thereafter, and wrote in pencil on the blank pages and parts of pages left in said record such amendments, and all the amendments, that he desired to make to the said case-made, as prepared by myself, and that I thereafter agreed that the case-made be signed, containing such amendments; that it was definitely agreed and understood between myself and the said Wooldridge that, if the said amendments which he thus suggested were admitted by me as a part of the case-made in said cause, he had no objection to the signing and settling of the said case-made at any time, and I agreed that said amendments should be so incorporated in said case-made, and they were so incorporated, and are a part of the same; and he thereupon waived notice of the time and place of settling said case-made." The facts here stated are uncontradicted. No other reason exists, that we are aware of, why notice should be served upon attorneys of record to appear at the time of settling of the case other than that the parties may have their suggestions considered, and, if approved, adopted; but where, as in this case, all of the amendments suggested by the attorney for the defendant in error were accepted by the plaintiff in error, and incorporated into the case-made, the defendant in error can have no cause for complaint. This case is determined upon the authority of *Insurance Co. v. Amick*, 36 Kan. 99, 12 Pac. 338. The motion will therefore be overruled. All the justices concur, except DALE, C. J., who presided below.

(5 Okl. 112)

BURNHAM et al. v. DICKSON et al.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

ATTACHMENT LIEN—PRIORITY—LEVY OF EXECUTION.

On the 26th day of July, 1894, the Consolidated Steel & Wire Company et al. had executions issue out of the probate court of Kay county upon judgments rendered therein, and delivered to the undersheriff of Kay county at 3:30 o'clock p. m. on said day. At half past 4 o'clock the plaintiff in error caused a writ of attachment to issue out of the district court of Kay county, and an effort was made by the at-

attaching creditor to find the sheriff at his office in the county for the purpose of placing the attachment in his hands, and, failing in that, the attaching creditor placed the writ in the hands of Crouse, a deputy sheriff of the county. The attachment was levied upon a stock of hardware belonging to the defendant Dickson in the town of Kildare, in Kay county, at 16 minutes past 5 o'clock of the same day. The executions were levied upon the same stock of hardware at 5:30 o'clock of the same afternoon. *Held*, that the attaching creditor is entitled to the priority by having secured the first levy and possession of the property.

(Syllabus by the Court.)

Error to Kay county court; before Justice A. G. C. Blerer.

Action by Burnham, Hanna, Munger & Co. against Thomas J. Dickson and others. Judgment for defendants, and plaintiffs bring error. Reversed.

On the 26th day of July, 1894, the plaintiffs in error obtained a writ of attachment against the property of the defendant Dickson in the district court of Kay county. The attachment was issued at half past 4 o'clock in the afternoon, and was levied upon a stock of hardware in the town of Kildare at 16 minutes past 5 o'clock of the same day by Crouse, a deputy sheriff. On the same day the interpleaders had executions issued out of the probate court of Kay county upon judgments rendered therein against the defendant Dickson. These executions were delivered to Mr. Harwood, undersheriff of the county, at the office of the sheriff in Newkirk, the county seat, at 3:30 o'clock p. m. on said day, but were not levied until after the writ of attachment had been actually levied upon the property of the defendant Dickson. The writ of attachment was delivered by the clerk of the district court to the attorney of the plaintiffs in error immediately after its issuance at 4:30 o'clock of the afternoon, and thereupon Miller, the agent of the plaintiffs in error, went to the office of the sheriff of said county for the purpose of delivering the writ of attachment into the hands of the sheriff at that time and place, but found the office entirely vacant; and thereupon the attorney of the plaintiffs in error took the writ of attachment himself to the town of Kildare, a distance of  $4\frac{1}{2}$  miles from Newkirk, starting at about the time the undersheriff, Harwood, started with the executions. The attorney of the plaintiffs in error reached the town of Kildare about 15 minutes before the arrival of the undersheriff, Harwood, and delivered the writ of attachment to Crouse, the deputy sheriff of the county, at 5:05 p. m., the attorney of the plaintiffs in error having prearranged with the deputy sheriff to be at that place for that purpose. The writ of attachment was levied upon the property of the defendant Dickson at 5:16 o'clock p. m., and the executions were levied at 5:30 o'clock p. m., upon the same property. Afterwards the property upon which the executions had been levied was by the sheriff sold, under the executions, and the proceeds in

money are now in the hands of the sheriff of said county.

Green & Strang, for plaintiffs in error.  
O'Bryan & Gordon, for defendants in error.

McATEE, J. (after stating the facts). The only question for solution is one of priority. Are the interpleaders, the Consolidated Steel & Wire Company and the Wichita Plumb & Pump Company, whose executions were issued upon judgments in the probate court, and senior in the sense that they came into the hands of the undersheriff, Harwood, prior to the time that the attachment issued out of the district court was placed in the hands of the deputy sheriff, Crouse, entitled to the proceeds? It is provided in the Code of Civil Procedure (section 4074, p. 793, St. Okl. 1893) that: "Where there are several orders of attachment against the same defendant, they shall be executed in the order in which they are received by the sheriff." If the question here for determination was one between writs of attachment, there would be no difficulty, nor would any difficulty arise if the question lay between writs of execution, since it is provided in the Code of Civil Procedure (section 4336, p. 836) that: "All real estate not bound by the lien of the judgment as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution." By section 4339, that: "\* \* \* In all other cases, the writ of execution first delivered to the officer shall be first satisfied." It is nowhere provided in the statutes of the territory what the duty of the sheriff shall be, nor what the rights of execution and attachment creditors shall be, in a case like the present, where the contention is not between attachments issued out of the same court, nor between executions issued out of the same court, but between executions issued out of the probate court, and finding their way first into the hands of the sheriff, and a writ of attachment issued out of the district court subsequently, and levied upon the property prior to the time of the levy of executions; and the questions therefore to be determined are, what is the rule of the common law? since, in the absence of statutory direction otherwise, it is provided by section 3874 of the Code of Civil Procedure that "the common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the General Statutes of Oklahoma." Under the statutes of this territory, attachment takes effect from the time that it is executed by the sheriff by his going "to the place where the defendant's property may be found, and declaring that, by virtue of said order, he attaches said property at the suit of the plaintiff." Code Civ. Proc. § 4075. And the levy of the execution is effectual only "from the time they



[that is, the goods and chattels] shall be seized in execution." "By a leading case on this subject (*Payne v. Drewe*, 4 East, 545) it was held 'that where there are several authorities competent to bind the goods of the party when executed by the proper officer, that they should be considered as effectually and for all purposes bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed.' The correctness of this principle has been recognized by the supreme court of North Carolina in the case of *Jones v. Judkins*, 3 Dev. & B. 456. Also by the court of appeals in Kentucky, who say, in *Kilby v. Haggin*, 3 J. J. Marsh. 212: 'As between execution creditors, it is not the date of the execution, nor of its delivery to the officer, but the date of the levy, which gives priority of lien;' and the court there refers to the case of *Tabb v. Harris*, 4 Bibb, 29, and the authorities there cited. The court proceeds to say: 'We not only admit the authority of these cases, but approve them as rational and just. The only object of attaching a lien to an execution is to prevent the debtor from defeating the creditor by alienating or embarrassing his estate. The reason of the law in such a case does not apply to a competition between execution creditors, and cessante ratione cessat lex.' Moreover, it is but sheer justice to give the preference to the creditor who, by his superior industry and vigilance, shall have procured the first levy on the debtor's estate." *Field v. Milburn*, 9 Mo. 492. We find this reasoning confirmed in *Johnson v. Gorham*, 6 Cal. 195, in which it was held that the execution first levied must be first satisfied, though there was an elder execution in the hands of the same officer. Since, in the jurisdiction of that court, no statute had at that time required that "the writ of execution first delivered to the officer shall be first satisfied," the reasoning is applicable to the facts in this case, in the absence of any statute directing what the duty of the sheriff shall be, or what the rights of the creditors are as between a writ of attachment coming into his hands from the district court, after a writ of execution had been placed in his hands from the probate court, and it turned out without fraud or complicity, but simply superior diligence on the part of the attaching creditor, that the attachment was first served. The fact that under our statute personal property is only bound from the time of the actual levy of an execution or an attachment renders the decision of the supreme court of California applicable.

But the question of diverse jurisdiction remains. The question is one between the jurisdiction of the probate court and the jurisdiction of the district court. A similar question was passed upon in the case of *Hagen v. Lucas*, 10 Pet. 400, with this difference:

that an execution was issued out of the district court of the United States, and placed in the hands of the marshal, who sought to levy the first execution upon the property which had been theretofore seized by the sheriff of the state under an execution upon a judgment in the district court of Alabama. It was there said by the supreme court that: "The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other. \* \* \* And where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain, after satisfying the first levy, by the order of the court. But the same rule does not govern where the executions, as in the present case, issue from different jurisdictions. \* \* \* A most injurious conflict of authority would be likely often to arise between the federal and state courts if the final process of the one could be levied on property which had been taken by the process of the other. \* \* \* Property once levied upon remains in the custody of the law, and it is not liable to be taken by another execution in the hands of a different officer; and especially by an officer acting under a different jurisdiction." And it was said by the supreme court of the United States in the case of *Freeman v. Howe*, 24 How. 450, that: "In the case of conflicting authorities under a state and federal process, on which property has been seized, the question as to which authority shall for the time prevail does not depend upon the rights of the respective parties to the property seized, but upon the question which jurisdiction had first attached by the seizure and custody of the property under its process." While, under our statute, therefore, the sheriff is in this proceeding the executive officer of the probate court, as also of the district court, yet, since the statute has made no provision requiring a priority to be reserved as between writs of execution and writs of attachment, and since the statute does fix the right of the property in the creditor who has procured the first seizure of it under his process, and inasmuch as the process of attachment and that of the execution have issued out of different courts, and any other holding might lead to the conflict of jurisdiction between the final order of one court and the final order of the other, and inasmuch as it does not appear, nor is it averred, that the sheriff was in any wise interested in the matter except to discharge his duty, we think that the rule of the common law should be obeyed which has been asserted in the cases hereinbefore recited, and that the jurisdiction which has first attached by a seizure of the property shall prevail. The judgment of the district court will therefore be reversed, and the cause remanded. All the justices concur, except BIERER, J., who presided below.

(5 Okl. 107)

**GUTHRIE NAT. BANK v. McELHINNEY,**  
Mayor, et al.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

**CONSTITUTIONAL LAW—CLAIMS AGAINST PROVISIONAL GOVERNMENTS—DUE PROCESS OF LAW.**

The statutory provision contained in article 1, c. 14, of the Statutes enacted December 25, 1890, providing a commission by which "claims and demands" against the provisional governments which preceded the enactment of that statute, and which attempted to affix such claims and demands upon the city governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, was void. Such claims and demands were incurred only by the persons who contracted them, and not by either a *de jure* or *de facto* municipality; and the legislature had no power to provide the method prescribed in that statute, by which it undertook to affix or determine such liabilities, even if the claims and demands had been incurred by *de jure* or *de facto* predecessors of the municipalities, for the reason that, by the provision referred to, no provision was made by which the municipalities sought to be incumbered should have their day in court, with the right to jury trial and the right to an appeal. The statutory provision referred to sought to affix a liability upon the said cities without due process of law.

(Syllabus by the Court.)

Application by the Guthrie National Bank for mandamus against A. M. McElhinney, mayor of the city of Guthrie, and others. Denied.

Decker, Jones & Devereux, for relator. B. T. Halner, for respondents.

McATEE, J. This was an original proceeding in mandamus. Its object was to enforce the issuance of warrants by the defendants, the mayor and common council of the city of Guthrie, under article 1, c. 14, of the Statutes of Oklahoma of 1890, being "An act for the purpose of providing for the allowance and payment of the indebtedness heretofore created by the people and cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, now consolidated into the village of Guthrie." By this act the district judge of Logan county was authorized to appoint a board of referees, consisting of three disinterested persons, who should pass upon claims and demands theretofore issued by the provisional governments which had been merged into the village of Guthrie. The petition alleged that the claims represented in the litigation were claims found by these referees to have been for "services" rendered to these divisions of the present city of Guthrie, and to have been "meritorious and equitable"; that the action of the referees was afterwards affirmed by the district court; that the court, in pursuance of their finding, ordered the respondents to issue warrants of the city of Guthrie in payment thereof; and that orders were assigned to the plaintiff for value, presented to the council in session, and demands made for the warrants, which were refused. The answer and return to the alternative writ made by the respondent sets up as defenses

that they had, on behalf of the city of Guthrie, no authority, under the laws of the territory of Oklahoma and of the United States, to issue the warrants in question; that article 1 of chapter 14 of the Statutes of Oklahoma of 1890, referred to in the alternative writ herein, is in conflict with section 9 of the organic act of the territory; and that it was in conflict with chapter 818, 24 Stat., being an act to prohibit the passage of local and special laws in the territories of the United States, to limit territorial indebtedness, and for other purposes, approved July 30, 1886; and that article 1 in question is also in violation of the constitution of the United States, which guarantees the right to a trial by jury where the value in controversy exceeds \$20; and that it was void, inasmuch as no provision was made by it for any hearing on the part of the cities therein named before the allowance against them of claims by the commissioners therein appointed, and because it made no provision for an appeal from an allowance of claims by such commissioners against said cities; and that it was in violation of the fifth amendment to the constitution of the United States, providing that no person shall be deprived of life, liberty, or property without due process of law. The petition for the alternative writ, and the answer and return thereto, were both sworn to, and the case is presented upon them.

It has been hitherto determined by this court that the provisional governments for the regulation and arrangement of the affairs of the cities and towns of the territory of Oklahoma which were established prior to the act of congress approved May 2, 1890, were mere voluntary associations of the people living in them, were without legal authority, and had no power to contract debts which should constitute legal obligations upon the municipalities afterwards formed under authority of law. *City of Oklahoma City v. T. M. Richardson Lumber Co.*, 3 Okl. 5, 39 Pac. 386. Recovery in this case is sought upon the grounds that municipal corporations are but the creatures of legislative enactment, and act under the rights, powers, and duties imposed upon and conceded to them by the legislative power; and that it is within the province of the legislature to compel them to pay debts which have a moral and equitable and meritorious basis, notwithstanding that such debts may not be strictly binding under the law for technical reasons, and could not be enforced in equity; yet that the legislature may enforce their payment, and may provide the method in which the municipality shall proceed, and what steps shall be taken, and what its duties shall be, in providing for such claims for public services and expenditures. No authority in support of the doctrine contended for is cited other than that which is derived from instances in which the corporations incurring the liability sought

to be enforced were either corporations de jure or else corporations de facto, exercising the functions of corporations de jure, under laws authorizing such incorporations, and which had failed to complete their organizations under the law, owing to some technical defect or irregularity. No case is referred to in the authorities cited in which the legislative branch has sought to affix a liability to compel payment of "meritorious" or "equitable" claims incurred by such voluntary associations as the provisional governments are held to be, prior to the enactment of the Statutes of 1890. We do not think that legislative authority can under any circumstances go further than to authorize municipal corporations to assume such liabilities, and to make such payments of claims incurred by such municipal corporations or their legal or de facto predecessors, if they see fit to do so; but the provisional governments were organized without authority of law, and in the absence of any law authorizing the incorporation of any municipality, and the liabilities incurred were therefore personal liabilities upon those only who incurred them, and they could not, in law, equity, or reason, be construed into liabilities upon the municipalities which ensued, and which became such under the law, when the law authorizing the creation of municipal corporations came afterwards to be enacted. The obligations incurred were personal only, and were in no sense of such a character as to be devolved upon the subsequent municipalities. Even if the liabilities were of such a character as that the legislature might have authorized their payment, we do not think that the method adopted was such as to affix and determine such liability, in the absence of a provision enabling the municipalities to have their day in court, to avail themselves of the right of jury trial, and of the right to an appeal from the awards made; nor do the provisions of the statute in question constitute that due process of law to which the city, as other persons, is entitled. *City of Oklahoma City v. T. M. Richardson Lumber Co.*, 3 Okl. 5, 39 Pac. 386; *State v. Tappan*, 29 Wis. 664; *Atkins v. Town of Randolph*, 31 Vt. 226; *Inhabitants of Hampshire Co. v. Inhabitants of Franklin Co.*, 16 Mass. 76; *People v. Mayor, etc., of City of Chicago*, 51 Ill. 17. The subject was fully considered at the September term of this court, and passed upon, in the case of *City of Guthrie v. Wylie*, 55 Pac. 103; and the views there expressed are here adopted and reaffirmed. The peremptory writ of mandamus refused. All the justices concur.

(5 Okl. 128)

**LONG v. BOARD OF COUNTY COM'RS.**  
(Supreme Court of Oklahoma. Feb. 12, 1897.)

NEW TRIAL ON MOTION OF COURT.

On December 5, 1895, a judgment was rendered in favor of the plaintiff and against the

defendant. On December 6, 1895, the court set aside said judgment, and continued the cause for trial at the next term. No motion was ever made for a new trial by either party, but the judgment was vacated and a new trial ordered by the court upon its own motion, and without any cause assigned. *Held*, that a trial court has no authority to vacate a judgment or grant a new trial upon its own motion; that a new trial can only be granted upon the initiative of one of the parties to the cause, and upon motion therefor filed within three days from the rendition of the judgment, unless longer time be given for filing such motion, upon good cause shown; that the order of the court vacating the judgment and granting a new trial upon its own motion was without authority of law, and is reversible error.

(Syllabus by the Court.)

Error from district court, Kingfisher county; before Justice John L. McAtee.

Action by William C. Long against the board of county commissioners. Verdict for plaintiff. From an order granting a new trial, plaintiff brings error. Reversed.

Cunningham, Cutlip & Sanders, for plaintiff in error. J. B. Moffett, for defendant in error.

**TARSNEY, J.** This action was commenced by the plaintiff in error, William C. Long, in the district court of Kingfisher county, to recover from the defendants in error, J. D. Mott et al., as the board of county commissioners of said county, compensation and salary due the plaintiff in error, as county clerk of said county; and on the 5th day of December, 1895, a judgment was rendered by said court, upon an agreed statement of facts, in favor of the plaintiff and against the defendants, for the sum of \$2,150.65, and costs of the action. Afterwards, on December 6, 1895, at the same term, the court, upon its own motion, set aside said judgment, and ordered said cause continued for the term, to which order of the court setting aside said judgment the plaintiff at the time duly excepted, and has appealed to this court from said order. No motion was filed in said cause by either party thereto, or any application made to the court for the setting aside of said judgment or the granting of a new trial in said cause; and nothing appears in the record to show the grounds of said order, or for what reason said judgment was set aside and a new trial ordered. The only record of the proceedings appears in the minutes and journal entry of said court, which is as follows: "And, now, on this 5th day of December, 1895, the same being one of the regular judicial days of the regular September, 1895, term of said court, the court, upon consideration, rendered judgment in favor of plaintiff and against the defendants, as board of county commissioners of said county aforesaid, in the sum of \$2,150.65, and interest thereon, and cost of suit, taxed at \$—; and that afterwards, to wit, 6th day of December, 1895, and at the same term of said district court, the court, upon its own motion, set aside and held for naught the judgment ren-

dered in said cause for said plaintiff, and ordered said cause continued for the term, to which the plaintiff duly excepted at the time, and still excepts." [Signed] John L. McAtee, Judge."

This record presents the single question whether the trial court can vacate a judgment and grant a new trial upon its own motion. The Code of Civil Procedure of this territory nowhere, in express terms, authorizes a court to set aside a judgment upon its own motion. By section 586 of the Code, the district court is given power to vacate or modify its own judgments or orders at or after the term at which such judgment or order is made, within the time and in the manner and for the causes specified in the nine subdivisions of said section. The first subdivision limits such powers to the time, manner, and cause prescribed in section 322 of the Code; but this last section relates to the granting of new trials where the grounds therefor could not, with reasonable diligence, have been discovered before, but are discovered after, the term at which the verdict, reference, or decision was rendered or made; and the new trial, in that case, must be upon petition, upon which a summons shall issue. The second subdivision relates to new trials granted in proceedings against defendants constructively summoned; the third, to new trials on account of mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order; and section 587 of the Code provides that proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action. Section 588 of the Code provides that proceedings to vacate or modify the judgment or order on the grounds mentioned in each of the other subdivisions of section 586 shall be by petition, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant, and that on such petition a summons shall issue and be served as in the commencement of an action. Hence we find no authority in section 586 for the district court to vacate or modify a judgment, except upon the initiative of one of the parties to the cause, and then only upon motion, or by petition and summons. The only other provisions of the Code relating to new trials are found in sections 318-322, which provide that a verdict, report, or decision shall be vacated and a new trial granted for causes therein specified. But these sections only provide for the vacating of verdicts, reports, or decisions, and the granting of new trials, on the application of the parties aggrieved; that the application must be by motion, upon written grounds filed at the time of making the motion, and requiring that, as to certain of the grounds specified as cause, they shall be sustained by affi-

davit. Nowhere does the statute provide for vacating judgments or granting new trials except upon a specified cause, and upon the application of an aggrieved party. When the order in this cause was made, there was no motion for a new trial pending before the court. No such motion was ever made by either party, nor was a new trial sought or requested by either party, at any time prior to the granting of the order. The parties to the cause were not before the court for any purpose. The Code affords ample facilities for moving for a new trial, and sets out plainly what shall be done as preliminary to the granting of such motion. This order, we think, was clearly erroneous, and cannot be sustained without making a precedent which would tend to unsettle and confuse the law and the practice regulating the granting of new trials in the trial court, and would be extremely dangerous, as liable to be used to prejudice the substantial rights of parties litigant. Our Code, for the substantial protection of the property rights of litigants, wisely provides that, unless for good cause shown, a motion for new trial must be filed within three days from the rendition of the judgment. If not filed within that time, the judgment may ordinarily be taken as final and conclusive, and the parties have a right to take action and to enter into engagements predicated upon such judgment. It could not but be recognized as an extremely dangerous practice, which might result in great hardships and injuries to litigants, if, after parties to an action had carefully, and with much cost and expense, prepared for trial, perhaps procured the attendance of witnesses from places remote from the place of trial, established their case, and obtained a judgment, and the unsuccessful party had not, within the time prescribed by the statutes, complained of such judgment or moved for a new trial, the court could, of its own motion, and without assigning any cause therefor, at a subsequent day, either at that or another term, arbitrarily set such judgment aside and order it to be retried, and subject the parties to the added cost, inconvenience, and hardship that necessarily result therefrom. Counsel for defendants in error has filed no brief in this court in this cause, and no cases are cited or known to this court which lend the least sanction or countenance to this practice. The order appealed from was made in disregard of plain statutory requirements. A statute in North Dakota (Comp. Laws, § 5091) expressly authorizes the district court to vacate a verdict and grant a new trial on its own motion, and the supreme court of that state has said, "In this state and in the late territory the instances of vacating verdicts and granting new trials without application of the parties have been exceedingly rare, and no such summary action should be taken except on cases falling clearly within the statute." *Gould v. Elevator Co.* (N. D.)

50 N. W. 969. For the reasons stated, we are clearly of the opinion that the order of the court setting aside the judgment in this case, and continuing the cause until the next term for trial, was manifestly erroneous, and the order must be reversed. It is ordered that said order setting aside said judgment be reversed, and this case remanded to the court below, with instructions to vacate said order and reinstate the judgment in said cause rendered on said 5th day of December, 1895.

DALE, C. J. I concur in the conclusion reached in this case, but do not concur in the statement made to the effect that in no case has the trial judge the power to set aside a judgment upon his own motion. I think that where it appears that the judge has been imposed upon in an ex parte proceeding, or where a judgment has been rendered by reason of an improper or collusive agreement between attorneys or parties, the court has the power to set aside such judgment upon his own motion.

The other justices concurring fully, except McATEE, J., not sitting, for the reason that he presided at the trial of the cause in the court below.

(5 Okl. 118)

**MEYER BROS. DRUG CO. v. KELLEY**  
et al.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

APPEAL — WEIGHT OF EVIDENCE — INSOLVENCY —  
CHattel MORTGAGES — ATTACHMENTS  
— PRIORITY.

1. The rule of *Light v. Bank*, 37 Pac. 1075, 2 Okl. 543, and *Bank v. Earl*, 39 Pac. 391, 2 Okl. 617, that where evidence has been produced upon all points necessarily included in the findings made by the trial court, if such evidence reasonably tends to support the findings, such a finding will not be disturbed by this court; and the rule is the same when the case is submitted to the court below without a jury as when a jury is impaneled to try the cause.

2. K., a druggist in insolvent circumstances, executed and recorded a mortgage upon a stock of goods, for \$2,500, to cover an actual indebtedness of \$844.66 due appellant, without appellant's knowledge; expecting to receive further advances and credit from appellant, and to secure from appellant a loan for the purpose of paying off a prior mortgage. Upon being informed of the transaction, appellant declined to accept the mortgage for \$2,500 in the form and manner in which it had been executed and recorded by K., but undertook to "correct" it by taking from K. a new mortgage for the amount actually due, \$844.66, and a note for the same; a part of the arrangement being that it should thereupon execute a release for the \$2,500 mortgage. Before the new mortgage could be recorded, and contemporaneously with the transactions between K. and the appellant, attaching creditors took the stock of goods of K. The trial court, without a jury, sustained the priority of the attachments as against any right now claimed by appellant under the mortgage for \$2,500. *Held*, that this finding and judgment of the trial court were correct, and should be sustained.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Action by the Meyer Bros. Drug Company against D. B. Kelley and others. From a judgment for defendants, plaintiff brings error. Affirmed.

The defendant Kelley was engaged in the drug business in the city of Guthrie, in Logan county, during the year 1889, and up to October 30, 1890; and he was at that date indebted to the appellant company in the sum of \$844.66, and to other creditors, the defendants, in various amounts. On the said date, Kelley, of his own motion, and without consulting the appellant, made, executed, and recorded a mortgage to the appellant, upon his entire stock of goods, for the sum of \$2,500, and executed a note for that amount, payable six months after date. The mortgage was recorded immediately, and the note taken by him to Kansas City, Mo., where he called upon the appellant company, exhibited the mortgage, and asked them to accept it as security for the amount (\$844.66) due from him on November 3, 1890. On November 4, 1890, the stock of goods was seized by the defendant Samuel Westheimer & Co. by virtue of an attachment issued November 4, 1890, from the district court of Logan county. A similar attachment was issued and placed in the hands of the sheriff of Logan county on November 6, 1890, in behalf of the defendants Ferdinand Westheimer & Sons; and on the following day a similar attachment was issued against the defendant Kelley for the sum of \$1,680; and on the — day of November, 1890, the goods were taken possession of by the Commercial Bank under and by virtue of a chattel mortgage theretofore executed and recorded in behalf of the same bank. The prior lien of the Commercial Bank is not contested. The contest is between the attachment lien of Samuel Westheimer & Co. and the others, as against the mortgage for \$2,500 executed to the Meyer Bros. Drug Company without their knowledge, and, as is contended by the appellees, without the consent and approval of the appellant company having been obtained either prior to the execution of the chattel mortgage or subsequent thereto.

Harper S. Cunningham, for plaintiff in error.

McATEE, J. (after stating the facts). While other questions are raised by the pleadings, they were abandoned at the trial, and not argued in the brief of appellant, which presents but a single question, which is the validity of the claim of the appellant company, under the evidence in the case, as mortgagee, against the attaching creditors, the appellees; and this validity is conceded to depend upon the question of fact, which is whether Meyer Bros. Drug Company did in fact ever in any manner sanction the mortgage made by Kelley, for the sum of \$2,500, without

their knowledge, and to cover the indebtedness of \$844.66. The case was on the 12th day of May, 1892, submitted to the court, the intervention of a jury having been waived. Depositions and oral testimony were introduced on behalf of both plaintiff and defendants, and, the cause having been submitted, the issues were found in favor of the appellees.

The motion for a new trial averred that (1) the court erred in deciding for the defendants and against the plaintiff; and (2) in finding that the \$2,500 mortgage given by Kelley to the Meyer Bros. Drug Company was not a prior lien to the attachment liens of the defendants; and (3) in refusing to find that Meyer Bros. ratified the \$2,500 mortgage, to the extent and amount of their claim; and (4) in finding that the execution and delivery of the \$2,500 mortgage to the register of deeds did not constitute a delivery to the Meyer Bros. Drug Company, within the meaning of the law.

The oral testimony of L. P. Smothers, given in court, showed that he was the adjuster and the collector for the appellant company, and resided in Kansas City, Mo.; that the transaction and conversations which he narrated between Kelley and the appellant company occurred on November 3d, when Kelley came to their place of business, at Kansas City, Mo., and stated to him and to Mr. Schulte, who was the general manager of the appellant's business, that: "He had executed a mortgage for the sum of twenty-five hundred dollars in favor of the appellant company, and had placed it on record." And that: "Mr. Schulte at once told him that it was in excess of what he owed us, and that we could not accept a mortgage for more than the amount owing us; that we could not appear to the public as entering into collusion with any one in any way. \* \* \*" That: "We appreciated his voluntary act in securing us, but that the mortgage must be corrected to the proper amount. The plan of correcting it was then brought up, into which I [Smothers] was called more particularly, and I suggested two plans, one of which was to credit on this mortgage note the amount of the excess. The other plan was to execute a new mortgage for the proper amount, and we at once execute a deed of release for the other mortgage." That: "The plan of having a new mortgage for the proper amount executed, and we executing a deed of release, was practicable, from the fact that it would put us right before the world; that the other was in fact all right, but it was a contract of which the world had no knowledge. We then discussed Mr. Kelley's plans, etc., and as to what he wanted to do, in which Kelley stated that his object in making this for such a large sum was that he supposed that he would have to pay off the bank [Commercial Bank], and that his stock had run down, and that he thought he could induce us to

furnish additional stock,—stock him up and start him out afresh, etc.,—to all of which Mr. Schulte declined. This brought us about to closing time, and it was then agreed that I should meet him at his hotel after supper. \* \* \* For that reason we consented to transact his business after supper. According to this arrangement, I went to the Midland Hotel about 8 or 8:30 o'clock. I took with me a blank note, and a Kansas form of a chattel mortgage, which I knew to conform to this form used in the territory. I then filled out this chattel mortgage, and made out this note for \$844.66. \* \* \* I saw the difficulty of executing it. Hence I told him to sign the note, and to take this mortgage back to Guthrie and sign it, and by the next mail I would forward him our deed of release, and he could have them put on record. I took the note, and took it to our office, and Kelley kept the mortgage. Early the next morning of the 4th, I went to our attorneys' office, and had them draw a deed of release for the twenty-five hundred dollar mortgage, and their notary go with me and take the acknowledgment of our vice president and manager, Mr. Schulte. I meant to mail it in time to catch the early mail to Guthrie. I inclosed it, with instructions to take it and the mortgage, recording the deed of release, and then in a few minutes afterwards, record the mortgage, having them come in logical order. \* \* \* On the 6th, I think it was, we received a telegram from Kelley, at Wichita, stating that: 'Commercial Bank closed the store before I got home. What shall I do? Answer here at Hotel Carey. D. B. Kelley.'" This proved correct, and Kelley did not record, but retained, the new mortgage, for the correct amount, in his possession. "Q. What was said by Schulte to Kelley with reference to accepting it, or any portion of that security? A. He stated that he appreciated his voluntary act in securing us, and that he could not accept the mortgage for an excessive amount; that we appreciated his act in attempting to secure us. It seemed that Kelley did not know of the fact that giving a mortgage for a greater sum was looked upon with disfavor in the eyes of the law. He didn't know that it was a badge of fraud. It didn't seem to occur to him that he might be putting himself in a questionable shape. I believe that is about all, except what I have stated in regard to that." On cross-examination, in reply to the question as to what conversation was had between Mr. Kelley and Mr. Schulte, when Kelley arrived from Guthrie, about the \$2,500 mortgage, the witness Smothers again said: "Mr. Kelley stated to Mr. Schulte that he had placed a mortgage on record at Guthrie in favor of the Meyer Bros. Drug Company, to secure them; stating that the amount of the mortgage was twenty-five hundred dollars. That was

about the amount of Mr. Kelley's statement. Mr. Schulte then replied that the house could not accept a mortgage for an amount in excess of what he owed them, and that the mortgage must at once be corrected to the proper amount." The evidence shows that the witness Smothers, being the adjuster and collector of the company, was deferred to as to the proper manner in which the mortgage should be changed or "corrected" so that it would be approved of and accepted by the company, and that the company followed his advice and direction. Under recross-examination he was asked: "Q. Was it not directed by Mr. Schulte, and agreed, that you was to take a new mortgage? A. It was discussed. When they came to the question as to how the mortgage should be corrected, then I was called in more directly. It was referred to me. They turned to me, in cases of that kind, as to how. I mentioned two plans,—one, to credit the excess on the twenty-five hundred dollar note; the other, to execute a release. We decided upon the latter plan, from the fact that it placed the whole transaction before the world in its proper light. Thereupon Mr. Schulte said, 'Go ahead and fix it up.'" The deposition of the witness Smothers showed that, in the conversation with Kelley: "Mr. Schulte then replied that the house could not accept a mortgage for an amount in excess of what he owed them, and the mortgage must at once be corrected to the proper amount." The testimony of Mr. Schulte, by deposition, stated that in a conversation with Kelley, after being informed of the execution of the mortgage for \$2,500: "I told him at once that, as near as I can recollect, his account was between seven and eight hundred dollars, and would necessitate the mortgage being made out to cover that amount and no more, as we had no use for the excess, and did not propose to come into collusion, as we were likely to be, in case there was lawing about it; that all we could claim was the amount he owed us, and did not propose to be secured for any more. Immediately after that a mortgage simply covering the amount due us was made out, and mailed or taken to him,—I don't know which,—to be recorded there. \* \* \* Q. Do you know whether or not any instrument was executed by Meyer Bros. Drug Company at that time with reference to the first mortgage? A. I believe I stated that there was a new mortgage drawn up, simply covering our account, and repudiating the other. Q. I mean, did the Meyer Bros. Drug Company execute any paper? A. I believe there was a paper in the form of a release of the first mortgage drawn."

Upon this testimony, and the other testimony introduced, the court, sitting to pass upon the facts and law, found that the contention of the appellant could not be sustained. The court having heard the evi-

dence below, and having passed upon it, we are not justified here in reversing the conclusion to which it came, there having been under its consideration any evidence tending to support the conclusion at which it arrived. It has been so repeatedly held in this court. *Bank v. Earl*, 2 Okl. 617, 39 Pac. 391. But, if we could do so, we should, upon a consideration of the whole evidence, sustain the judgment of the lower court. The mortgage executed by Kelley, upon his own motion, for \$2,500, to secure an indebtedness of \$844.66, was declared by the manager of the company to be such an act as would "appear to the public as entering into a collusion with the defendant Kelley," and that "they could not accept the mortgage for more than the amount owing us," and that "we could not accept the mortgage for an excessive amount," and "Kelley did not seem to know that a mortgage for a greater sum was looked upon with disfavor in the eyes of the law," and "a badge of fraud," and that it would be putting himself in a "questionable shape," and that "the house could not accept a mortgage for an amount in excess of what he owed them, and that the mortgage must at once be corrected to the proper amount." As between the two plans which were considered by the appellant company for "correcting" the mortgage in question, if the plan had been adopted of remitting the excess immediately upon the note and mortgage for \$2,500, and forthwith accepting the security thus altered, we are not called to determine. The appellant company did not accept this course, but took the course of not "accepting the mortgage," because it was "excessive," appeared as a "badge of fraud," was looked upon with "disfavor in the eyes of the law," and was putting the matter in a "questionable shape." The note for \$2,500 was never placed among the bills receivable of the house, where the appellant company always placed notes which they "relied upon as settling the account. \* \* \* This note was never treated in that way." And it was said again by Mr. Schulte, as repeated in the testimony, "The house could not accept the mortgage for an amount in excess of what he owed them." The mortgage was not in fact accepted. It remained uncorrected. It remained, therefore, in a form in which it "could not be accepted"; and a method was adopted whereby the appellant company did not undertake to "correct" the mortgage then offered, for an excessive amount, but did in fact refuse to accept it, and did adopt another method, which was not by "correcting" the mortgage, but by taking a second one, which they never succeeded in placing on record in time to acquire any right prior to that of the attaching creditors, the appellees.

In passing upon this case, and upholding the conclusion of the court below, we do but follow the natural promptings of justice

in wishing that those who adopt so honorable a course as was chosen by the appellant in this case might always be successful in the courts. The judgment of the lower court is affirmed. All the justices concur.

(5 Okl. 141)

BLEVINS v. MORLEDGE et al.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

NEW TRIAL—TIME FOR MOVING—REFERENCE—AUTHORITY OF REFEREES—APPEAL—REVIEW.

1. Upon the return of a report of referees in to court, and exceptions having been filed thereto, the court, on the 3d day of November, 1894, overruled these exceptions, to which ruling exceptions were reserved; and, a motion to confirm the report of the referees being sustained, judgment was entered thereupon. At the time the court made this entry, no further time was given by the court within which to make and serve a case-made, but motions to vacate the judgment and grant a new trial were made and filed on November 6, 1894. *Held*, that the motion for a new trial was made within three days after a "decision of a court," and was in time to bring the case here and give this court jurisdiction.

2. A reference having been made to three referees, one of whom failed to appear and qualify, the remaining two having qualified and having heard the case and made their report, such report is valid and binding upon the parties agreeing to the reference, under the provision of section 2695, St. Okl. 1893, providing that: "Words giving joint authority to three or more public officers, or other persons, are considered as giving such an authority to a majority of them, unless otherwise expressed in the act giving the authority."

3. An objection that the trial of the referees was held in the state of Kansas, outside of the jurisdiction of this court, is untenable where the point was not raised at the trial, and where it does not appear that the decision was made outside of the jurisdiction.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Replevin by Morledge and Allen against James Blevins. From a judgment for plaintiffs, defendant brings error. Affirmed.

This proceeding was begun November 21, 1893, and upon December 23, 1893, submitted to referees agreed upon by the parties, under a stipulation which provided: "That said parties shall hear and determine all issues of law and fact in said cause, and report thereon in accordance with the statutes of Oklahoma territory in such case made and provided." The referees were Pile, Remick, and Hollingsworth, all citizens of Kansas, and it was agreed that they should sit as referees, and hear the cause in Arkansas City, Kan. The district judge in chambers thereupon ordered and adjudged a reference in the terms, at the place, and to the persons agreed upon. A report and accompanying exhibits of the referees were filed in the district court of Logan county in the cause on the 7th day of January, 1894. The plaintiff in error (defendant below), on the 24th day of April, 1894, filed exceptions to the report

of the referees, and moved to set it aside. On the 3d of November, 1894, these exceptions were overruled by the court, and exceptions reserved to the ruling, and, a motion to confirm the report of the referees being sustained, judgment was entered thereupon. At the time the court made this entry, no further time was given by the court within which to make and serve a case. Motions were made to vacate the judgment and to grant a new trial, which were filed on November 6, 1894, and heard and overruled on the 31st day of December, 1894, and 30 days' time given to make and serve a case for the supreme court. The case-made was served within the time granted on the 31st day of December, 1894. It was not, however, served for more than 60 days after the orders complained of, which were made upon the 3d day of November.

Baker & De Bois, for plaintiff in error.  
Pollock & Love and Asp, Shartel & Cottingham, for defendants in error.

McATEE, J. (after stating the facts). It is the contention of the defendants in error that the case was filed in this court out of time; that it should have been served within the statutory time,—three days after the orders of November 3d,—and because no time was granted at that time extending the time for such service; and that the motion for a new trial in a proceeding like the present must come up on exceptions to the report of the referees, and that the exceptions to the report of the referees, as in other similar cases, were in the nature of a motion for a new trial. It is provided in section 313 of the Code of Civil Procedure that: "A new trial is a re-examination, in the same court, of an issue of fact, after a verdict by a jury, report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated and a new trial granted, on the application of the parties aggrieved, for any of the following reasons." The referees were in this case authorized to "hear and determine all issues of fact and law in this cause, and report thereon." Upon this report a motion to confirm was made, considered by the court, and sustained, and a judgment entered thereon. While the matter acted upon was contained in the report of the referees, yet, being but a report, it presented matters not only of law, but also of fact, upon which a "decision of the court" was had before the report could have been sustained, and a judgment entered; and the motion for a new trial was properly made after such "decision of the court" was made. Nor could the appellant have known, until upon the 3d day of November, 1894, that the court, by its decision, and upon then finally reviewing the action of the referees, would "confirm their report," and enter judgment thereon. We cannot, therefore, sustain this



contention, but must hold that the cause is regularly here; the motion for a new trial, made upon the 6th day of November, 1894, having been filed in time. We have examined the cases referred to in the brief of the defendants in error, but do not find that they sustain the view there sought to be upheld. It appeared from the record that the attorney for the plaintiff in error had appeared at the hearing before the referees, and, after objecting to any action being taken in the cause, "had advised Hollingsworth," as he said, "one of the referees, not to appear and qualify, and that he therefore objected to any action being taken by the referees in this cause," and that Hollingsworth accordingly refused to appear and qualify and act as a referee.

It is assigned for error that the failure of the referee Hollingsworth to appear and act with the other referees invalidates the acts of the referees, and their entire report. It is provided in section 2695, St. Okl. 1893, that: "Words giving a joint authority to three or more public officers, or other persons, are considered as giving such an authority to a majority of them, unless it is otherwise expressed in the act giving the authority." Authority is "(1) legal or rightful power," and "(5) a precedent, a decision of a court, an official declaration." *Webst. Dict.* The three referees having, by words giving them the joint authority to act as such referees, been legally and rightfully empowered to make a "decision" and an "official declaration," and under our statute, therefore, two of them, being a majority, were authorized to act, it not having been otherwise expressed in the act (that is, the stipulation and order of the court) giving the authority." The comprehension of the case under the provision of this statute is not to be doubted, for all the cases of "joint authority" are comprehended in its provisions, and the jurisdiction which the district court of Logan county had over this case and undertook to exercise, as the statute provides, in appointing the referees at the request of the parties to the case was nothing more or less than that authority given to judicial officers to take cognizance of and decide cases, and authority to hear and determine a cause is constantly interpreted as the equivalent of jurisdiction. *Cooper v. Reynolds*, 10 Wall. 317; *Underwood v. McDuffee*, 15 Mich. 368; *Shumway v. Bennett*, 29 Mich. 452; *Cole v. Superior Court*, 63 Cal. 86; *Sheldon's Lessee v. Newton*, 3 Ohio St. 494; *Worcester v. Georgia*, 6 Pet. 591; *Brownsville v. Basse*, 43 Tex. 449. It is, however, assigned as error that the referees were empowered to act as such referees at Arkansas City, in the state of Kansas, and that this is error. We do not think that this assignment is well founded. Upon this subject it has been decided that, while it is true that the reference, if required, must be held within the jurisdic-

tion, yet, the objection that the trial was held outside the jurisdiction is untenable where the point was not raised at the trial, and where it does not appear that the decision was made outside the jurisdiction. *Blake v. Manufacturing Co.*, 77 N. Y. 626.

It was again assigned as error that the report of the referees was not, in fact, such as was required by the law in suits of replevin, inasmuch as the referee did not fix a specific valuation upon each piece of property replevied. No demand was made for such "specific valuation," and no aid furnished by the plaintiff in error, to the referees at the hearing before them to make it, and no exception was taken to the manner in which their report was made as to the valuation of the property replevied by the appellant. The point was, therefore, waived.

The defendant (plaintiff in error) assigns as error that he did not have a trial by jury. This was waived by his agreement to a reference. Other assignments of error were made, but were abandoned, not having been argued in the briefs. The case will be affirmed. It is so ordered. All the justices concur, except DALE, C. J., who presided below.

(5 Okl. 78)

#### WRIGHT v. TERRITORY.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

ALIBI—BURDEN OF PROOF—INDICTMENT FOR MURDER—SUFFICIENCY—DEFECTS WAIVED.

1. An instruction to the jury that, when the defense of alibi is interposed by the defendant, it is incumbent upon him to establish same by a preponderance of the evidence, *held* erroneous, and a sufficient ground for reversing the case. *Shoemaker v. Territory* (Okl.) 43 Pac. 1059, followed.

2. An indictment which does not charge that the acts by which the killing was accomplished, and the killing itself, were perpetrated by the accused with the premeditated design or intent to effect the death of the person killed, is insufficient to support a conviction of murder (following *Holt v. Territory* [Okl.] 43 Pac. 1083; *Jewell v. Territory*, *Id.* 1075); but this court is not required to examine, and pass upon the validity of, an indictment unless the same has been challenged by some proper proceeding in the trial court.

(Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice John L. McAtee.

John Wesley Wright, the defendant below, was indicted, tried, and convicted of murder, and appeals. Reversed.

W. A. McCartney, E. O. Taylor, and Buckner & Sons, for appellant. C. A. Galbraith, Atty. Gen., for the Territory.

KEATON, J. While the record in this court by appellant is very voluminous, and a number of errors have been assigned thereon, but two are urged by his counsel, which we shall consider in their order.

In the eighth assignment of error appellant complains of the giving of certain instruc-

tions, among them being the following, relating to the defense of an alibi, which he interposed at the trial of the cause: "(31) The burden is upon the defendant to prove this defense for himself, by the preponderance of the evidence; that is, by the greater and superior evidence. The defense of alibi, to be entitled to consideration, must be such as to show, at the very time of the commission of the crime charged, the accused was at another place so far away or under such circumstances as, with all means of travel within his control, to reasonably exclude the possibility that the defendant could have reached the place where the crime was committed, so as to have participated in the commission thereof,"—to the giving of which instruction the defendant duly excepted. This court, on February 13, 1896, in the case of *Shoemaker v. Territory*, 43 Pac. 1059, held an instruction in the identical language of the one under consideration to be erroneous, and the giving of same a sufficient ground for reversal. We have carefully reviewed said decision, and the authorities therein cited and relied upon, and find no reason for changing or modifying the conclusion there reached. On the contrary, a re-examination of the authorities upon this question has tended to convince us more firmly that the law, as announced in said decision, is correct. Under the tenth assignment of error, which is as follows: "Said court erred in rendering judgment on the verdict of the jury," appellant's counsel endeavor to attack the indictment returned against him in the court below. We do not believe that the above assignment can be so construed as to support their contention, nor does the record filed in this court disclose that any such objection was made to said indictment in the district court as to entitle appellant to have the sufficiency of same passed upon by this court, as it is not shown to have been challenged by a motion to set aside demurrer, motion in arrest of judgment, or in any other manner. But, as the case must be reversed and remanded for further proceedings, and as the indictment will doubtless be properly attacked by defendant immediately after the cause reaches the trial court, we deem it proper to examine same and pass upon its validity. Under the former decisions of this court, the indictment is clearly insufficient to support a conviction of murder, as it is nowhere stated therein that the acts by which the killing was accomplished, and the killing itself, were perpetrated by the accused with the premeditated design or intent to effect the death of the person killed. *Holt v. Territory* (Okla.) 43 Pac. 1083; *Jewell v. Territory*, Id. 1075. The charging part of said indictment is in the following language: "That Wesley Wright, on the 15th day of August, A. D. 1894, in Kingfisher county, Oklahoma territory, in and upon one George Curtis, then and there being, willfully, unlawfully, purposely, feloniously, and of his deliberate and premeditated malice

to kill and murder, and that the said Wesley Wright, a certain shotgun then and there charged with gunpowder and leaden bullets, which the said shotgun he, the said Wesley Wright, in his hands then and there had and held, there and then willfully, unlawfully, purposely, feloniously, and of his premeditated malice, did discharge and shoot off, to, at, against, and upon the body of him, the said George Curtis; and that he, the said Wesley Wright, with the leaden bullets aforesaid, out of the shotgun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Wesley Wright discharged and shot off as aforesaid, then and there, willfully, unlawfully, purposely, feloniously, and of his deliberate and premeditated malice, did strike, penetrate, and wound, with the intent aforesaid, thereby then and there giving to the said George Curtis, in and upon the body of him, the said George Curtis, then and there with the bullets aforesaid so as aforesaid discharged and shot out of as aforesaid, by force of the gunpowder aforesaid, by the said Wesley Wright, in and upon the body of him, the said George Curtis, one mortal wound of the depth of about ten inches, and of the breadth of about one-half inch, of which said mortal wound he, the said George Curtis, on and from the 11th day of August, A. D. 1894, until the 17th day of August, A. D. 1894, in said county did languish, and languishing did live, on which said 17th day of August, A. D. 1894, in which said aforesaid year he, the said George Curtis, in said county, of said mortal wound aforesaid died." As the other errors assigned, if tenable, are not likely to occur again upon another trial of the case, and are not urged by counsel for appellant, it is not necessary to give them any consideration. The judgment of the district court is reversed, a new trial ordered, and the cause remanded for further proceedings in accordance with this decision. All the justices concur, except McATEE, J., who tried the case below, and therefore takes no part in this decision.

(5 Okl. 99)

#### LEWIS v. ATHERTON.

(Supreme Court of Oklahoma. Feb. 12, 1897.)  
UNRECORDED DEED—SUBSEQUENT JUDGMENT LIEN  
—PRIORITY.

Under section 13, c. 21, St. 1893, a judgment, in the district court, against parties who had been seised of real estate, and in whom the title still appears of record, becomes a lien upon the property, notwithstanding that the judgment debtors had previously executed a deed conveying said real estate to a third party, regardless of whether the judgment creditor had actual notice of such conveyance or not.

(Syllabus by the Court.)

Error to district court, Payne county; before Justice Frank Dale.

This is an action of injunction, brought by Ervin C. Lewis against James Atherton, as sheriff of Payne county, Okla. T., to restrain

him from selling blocks 2 to 10, inclusive, of Lewis' First addition to the town of Stillwater, in said county and territory. From a judgment sustaining a demurrer, plaintiff brings error. Affirmed.

Neill & Clark, for plaintiff in error. King & Hutto, for defendant in error.

KEATON, J. The trial court sustained a demurrer to the plaintiff's petition, and plaintiff brings the cause here to review this ruling of said court. Plaintiff's said petition, omitting the caption, is as follows:

"Now comes the above-named plaintiff, and for his cause of action against the above-named defendant says that he is the owner (in fee simple) of the following described real estate, to wit, 'Blocks two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), and ten (10), in Lewis' First addition to the town of Stillwater, in the county of Payne, and territory of Oklahoma'; and that plaintiff was the owner of said above-described real estate on the 9th day of January, 1895, and long prior thereto, as shown by warranty deed, a copy of which is hereto attached, marked 'Exhibit A,' and made a part hereof. Plaintiff further says that the defendant, James Atherton, has levied on said above-described real estate by virtue of an execution issued by the clerk of the district court of Payne county, Oklahoma territory, upon a judgment rendered in said court in favor of Clinton L. Caldwell, assignee of Angel Mathewson and Company, against Vessa Lewis and George W. Lewis; and plaintiff says that he is not now, nor ever was, indebted to Clinton L. Caldwell, or Angel Mathewson and Company, and that the said Vessa Lewis and George W. Lewis have no interest in said above-described real estate, and had no interest in said above-described real estate at the time of issuing said execution; and that the defendant has advertised said described real estate to be sold at sheriff's sale on the 1st day of April, 1895, at 2 o'clock, p. m., and that the defendant will, unless restrained by this court, proceed to sell said real estate, and thereby work an irreparable injury and damage to plaintiff; that plaintiff has no adequate remedy at law. Wherefore plaintiff prays the court for a temporary injunction restraining defendant from selling or disposing or in any way interfering with said real estate until the final hearing of this cause, and that upon the final hearing said injunction be made perpetual, and for such other and further relief as the court may deem just and equitable Neill and Clark, Attorneys for Plaintiff.

"Ervin G. Lewis, being duly sworn, says that he has read the above and foregoing petition, and that the same is true. Ervin G. Lewis.

"Subscribed and sworn to before me this 20th day of March, 1895. W. L. Norman,

Dep. Dist. Clerk. District Court [Seal] Payne County, O. T."

The demurrer thereto is upon the ground that "said petition does not state facts sufficient to constitute a cause of action."

The petition in this case, including the exhibit attached thereto, and made a part thereof, shows that plaintiff in error purchased the land described therein from Vessa Lewis and George W. Lewis, husband and wife, on the 19th day of January, 1894, for the sum of \$100, receiving a deed therefor, which was filed for record in the office of register of deeds of said county on March 5, 1895, at 1 o'clock p. m.; that Clinton L. Caldwell recovered a judgment against the grantors of plaintiff in error, and had an execution issued thereon, and at the time of the commencement of this action James Atherton, as sheriff of said county, was proceeding to sell said real estate under said execution; but the petition does not disclose the date of said judgment, or even the date on which execution issued thereunder. It is true that plaintiff alleges in his said petition that his grantors, Vessa Lewis and George W. Lewis, "had no interest in said above-described real estate at the time of issuing said execution," but this allegation does not disclose when said judgment was obtained or the execution issued; hence we think it extremely doubtful whether or not said petition is sufficiently definite to present the question argued by counsel for plaintiff in error in their brief, to wit, the validity of an unrecorded deed of conveyance as against a subsequent judgment lien covering the same real estate; but, as this question is one of considerable importance, and has never been passed upon by this court, we shall assume that the petition is sufficiently definite to fairly present the same, and which, it seems to be conceded, the actual facts, if properly pleaded, would present. The determination of the proposition presented requires a construction of section 13, c. 21, p. 379, St. Okl. 1893, which is in the following language: "All deeds, conveyances or agreements in writing affecting the title to real estate, interests therein, and powers of attorney, for the conveyance of real estate or interest therein, only [duly] acknowledged or proven, may be recorded in the office of the county clerk, or the recorder of deeds, if the office of the recorder of deeds is separate from that of the county clerk, wherein such real estate is situated, and from and after the filing thereof, for record in such office, and not before, such deeds, conveyances and agreements shall take effect as to consequent bona fide purchasers, and incumbrances by mortgages, judgment or otherwise,"—in connection with section 432 of the Civil Code (St. Okl. 1893), which provides that "judgments of courts of record, of this territory, and of courts of the United States rendered within this territory, shall be liens on the real estate of the debtor,

within the county in which the judgment is rendered, from the first day of the term at which the judgment is rendered."

Counsel for plaintiff in error cite a number of decisions, and we have examined as many of them as could be found. We consider many of the cases so cited inapplicable, and do not think any of them support the contention of counsel, unless it be *Holden v. Garrett*, 23 Kan. 99, which we shall notice later. *Brown v. Pierce*, 7 Wall. 205, *Baker v. Morton*, 12 Wall. 150, and *Galway v. Malchow*, 7 Neb. 285, are cited in the brief of counsel for plaintiff in error as supporting their contention. These decisions are all based upon the recording act then in force in Nebraska, which is in the following language: "All deeds, mortgages, and other instruments of writing which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to the clerk for record, and not before, as to all creditors and subsequent purchasers, in good faith without notice, and all such deeds, mortgages and other instruments, shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments, shall be first recorded: provided that such deeds, mortgages, or instruments shall be valid between the parties." Section 16 of chapter 73 of the Compiled Statutes of Nebraska is identical with the section just quoted, except that instead of the word "clerk" the words "register of deeds" are used. In *Galway v. Malchow*, supra, the supreme court of Nebraska quote the following section from the Revised Statutes of Illinois: "All deeds, mortgages, and other instruments of writing, which are authorized to be recorded, shall take effect and be in force from and after the time of filing same for record, and not before, as to all creditors and subsequent purchasers without notice, and all such deeds, and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record;" and then say: "Under the operation of this section the supreme court of that state has held that, as between an attachment or judgment creditor and the grantee in an unrecorded conveyance, the former is to be preferred,"—citing cases; and then proceed: "While there can be no doubt of the soundness of the rule adopted in these cases under the statutes of Illinois, which makes an instrument void 'until the same shall be filed for record,' it is very clearly inapplicable to ours, which makes it void only as to 'such creditors and subsequent purchasers' without notice, whose deeds, mortgages, and other instruments, shall be first recorded.

\* \* \* This section evidently has no reference whatever to simple judgment creditors, who, by force of another statute (section 477, Code Civ. Proc.), have a general lien up-

on all of the lands of the debtor lying within the county where the judgments are rendered." And further on in this said opinion the supreme court of Nebraska say: "As we have already shown, our recording act confers no advantage whatever upon a mere judgment creditor whose lien upon the estate of his debtor is declared by another statute. \* \* \* We are of the opinion, therefore, that under the statute in question the liens of these judgment creditors have no standing as against the equitable liens of the prior mortgages."

Several Iowa cases are also cited by counsel for plaintiff in error in their said brief as supporting their position, but these decisions are all based upon a statute which provides "that no instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless recorded." See *Evans v. McGlasson*, 18 Iowa, 150. In discussing the question of whether or not, under this statute, a judgment creditor has a prior lien to that of a mortgagee holding an unrecorded mortgage, the supreme court of Iowa use the following language: "Now how is it with the plaintiff in this suit? He obtained, it is true, a judgment without notice, which took effect as a lien on the property in controversy; but this did not make him a purchaser, nor give him a preference over prior equities or unrecorded mortgages, simply because our registry laws do not protect judgment creditors as they do purchasers. When he afterwards became a purchaser at sheriff's sale under his judgment, he did so with notice of defendant's mortgage; and, thus being affected with notice, he was not a bona fide purchaser. Had he regarded this notice he would not have purchased, and thus unnecessarily have incurred the hazard of loss. Under the recording acts of 1843, the plaintiff would have been brought within the rule laid down in the case of *Brown v. Tuthill*, 1 G. Greene, 190, and of *Martin v. Dryden*, 1 Gilman, 217, because these acts placed a subsequent purchaser and a judgment creditor without notice on the same footing, and protected each alike against prior unrecorded equities. But the Code has materially changed the recording acts, and hence the authorities no longer apply, nor do the other authorities referred to by plaintiff's counsel from Ohio, Pennsylvania, Massachusetts, Kentucky, and Tennessee, for the reason that they are founded upon express legislative enactments to the effect that judgments shall be preferred to unrecorded mortgages and deeds, or that such instruments possess no validity until after they are recorded." See *Seever v. Delashmutt*, 11 Iowa, 174.

Several California cases are also cited in support of the contention of plaintiff in error, but these decisions are based upon a recording act very similar to those of Nebras-

ka and Iowa. In the case of *Hunter v. Watson*, 12 Cal. 363, the supreme court of that state, in discussing this question, say: "It is not necessary to review the various decisions of this court. The questions we are considering turn upon the proper construction of the twenty-fourth and twenty-sixth sections of the recordation act of 1850. This is the language of the twenty-fourth section, as amended in 1855: 'Every conveyance of real estate, and every instrument of writing, setting forth an agreement to convey any real estate, or whereby any real estate may be affected, proved, acknowledged, and certified in the manner prescribed in this act to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such record.' The twenty-sixth section is as follows: 'Every conveyance of real estate within this state, hereafter made, which shall not be recorded as provided in this act, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded.' It would seem that the legislature designed, in the twenty-fourth section, to hold that the recording of the deed was necessary to give notice of it to third persons, and supposed that the want of such notice invalidated the deed as to them; but that afterwards the twenty-sixth section was inserted, which was intended to qualify and limit the effect of this provision. The twenty-sixth section is taken from the legislation of New York on that subject, and is in the words of a section of the statute of that state. Taking both sections together, it seems evident that the true construction is that the failure of a grantee to record a deed does not absolutely and without exception avoid the deed as to third persons; for, if it did, it is impossible to give effect to the words 'bona fide purchaser for a valuable consideration.' The failure to register only protects this class of persons." And in *Wilcoxson v. Miller*, 49 Cal. 193, it is held that: "The plaintiffs claim that the sheriff's deed has priority over that of Morton to Messick, on the ground that the lien of their judgment is a conveyance within the meaning of the registry act; but there is nothing in the act which gives countenance to that position, and there is no ground upon which the priority claimed for their judgment lien can be maintained."

We now come to the case of *Holden v. Garrett*, supra, upon which counsel for plaintiff in error chiefly rely. The recording act, which, in part at least, controlled the decision of this case, is quite different from ours, and provides that:

"Sec. 19. Every instrument in writing that conveys any real estate or whereby any real

estate may be affected, proved or acknowledged, and certified in the manner hereinbefore prescribed, may be recorded in the office of register of deeds of the county in which such real estate is situated.

"Sec. 20. Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same, with the register of deeds for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice.

"Sec. 21. No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record."

Comp. Laws Kan. 1885, c. 22, p. 207.

Justice Brewer wrote the opinion of the court in said case, and his reasoning on the question is, in part, as follows: "With much hesitation, and after a long and careful examination of the question in its various relations, we have reached the conclusion that the lien of the mortgage must be adjudged prior and paramount. These are the reasons which have controlled us: It gives exact force to the statute declaring to what a judgment lien and an execution levy extend. Judgments 'shall be liens on the real estate of the debtor within the county.' Dassler's Comp. Laws 1879, p. 656, § 419. This evidently contemplates actual, and not apparent, ownership. The judgment is a lien upon that which is his, and not that which simply appears to be his. How often the legal title is placed in one party when the equitable title, the real ownership, is in others. Many reasons induce this,—convenience in managing, facility in passing title, number of parties interested, and others needless to mention. And yet the record discloses only the naked legal title. Now, if the judgment is a lien upon all that appears, it will cut off all the undisclosed equitable rights and interests. To extend the lien to that which is not, but which appears of record to be, the defendant's, is to do violence to the language. 'Real estate of the debtor' plainly means that which is in fact of or belonging to the debtor. And he who claims under a judgment lien can take no more than the statute gives. The question is not what rights some one else may have, but what rights does he acquire?" While we have great respect for the ability of the learned justice who wrote the language above quoted, yet we cannot agree with the reasoning thereby expressed. We do not doubt the correctness of the conclusion arrived at in the case just cited and quoted from; for we think that, construing sections 20 and 21 together, the legislature intended to provide that no such instrument should be valid, as to all subsequent purchasers and mortgagees without actual notice thereof, until it was deposited for record. But, after giving to section 21 the

broad meaning which Justice Brewer seems to do, we think the better reasoning would be to say that, except as to the parties themselves and others having actual notice of such an instrument, no conveyance was made and no title whatever passed from the grantor to the grantee. This view has been repeatedly expressed by the supreme court of the state of Ohio in construing a similar statute which declares that all mortgages "shall take effect from the time they are recorded." *Stansell v. Roberts*, 13 Ohio, 148; *Mayham v. Coombs*, 14 Ohio, 429; *White v. Denman*, 16 Ohio, 60; *Holliday v. Bank*, Id. 534. The statute of this territory upon the question under consideration is much more explicit than that of any other state to whose statutes we have had access. By our statute, judgment liens are specifically made superior to titles which can be conveyed by unrecorded, though previously executed, instruments; hence, to give an unrecorded deed precedence over a subsequent judgment lien, we must nullify or repeal this statute, and would thereby assume the functions of a legislative body, instead of performing the duties of a court. We have been unable to find a single decision, based upon a statute similar to ours, which holds that a judgment lien is inferior to a title acquired by a previously executed, unrecorded deed or mortgage.

In addition to the decisions of the supreme courts of Ohio and Illinois, our view of this question is supported by decisions of the supreme courts of Minnesota and New Jersey. See *Dutton v. McReynolds* (Minn.) 16 N. W. 468, where it is held that "a judgment docketed against one who had been seised of real estate, and in whom the title still appears of record, becomes a lien upon the property, notwithstanding a prior unrecorded conveyance of it by the debtor, the judgment creditor having no notice of such conveyance." Also *Howell v. Brewer* (N. J. Ch.) 5 Atl. 137, and *Roane v. Baker* (Ill. Sup.) 2 N. E. 501. The same rule of construction is announced in the text-books. See *Tied. Real Prop.* § 817, p. 808, where it is stated that: "When, however, the recording laws declare that a judgment lien shall have precedence over the unrecorded mortgage or a conveyance, the statutory provision must prevail, giving to the judgment lien priority over the unrecorded mortgage, even though the judgment creditor knew, when the judgment was docketed, that such unrecorded mortgage existed." While it is true, as suggested by counsel for defendant in error in their brief, that the question of whether or not a different rule would obtain if the judgment creditor had notice of the conveyance prior to his obtaining the judgment, is not raised by the pleadings in this case, yet we feel warranted in saying that, under the recording act of our statutes, it is immaterial whether or not a judgment creditor has notice of a former deed, mortgage, or other unrecorded instrument of conveyance. It is only necessary that the judgment be bona fide,—

meaning, we presume, that it must be a valid one; i. e. that it be based upon a legal consideration, and not tainted with fraud. Without assuming here to state exactly what the legislature meant by the term "bona fide" as applied to judgments, we are certain that knowledge of an unrecorded instrument of conveyance executed by his debtor on the part of a judgment creditor prior to acquiring his judgment would have no tendency to affect the bona fides thereof. Finding no error in the record, the judgment of the district court is affirmed, at the cost of plaintiff in error. All the justices concur, except DALE, C. J., who presided at the trial of the case below, and therefore takes no part in this decision.

(5 Okl. 379)

## In re GRIBBEN.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

MUNICIPAL CORPORATIONS—POWERS—CIVIL RIGHTS—HABEAS CORPUS—WHEN GRANTED.

1. A city ordinance providing that "the making of any noise upon the streets or sidewalks of the city, by means of drums or musical instruments or otherwise, of such a character, extent and duration as to annoy and disturb others, is hereby prohibited; and it is hereby made the duty of the mayor and the city marshal to order any person or persons, making such noise, to desist therefrom, and the failure or refusal of such person or persons to promptly obey such order of the mayor or city marshal is hereby declared to be a misdemeanor,"—and providing punishment therefor by fine or imprisonment, is invalid, because unreasonable, and not essential or indispensable to carrying into effect any of the purposes for which a city is created, and is oppressive and in contravention of common rights.

2. A person, in arrest upon a warrant charging a violation of a city ordinance that is void, may be released therefrom by habeas corpus proceedings. In such case the party in arrest need not submit to trial in the court issuing such warrant, and is not compelled to seek relief by appeal or proceedings in error.

3. Where the imprisonment is upon process erroneously or irregularly issued, the party seeking relief must proceed by appeal or proceedings in error; but, where there is an entire want of jurisdiction in the court to issue the process, habeas corpus is the proper remedy.

(Syllabus by the Court.)

Habeas corpus by Carrie Gribben for release from imprisonment. Prisoner discharged.

Redick, Lewis & Snyder, for petitioner.  
W. R. Taylor, for respondent.

TARSNEY, J. The petitioner, Carrie Gribben, was, on the 5th day of July, 1895, while engaged in religious work as a member of a religious organization known as the "Salvation Army," and holding religious services on a public street of Oklahoma City, arrested by J. H. Boles, the respondent, as chief of police of said city, and taken into custody, under a warrant issued by the police judge of said city, charging petitioner with violating an ordinance of said city by making a

noise upon the streets of said city, by beating a drum therein, said noise then and there made being of such a character, and to such an extent, and at such a time and place, as would be likely to cause horses and teams to become frightened and ungovernable, and of such a character, extent, and duration as to annoy and disturb other persons. She (the said petitioner) was then and there requested and ordered by the marshal of said city to desist from making such noise, and she then and there failed and refused to obey said order,—contrary to the ordinances and against the peace and quiet of said city. The ordinance referred to in said warrant, and upon which said warrant was based, was Ordinance 104 of said city, entitled "An ordinance to restrain and prohibit the use of drums and other musical instruments on the public streets, within the limits of Oklahoma City, which becomes an annoyance and a nuisance to the public, and dangerous to public safety." Said ordinance was as follows: "Be it ordained by the mayor and councilmen of the city of Oklahoma City, O. T.: Section 1. That the making of any noise upon the streets or sidewalks of the city, by means of drums or musical instruments or otherwise, of such a character, extent and duration as to annoy and disturb others, is hereby prohibited; and it is hereby made the duty of the mayor and the city marshal to order any person or persons, making such noise, to desist therefrom, and the failure or refusal of such person or persons to promptly obey such order of the mayor or city marshal is hereby declared to be a misdemeanor, and upon conviction thereof such person or persons shall be punished by a fine of not less than five dollars and not more than one hundred dollars for each offense, in the discretion of the court, and shall be imprisoned in the county jail until such fine and cost of the prosecution are paid." The validity of this ordinance is disputed by the petitioner on the ground that the city council had no authority to pass said ordinance or any ordinance of such a nature; that said ordinance is void because indefinite and uncertain, because it confers arbitrary powers upon officers of the city; that it is unreasonable, does not operate uniformly and impartially, and contravenes common rights; that it was not passed for the furtherance of any public purpose, for which said city was authorized by law to make by-laws or ordinances, but was passed by said city council with the view and for the purpose of suppressing the Salvation Army, and for the purpose of preventing the members of said Army from worshipping God and conducting religious services in accordance with the requirements and rules of said organization. A municipal corporation has no inherent jurisdiction to make laws or adopt regulations of government. They are governments of granted and enumerated powers, acting by

delegated authority. The charter or the general law which creates them is their constitution, in which they must be able to show authority for the acts they assume to perform. While state legislatures may exercise such powers of government, coming within a proper designation of legislative powers, as are not expressly or impliedly prohibited, the legislative body of a municipal corporation can exercise those powers only which are expressly or impliedly conferred by charter or the general law. The general scope, plan, and purpose in the creation of municipal corporations, as deducible from their charters or general laws under which they are organized, is the aiding of the state, within the local district for which they are created, in protecting the public peace and order, the public health, public morals, public safety, public convenience, and the trade and commerce of the inhabitants. For the carrying out of these objects and purposes, not only must there be a direct grant of authority and power therefor from the state, but the exercise of such power by the corporation must be reasonable and not inconsistent with the laws or general policy of the state, must not be oppressive nor partial nor unfair, nor make special or unwarranted discriminations, and must not contravene common rights. It is essential to the validity of an ordinance—First, that the power to ordain such ordinance has been delegated and granted to the corporation by the legislature; and, second, that such power has been exercised in conformity with the rules we have just stated.

To determine the validity of the ordinance in question in this case, we must first determine whether there has been a grant or delegation of authority by the legislature of the territory to the city of Oklahoma City to pass such ordinance. The city of Oklahoma City was not created by special charter, but is organized as a city of the first class under the provisions of a general law of the territory, being chapter 14 of the Statutes of 1893. Mr. Dillon, in his work on Municipal Corporations (1 Mun. Corp. [3d Ed.] p. 115), says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no other: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the court against the corporation, and the power is denied. Of every municipal corporation, the charter or statute by which it was created is its organic act. Neither the corporation nor its officers can do any act or make any contract or incur any liability not authorized thereby. All acts beyond the scope of the powers granted are void." The only provisions in the Statutes of Oklahoma which

confer upon municipal corporations police powers in any degree similar to the power attempted to be exercised under the ordinance in question in this case are found in section 2 of article 3 of said chapter 14 (page 163, St. 1893), which reads: "Sec. 2. That mayor and council shall have the care, management and control of the city and its finances, and shall have power to enact, ordain, alter, modify or repeal any and all ordinances not repugnant to the constitution of the United States and the organic act and laws of this territory as they shall deem expedient and for the good government of the city, the preservation of the peace and good order, the suppression of vice and immorality and the benefit of trade and commerce and the health of the inhabitants thereof, and such ordinances, rules and regulations as may be necessary to carry such powers into effect." Also section 22 of said article 3, as follows: "The council may also retain and prohibit riots, routs, noises, assaults, assaults and batteries, petty larceny, disturbances or disorderly assemblies and immoral and indecent shows, exhibitions and concerts in any street, house or place in the city, and regulate, punish and prevent the discharge of firearms, rockets, powder, fire-works or other dangerously combustible material in the streets, lots, grounds, alleys or about or in the vicinity of any building." And section 39 of said article, which reads as follows: "For any purpose or purposes mentioned in the preceding section, the council shall have power to enact and make all necessary ordinances, rules and regulations, and they shall also have power to enact and make all such ordinances, by-laws, rules and regulations not inconsistent with the laws of the territory, as may be expedient for maintaining the peace, good government and welfare of the city in its trade and commerce, and all ordinances may be enforced by prescribing and inflicting upon inhabitants and other persons violating the same, such fine not exceeding one hundred dollars or such imprisonment not exceeding three months or both such fine and imprisonment as may be just." There is no provision in the general laws of this territory relating to cities of the first class which in express terms authorizes such cities to control, prescribe, and regulate the manner in which the highways, streets, avenues, lanes, alleys, and public grounds within said city shall be used, or to prohibit practices, amusements, and doings in said streets having a tendency to frighten teams and horses, and dangerous to life and property. There is, in the statute, no express reference to the use of streets for processions, or any power given in express terms to prohibit, suppress, license, or regulate the use of drums or other musical instruments in said streets. It contains no reference to streets beyond such as contemplate that they shall be under municipal control in the usual ways, some of which are mentioned.

It cannot be contended that authority for

this ordinance could be derived from a grant of power "to prevent vice and immorality," "to preserve public peace and good order," "to prevent and quell riots, disturbances, and disorderly assemblages," "the benefit of trade and commerce," and "the protection of the health of the inhabitants," or that it was derived from the power "to restrain and prohibit riots," noises, assaults, assaults and batteries, petty larceny, disturbances, or disorderly assemblies, or immoral and indecent shows, exhibitions, and concerts. Nor can we assent to the reasoning or conclusion of counsel for respondent, who say that, "under our statutes, the mayor and council of cities of the first class are authorized to pass any and all laws not in conflict with the constitution and laws of the United States, the organic act, and the laws of the territory." To give the clause of the statute to which counsel refer the construction contended for would be to give the city council legislative authority and jurisdiction concurrent with and co-extensive with that possessed by congress and the territorial legislature. That provision cannot be construed as a grant of power, but as a restriction upon powers that otherwise might be possessed. It means, and means only, that, within the scope and for the objects and purposes of the corporation, the city council shall have power to pass all ordinances, rules, and regulations not inconsistent with or repugnant to the laws of the United States or of the territory; but their ordinances must be for the purposes and within the limitations of the legislative power delegated to them, as well as consistent with, and not repugnant to, the laws of the United States and the territory. Applying the test of the rule laid down by Mr. Dillon, in the paragraph from his work cited *supra*, to the statute under which the city of Oklahoma City was created, we cannot find that the power to enact the ordinance in question was granted by said statute in express words; nor can we find that such power can necessarily or fairly be implied from, or that it was an incident to, any of the powers therein expressly granted. If, therefore, it has any validity, such validity must be based upon the third rule laid down by Mr. Dillon, namely, that the power for its enactment was essential to the declared objects and purposes of the corporation, and indispensable to the attainment of such objects and purposes.

What declared object and purpose of the corporation could the power to pass this ordinance have been essential to? Was it indispensable that the council should have had power to pass this ordinance to protect the public peace, the public health, the public morals, public safety, or to benefit trade and commerce, or was it indispensable to the convenience and welfare of the inhabitants of the city? Unless we declare in the affirmative, we must hold that there was no authority for the passage of such an ordinance, and that its passage and attempted enforcement were an attempt



to exercise, and in an unreasonable manner, a power which the council did not possess. Certainly, it could not be contended that it could be based upon any of the objects or purposes for which the corporation was created, above stated, unless it could be predicated upon the duty of the council to provide for "the public safety." The time, manner, and conditions under which the natural and lawful rights and privileges of the citizen may be interfered with and restrained by public law or ordinance, for the protection of the public safety, for the prevention of disturbances, the commission of nuisances, or threatened, tangible, public or private mischief, was clearly and logically shown and expressed by Mr. Chief Justice Campbell in *Frazee's Case*, in the supreme court of Michigan (30 N. W. 72), wherein that eminent jurist says: "It has been customary *fivum* time immemorial, in all free countries, and in most civilized countries, for people who are assembled for common purposes to parade together, by day or reasonable hours at night, with banners and other paraphernalia, and with music of various kinds. These processions for political, religious, and social demonstrations are resorted to for the express purpose of teaching unity of feeling and enthusiasm, and frequently to produce some effect on the public mind by the spectacle of union and numbers. They are a natural product and exponent of common aims, and valuable factors in furthering them. They are only found to any appreciable extent in places having collected inhabitants, for spectators are generally as important as members. They are among the incidental conditions of city life, and are as much to be expected on suitable occasions as any other public meeting, and not necessarily any more dangerous. They are, however, capable of perversion to bad uses, and, when so perverted, may be dangerous. When people assemble in riotous mobs, and move for purposes opposed to private or public security, they become unlawful, and their members and abettors become punishable. These dangers are as well known as the customs themselves are, and are sometimes very great dangers. There may be times and occasions when such assemblies may for a while be dangerous in themselves, because of inflammable conditions among the population. All of these things are as ancient as the law, and are generally within reach of the law, unless the law is, for the time, suspended by military necessity. During all this period of public history, cities have existed and had powers of local administration. But it has never been supposed that they needed or ought to possess any repressive power over these movements which was not subservient and subsidiary to the general legal scheme of government. It is only when political, religious, social, or other demonstrations create public disturbances, or operate as nuisances, or create or manifestly threaten some tangible public or private mischief, that the law inter-

feres. And, when it interferes, it does so because of the evil done or apparently menaced, and not because of the sentiments or purposes of the movements, if not otherwise unlawful; and things absolutely unlawful are not made so by local authority, but by general law. It is lawful to provide for dealing with the mischief, but it is not lawful to go beyond reasonable measures and precaution in anticipating it. Private liberty and public tranquillity and security must both be kept in view." The case in which Judge Campbell thus so clearly defined the limit of municipal legislative interference with private right and private liberty was one in all respects identical with the case at bar. There, as here, an ordinance had been enacted the aim and purpose of which was to interfere with, if not to suppress, the practices of the religious organization known as the "Salvation Army." The city of Grand Rapids had passed an ordinance which was as follows: "No person or persons, association or organization shall march, parade or drive in or upon or through the public streets of the city of Grand Rapids with musical instruments, banners, flags, torches, flambeaux or while singing or shouting without having first obtained the consent of the mayor or common council of said city. Funeral and military processions, however, shall not be subject to the foregoing provisions of this section. But such processions, as well as those having a permit or consent of the mayor or common council, when using the public streets of said city, shall conform to such directions as the mayor or chief of police may give in relation to the streets to be used and the portion thereof to be occupied by them in relation to the manner of its use." The petitioner in that case, as in this, was a member of the Salvation Army, and was arrested for a violation of said ordinance. The charge was that the petitioner "did then and there parade in, upon, and through the public streets of the city of Grand Rapids, to wit, Canal street and Pearle street, with musical instruments, banners, and flags, while singing and shouting, without having first obtained the consent of the mayor or common council of the city of Grand Rapids, contrary to said ordinance." In proceedings by habeas corpus, the supreme court declared the ordinance to be void, and discharged the prisoner from arrest. An ordinance of the city of Wellington, Kan., in all material respects identical with the one we are considering, was by the supreme court of that state held to be void, upon the ground that it was of doubtful delegated power, was unreasonable, did not operate upon conditions and persons uniformly and impartially, and that it contravened common rights. *Anderson v. City of Wellington*, 40 Kan. 173, 19 Pac. 719. We have been cited by counsel for respondent to the case of *City of Chariton v. Fitzsimmons*, 54 N. W. 146, as holding an ordinance similar to that which we are considering to be valid. In that case the contention

was, and the decision of the supreme court of Iowa was, upon another point involved in this case, and which we have not yet considered, and the ordinance in question in that case was materially different from the one we are considering. That court held that: "An ordinance of a city prohibiting the collection and marching of crowds and processions, and the making of noise with musical instruments and otherwise, on the streets and sidewalks, so as to obstruct travel, frighten horses, interfere with business, or disturb others, is not unreasonable and invalid because it makes it the duty of the mayor or city marshal first to order the offenders to desist, and provides that the failure or refusal of any person or persons to promptly obey such order is a misdemeanor, since the gravamen of the offense is the commission of the prohibited act, and not the disobedience of such order." This court would not be inclined to hold, nor does it herein hold, that an ordinance which prohibited acts upon a public street that frightened horses, obstructed travel, or interfered with business would be void, as unreasonable. The ordinance we are construing does not purport to prohibit such acts, nor was there any contention in the Iowa case that the ordinance in question was unreasonable, and therefore void, because of its prohibitory provisions. The question in contention there, and one also in contention in this case, we do not deem it necessary to discuss, namely, whether an ordinance prohibiting certain acts, and otherwise valid, is invalid because it makes it the duty of some officer of the city first to order the offenders to desist, and provides that the failure or refusal to promptly obey such order is a misdemeanor, although we are not prepared to concur with the conclusion of the Iowa court, that the gravamen of the offense in such cases is the commission of the prohibited act, and not the disobedience of such order, especially when no criminality attaches to the commission of the act until the order forbidding its performance has been made and disregarded, for, until such order has been given, the act may be lawfully performed; and we are not prepared to say that it is a reasonable regulation which vests the power arbitrarily in the chief of police or city marshal to determine when and upon whom the penal ordinances of the city shall become operative.

So long as there have been municipal codes, so long as cities have existed, the use of public streets for processions, for the movement of bodies of the people, whether organized as political, religious, or social organizations, has been recognized as a proper and lawful use of such streets; and the fact that such gatherings and processions embrace the use of musical instruments has never distinguished their rights of use and occupancy of the streets; and such right cannot be abrogated, taken away, or restricted unless abused, and such abuse amounts to an interference with a paramount right common

to all, or is exercised in such manner as to interfere with or subvert some purpose for which the corporation is created, and which it is its duty to protect. A city implies a large aggregation of people. The use of its streets contemplates not quietude and repose, but the noise, bustle, and confusion incident to the transaction of the lawful business of the people, and their lawful and harmless amusements and recreations, pleasures, and devotions. These are but incidents of a city's life. The tendency of American thought and action is towards association for the accomplishment of good purposes; hence we see a large portion of our people associated in the various organizations for the promotion of public good, the betterment of mankind, and the alleviation of its miseries. Every city has its charitable, benevolent, and religious associations, to say nothing of the great political organizations whose aim is for the betterment of our system of government. Certainly associations like Masons, Odd Fellows, Knights of Pythias, Grand Army of the Republic, and others engaged in charitable and benevolent work, have always been recognized as having the right to use, for lawful purposes, the public streets, for whose improvement and maintenance they are taxed. The use of music has been deemed, if not necessary, at least a useful auxiliary in bringing in and keeping members within these organizations, and their parades and processions upon the public streets with music as tending to the accomplishment of the ends and purposes for which they are organized; and their right in this respect has never been sought to be abridged; and we can find nothing in our system of government which warrants legislatures or courts in discriminating between such associations and an association which, animated by the same love of humanity, seeks its betterment through the precepts and practices of religion. We hold this ordinance to be void for the reasons that if the legislature had the power to expressly authorize the municipality to enact it, which we do not and cannot concede, no such power has been attempted to be delegated by the law under which the city was organized, and the power to enact it cannot be inferred from any power expressly granted; that it was not an essential, indispensable power, required to carry into effect any of the purposes for which the city was created; that it was not reasonable nor consistent with the general policy of our laws; that it was oppressive, and in contravention of common right.

Counsel for respondent further contend that, if the ordinance is void, yet the petitioner is not entitled to discharge from imprisonment in a proceeding by habeas corpus; that petitioner should have submitted to trial before the police judge, and presented the question of the validity of the ordinance by appeal. This position is not tenable. It is

true that habeas corpus is not a proper remedy in cases where one is imprisoned under process which may be avoided because of irregularity or error, and that the only remedy in such cases is by appeal or proceedings in error; but, where there is an entire want of jurisdiction to issue the process, habeas corpus is the proper remedy, and no court has jurisdiction to issue a warrant where there is no law or ordinance making the act complained of unlawful. This proposition is too elementary to require the citation of authorities. For the reasons herein stated, the return of the respondent is held to be insufficient, and the petitioner is ordered to be discharged from arrest. The other judges concur.

(5 Okl. 201)

### COLEMAN v. TERRITORY.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

CRIMINAL LAW — LIMITATIONS — NONRESIDENCE — BURDEN OF PROOF.

1. The clause in the exception in the statute of limitations (section 4963, St. Okl. 1893) reading, "and no time during which the defendant is not an inhabitant of or usually resident within the territory is part of the limitation," means that no time during which the defendant did not have a fixed, permanent, and established home, where his personal presence might reasonably be known, would constitute any part of the period of limitation.

2. The defense of the statute of limitations is an extrinsic, exculpatory defense, in the nature of confession and avoidance. It does not traverse any of the material elements of the crime charged. And where an indictment was not found until more than four years after the commission of the crime, and the territory had established that immediately after the commission of the crime the defendant fled, the burden was not upon the territory to establish by evidence to the satisfaction of the jury, beyond a reasonable doubt, that the defendant, during the period of the statute of limitation, was not an inhabitant or usually resident within the territory; but the burden was upon the defendant to satisfy the jury by the preponderance of evidence that during said time he was an inhabitant and usually resident within the territory. Where, in a criminal case, the defense is extrinsic, not traversing any of the material elements of the offense, and the facts upon which such defense is based are peculiarly within the knowledge of the defendant, he will be held to establish those facts to the satisfaction of the jury, by the preponderance of the evidence, before he is entitled to an acquittal.

(Syllabus by the Court.)

Error to district court, Oklahoma county; before Justice Henry W. Scott.

Asa Coleman was convicted of forgery, and appeals. Affirmed.

Hays & Jenkins, for plaintiff in error. C. A. Galbraith, Atty. Gen., for the Territory.

TARSENEY, J. Plaintiff in error brings this case here, and asks a reversal on numerous assignments of error. The only questions presented in this record requiring our consideration or attention are those presented by the action of the court below in overruling a de-

murrer to the indictment, and upon the instructions as to the law of the case given to the jury.

At the November, 1895, term of said court, the defendant was indicted under the second paragraph of section 2356 of the Statutes of Oklahoma, which said paragraph reads as follows: "Second. Any instrument of writing, being or purporting to be the act of another by which any pecuniary demand of obligation is, or purports to be created, increased, discharged or diminished, or by which any rights or property whatever, are, or purports to be, transferred, conveyed, discharged, diminished, or in any manner affected, the punishment of which is not herein before prescribed, by which false marking, altering, forging or counterfeiting, any person may be affected, bound or in any way injured in his person or property, is guilty of a forgery in the second degree." The indictment, in due and proper form, charged substantially that on the 15th day of April, 1891, one George A. Strauss had pending in the United States land office a contest against the homestead entry of the defendant on certain lands in Oklahoma county, seeking to procure a cancellation of such homestead entry, and to obtain for himself, under the laws of the United States, the preference right to make entry of said land; that the defendant did on said 15th day of April, 1891, cause and procure one John Deoto to personate the said Strauss, and falsely make, forge, and counterfeit, and file in said land office, an instrument in writing as follows: "Before the United States Land Office, Oklahoma City, O. T., April 15, 1891. George A. Strauss v. Asa Coleman. Involving the S. W.  $\frac{1}{4}$  of Sec. 25, township 12, R. 3 W. Motion to dismiss. Comes now the plaintiff in the above-entitled cause, George A. Strauss, and moves the honorable register and receiver to dismiss said cause, and that it appear of record. [Signed] George A. Strauss. Witness: J. S. Lindsay." The indictment charged the crime to have consisted in falsely making and forging said instrument. And the sufficiency of the indictment, and the correctness of the ruling of the court in overruling the demurrer thereto, must depend upon the determination of the question whether the instrument set out in the indictment was susceptible of being forged or counterfeited, and whether the falsely making and forging of such instrument amounted in law to forgery. If this instrument, if genuine, could have the effect to create, increase, discharge, or diminish, or in any manner affect, the property rights of the person whose name appeared to be signed thereto, and the defendant falsely made and forged such instrument, or procured the same to be done, then such act was within the statute we have quoted, and the indictment was sufficient. The determining point in this question was before this court at the last term, in *Bank v. Maddox*, 46 Pac.

563. We there held that an agreement by a contestant to surrender his preferment right, and not assert the same, when such preferment right should have been affirmed by the land office, constituted a valid consideration for an assignment of money. In *Lamb v. Davenport*, 18 Wall. 307, it was held that: "The right of the United States to dispose of her own property is undisputed, and to make rules by which the lands of the government that are sold or given away is acknowledged; but, subject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where congress has imposed restrictions upon such contracts." In that case the court held that, unless forbidden by some positive law, contracts made by actual settlers upon the public land, concerning their possessory rights, and concerning the title to be acquired in the future from the United States, are valid, as between the parties to the contract, though there be at the time no act of congress by which the title may be acquired, and though the government is under no obligation to either of the parties in regard to the title. See, also, *Pelham v. Service* (Kan. Sup.) 26 Pac. 29; *McCabe v. Caner*, 68 Mich. 182, 35 N. W. 902; *Lapham v. Head*, 21 Kan. 332; *Bell v. Parks*, 13 Kan. 152; *Fessler v. Haas*, 19 Kan. 216; *Olson v. Orton* (Minn.) 8 N. W. 878; *Thompson v. Hanson* (Minn.) 11 N. W. 86; *Kennedy v. Shaw*, 43 Mich. 359, 5 N. W. 396; *Sanford v. Huxford*, 32 Mich. 318. We think that one who contests the right of entry made upon public lands by another, and who is himself qualified to make entry thereon, and who, if successful in his contest, will have a preference right over all others to make entry of said land, has a property right therein, and that any instrument required to evidence a relinquishment of such right is of such character that it may be the subject of forgery. The above authorities clearly holding that the rights of the contestant in such case are such that an agreement to relinquish the same may constitute a good and valid consideration for a contract, we must hold that upon this point the instrument alleged to have been forged was one which, if genuine, could have affected the property rights of said Strauss, and that the indictment which properly charged the making, forging, and counterfeiting of such instrument did properly charge a public offense, and that the court below committed no error in overruling the demurrer to the indictment in this cause.

The other contention of plaintiff in error which we deem it important to consider is that the court erred in its instructions given to the jury. The indictment was found and returned into court on the 11th day of November, 1895, and charged the offense to have been committed on the 15th day of

April, 1891; the indictment being found and returned 4 years, 6 months, and 26 days after the date at which it alleged that the offense was committed. It, however, contained, in apt words, an averment that on the day of the commission of said offense the defendant fled from the territory of Oklahoma, and has not since that time been an inhabitant of, or usually resident within, said territory, for a period of three years. Section 4952, p. 941, St. Okl. 1893, provides that in all cases other than murder an indictment for a public offense must be found within three years after its commission; and section 4953 of said statutes provides that "if, when the offense is committed, the defendant be out of the territory, the indictment may be found within the term herein limited after his coming within the territory, and no time during which the defendant is not an inhabitant of or usually resident within the territory, is part of the limitation." The evident intention of this statute was that as to persons who, being without the territory, should, by means or agencies within the territory, or by aiding and abetting others who were in the territory, commit any crime, the statute of limitations should not run until such person came within the territory. And as to all persons committing offenses, whether being at the time of the commission thereof within or without the territory, the statute of limitations should not run during the time when such offenders were not inhabitants of, or usually resident within, the territory; and if the defendant in this case was not, during the three years succeeding the offense charged, an inhabitant of, or usually resident within, the territory, the statute did not run as to him. On the other hand, if during said time he was an inhabitant of, or usually resident within, the territory, the statute did run, and he could not now lawfully be convicted of the offense charged. Evidence was offered by both parties to show the movements and whereabouts of the defendant after the commission of the offense, and as tending to show whether the defendant was or was not an inhabitant or usually resident within the territory during the period of the running of the statute of limitations, after the commission of the offense. The instructions complained of by the plaintiff in error were to the effect that the burden was upon the territory to prove that the defendant was not an inhabitant or usually resident within the territory for a period of three years after April 15, 1891, and before November 11, 1895, but that in proving such fact the territory was not bound to prove it beyond a reasonable doubt; that it was sufficient if that fact was made to appear by a fair preponderance of the evidence; that residence and inhabitancy, within the meaning of the law, was open, public residence, as persons ordinarily reside in and inhabit a place,—living and

moving about in the ordinary way; that, if there was flight from the territory by the defendant after the commission of the crime, then occasional returns within the territory for brief periods would not make defendant a resident and inhabitant of the territory, within the meaning of the law; and that if the jury found from the evidence that the defendant went from the territory of Oklahoma after the commission of the alleged crime, and then returned and lived secretly or in a concealed manner in the territory, then he would not be a usual resident of the territory, within the meaning of the law.

The contention of the defendant is that the court erred in not instructing the jury that it was incumbent upon the territory to establish to the satisfaction of the jury, beyond a reasonable doubt, that the defendant had been a nonresident of the territory for the time alleged in the indictment, and therefore it was manifest error for the court to instruct the jury that the territory was not bound to prove beyond a reasonable doubt that the defendant was not an inhabitant or usual resident within the territory for said period of time; and in instructing that it was sufficient if that fact was made to appear from a fair preponderance of the evidence, and that such instructions were clearly erroneous in defining "residence" and "inhabitaney," within the meaning of the law. We do not think there was any error prejudicial to the defendant in the instruction of the court defining what was meant by "inhabitant" or "usually resident," as used in the statute, or as to what evidence or facts were competent to establish such inhabitancy or residence. These words have a clear and well-defined meaning. Bouvier defines an "inhabitant" to be "one who has his domicile in a place. One who has an actual fixed residence in a place." The same author defines the word "resident" to mean "one who has his residence in a place." Personal presence in a fixed and permanent abode constitutes residence. *Roosevelt v. Kellogg*, 20 Johns. 208; *Sears v. City of Boston*, 1 Metc. (Mass.) 251. "Residence" indicates permanency of occupation, as distinct from lodging or boarding or temporary occupation, but does not include so much as "domicile," which requires an intention continued with actual residence (*Inhabitants of Jefferson v. Inhabitants of Washington*, 19 Me. 293; 2 Kent, Comm. 576); that place where a man has his true, fixed, and permanent home, and to which, whenever he is absent, he has the intention of returning (*Putnam v. Johnson*, 10 Mass. 188; *Tanner v. King*, 11 La. 175; *Horne v. Horne*, 9 Ired. 90; *Inhabitants of Greene v. Inhabitants of Windham*, 13 Me. 225; *Hairston v. Hairston*, 27 Miss. 704). "Residence," "inhabitaney," and "domicile" are generally used as synonymous. *Moore v. Wilkins*, 10 N. H. 453; *Winship v. Winship*, 16 N. J. Eq. 107. Within the meaning of these authorities, the plaintiff in error must have had an actual

fixed and permanent abode within the territory, or the statute of limitation did not run as to any offense committed by him. Independent of the authorities, the fair, reasonable construction of the statute itself would indicate that it was the intention of the legislature that the defendant should have had within the territory a fixed, permanent, and established home, where his personal presence might reasonably be known. The legislature, in the first part of the section, excepting from the operation of the statute of limitations, carefully provided that such limitation should not run as to one who was not within the jurisdiction of the territory, and, in the latter part of said section, excluded from its operation those who were not inhabitants or usually resident in the territory. They certainly did not intend to extend its grace and exemptions to those who were within the territory, and who were concealed, or whose presence therein might not readily be known; and hence we think that the legislature meant such inhabitancy and residence, open, permanent, and known, as evidences the presence within the territory of those citizens who fear no accusation of crime and seek no concealment.

The substantial question in this cause is, as to the correctness of the instruction that it was not incumbent upon the territory to establish by the evidence, beyond a reasonable doubt, that the defendant was not an inhabitant or usually resident within the territory for the period of time in question, and that it was sufficient if the fact of such inhabitancy and residence was made to appear by a preponderance of the evidence. The general rule of the law in criminal procedure is that the burden is upon the prosecution to establish by evidence to the satisfaction of the jury, beyond a reasonable doubt, the guilt of the accused of the crime charged; that to do this the prosecution must establish by evidence to the satisfaction of the jury, beyond a reasonable doubt, each and every material element constituting the offense charged. And our statute (section 5201) provides that "a defendant in a criminal action, is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted." But is it incumbent upon the prosecution, in addition to establishing beyond a reasonable doubt the material and essential elements of the crime, to also negative by evidence beyond a reasonable doubt a defense which is extrinsic, and of the nature of a confession and avoidance? There is much confusion and want of harmony among the authorities upon this proposition. In this case the question is clearly presented whether, when the prosecution has established the commission of the offense by the accused, it was also its duty to establish by evidence, beyond a reasonable doubt, its right to have the accused punished for such offense, by facts

showing that he was not entitled to the benefits of the statute of limitation, or was it the duty of the defendant to establish by facts, to the satisfaction of the jury, his right to exemption from punishment by virtue of that statute? When the defense consists, not in confession and avoidance, but in the traverse of some essential fact relied on by the prosecution, and where such fact is an essential element of the offense, the burden of proof is unquestionably upon the prosecution, and it must establish such fact beyond a reasonable doubt. In determining upon which party lies the burden of proof and the degree of proof, we think a clear distinction may be drawn between cases where the defense traverses the material elements of the crime, and those which are exculpatory, or in the nature of confession and avoidance, and keeping clearly in mind this distinction will aid materially in construing apparently conflicting authorities. The defense of alibi is not strictly a defense of confession and avoidance, although frequently treated as such, and by many authorities required to be established by the defendant by a preponderance of proof. *State v. Davidson*, 30 Vt. 377; *Fife v. Com.*, 29 Pa. St. 429; *Creed v. People*, 81 Ill. 565; *State v. Hamilton*, 57 Iowa, 596, 11 N. W. 5; *State v. Krewsen*, 57 Iowa, 588, 11 N. W. 7; *Ware v. State*, 67 Ga. 349. On the other hand, it is said an alibi not only goes to the essence of guilt, but it traverses one of the material averments of the indictment,—that the defendant did then and there do the particular act charged. And many authorities hold that undoubtedly, if the prosecution makes out a case sufficient to secure a verdict of conviction, then the burden is on the defendant to prove his defense; but, when his proof is in, then the final question is, are the essential averments of the indictment proved beyond a reasonable doubt? And among these essential averments is the defendant's presence and participation in the act charged. *Whart. Cr. Ev. (9th Ed.)* § 333; *Stuart v. People*, 42 Mich. 255, 3 N. W. 863; *State v. Lewis*, 69 Mo. 92; *Pollard v. State*, 53 Miss. 410; *Howard v. State*, 50 Ind. 190; *Shoemaker v. Territory*, 4 Okl. —, 43 Pac. 1050. The defense of insanity is one also upon which there has been much conflict in the authorities regarding the shifting of the burden of proof, and the degree of proof required to be presented by either party. And the failure to keep in mind the distinction we have noted between a defense that is a traverse of the elements of the offense and one which confesses and avoids is perhaps the occasion of the want of uniformity in the authorities. Mr. Wharton says that three distinct theories have been propounded as to the degree of evidence requisite to justify a conviction on the issue of insanity: The first is that insanity as a defense must be proved beyond reasonable doubt, and that, unless this be done, the jury—the case of the prosecution being otherwise proved—are to

convict. *Whart. Cr. Ev.* § 337, and numerous cases cited. The author quotes from Mr. Chief Justice Hornblower, of New Jersey, as follows: "The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be to find a sane man guilty." *State v. Spencer*, 21 N. J. Law, 196. Second, that the jury are to be governed by the preponderance of the evidence, and are not to require insanity to be made out beyond a reasonable doubt. *Whart. Cr. Ev.* § 338, citing numerous cases. And, third, that in such an issue the prosecution must prove sanity beyond a reasonable doubt. *Id.* § 340, and cases cited. And the author adds that the conflict noted arises from the habit of viewing the statutory plea of insanity as a defense of the nature of confession and avoidance, which, however, is not the case. *Id.*

In line with the defenses of alibi and insanity, and also marking the distinction, relative to the manner and degree of proof, between defenses which traverse the elements of the crime and those that are exculpatory, is the defense of provocation. Of this defense, Mr. Wharton says: "Provocation, also, as a defense which goes to negative premeditation and malice, must be regarded as traversing essential ingredient of all offenses which require proof of premeditation and malice. Hence, while, according to the distinction just stated, the burden is on the defendant to prove provocation in all cases when he opens this defense, yet, when the evidence on both sides is closed, he is entitled to a verdict, if he has offered proof enough to cast a reasonable doubt on the averment of malice and premeditation, when thus essential. It is otherwise, however, as we have seen, when the defense does not traverse any averment of the indictment." Regarding defenses which are extrinsic, and do not traverse the material elements of the offense, the rule as to where the burden of proof lies, and the degree of proof essential, would seem to be clearly distinguished from those defenses which we have been considering. These defenses, such as licenses or authorizations from the state, *autrefois acquit*, *autrefois convict*, pardon, or the defense of compulsion, and the like, are extrinsic defenses, and as to them there does not appear to be any material conflict in the authorities. But the authorities, apparently uniformly, hold that to establish such a defense, or make it available, the burden is upon the defendant to satisfy the jury by the preponderance of the evidence. The rule seems to be well established that where the prosecution makes out such a case as would sustain a verdict of guilty, and the defendant offers evidence, the burden is on him to make out the defense, whatever it may be, that he presents. He becomes the actor, and the duty is on him to make good by proof the point

he asserts. When he asserts a defense that merely traverses the elements of the offense charged, it is sufficient for him if he raises a reasonable doubt as to the defense he advances; but where his defense is, extrinsic, as of confession and avoidance, it is not sufficient that his proof may raise a reasonable doubt, but he must satisfy the jury of the truth of the facts establishing such defense by a preponderance of evidence. Whart. Cr. Ev. § 331, and numerous cases there cited. The rule seems to be well settled, as in New York and many other states, that in homicide cases the facts of provocation and necessity, when offered to prove an extrinsic defense, and not to negative the essential averment of the indictment, must be established by a preponderance of testimony, by the rules that obtain in civil actions. *People v. Schryver*, 42 N. Y. 1; *Stokes v. People*, 53 N. Y. 164; *State v. Jones*, 20 W. Va. 764; *Sawyer v. People*, 91 N. Y. 667. On the other hand, when the defense traverses malice or other material averment, if in such case such averment is not, on the whole evidence, proved beyond reasonable doubt, the charge is not sustained. *Com. v. Drum*, 58 Pa. St. 9; *O'Mara v. Com.*, 75 Pa. St. 424; *State v. Willis*, 63 N. C. 26; *State v. Vincent*, 24 Iowa, 570.

It remains, then, to determine, from the character of the defense in the case at bar, under which of these rules it falls, and by what line of authorities the manner and degree of proof necessary for its establishment must be governed. The defense of the statute of limitations traverses no element of the crime charged. It is essentially an extrinsic defense. It does not put in issue either the guilt of the defendant, or the existence of any of the essential elements constituting his guilt of the offense charged. He simply asserts that by virtue of an extrinsic condition, not relating to the commission of the offense, but recognizing its commission, namely, a statute of repose or limitation, he is not now subject to punishment for the crime which he admits having committed. We can see no reason why the rule relating to the defenses of license, authorization by the state, autrefois acquit, autrefois convict, pardon, provocation, or compulsion should not be the rule as to this defense. In fact, we think the rule applies with more reason and justice to this defense than to the others. It is not inequitable, oppressive, or substantially prejudicial to the safeguards which should surround the defense of one accused of crime, that if his defense does not deny the commission of the acts charged, or traverse any of the material elements of the offense, but is based upon facts wholly extrinsic, and peculiarly within his knowledge, and more readily susceptible to proof by him than by the prosecution, he should be held to establish such defense to the reasonable satisfaction of the jury. In the case at bar, as shown by this record, the prosecution, by

the exercise of reasonable diligence, were not able to establish or prove that the defendant had a fixed, definite, habitation or residence within the territory. If such fact existed,—if the defendant did, in fact, during the disputed time, have a fixed, permanent residence within the territory,—that fact was peculiarly within his knowledge, and would be easily susceptible of proof by him; and we think it would be a sound rule only which would require him to make such proof. We must therefore conclude that, if there was error in the instructions given by the court below in this cause, such error was favorable, and not prejudicial, to the defendant. It follows, there being no substantial errors in the other assignments in the record, the judgment of the court below must be affirmed, and it is so ordered. The other judges concur.

(5 Okl. 61)

## ROYCE v. TERRITORY.

(Supreme Court of Oklahoma. Feb. 12, 1897.)  
CONSTITUTIONAL LAW — INDICTMENT — MOTION TO QUASH.

1. Article 5 of the amendments to the constitution of the United States, providing that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," does not mean an accusation in the mere form of an indictment, but does mean a presentment or indictment found and returned by a grand jury, legally selected, impaneled, and sworn, and upon competent evidence, as authorized by law; and a trial of a person for such crime without an indictment thus found and returned is in violation of constitutional right, and void.

2. Where a defendant files a motion to set aside and quash an indictment on the grounds that it is found by the grand jury, without legal and competent evidence, but upon hearsay testimony, and makes application to the trial court to set a day for the taking of testimony as to the matters alleged in said motion, and for the subpoena of witnesses therefor, in accordance with section 5110, St. 1893, as amended (Laws 1895, p. 196), it is reversible error for the court to refuse such application, and to summarily overrule said motion, and to proceed with the trial of the indictment.

(Syllabus by the Court.)

Appeal from district court, Garfield county; before Justice John L. McAtee.

Frank Royce was convicted for embezzlement, and appeals. Reversed.

Beauchamp & Rush and W. S. Denton, for appellant.

TARSNEY, J. The defendant was tried, found guilty, and sentenced for the crime of embezzlement, at the November, 1895, term of the district court of Garfield county. From the judgment of conviction he appealed, and assigns numerous errors appearing in the record of the proceedings preliminary to said trial, and upon the trial of the cause. The indictment was found and returned at April, 1895, term of said district court. Thereafter, on the 16th day of said month,

defendant filed his motion in said cause to set aside and quash said indictment, and for an order to take testimony thereon, assigning as grounds for said motion as follows: "Fourth. For a further reason for quashing said indictment, the defendant says that the grand jury which found said indictment received incompetent, illegal, irrelevant, hearsay, and secondary evidence, in order to receive any testimony which would authorize them to return said indictment into this court. And that, without said illegal, incompetent, irrelevant, hearsay, and secondary evidence, there was no testimony introduced whatever before said grand jury which proved or tended to prove in any manner the charge set out in said indictment. Fifth. For a further ground for setting aside and quashing said indictment, this defendant says he in good faith believes that the only testimony before said grand jury which was legal and proper testimony was to this effect, and this effect alone: That this defendant, as an officer of the O. County Bank, received and collected a sum of money set out and described in said indictment; but this defendant says that, from the names of the witnesses which appear upon said indictment, he in good faith believes that there was no legal testimony introduced before said grand jury which would show, or tend to show, that said sum of money was not duly and properly remitted or paid to the parties then and there entitled to the same." To support this motion, the defendant, on the same day, filed his application in said court for an order fixing a day for the hearing of testimony upon said motion in said court, and that witnesses might be subpoenaed in his behalf to testify in relation to said matter, which application was supported by an affidavit of the defendant to the effect: That the affiant in good faith believed that all the legal testimony which was introduced before said grand jury was to the effect that the defendant had received and collected the sum of money set out and described in said indictment from the Arkansas Lumber Company. That there was no legal evidence to prove, or tending to prove, in any manner, that said money was not duly and properly remitted and paid to the parties entitled thereto. That affiant in good faith believes that the following illegal, irrelevant, and incompetent testimony was introduced before said grand jury, in order to induce them to find and return said indictment, to wit: That F. W. Edmonds and E. Warecek testified before said grand jury that they had been informed by the S. E. Barrett Manufacturing Company (the party whose money is alleged to have been embezzled) that said sum of money had not been remitted or paid to them by defendant. That a former indictment, which charged defendant with said offense, and which had been by the court quashed and set aside, was exhibit-

ed to said grand jury, and considered by them as evidence in order to induce them to find and return an indictment. That, in order to induce said grand jury to return said indictment, the county attorney of said county, in the presence of the grand jury, stated to them that he was not at that time in possession of legal and competent testimony to show that said sum of money was not duly and properly remitted and paid to the party entitled thereto, but that such testimony was in existence, and that upon the trial of said cause, before a jury in the district court, he would be in possession of such testimony, and would there introduce the same, and could thereby obtain a conviction of the crime charged in said indictment. That the grand jury, by reason of said illegal, incompetent, irrelevant, secondary, and hearsay testimony, and illegal, incompetent, and improper statement of said county attorney, and the exhibition of said old indictment, were induced, without any legal testimony whatever which proved or tended to prove in any manner that defendant was guilty of the crime charged in said indictment, to find and return said indictment into court. That defendant, in good faith, desired that witnesses might be summoned before the court to testify in relation to the matters set out in the application, and that a day might be fixed for the hearing of said testimony by the court; and that witnesses might be subpoenaed to testify in relation to said matters. That thereupon, on said day, the court overruled the application of defendant to take testimony in support of said motion to set aside and quash said indictment, and overruled said motion to quash and set aside said indictment, to which action of the court defendant at the time duly objected and excepted.

As the grand jury is an informing and accusing body, which makes its investigation and holds its deliberations in secret, and irresponsible for its official action upon matters of fact, except before the tribunal of public opinion, it is very important that its powers, duties, and methods of procedure should be well understood, and should be strictly confined within the conservative and salutary limits imposed by law which experience has shown to be necessary to subserve the public good, and to accomplish a just and impartial administration of the criminal law. Mr. Rice, in his work on Criminal Evidence (volume 3, p. 409), says: "The jealousy with which the early law guarded the secrets of the grand-jury room has largely disappeared. The sacramental character of that august body is very imperfectly recognized at the present day. The theory that the proceedings before this body are beyond the scrutiny or condemnation of court or counsel is a foolish pretense, that is very generally abandoned. Malice, corruption, and ignorance frequently combine to impress up-



on the proceedings of this body the tyrannical and oppressive functions of the star chamber and the council of ten; and to say, or even intimate, that, where correct practices exist, there is no method open for their proper disclosure, is simply to insist that our criminal law is crippled with a hideous deformity." At the common law, an indictment is invalid and may be quashed where it is found and returned by a grand jury not legally constituted, or where there was no legal evidence before the grand jury upon which it was based; and this invalidity might be shown upon a plea in abatement. The proceedings of grand juries cannot ordinarily be disclosed, but this rule is not to be carried to the extent of obstructing justice or creating wrong and hardship. A court may inquire into the evidence upon which a grand jury has found an indictment, and, if such evidence is plainly illegal and incompetent, should quash the indictment. *People v. Restenblatt*, 1 Abb. Prac. 268; *Rice*, Ev. 411; 1 Bish. New Cr. Proc. § 764; *State v. Grady*, 12 Mo. App. 361; *U. S. v. Kilpatrick*, 16 Fed. 765. Where a plea in abatement is sufficient on its face, issue should be taken thereon, and such issue should be tried; and if summarily overruled, without any issue being taken thereon, such action of the court is irregular. Upon a proceeding of this character the supreme court of Wisconsin has said: "This method of disposing of a plea in abatement was undoubtedly irregular. The district attorney should have taken issue thereon, either by reply or demurrer, and such issue should have been tried. This was decided in *Martin v. State*, 79 Wis. 165, 48 N. W. 119. We trust we shall not be again required to call attention to this rule of procedure. *Baker v. State* (Wis.) 50 N. W. 518." *People v. Lauder* (Mich.) 46 N. W. 956; *Priest v. State* (Neb.) 6 N. W. 468. If the plea contains a material averment on which issue is joined, it is error for the court to refuse the prisoner a trial of it. *Bohannon v. State* (Neb.) 18 N. W. 129. Under the statutes of this territory, the motion to quash and set aside an indictment takes the place of the plea in abatement at common law.

Our statutes (sections 5049, 5050, St. 1893), as amended (Laws 1895, p. 195), provide:

"Sec. 5049: In the investigation of a charge for the purpose of presenting an indictment or accusation, the grand jury may receive the written testimony of the witnesses taken in a preliminary examination of the same charge and also the sworn testimony prepared by the county attorney without bringing those witnesses before them, and may hear evidence given by witnesses produced and sworn before them and may also receive legal documentary evidence.

"Sec. 5050. The grand jury may not receive hearsay or secondary evidence."

These provisions do not qualify or change

the rule of the common law requiring that the indictment must be found on legal and competent evidence. And section 5110, St. 1893, as amended (Laws 1895, p. 196), provides that "the indictment must be set aside by the court in which the defendant is arraigned, and upon his motion, in either of the following cases: First: When it is not found endorsed, presented or filed as prescribed by the statutes of the territory, or when the grand jury is not drawn and empaneled as provided by law and that fact is known to the defendant at or before the time the jury is sworn to try the cause.

\* \* \* To enable the defendant to make proof of the matter set up as grounds for setting aside the indictment, the defendant may file his application before any court of record in the county, setting out and alleging that he is indicted in the district court, naming it, and setting out a copy of his motion to set aside the indictment and alleging, all under oath that he is acting in good faith and praying for an order to examine witnesses in support thereof. The court shall, thereupon, issue subpoenas to compel any or all witnesses desired, to appear before him at the time named, and shall compel, the witnesses to testify fully, in regard to the matter and reduce the examination to writing, and certify to the same and it may be used to support the motion. \* \* \*

All witnesses, including grand jurors, shall be bound to answer fully for the crime of perjury committed in giving such evidence." These provisions simply declare and codify the rules of the common law, under which no indictment was valid unless found and based upon legal and competent evidence; that its invalidity, in this respect, might be brought to the attention of the court by a plea in abatement; and that the facts to sustain said plea might be shown by the testimony of witnesses; and that the defendant was of right entitled to a trial of the matters so set up and relied upon in his plea in abatement. It is true that at the common law a motion to quash or a plea in abatement was an appeal to the discretion of the judge, and that matters of judicial discretion cannot ordinarily be reviewed upon appeal; but that proposition is not involved in the case at bar. Here the court below refused to exercise that discretion, by refusing to set a day for hearing of the matters set up in the motion, and by refusing to summon or hear witnesses in that behalf, and by summarily overruling the application and motion. We think this was substantial error against the rights of the defendant. He could only be legally put upon trial upon a valid indictment. To the validity of such indictment, it was essential that it should have been found by a grand jury, upon legal and competent evidence tending to sustain the offense charged. The defendant sought to avail himself of the rights guaranteed to him both by the common law and the statute, by showing that such indictment was found without any legal or competent evidence showing the

commission of the crime charged; and to this end the motion to set aside and the application for the taking of testimony in support thereof plainly alleged that there was no evidence before the grand jury that the money alleged to have been collected and embezzled had not been remitted and paid to the owner, and that, therefore, there was no evidence before the grand jury legally establishing, or tending to establish, the conversion of said money by the defendant to his own use, and hence that there was no legal or competent evidence as to an essential element constituting the crime of embezzlement; that the want of such competent evidence was attempted to be supplied by hearsay statements, and by the improper presentation to the grand jury of a former indictment, that had been quashed, and the improper statement of such prosecuting attorney that, if an indictment were returned without such essential legal evidence, he could afterwards procure such evidence, and, by presenting it to the trial jury, secure a conviction. We think the motion and application to take testimony presented a right to be heard upon the motion showing the invalidity of the indictment; that it was a substantial right of the defendant to be allowed to establish the facts stated in such motion, for the purpose of showing that he was about to be tried without due process of law; and that while the court below, in determining said motion, after hearing the evidence thereon, would exercise a judicial discretion, not ordinarily reviewable, it had no discretion to refuse to hear said motion, or to refuse the application to take testimony to sustain the facts stated in such motion; and that such refusal was error, reversible by this court. The importance of the proposition involved may be appreciated when it is considered that the defendant had no other way to have the question presented to the attention of the court or considered by it, as, under our statutes, it could not be presented, either upon a motion for a new trial or upon a motion in arrest of judgment; hence, if it be not substantial error for a trial court to summarily overrule a motion to set aside and quash an indictment, based upon the grounds stated in this motion, and to arbitrarily refuse to comply with the statutes, and permit the defendant to produce evidence showing its invalidity, then the constitutional right of one accused of crime may be taken from him, and he may be held to answer to a capital or otherwise infamous crime, without a presentment or indictment of a grand jury. The constitution, in guarantying this right to persons accused of crime, did not mean a mere form of indictment, but meant a valid indictment, found and presented in accordance with the ancient and just rules and safeguards of law, provided for the organization, action, and conduct of grand juries. As the views we entertain upon this proposition necessitate a reversal and setting aside of the judgment of the court below in this cause, it is not neces-

sary that we shall consider the many other assignments of error presented in the record. The judgment of the court below is reversed, and the cause remanded, with instructions to proceed in accordance with the views herein expressed. All the judges concurring, except McATEE, J., not sitting.

(5 Okl. 217)

## CHISHOLM et al. v. WEISE.

(Supreme Court of Oklahoma. Feb. 12, 1897.)

## FORCIBLE ENTRY AND DETAINER—WHEN LIES—MEASURE OF DAMAGES.

In an action of forcible entry and detainer, under the statutes of this territory, it is not competent for the defendant to show, as a defense, that the defendant claimed title, or even owned the title to the premises, where it is shown that the plaintiff was in the peaceable and quiet possession of said premises, and was, by force, dispossessed thereof by the defendant. A party out of possession, though he may be entitled to the possession, must resort to legal means to obtain possession. The action is not an action for rent. It need not be predicated upon the relation of landlord and tenant. It is an action to recover possession, and for the wrongful withholding of possession. The statute measures the damage by double the rental value of the premises; and where it is shown that the plaintiff was in the peaceable and quiet possession of the premises, and was dispossessed thereof, by force, by the defendant, plaintiff is entitled to recover, as damages, double the rental value of the premises for the period the possession was withheld from him.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; before Justice Henry W. Scott.

Action by Theodore H. Weise against Jessie Chisholm and others. Judgment for plaintiff. Defendants bring error. Affirmed.

T. G. Cutlip and B. B. Blakeney, for plaintiffs in error. J. H. Woods, for defendant in error.

TARSNEY, J. This is an action for forcible entry and detainer, commenced by defendant in error, Theodore H. Weise, against the plaintiffs in error, before a justice of the peace in Pottawatomie county, and appealed to the district court of said county, where judgment was rendered in favor of the defendant in error, and the cause was brought to this court for review. While the record and briefs show such assignment of error as "that the complaint does not state facts sufficient to entitle the plaintiff to any relief," that "the complainant was not entitled to recover rents in any sum, under the evidence," and "errors occurring in the trial of the cause," though no exception was taken or saved to the action of the court in overruling the demurrer to the complaint, and though counsel for plaintiffs in error have wholly disregarded and failed to comply with rule 4 of this court (43 Pac. viii.), which provides that "the briefs must refer specifically to the page of the record which counsel desires to have examined," we have looked into the record sufficiently to ascertain

that there was evidence to warrant the jury in finding the existence of the following facts: That on September 23, 1891, Weise settled upon and went into the possession of lot 10 in block 33 in the town of Tecumseh, said town having been set apart by the secretary of the interior for a town site under the laws of the United States; that he immediately inclosed the lot with posts and wire fence, and made improvements thereon; that about November 10, 1891, the Chisholms, in a temporary absence of said Weise from said lot, entered thereon, and took possession, and forcibly held the same from said Weise, and continued to retain the possession thereof until a short time before this cause was tried in the district court; that the Chisholms erected a house, and made other improvements thereon, during their occupancy of the same; that the rental value of said premises while so occupied by said Chisholms was reasonably worth \$15 per month. After said lot was taken possession of by said Chisholms, they endeavored to procure a deed of conveyance thereof from the probate judge of said county, who was the trustee, holding the title to the lots in said town site in trust for the use and benefit of the occupants under the laws of the United States; that after this action was commenced, and while it was pending in the justice's court, the said probate judge executed a deed of conveyance for said lot to said Chisholm; that afterwards, while this cause was pending in the district court, in an action and proceeding in equity, commenced by Weise against the Chisholms, a judgment and decree was obtained in the district court cancelling and annulling said deed, on the ground that the same was procured by fraud, and said decree, on appeal to the supreme court, was affirmed and made final. On the trial of this cause in the justice's court, the defendants therein offered said deed from said probate judge in evidence to show that the title to said lots was in controversy, and that the justice of the peace had no jurisdiction in the cause, the title of real estate being involved. The same question was presented in the district court, and this contention, together with the contention that, if plaintiffs in error were guilty at all, it was for a trespass upon the premises of defendants in error, and that a judgment for rents cannot follow a trespass, are the principal propositions urged by plaintiffs in error upon this appeal.

Under the statutes of this territory in force when this action was commenced, the action of forcible entry and detainer might be maintained against any person who committed a forcible entry and ouster, even though the latter was the owner of the property, and entitled to immediate possession, if the plaintiff had at the time of the forcible ouster the actual peaceable possession thereof. And an action for the forcible detention of real property may be maintained by one whose complete possession thereof has been ended by the wrongful entry of

another, even though such entry was made under claim of a paramount title. The general purpose of the statute does not regard the actual condition of the title of the property, but, where any person is in the peaceable and quiet possession of it, he shall not be turned out by force, by violence, or by terror. The party so using force and acquiring possession may have a superior title, or may have the better right to the present possession; but the policy of the law is to prevent disturbances of the public peace, and to forbid any person righting himself by his own hands and by violence, and requiring that the party who has obtained possession in this manner shall restore it to the party from whom it has been so obtained. The party out of possession must resort to legal means to obtain possession if he be entitled thereto. A party out of possession, though he may be entitled to the possession, must resort to the law alone to obtain what he claims. The law of this case was very clearly stated, and the meaning of our forcible entry and detainer statute very fully discussed, by Mr. Justice Blerer, at the last term of this court, in *Oklahoma City v. Hill*, 46 Pac. 568. It was there shown that the statute of Kansas from whence ours was adopted had been repeatedly construed by the supreme court of that state, and that the construction of such statute, as stated in *Oklahoma City v. Hill*, was a settled construction in the state of Kansas (*Campbell v. Coonradt*, 22 Kan. 704; *Conaway v. Core*, 27 Kan. 127; *Burdette v. Corgan*, Id. 275; *Buettinger v. Hurley*, 9 Pac. 197); also, that the same doctrine obtains in the state of Iowa (*Ensley v. Bennett*, 37 Iowa, 15), and in the state of Nebraska (*Brown v. Feagins*, 55 N. W. 1048). If the question of ownership, or in which party the title may be, is not properly an issue in forcible entry and detainer proceedings, the mere claim of title or the offering in evidence of a deed of conveyance by one of the parties will not raise a question of title, so as to divest a justice of the peace of jurisdiction. Title is only involved where the title may be a proper question for decision.

The jury in this cause found the reasonable value of the use of the premises in question to be \$15 per month, and the court below, upon the verdict, rendered a judgment for double the rental value thus found, in accordance with the provisions of the statutes. There is no merit whatever in the proposition of counsel for plaintiff in error "that there could be no recovery for rents; that the relation of landlord and tenant was not shown to exist; that plaintiffs in error were shown by the record to be trespassers; and that rent cannot be predicated upon a trespass, but can only be recovered where the relation of landlord and tenant does exist." There is no question of rents in this case. The action of forcible entry and detainer or of unlawful detainer need not be predicated upon the relation of landlord and tenant. They are actions to re-

cover damages for the wrongful taking and withholding, or for the wrongful withholding of the possession, of real property. The damages are measured under the statute by the rental value of the premises withheld. It is not for rents the action is brought, but for the possession and damages, measured by the actual rental value; and the statute measures the damage by a sum equaling double the amount of such rental value. Numerous objections are urged by counsel for plaintiffs in error in their briefs to the instructions given by the court below, and to the action of the court in refusing to give the numerous instructions asked by plaintiffs in error; but as the instructions given by the court correctly stated the theory of the law in this action, as herein stated, and as the instructions refused were predicated upon an erroneous theory of the law in this case, the law was fairly and properly stated to the jury, and there was no error committed therein. There being sufficient evidence, as shown by the record, to authorize the jury to find for the defendant in error upon the issues in this cause, the law having been fairly and properly stated to the jury, there being no error in the assessment of damages, and the judgment being clearly for the right party, it is affirmed. The other judges concur.

(5 Okl. 393)

**ST. LOUIS COMMISSION CO. v. CALLOWAY.**

(Supreme Court of Oklahoma. Feb. 12, 1897.)

**CASE-MADE—TIME FOR SERVICE.**

Where, by an order of court, time is given to a certain day within which to serve a case-made or other paper, or to do any act in court practice, the time allowed includes the day named as the close of the period prescribed. And where an order was made granting to the 6th day of May, 1895, to make and serve a case-made, *held*, that such case-made was served in time when served on said day.

(Syllabus by the Court.)

Error from district court, Kay county; before Justice A. G. C. Bierer.

Action by the St. Louis Commission Company against J. H. Calloway. Judgment for plaintiff, and it brings error. Affirmed.

Exline & Jacobus, for plaintiff in error.  
D. J. Donahoe, for defendant in error.

**TARSNEY, J.** This case stands on motion to set aside the case-made herein for the reason that said case-made was not served within the time allowed by the court therefor. It appears from the record that on March 28, 1895, judgment was rendered in said cause upon a verdict of a jury in favor of the plaintiff in error for the sum of \$100 and the costs of the action; that the court thereupon, on said day, ordered that the plaintiff in error have 30 days in which to make and serve a case-made; that the defendant in error have 15 days to suggest

amendments thereto, the case to be settled on 10 days' notice. Afterwards, on April 26, 1895, on motion of attorney for plaintiff in error, and for good cause shown, it was ordered by the court that the time for making and serving a case-made be extended to May 6, 1895. Said case-made was duly served upon the attorney for defendant in error upon May 6, 1895. The contention of the defendant in error is that the plaintiff in error, having been given to May 6, 1895, to make and serve a case-made, and said service not having been made until on May 6, 1895, such service was not within the time allowed by the court, and is therefore void. This contention cannot be sustained. We are cited by counsel for defendant in error to *Hartman v. Ringenberg* (Ind. Sup.) 21 N. E. 464, wherein it is said that, "when time is given until a day named to file a bill of exceptions, a bill filed on the day named is not within the time fixed for the filing." A number of cases show this to be the rule of the state of Indiana, but we think the contemplation of such an order of court, providing time to a certain date within which to do an act in court practice, such as the filing or service of a case-made or other papers, includes the date named as the close of the period prescribed. *Mining Co. v. Schreiner* (Mont.) 35 Pac. 878. No notice is required by the statutes to be given the defendant in error of an application for an extension of time in which to make and serve a case-made, or that such extension has been granted; and there is no strength in the suggestion of defendant in error that, because he had no notice of the application for such extension, or of the allowance of the order extending the time, he was not given time to suggest amendments, and that the case was settled and signed in the absence of the defendant in error, without any notice to him of the time or place where the same would be settled. The extension of the time in which to make and serve a case-made carried with it that part of the original order allowing 15 days after such case-made should be served to suggest amendments thereto. And defendant in error had 15 days after May 6, 1895, in which to suggest amendments. The record shows that long after the expiration of 15 days from May 6, 1895, when the case-made was served, namely, on June 17, 1895, defendant in error was duly served with notice "that on June 29, 1895, at eleven o'clock a. m., as soon thereafter as counsel could be heard the plaintiff in error would apply to the judge of said court in chambers, at Per Noble county, Oklahoma territory, and present and submit to the said judge for settlement the case-made as served" upon the defendant in error in said cause; that defendant in error had from May 6, 1895, to June 29, 1895, to suggest amendments to such case, if he desired to suggest any amendments.

ments thereto. The motion to dismiss must be denied.

2. This cause was tried by the court below with a jury. There was a verdict for the plaintiff in error. Not having recovered therein the amount prayed for in its petition, after verdict, it moved the court for a judgment for the amount prayed for in said petition non obstante veredicto, which motion was by the court below overruled, and judgment rendered on the verdict. We find no error calling for a reversal of this judgment in this record. There was evidence to support the verdict, and this court will not review the verdict of the jury or the findings of the court as to the weight or sufficiency of the evidence upon which the verdict was based. There being no other error apparent in the record, assigned for reversal, the judgment of the court below will be affirmed. It is so ordered. The other judges concur.

(5 Okl. 57)

**BREWER et al. v. BLACK.**

(Supreme Court of Oklahoma. Feb. 12, 1897.)

**JUSTICE'S COURT—PLEADINGS—FINDINGS—SUFFICIENCY.**

1. The same degree of particularity in pleadings is not required in actions before a justice of the peace that is required in other courts. It is sufficient if the bill of particulars states in a plain and direct manner the facts constituting the cause of action or the claim to be set off; and a pleading that is sufficient in a justice's court is sufficient in the district court, where the cause is tried de novo, upon an appeal.

2. A general finding includes the finding of all necessary facts to constitute the claim of the party in whose behalf the judgment is rendered; and upon appeal this court will not review the evidence upon which such finding was made to determine its sufficiency.

(Syllabus by the Court.)

Error to district court, Lincoln county; before Justice Frank Dale.

Action by T. L. Black against Brewer & Stannard. Judgment for plaintiff, and defendant brings error. Affirmed.

P. P. Hillerman, for plaintiff in error. L. E. Payne, for defendant in error.

TARSNEY, J. This action was commenced before a justice of the peace, where the plaintiff had judgment for the sum of \$58 and costs, from which judgment the defendant appealed to the district court of Lincoln county, where the cause was tried de novo, and judgment was rendered in favor of the plaintiff and against the defendant thereon, on November 14, 1894, for the sum of \$90.62 and costs of suit; and thereupon, after the filing and overruling of a motion for a new trial therein, the cause was duly appealed to this court; and the errors assigned for reversal are that the court erred in refusing to sustain a demurrer to plaintiff's bill of particulars; that the

court erred in the assessment of the amount of the damages; that the decision of the court was not sustained by sufficient evidence; and that the decision of the court was contrary to law.

The action was commenced by the defendant in error to recover of plaintiff in error certain commissions claimed for selling certain nursery stock under a contract therefor between the plaintiff and the defendant, and also for work and labor done and performed by plaintiff for defendant, at defendant's request. The bill of particulars filed in the cause alleged: That the defendant, Brewer & Stannard, was a co-partnership and proprietors of the Ottawa Star Nursery, at Ottawa, Kan., and doing business in the territory of Oklahoma. That on the 29th day of May, 1893, a certain salesman's contract, bearing date of that day, which was to said bill of particulars annexed, marked "Exhibit A," and made a part thereof, was made and entered into by and between the plaintiff and defendant. By the terms of said contract, the plaintiff was to act as salesman for the defendant, in the sale of nursery stock, and to devote his whole time and attention thereto, and comply with and carry out all instructions given him by said defendant for such time as it should be deemed mutually advantageous for both parties; and said contract provided that said plaintiff should sell at prices given him by the defendant, and not deviate therefrom. That, in consideration of the faithful performance of said contract by plaintiff, the defendant agreed to pay for such service at the rate of 27½ per cent. commission on all good orders sold for cash on delivery, and so delivered; 12½ per cent. of this commission to be advanced and become payable at any time after the orders were received and accepted by the defendant. It was also stipulated in said contract that all losses sustained by the defendant caused by verbal contracts made by said plaintiff for the sale of such stock, outside of written or printed orders, or in violation of instructions, should be retained by the defendant out of any amount due to the plaintiff under said contract. The bill of particulars further alleges that there was then due and owing to plaintiff from defendant on said contract, for commissions as aforesaid, the sum of \$80, and, for work and labor done and performed for said defendant, the sum of \$11. To this bill of particulars the defendant demurred, and said demurrer was by said justice of the peace overruled; whereupon the defendants filed their counterclaim in said action, claiming that, in violation of the terms of said contract, the plaintiff had sold large amounts of nursery stock, at prices less than those given to him by said defendant, in the regular price list furnished by defendant to plaintiff, and asked a recovery against the plaintiff for the amount for which said goods

were sold, less than the said price list thereof. Defendant's demurrer to plaintiff's bill of particulars was presented and argued to the district court, and was by said court overruled; and, the parties having waived a trial by jury, the cause was submitted to and tried by said court.

We think the bill of particulars sufficient and fully set forth a cause of action, and that the demurrer was rightfully overruled. The same degree of particularity in pleadings is not required in actions before a justice of the peace that is required in other courts. It is sufficient if the bill of particulars states in a plain and direct manner the facts constituting the cause of action or the claim to be set off. There was evidence in the record to sustain the findings of the district court that the plaintiff below was entitled to recover upon the items claimed and stated in his bill of particulars, and also evidence tending to establish the fact that if the plaintiff below, in selling and disposing of said nursery stock, violated that clause of the contract which provided that he should sell at prices given him by the defendant, and not deviate therefrom, such deviation from the terms of said contract was ratified and approved by the defendant. After they knew that plaintiff was selling at less than the price list, and after they had been informed by him that, unless he was permitted to sell at prices less than those mentioned in said list, he could not make sales, and would have to abandon the business, they continued to receive and approve orders from him, and to allow and pay the advance commissions provided for in the contract. We hold that this would constitute a ratification of the acts of the agent in departing from the terms of the contract, and that the defendant would thereby be estopped from claiming any damages on account thereof. The cause having been tried by the court, and there being a general finding by the court, such finding includes a finding of all the necessary facts to constitute the claim of the party in whose behalf the judgment is rendered; and we cannot review the same, or review the evidence upon which such finding was made to determine its sufficiency. There being no error in this record, the judgment of the court below must be affirmed. It is so ordered. The other judges concur.

(5 Okl. 225)

**BOARD OF EDUCATION OF CITY OF  
POND CREEK v. BOYER, Coun-  
ty Superintendent.**

(Supreme Court of Oklahoma. Feb. 12, 1897.)

**MUNICIPAL CORPORATIONS — SCHOOL DISTRICTS —  
ANNEXATION—PRESUMPTION.**

1. The board of education of a city of the first class has authority, upon application to it by a majority of the electors of the adjacent territory, to attach such territory to the city for school purposes.

2. Where a petition signed by persons who state that they are electors of the territory adjacent to a city is presented to the board of education of a city of the first class to have such adjacent territory attached to the city for school purposes, and the board acts upon the petition, and orders the territory mentioned in the petition to be attached to the city for school purposes, and an entry is made of this action upon the journal of the board, the law presumes that the board of education made the order of attachment regularly, and made it only upon its being ascertained that the petition was signed by a majority of the electors of such adjacent territory; and this presumption stands as evidence of the fact until overcome by proof.

3. Where territory adjacent to a city of the first class has been duly attached to such city for school purposes, the county superintendent has no power to detach such territory, and attach it to another school district, and, if she attempts to do so, she may be enjoined from so doing by the board of education of the city district.

(Syllabus by the Court.)

Appeal from district court, Grant county; before Justice John L. McAtee.

Action of injunction by the board of education of the city of Pond Creek against Frances Boyer, county superintendent, to restrain her from detaching one half section of land from the plaintiff's school district, and attaching it to an adjoining district. Judgment was had for the defendant, from which the plaintiff appeals. Reversed.

W. H. Taylor, for plaintiff in error. A. M. Mackey, for defendant in error.

BIERER, J. On the 21st day of June, 1895, the plaintiff board of education instituted its suit in the district court of Grant county to enjoin the defendant in error, as county superintendent, from detaching the N.  $\frac{1}{2}$  of section 11, township 25 N., of range 6 W. of the Indian meridian, in Grant county, Oklahoma Territory, from the school district of the city of Pond Creek, which was school district No. 90, and attaching the same to an adjoining school district—No. 103—of said county. The essential facts, as shown and undisputed, are that on the 14th day of November, 1893, the governor of the territory of Oklahoma issued his proclamation, as authorized by law, incorporating the government town site of Round Pond, the county seat of then L, now Grant, county, as a city of the first class, under the name of the city of Pond Creek. In January, 1894, the county superintendent divided the county into 120 school districts, forming district No. 90 from the territory covered by the city of Pond Creek and the lands surrounding the same, within one-half mile thereof, and also extending a mile further on the north to the Salt Fork of the Arkansas river. In this district so formed, school-district officers, consisting of director, clerk, and treasurer, were elected as for a country district. These officers qualified, opened schools, purchased furniture and supplies, employed teachers, and incurred an indebtedness amounting to \$1,064. They subsequently resigned, and

the board of education of the city of Pond Creek became their successors, assumed the indebtedness of the district, and issued the warrants of the board of education therefor. On the 22d day of September, 1894, a petition was presented to the board of education of the city of Pond Creek by persons who signed themselves as residents and electors of territory requested to be attached to the city of Pond Creek for school purposes, the petition giving their names, and the quarter section of land on which each resided. The petition asked that all the territory included within original district No. 90, and adjoining Pond Creek, be attached to the city of Pond Creek for school purposes. The territory asked to be attached to the city for school purposes comprised 19 quarter sections or fractional quarters of land, and was signed by 16 different persons. On the consideration of this petition, a majority of the members of the board being present on that day, as the record recites, "the petition of electors of adjacent territory to be attached to the city of Pond Creek for school purposes was read by the clerk. On motion, the above-named territory was attached by unanimous vote of the board." On the 12th day of January, 1895, the defendant county superintendent made an order detaching the land now in controversy, to wit, the N.  $\frac{1}{2}$  of section 11, township 25 N., of range 6 W., from the city school district, and attaching it to school district No. 103, lying to the south. As shown by the map attached to the record, the city of Pond Creek covers one half section of land. The northeast quarter of section 11, referred to, adjoins the west half of Pond Creek on the south, and, of course, the northeast corner of the northwest quarter of section 11 is the southwest corner of the city of Pond Creek. The board of education appealed from this order to the board of county commissioners of the county, and the order of the county superintendent was vacated. On the 12th day of June, 1895, the county superintendent made an order, on the application of homesteaders having entries on these two quarter sections of land, again detaching it from the school district of the city of Pond Creek, and attaching it to school district No. 103. This action was then brought to restrain the county superintendent from further proceeding to carry out such order, or detaching this land from the school district of the city of Pond Creek.

There is but one question necessary to be considered by us; that is, was the order detaching these lands from the city school district valid? It is the direct question at issue, and is answered by the consideration and determination of two other questions: First. When, under section 5832 of the school law of this territory, an order is made by the board of education of a city of the first class, on application to the board by the electors and residents of territory adjacent to the city, to attach such territory to the city for school purposes, is it to be presumed that the petition was signed by a majority of the electors of

such territory, or is the order to be held invalid unless it appears of record, or is proven as a fact, that the petition was signed by a majority of such electors? Second. When territory adjacent to a city of the first class has been attached to such city for school purposes, has the county superintendent then power to make an order detaching such territory from the city school district?

We proceed to the determination of these questions in their order. The board of education of the city of Pond Creek had the power to attach all the lands named in the petition presented to it to the city for school purposes if the petition was signed by a majority of the electors of such territory, although a part of the land did not immediately adjoin the city limits, the lands being a part of the entire body attached to the city for school purposes. *School Dist. v. Long*, 2 Okl. 460, 37 Pac. 601. A petition was presented to the board, setting out and describing the lands asked to be attached, which petition included the lands in controversy. This petition was signed by numerous persons who stated that they were electors of this adjacent territory. The board acted upon the petition, and made an order attaching the territory named in the petition to the city of Pond Creek for school purposes. It is stated in the brief of plaintiff in error that the district court rendered judgment against the plaintiff for the reason that the journal of the board of education did not show that there had been evidence produced before the board to prove that this petition was signed by a majority of the electors of the adjacent territory, and from the brief of counsel for defendant in error it would seem that this was his only contention. There is nothing in section 5832 which gives to boards of education of cities of the first class authority to attach to the city territory outside of the city limits, and adjacent thereto, for school purposes, which requires that the journal should show that evidence was produced to prove that the petition for such attachment was signed by a majority of the electors of the territory to be attached. The requirement of the law is that the petition shall be signed by a majority of the electors, not that it should appear upon the journal that evidence was produced to prove that it was so signed. It must exist as a fact that the petition is signed by a majority of the electors before the board has power to make the attachment. It is the duty of the board, then, to issue an order attaching the territory, and to have the same entered upon the journal. The journal, as it appears in this record, shows that the order approving the petition and attaching the territory as named in the petition was made, and this was by the clerk entered upon the journal. There was no evidence whatever offered by the defendant to show that this petition was not signed by a majority of the electors of the attached territory.

Was it necessary, in such a case, for the

journal of the board of education to show that evidence was produced proving that the petition was signed by a majority of these electors, or was it necessary for the plaintiff to prove as a fact in the district court that the petition was so signed? We think not. The statute gives the board of education power to make the attachment to the city, for school purposes, of adjacent territory, upon a petition signed by a majority of the electors thereof. The board in this case did have a petition presented to it. It did act upon the petition. And it did make an order attaching this territory to the city for school purposes, and the order was entered upon the journal. What more can be required to make a *prima facie* showing of the validity of this order? And, if nothing, then the *prima facie* showing becomes absolute, unless there is something presented to overcome it, which was not done in this case. The law presumes the validity and regularity of the official acts of public officers within the line of their official duty, as it does the legality of the acts of private persons; and this presumption obtains, until overcome by proof, as to all acts involving the performance of ministerial or administrative duties, except in cases where it is sought to take away personal rights of a citizen, or deprive him of his property, or place a charge or lien thereon. None of these exceptions appear in this case. It is simply a question whether this territory is a part of one school district or of another; purely a public question, in which no private or property rights are involved.

As to the presumption to be indulged in favor of the validity of the acts of persons in the performance of private or corporate duties, it is said by that able jurist Mr. Justice Story, whose decisions are replete with authorities in support thereof, in the case of *Bank v. Dandridge*, 12 Wheat. 70, that: "By the general rules of evidence, presumptions are continually made in cases of private persons of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace and the security of private property, indulges its own presumptions. It presumes that every man, in his private and official character, does his duty, until the contrary is proved. It will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, '*Omnia præsumentur rite et solemniter esse acta, donec probetur in contrarium.*' Thus it will presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matter collateral to that title shall be deemed to have been done,—as, for in-

stance, if a grant or feoffment has been declared on, attornment will be intended, and that deeds and grants have been accepted, which are manifestly for the benefit of the party. The books on evidence abound with instances of this kind, and many of them will be found collected in Mr. Starkie's late valuable treatise on Evidence. 3 Starkie, Ev. pt. 4, 1234, 1241, 1248, and note 1250 et seq. The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact." This decision has been a leading case ever since it was written whenever and wherever the question has been presented and fully considered in this country as to the presumptions to be made in favor of the regularity of the acts of public officers. In the case of *Gelpcke v. City of Dubuque*, 1 Wall. 221, the question was as to whether or not the indebtedness on which the suit was brought had been authorized by the consent of two-thirds of the electors as required by law. On the question the court said: "Where suit is brought on a contract made by a city, where the laws regulating it require the consent of two-thirds of its electors to validate debts for borrowed money, such consent need not be averred on the plaintiff's part. If, with such sanction, the debt would be obligatory, the sanction will, primarily, be presumed. Its nonexistence, if it does not exist, is matter of defense, to be shown by the defendant." In *Rankin v. Hoyt*, 4 How. 327, the question was as to whether the appraisers who had acted in the matter had done so upon the request of the collector, which request was a prerequisite to their action. The court said: "Although it was necessary for the collector to request the appraisers to act, and no such request appears in the record, yet the legal presumption is that the collector and appraisers did their duty, he requesting their action and they complying." In *Ward's Lessee v. Barrows*, 2 Ohio St. 242, the question arose as to the validity of a sale of land for taxes, and it was urged that the sale was invalid, because it did not affirmatively appear in the auditor's record that the delinquent list was sworn to by the collector, as required by law, and on the question the court said: "In favor of the acts of public officers, the law will presume all to have been rightly done, unless the circumstances of the case overturn this presumption; and consequently, as stated by the supreme court of the United States in *Bank of the United States*



v. Dandridge, 12 Wheat. 70, 'acts done which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter.' The act of the county auditor in allowing credit and making the certificate, which could only be lawfully done after the delinquent list had been verified by the collector, is presumptive proof that the oath had been administered by the auditor to the collector." The same doctrine was reaffirmed in *Coombs' Lessee v. Lane*, 4 Ohio St. 112. The question was again before the supreme court of Ohio in the case of *The Northern Indiana v. Milliken*, 7 Ohio St. 384, where the question arose as to the validity of an act of the legislature which conferred judicial powers upon mayors of cities. The constitution of the state required that such act should be passed by a vote of two-thirds of all the persons elected to each house of the general assembly. On the question the court said: "It is true, however, as contended by counsel for plaintiff in error, that, in order to the validity of those portions of the act referred to, which establish and confer judicial powers on the mayors of cities, the act must have been passed by the concurring vote of two-thirds of all the members elected to each house of the general assembly. This, however, in the absence of all showing in the record to the contrary, we will presume to have been done; and the record is silent on the subject. It is not to be presumed that the presiding officers of the two houses of the legislature would sign and promulgate an act as duly passed into a law, unless it had received the vote which the constitution requires." See, also, in support of the conclusion we reach, *Downing v. City of Miltonvale* (Kan. Sup.) 14 Pac. 281; *City of Seattle v. Doran* (Wash.) 32 Pac. 105; *Mathews v. Buckingham*, 22 Kan. 166. There being nothing to show that this petition was not signed by a majority of the electors of the attached territory, the presumption necessarily follows that it was so signed, and validates the attachment.

This territory having been attached to the city for school purposes, did the county superintendent have authority to detach it? Section 5760 gives the county superintendent the power, and makes it his duty, to divide the county into a convenient number of school districts, and to change such districts when the interests of the inhabitants thereof require it, under certain regulations prescribed in the section. Does this give him power to change the boundary of a school district of a city of the first class, where outlying territory has been attached thereto for school purposes? A city of the first class, by section 5831, constitutes a separate school district; and by section 5832, as we have seen, the board of education of such school district of a city of

the first class has power to attach adjacent territory, lying outside of the city. These latter provisions, we think, are a limitation upon the general authority given to a county superintendent by section 5760; and, although section 5760 is not, in its terms, limited to county districts, it must be so held to have been within the intention of the legislature, in order to give full effect to sections 5831 and 5832. As to the boundaries of city school districts, it was evidently the intention of the legislature that the boundary of the city should be the boundary of the school district, excepting that the board of education might determine to take in outside adjacent territory upon proper application. This application was not to be presented to the county superintendent, nor does the section providing for it authorize or require the county superintendent to perform any duty whatever in the premises. The application is to the board of education of the city, and it determines the question. It would be useless to say that the board of education of a city could attach adjacent territory, and that "such territory shall, from the date of such order, be and compose a part of such city for school purposes only," as is provided by the section giving authority for such attachment, if the county superintendent could immediately turn around and detach the attached territory. Sections 5760, 5831, and 5832 of our statute were substantially adopted from the school law of Kansas, there being no amendments in the adoption here in any particular which affects the question before us; and in the case of *Stewart v. Adams* (Kan. Sup.) 32 Pac. 122, the supreme court of that state held that territory outside of the limits of a city could not be attached to the city school district by order of the county superintendent, but could be attached only in the manner prescribed by the section of the statute of that state which is the same as section 5832 of the Statutes of this territory. Now, if the general section giving the county superintendent power to form school districts and to change the boundaries thereof could not be held, as against the other provisions, to give the county superintendent power to attach outlying territory to a city for school purposes, it must necessarily follow that such provision could not give the superintendent power to detach territory that had been properly attached. We hold, therefore, that, the territory in question having been once legally attached to the city of Pond Creek for school purposes, the county superintendent had no authority whatever to detach it, and the district court should have enjoined her from any further interference in the matter. The judgment of the court below is reversed, and remanded, with directions to enter judgment making the injunction perpetual at the costs of defendant. All the justices concurring excepting McATEE, J., who tried the case below, not sitting.

(5 Okl. 297)

**SCHWEIZER v. TERRITORY.**

(Supreme Court of Oklahoma. Feb. 12, 1897.)

**GAMING—INDICTMENT—STATUTE—ENACTMENT.**

1. An indictment under article 56, c. 25, St. 1893 (Gambling Laws), charging that the defendant did unlawfully play at a game of cards for money, to wit, a game commonly called "poker," is sufficient, and it is unnecessary in such an indictment to allege the nature or circumstances of the game, or the person or persons with whom it was played.

2. Where there is no constitutional provision requiring the legislature to read a bill upon different days, or in any particular manner, the validity of a statute is not affected by the fact that a provision of the law, requiring that every bill be read on three separate days, the first two readings being by title if desired, and the reading on its final passage being by sections, was suspended by a vote of less than two-thirds of the members present, as required by the section of the law requiring such reading. St. 1893, c. 46, § 17. Such a provision is merely a rule directing the conduct of the legislative body, and an act, when passed and signed by the governor, is not invalid because the legislature failed or refused to observe such rule.

(Syllabus by the Court.)

Appeal from district court, Canadian county; before Justice John H. Burford.

Jacob Schweizer was convicted of gaming, and brings error. Affirmed.

W. H. Orley, for plaintiff in error.

**BIERER, J.** Plaintiff in error was indicted and convicted in the district court of Canadian county under our statute against gambling. The indictment charged that on the 13th day of May, 1894, in Canadian county, Okl., the defendant "did unlawfully play at a game of cards for money, to wit, a game commonly called 'poker,' contrary to the statute," etc. The defendant claims that this indictment was insufficient, in that it did not inform the defendant of the particular act he was called upon to defend himself against. The crime charged is a statutory misdemeanor, and the language of the indictment covers all the material elements of the crime as defined in the section prohibiting it. Reading the statute as applicable to this particular class of gambling, it places a punishment upon any one who plays poker with cards, dice, or any device, for money, checks, credits, or any representative of value. All of the elements and conditions constituting this offense as defined in the statute are charged against this defendant, and it was not necessary to give the particulars of the offense as they might be proven by the evidence on the trial. The statute names and prohibits this particular game of poker, and it was unnecessary that the indictment should state any of the particulars of the game, or the person or persons with whom it was played. Whart. Cr. Pl. § 155; Schilling v. Territory (Wash. T.) 5 Pac. 926; State v. Light (Or.) 21 Pac. 132.

The defendant's conviction is also opposed because, as it is claimed, article 56, c. 25, St. 1893, which is the article on gambling, was not properly passed by the legislature, because the operation of section 17, c. 46, of the Statutes, was suspended by a vote of less than two-thirds of the representatives in the lower house of the legislature voting upon the proposition. The section referred to provides that every bill shall be read on three separate days in each house, and that the first two readings may be by title, and the reading on its final passage by sections; provided that in case of an emergency either house may, by a two-thirds vote, and by not less than a majority of the members elected, to be entered on the journal, suspend the operation of this section. Without stopping to decide how far the courts should properly go in determining whether or not an act, as it appears on the statute books, has received legislative sanction, and become a portion of the laws of the territory, and without stopping to determine whether or not the section alleged to have been violated in the passage of the gambling law was in fact disregarded, the objection of the defendant to this prosecution cannot be sustained. The matter presented suggests no valid reason why the provisions of the gambling act, as they appear in article 56 of chapter 25 of the Statutes, should not be enforced as law in this territory. We have no constitutional provision requiring that the legislature should read a bill in any particular manner. It may, then, read or deliberate upon a bill as it sees fit, either in accordance with its own rules, or in violation thereof, or without making any rules. The provision of section 17 referred to is merely a statutory provision for the direction of the legislature in its action upon proposed measures. It receives its entire force from legislative sanction, and it exists only at legislative pleasure. The failure of the legislature to properly weigh and consider an act, its passage through the legislature in a hasty manner, might be reasons for the governor withholding his signature thereto; but this alone, even though it is shown to be a violation of a rule which the legislature had made to govern its own proceedings, could be no reason for the court's refusing its enforcement after it was actually passed by a majority of each branch of the legislature, and duly signed by the governor. The courts cannot declare an act of the legislature void on account of noncompliance with rules of procedure made by itself to govern its deliberations. *McDonald v. State*, 80 Wis. 407, 50 N. W. 185; *In re Ryan*, 80 Wis. 414, 50 N. W. 187; *State v. Brown*, 33 S. C. 151, 11 S. E. 641; *Railway Co. v. Gill*, 54 Ark. 101, 15 S. W. 18. No other questions are raised in counsel's brief, and the judgment is therefore affirmed. All the justices concurring.

(115 Cal. 216)

FASSETT v. WISE et al. (Sac. 9.)

(Supreme Court of California. March 8, 1897.)

For majority opinion, see 47 Pac. 47.

GAROUTTE, J. (dissenting). The facts may be stated briefly as follows: (1) On March 14, 1894, plaintiff's mortgage was executed, and at that date the mortgagor resided in Kings county, and the mortgaged property was also there situated. (2) The mortgaged property was thereafter, on April 3, 1894, and before the mortgage was recorded anywhere, removed to the county of Tulare, where it was attached by the defendants, on April 28, 1894, after plaintiff's mortgage had been recorded in the county of Kings, but before its recordation in the county of Tulare. (3) After such attachment, and on April 30, 1894, plaintiff's mortgage was duly recorded in the county of Tulare, where the mortgaged property then was.

Upon the foregoing statement of facts, the only question presented is, was the mortgage of plaintiff recorded in the manner required by law, before the levy of the attachment under which the defendants justify? for, if it was so recorded, then plaintiff is entitled to a judgment upon the findings. And the solution of this question is dependent upon the true construction of two sections of the Civil Code. These sections read:

"Sec. 2959. A mortgage of personal property must be recorded in the office of the county recorder of the county in which the mortgagor resides, and also in the county in which the property mortgaged is situated, or to which it may be removed."

"Sec. 2965. When personal property mortgaged is thereafter by the mortgagor removed from the county in which it is situated, it is, except as between the parties to the mortgage, exempted from the operation thereof, unless either,

"(1) The mortgagee, within thirty days after such removal causes the mortgage to be recorded in the county to which the property has been removed; or,

"(2) The mortgagee, within thirty days after such removal, takes possession of the property as prescribed in the next section."

A fair construction of section 2959 is that the mortgage must be recorded in the county where the mortgagor resides at the time of its execution; and, if the property is situated in a different county at that time, then the mortgage must also be recorded in the county where the property is then situated. Jones on Chattel Mortgages (section 251) says: "It is the place of residence of the mortgagor at the time the mortgage is executed, and not his place of residence at the time it is recorded or filed, that determines the place where it should be recorded or filed." Cobbey on Chattel Mortgages (section

573) says: "The place of residence at the time it is executed, and not at the time it is filed, is what governs." While the text of these writers is not fully borne out by cases they have cited, owing to the peculiar language of the various statutes under which these decisions were made, I think the general principle they have stated entirely sound; and the case of Bank v. Weed, 89 Mich. 357, 50 N. W. 864, supports such a construction of our statute. We have statutes authorizing chattel mortgages in nearly every state in the Union. About one-half of these statutes provide, in terms, that the mortgage must be recorded where the mortgagor resides at the time the mortgage is executed, while the remainder are couched in language similar to our own. There does not appear to be a single statute of them all that in terms requires the mortgage to be recorded in the county where the mortgagor resides at the time the mortgage is recorded. And in the decision of many cases under similar statutes, from other states, the courts appear to assume without question that the residence of the mortgagor and location of the mortgaged property at the date of the execution of the mortgage are the all-controlling elements.

It necessarily follows from the foregoing that the fact of the mortgage not having been recorded in Kings county until after the sheep were removed to Tulare county is immaterial. That portion of section 2965 here involved means that the mortgagee had 30 days from such removal within which to record his mortgage in the county to which the property is removed, and that he loses no rights if he records his mortgage within that time. In the present case the mortgage was recorded in Kings county—the county in which the mortgagor resided, and in which the property was situated at the time of its execution—prior to the levy of defendants' attachment; and, although the attachment was levied upon the property in Tulare county prior to the recordation of the mortgage in Tulare county, still it was levied at a time before the 30 days had expired in which the mortgagee had the right to there record the mortgage. If this attachment is binding against the mortgagee, it would have been binding against him if levied the very day the property passed into Tulare county, and thus the purpose of the statute in giving the mortgagee time in which to record his mortgage would be defeated, and the statute rendered unavailing for any purpose. By reason of the foregoing views, the case, then, presents itself exactly as though the property had never been removed from Tulare county, but had remained in Kings county, and this attachment had been levied there as of the time it was actually levied. Under such conditions, the writ of attachment being levied subsequent to the recordation of the mortgage, it should not prevail.

It is urged by respondents that the mortgage must be recorded immediately upon its execution, and, if not so recorded, it is void; but I find no law for such a conclusion. The statute has no provision requiring immediate recordation, and it would be judicial legislation for this court to so declare the law. Section 2957 of the Civil Code declares: "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless: (1) It is accompanied by an affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay or defraud creditors; (2) it is acknowledged or approved, certified and recorded, in like manner as grants of real property." Under the statutes of other states which, like ours, contain no provision fixing a definite time in which a chattel mortgage must be recorded in order that it may not be void, it has been held that mere delay in such recordation in no way invalidates the mortgage, and that the holder of the mortgage, in not recording it, simply assumes the perils and risks of losing his security by the intervention of other liens or subsequent purchasers. *Jones, Chat. Mortg.* § 237; *Wilson v. Leslie*, 20 Ohio, 166; *Hicks v. Williams*, 17 Barb. 527; *McVay v. English*, 30 Kan. 368, 1 Pac. 795; *Mitchell v. Black*, 6 Gray,

100; *Crooks v. Stuart*, 2 McCrary, 13, 7 Fed. 800. I believe such to be the law in this state.

Respondents rely, both directly and by analogy, upon section 3440 of the Civil Code, which declares that all transfers of personal property are void, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession. But this section cannot be invoked to any degree in this case. It is not applicable, for in terms mortgages upon personal property, when allowed by law, are exempted from its provisions. Neither is there any analogous principle of law which will aid respondents' contention. *Berson v. Nunan* and like cases declare that the recordation of the mortgage is an equivalent of an immediate delivery and continued change of possession, but there the court only meant to say, and the language can have no other reasonable interpretation, that the recordation of the mortgage, when had, from that time was the equivalent of the immediate delivery and continued change of possession referred to in section 3440 of the Civil Code. The recordation of the mortgage is no part of the execution, no more than recordation would be an element in the execution of a deed. It is substantially so stated in *Berson v. Nunan*, 63 Cal. 551. I think the judgment should be reversed.

MEMORANDUM DECISIONS.

In re BLYTHE'S ESTATE. (S. F. 657.) (Supreme Court of California. Jan. 8, 1897.) Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge. H. T. Blythe and others appeal from the decree of final distribution in the matter of the estate of Thomas H. Blythe. Dismissed on motion. Holliday & Holliday, for appellants. W. H. H. Hart (Garber, Boalt & Bishop and W. W. Foote, of counsel), for respondent.

PER CURIAM. This is a motion to dismiss the appeal of H. T. Blythe and others from the decree of final distribution in the matter of said estate, upon the ground that said appellants are not parties in interest in the proceeding. The appellants are concluded by the decision of this court upon their other appeals. They are no longer parties in interest. The motion is granted, and the appeal dismissed.

In re BLYTHE'S ESTATE. (S. F. 658.) (Supreme Court of California. Jan. 8, 1897.) Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge. The Blythe Company appeals from the decree of final distribution in the matter of the estate of Thomas H. Blythe. Dismissed on motion. George W. Towle, Jr., for appellant. W. H. H. Hart (Garber, Boalt & Bishop and W. W. Foote, of counsel), for respondent.

PER CURIAM. This is a motion to dismiss the appeal of the Blythe Company from the decree of final distribution in the matter of the said estate, upon the ground that said company is not a party in interest in the proceeding. Such was the determination of the court as to this appellant in *Re Blythe's Estate*, 112 Cal. 689, 45 Pac. 6. The appeal is therefore dismissed.

FIRST NAT. BANK OF SAN DIEGO, Appellant, v. NASON, Respondent. (L. A. 140.) (Supreme Court of California. Jan. 22, 1897.) Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge. Action by the First National Bank of San Diego against Arthur G. Nason. From a judgment of dismissal for want of prosecution, plaintiff appeals. Affirmed. Trippett & Neale, for appellant. Cassius Carter, for respondent.

PER CURIAM. This appeal is from a judgment of dismissal of the action for want of prosecution. The action is upon a promissory note, and is in all essentials identical with the case between the same parties, entitled "*First National Bank of San Diego vs. Arthur G. Nason*, No. 141," submitted on a like bill of exceptions and the same briefs, and this day decided. 47 Pac. 596. For the reasons given in that case, the judgment here is affirmed.

GRAY et al., Appellants, v. MAHON, Respondent (three cases). (S. F. 459-461.) (Supreme Court of California. Dec. 23, 1896.) Department 1. Appeal from superior court, Marin county; F. M. Angellotti, Judge. Actions by Gray and others against Mahon. Judgments for defendant and plaintiffs appeal. Affirmed. Fisher Ames and Jas. W. Cochrane, for appellants. E. B. Mahon, for respondent.

PER CURIAM. Upon the authority of *Gray v. Lucas* (S. F. 458; this day decided) 47 Pac. 354, the order in each of the above-entitled cases is affirmed.

HALEY, Appellant, v. PARKER, Auditor, Respondent. (S. F. 344.) (Supreme Court of California. Jan. 6, 1897.) In bank. Appeal from superior court, Santa Clara county; John Reynolds, Judge. Action by Edward Haley against W. F. Parker, auditor. From a judgment in favor of defendant, plaintiff appeals. Reversed. D. W. Burchard, for appellant. B. A. Herrington, for respondent.

PER CURIAM. This cause was submitted to follow the decision in *Dwyer v. Parker* (S. F. 345) 47 Pac. 372. For the reasons given in the opinion in that case, the judgment is reversed, with directions to enter judgment for the appellant as prayed for. BEATTY, C. J., not participating.

JOHNSTON et al., Respondents, v. SHORE et al., Appellants. SAME, Respondents, v. BROWN et al., Appellants. SAME, Respondents, v. SAWYER et al., Appellants. (S. F. 354-356.) (Supreme Court of California. Jan. 23, 1897.) Department 1. Appeal from superior court, San Benito county; James F. Breen, Judge. Actions by one Johnston, administratrix, and others, against Shore and others, Brown and others, and Sawyer and others. From orders granting changes of venue, defendants appeal. Affirmed. Scott & Dooling and N. C. Briggs, for appellants. D. W. Burchard (F. E. Spencer, G. B. Montgomery, and L. W. Jefferson, of counsel), for respondents.

PER CURIAM. Upon the authority of *Johnston v. Brown* (S. F. 353; this day decided) 47 Pac. 686, the order in each of the above cases is affirmed.

WARREN, Respondent, v. CHANDOS et al., Appellants. (S. F. 451.) (Supreme Court of California. Dec. 18, 1896.) Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge. Action by one Warren against one Chandos and others on an assessment for grading a street. From a judgment for plaintiff, defendants appeal. Reversed. Naphtaly, Friedenrich & Ackerman, for appellants. J. C. Bates, for respondent.

PER CURIAM. Upon the authority of *Warren v. Chandos* (S. F. 450; this day decided) 47 Pac. 132, the judgment herein is reversed, and the superior court is directed to enter judgment upon the findings in favor of the defendants.

MOLLIE GIBSON CONSOLIDATED MINING & MILLING CO., Plaintiff in Error, v. SUMMERS, Defendant in Error. (Supreme Court of Colorado. Dec. 7, 1896.) Error to court of appeals. Action by Mary Summers against the Mollie Gibson Consolidated Mining & Milling Company. From a decision in favor of plaintiff, the defendant appealed to the court of appeals, and from a judgment of affirmance (38 Pac. 853) brings error. Affirmed. Brown & Smith, for plaintiff in error.

PER CURIAM. Substantially the same legal questions are involved in this case as in that of *Milling Co. v. Sharp* (decided at this term) 47 Pac. 266. The decision there controls here, and in accordance therewith the judgment of the court of appeals should be affirmed, and it is so ordered. Affirmed.

# ADA COUNTY v. FIRST NAT. BANK OF IDAHO.

(Supreme Court of Idaho. Dec. 12, 1896.)

Appeal from district court, Ada county; J. H. Richards, Judge.

Action by the county of Ada against the First National Bank of Idaho. Judgment for defendant on demurrer, and plaintiff appeals. Affirmed.

Hawley & Puckett, for appellant. Johnson & Johnson and George H. Stewart, for respondent.

**HUSTON, J.** The decision of this case will necessarily follow that made in the case of *Ada Co. v. Bullen Bridge Co.*, 47 Pac. 818. The end sought in both cases is the same, to wit, the cancellation of certain warrants drawn upon the treasury of Ada county by order of the board of county commissioners. The complaint is as follows:

"The plaintiff complains of defendant, and for a first cause of action alleges:

"First. That the plaintiff is a political subdivision of the state of Idaho, and a county of said state.

"Second. That defendant is a corporation organized and existing under the laws of the United States, and doing business in Ada county, state of Idaho.

"Third. That at the regular April, 1893, meeting of the board of county commissioners of Ada county, and on April 10, 1893, there was filed by the defendant before said board of county commissioners, and with Sherman G. King, auditor of Ada county, and clerk of said board, two several instruments in writing, which said instruments were attached together, and filed and presented as one instrument or document, and one of which said instruments was and is in words and figures following, to wit:

"Boise City, February 22d, 1893. This is to certify that I have entered into a contract as county commissioner in charge of the building and protecting of the new bridge above Boise City, with D. P. B. Pride, for the hauling, delivering, and laying of the stone for the protection of the piers and approach to the south side of said bridge, in the sum of nine hundred and ninety-five dollars; said work to be done under my personal direction. \$995. [Signed] W. Jauman, Commissioner.

"County Commissioners, Ada County, Idaho: You will please pay the First National Bank of Idaho the amount due me as above, \$995. [Signed] D. P. B. Pride."

"And the other of which said instruments was and is in words and figures following to wit:

"Boise City, — 10th, 1893. This is to certify that under contract with D. P. B. Pride, made with him as commissioner in charge of the building and protecting of the new bridge across Boise river above said Boise City, the county of Ada is indebted to said Pride, for stone delivered, in the sum of nine hundred and ninety-eight dollars. \$998. [Signed] W. Jauman, Commissioner."

"County Commissioners, Ada County, Idaho: Will please pay the amount due me, as above, \$998, to the First National Bank of Idaho. [Signed] D. P. B. Pride."

"That said instruments, so filed and presented and attached together, were and are indorsed on the back thereof as follows: 'Cur. Ex. Fund. Bill of First Nat. Bank, \$1,903. Filed April 10th, 1893. S. G. King, Auditor. Allowed. \$1,903. Disallowed, \$——. W. Jauman, Chairman.'

"Fourth. That there was not at said or any time a bill or account filed with said instruments, and no affidavit of defendant, or any one in its behalf, or any person whomsoever,

and the same was not verified as to its correctness, or verified in any manner or at all.

"Fifth. That as plaintiff is informed and believes, and therefore alleges, the defendant claimed said instruments in writing attached together as aforesaid was a legal and proper charge against said Ada county, and that by presenting and filing the same as aforesaid defendant claimed it had presented an account, demand, and claim against said county; that said claim, as plaintiff is informed and believes, and therefore alleges, was not legally chargeable against said county, and no liability was created thereby.

"Sixth. That W. Jauman, mentioned in said instruments, was in said year 1893 a member of the board of county commissioners of Ada county and chairman of said board.

"Seventh. That no order was at any time made by said board of county commissioners of said Ada county, either upon the dates mentioned in said instruments or prior or subsequent thereto, authorizing, empowering, or directing the said W. Jauman, or either or any of the members of the board of county commissioners of Ada county, to enter into any contract or agreement with D. P. B. Pride, or any other person, for hauling, delivering, or laying of the stone for the protection of the piers or approaches to the south side, or either side, of the new bridge above Boise City, for any sum whatever, or for building or protecting the said new bridge across Boise river above Boise City.

"Eighth. That said board did not at any time, either at the times mentioned in said instruments, or before or after said times, authorize, empower, or direct, by any order of said board, the said W. Jauman, or any member of said board, to make any contracts or agreements, with any person or persons, in regard to any purchase of stone, or in regard to any bridges belonging to Ada county, either in regard to the building or repair thereof, or the protection of the same, or give any authority or power to said W. Jauman, or any member of the board, to protect or care for bridges or any property of the county, or to make any agreement or contract in regard to the care or protection of county property.

"Ninth. That said W. Jauman, as plaintiff is informed and believes, and therefore alleges, signed said instruments and delivered them to the said Pride, with the intent then and there and thereby to cheat and defraud, and to permit said Pride to cheat and defraud, this plaintiff; and that said Pride received said instruments well knowing that said Jauman had no right, power, or authority to bind said Ada county thereby, or to create any liability against said Ada county by reason thereof; and that the defendant accepted said instruments in writing from said Pride, and presented them as aforesaid to said board of county commissioners, well knowing that they were not proper or legal charges against said county, and that no liability against said county was created thereby.

"Tenth. That the pretended services mentioned and referred to in said written instruments were not rendered or performed by said Pride or the defendant, or by any one in his or their behalf.

"Eleventh. That upon said 10th day of April, A. D. 1893, at the regular session of said board aforesaid, the defendant fraudulently obtained the sum of one thousand nine hundred and ninety-three dollars, to be allowed in its favor out of and upon the current expense and redemption fund of said Ada county, for and on account of said instruments in writing, and to settle and satisfy the pretended claim and demand of defendant against Ada county by reason thereof.

"Twelfth. That by reason of said fraudulent allowance, made as aforesaid, the defendant fraudulently obtained a warrant of said county to be issued and drawn upon the current ex-

pense and redemption fund of said county upon the 17th day of April, 1893, by the auditor of said county, and in favor of said defendant, said warrant being marked and numbered No. 325 of the current expense and redemption fund warrants of said county, which said warrant was then and there, by said officer, given over into the possession of defendant, and defendant now holds and claims said warrant; that said warrant was without consideration, and was and is illegal and void.

"Thirteenth. That defendant, after the allowance of said warrant as aforesaid, and its issuance and delivery to him as aforesaid, presented said warrant for payment to the treasurer of said county, and the treasurer of said county refused to pay said warrant for want of funds, and indorsed thereon, 'Not paid for want of funds,' annexing the date of presentation and signing his name as treasurer, and returning said warrant to defendant; that defendant holds said warrant, and claims and pretends it is a legal obligation of said county.

"And for a second cause of action herein plaintiff alleges:

"First. That the plaintiff is a political subdivision of the state of Idaho, and a county of said state.

"Second. That defendant is a corporation organized and existing under the laws of the United States, and doing business in Ada county, state of Idaho.

"Third. That at the regular April, 1893, meeting of the board of county commissioners of Ada county, and on April 10, 1893, there was filed by the defendant before said board of county commissioners, and with Sherman G. King, auditor of Ada county, and clerk of said board, two several instruments in writing, which said instruments were attached together and filed and presented as one instrument or document, and one of which said instruments was and is in words and figures following, to wit:

"Boise City, Idaho, March 25th, 1893. This is to certify that as one of the county commissioners within and for the county of Ada, being in charge of the county bridge at Boise City known as the "Eighth Street Bridge," that I have entered into a contract with said Pride, on and in behalf of said Ada county, for the repairing, with stone, the south bank of said river above said bridge, said Pride to lay the stone and put in brush under my personal direction; and for doing of said work, hauling the stone, and delivering the brush Ada county is to pay to said D. P. B. Pride the sum of nine hundred and ninety-five dollars. [Signed] J. A. Beal, County Commissioner."

"Indorsement on back of above: '\$995. County auditor of Ada county will please issue warrant to the First National Bank of Idaho, who are authorized to receipt and receive the same. [Signed] D. P. B. Pride. April 1, 1893."

"And the other of which said instruments was and is in words and figures following, to wit:

"Boise City, Idaho, April 1st, 1893. This is to certify that as county commissioner, being in charge of county bridge at Boise City known as the "Eighth Street Bridge," I contracted with D. P. B. Pride for stone to the amount of nine hundred and ninety-eight dollars, for the support of the embankments above said bridge, and for the protection of said bridge; and that the county of Ada is indebted to said Pride under said contract for the sum of nine hundred and ninety-eight dollars. [Signed] J. A. Beal, County Commissioner."

"In pencil: 'Contract completed April 1, 1893."

"Indorsement on back of above: '\$998. County auditor of Ada county will please issue warrant to the First National Bank of Idaho, who are hereby authorized to receive and re-

ceipt for same. [Signed] D. P. B. Pride. April 1, 1893."

"That said instruments so filed and presented and attached together are indorsed on the back thereof as follows: 'Cur. Ex. Fund. Bill of First Nat. Bank, \$1,993. Filed April 8th, 1893. S. G. King, Auditor. Allowed, \$1,993. Disallowed, \$——. W. Jauman, Chairman.'

"Fourth. That there was not at said or any time a bill or account filed with said instruments, and no affidavit of defendant, or any one in its behalf, or of any person whomsoever, and the same was not verified as to its correctness, or verified in any manner, or at all.

"Fifth. That as plaintiff is informed and believes, and therefore alleges, the defendant claimed said instruments in writing attached together as aforesaid as a legal and proper charge against said Ada county, and that by presenting and filing the same as aforesaid defendant claimed it had presented an account, demand, and claim against said county; that said claim, as plaintiff is informed and believes and alleges, was not legally chargeable against said county, and no liability was created thereby.

"Sixth. That J. A. Beal, mentioned in said instruments, was in said year 1893 a member of the board of county commissioners of said Ada county, and the chairman of said board.

"Seventh. That no order was at any time made by said board of county commissioners of said Ada county, either upon the dates mentioned in said instruments or prior or subsequent thereto, authorizing, empowering, or directing the said J. A. Beal, or either or any of the members of said board of county commissioners of Ada county, to enter into any contract or agreement with D. P. B. Pride, or any other person, for hauling, delivering, or laying of the stone for the protection of the piers or approaches to the south side, or either side, of the new bridge at Boise City, for any sum whatever, or for building or protecting the said new bridge across Boise river known as the 'Eighth Street Bridge.'

"Eighth. That said board did not at any time, either at the times mentioned in said instruments, or before or after said times, authorize or direct, by any order of said board, the said J. A. Beal, or any member of said board, to make any contracts or agreements with any person in regard to any purchase of stone, or in regard to any bridges belonging to Ada county, either in regard to the building or repair thereof, or the protection of the same, or give any authority or power to said J. A. Beal, or any member of said board, to protect or care for bridges or other property of Ada county, or to make any agreement or contract in regard to the care or protection of county property.

"Ninth. That said J. A. Beal, as plaintiff is informed and believes, and therefore alleges, signed said instruments and delivered them to the said Pride, with the intent then and there and thereby to cheat and defraud, and to permit said Pride to cheat and defraud, this plaintiff; and that said Pride received said instruments well knowing that said Beal had no right, power, or authority to bind said Ada county thereby, or to create any liability against said Ada county by reason thereof; and that he accepted said instruments in writing from said Pride, and presented them as aforesaid to said board of county commissioners, well knowing that they were not proper or legal charges against said county, and that no liability against said county was created thereby.

"Tenth. That the pretended services mentioned and referred to in said written instruments were not rendered or performed by said Pride, or by the defendant, or by any one in his or their behalf.

"Eleventh. That upon said 10th day of April, 1893, at the regular session of said board aforesaid, the defendant fraudulently obtained the sum of one thousand nine hundred and ninety-three dollars, to be allowed in its favor out of and upon the current expense and redemption fund of said Ada county for and on account of said instruments in writing, and to settle and satisfy the pretended claim and demand of defendant against Ada county by reason thereof.

"Twelfth. That by reason of said fraudulent allowance made as aforesaid the defendant fraudulently obtained a warrant of said county to be issued and drawn upon the current expense and redemption fund of said county upon the 17th day of April, 1893, by the auditor of said county, and in favor of said defendant, said warrant being marked and numbered No. 326 of the current expense and redemption fund warrants of said county, which said warrant was then and there, by said officer, given over into the possession of defendant, and the defendant now holds and claims said warrant; that said warrant was without consideration, and was and is illegal and void.

"Thirteenth. That defendant after the allowance of said warrant as aforesaid, and its issuance and delivery to it as aforesaid, presented said warrant for payment to the treasurer of said county, and the treasurer aforesaid refused to pay said warrant for want of funds, and indorsed thereon, 'Not paid for want of funds,' annexing the date of presentation, and signing his name as treasurer thereto, and returning said warrant to defendant; that defendant holds said warrant, and claims and pretends it is a legal obligation of said county.

"Wherefore plaintiff prays that the said warrant numbered 325, mentioned in the first cause of action herein, and the said warrant numbered 326, mentioned in the second cause of action herein, and each and both of them, be decreed to be surrendered and canceled, as having been obtained by fraud and without consideration, and for such other relief as to the court may seem meet and proper in the premises; and for costs of suit.

"Hawley & Puckett,

"Attorneys for Plaintiff.

"Duly verified. Filed June 10th, 1895."

To this complaint defendant interposed a general demurrer, which was sustained by the district court, and, plaintiff declining to amend, judgment was entered for defendant, from which plaintiff appeals. After what has been said by the court in the case of *Ada Co. v. Bullen Bridge Co.*, further comment is unnecessary. The judgment of the district court is overruled, and the cause remanded, with instructions to overrule the demurrer of defendant, with leave to defendant to answer. Costs to appellant. MORGAN, C. J., and SULLIVAN, J., concur.

On Rehearing.

(Feb. 6, 1897.)

This case was submitted with the case of *Ada Co. v. Bullen Bridge Co.*, 47 Pac. 818, with the understanding that the decision in this case should follow the decision in that. For the reasons stated in the opinion in that case, the judgment of the court below is sustained in this case. Costs in favor of respondent. HUSTON and QUARLES, JJ., concur.

**DENNIS v. STATE BANK OF SENECA.** (Supreme Court of Kansas. Feb. 6, 1897.) Error from district court, Nemaha county; J. F. Thompson, Judge. Action by the State Bank of Seneca against T. G. Dennis. Judgment for plaintiff, and defendant brings error. Affirmed. Wm. R. Hazen, for plaintiff in error. J. E. Taylor and Wells & Wells, for defendant in error.

**PER CURIAM.** On an examination of the record, the motion to dismiss is overruled. We have examined the various errors assigned, but find nothing requiring a reversal of the judgment; nor is any question of law presented which appears to require consideration in a formal opinion. The testimony in the case is sufficient to sustain the verdict, and a discussion of the facts would be of no interest to the profession. The judgment is affirmed.

**JACOB v. GRAVES et al.** (Supreme Court of Kansas. Jan. 8, 1897.) Error from district court, Reno county; F. L. Martin, Judge. Action by Adam Jacob, administrator, against William Graves and others. Judgment for defendants, and plaintiff brings error. Affirmed. Wright & Stout, for plaintiff in error. Lewis & Pierce, for defendants in error.

**PER CURIAM.** The error assigned in this case is that the judgment of the court is not sustained by sufficient evidence, and is contrary to law. The defendants call attention to the fact that the case made fails to show that it contains all the evidence. On examination we find this claim well founded. There is nothing indicating, even inferentially, that the evidence is all before us. This being the only question presented, there is nothing for us to consider. The judgment is affirmed.

**ADAMS, Plaintiff in Error, v. CITY OF ARGENTINE et al., Defendants in Error.** (Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.) Error from district court, Wyandotte county; H. L. Alden, Judge. Action by the city of Argentine and others against David J. Adams. Judgment for plaintiffs, and defendant brings error. Affirmed. Thos. J. White, for plaintiff in error. H. A. Bailey, for defendants in error.

**GARVER, J.** The facts and questions involved in this case are substantially the same as in the case of *Kansas Town Co. v. Same Defendants*, 47 Pac. 542, and upon the authority of the opinion filed in that case this judgment is affirmed.

**CLOUD COUNTY BANK, Plaintiff in Error, v. PROVIDENCE-WASHINGTON INS. CO., Defendant in Error.** (Court of Appeals of Kansas, Northern Department, C. D. Dec. 5, 1896.) Error from district court, Cloud county; F. W. Sturges, Judge. Action by the Cloud County Bank against the Providence-Washington Insurance Company of Providence, R. I. Judgment for defendant, and plaintiff brings error. Affirmed. Kennett, Peck & Matson, for plaintiff in error. G. W. Barnett, I. A. Rigby, and C. L. Botsford, for defendant in error.

**GARVER, J.** The errors complained of in this case arise upon the testimony. The evidence is not preserved in the record; the case made merely containing a stipulation and reference to another case pending in this court, which, with certain suggested changes, it is agreed shall be taken and considered as evidence, in connection with the record in this case. As we have held in the case of *Hannon v. Holmes*, 47 Pac. 162, such a stipulation and reference do not justify this court in going outside of the record in this case to ascertain the facts necessary to be considered for a review of the errors assigned. Upon the authority of *Hannon v. Holmes* and *Parkhurst v. Bank*, 55 Kan. 100, 39 Pac. 1027, the judgment is affirmed. All the judges concurring.

**KING, Plaintiff in Error, v. CITY OF ARGENTINE et al., Defendants in Error.** (Court of Appeals of Kansas, Northern Department, E. D. Dec. 29, 1896.) Error from district court,



Atchison county; W. D. Webb, Judge. Action by the city of Argentine and others against Julius King. Judgment for plaintiffs, and defendant brings error. Affirmed. Thos. White, for plaintiff in error. H. A. Bailey, for defendants in error.

GARVER, J. The facts and questions involved in this case are substantially the same as in the case of *Kansas Town Co. v. Same Defendants*, 47 Pac. 542, and upon the authority of the opinion filed in that case this judgment is affirmed.

RICHARDSON, Plaintiff in Error, v. WOODLAWN TOWN CO., Defendant in Error. (Court of Appeals of Kansas, Southern Department, C. D. Jan. 5, 1897.) Error from district court, Sumner county; James A. Roy, Judge. Action by the Woodlawn Town Company against Thomas Richardson. Judgment for plaintiff, and defendant brings error. Affirmed. W. W. Schwinn, for plaintiff in error. A. E. Parker and L. Nebeker, for defendant in error.

JOHNSON, P. J. This case was submitted together with the case of *Richardson v. Woodlawn Town Co.* (No. 154; just decided) 47 Pac. 556, and as the contract in this case is precisely the same as the agreement in that case, except it is for different parcels of real property, and to a different vendee, the decision in that case is decisive of all the questions in this. The judgment of the district court is affirmed. All the judges concurring.

WILSON et al., Respondents, v. HARRIS et al., Appellants. (Supreme Court of Montana, Jan. 2, 1897.) Appeal from district court, Lewis and Clarke county; Horace R. Buck, Judge. Action by Milton H. Wilson and others against B. Harris and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed. H. G. McIntire, A. J. Craven, and Thos. C. Bach, for appellants. McConnell, Clayberg & Gunn, for respondents.

PER CURIAM. This case was argued on December 7, 1896, before PEMBERTON, C. J., and DE WITT, J.; HUNT, J., deeming himself disqualified. From that day until now—January 2, 1897,—the case has had the earnest consideration of the justices who heard it. There are several important questions of law in the case, but the greatest difficulty arises in the interpretation and construction of the facts and the application of the law thereto. Upon some of the questions involved we are wholly in accord,—for example, as to finding 5 by the court. While the finding does not so state, it suggests a participation by H. L. Frank in some fraud in a sale by the assignee to him. It is expressly found that the assignee acted in good faith, and we do not think that the facts as presented to us warrant any different conclusion as to Frank. There are also other matters in which we agree, some of which are material, and others of which are unimportant; but there are other questions which are material and necessary to the affirmance or reversal of the judgment upon which we do not agree, and upon which, after three weeks' consideration, we find that we are not at all able to agree. The personnel of this court changes on day after to-morrow. At that time there will be two justices who will be disqualified to sit upon a reargument, if one were ordered. The case could therefore not be heard at all after to-day. These circumstances, therefore, compel a decision to be made to-day, and must result in an affirmance of the judgment and order appealed from on account of the disagreement of the justices who heard the case, which is accordingly done.

HAINES v. CALDWELL. (Supreme Court of Oklahoma. Feb. 12, 1897.) Action between Rachel Haines and Belle Caldwell. From a judgment for the latter, the former brings error. Affirmed. Amos Green & Son, for plaintiff in error. J. H. Everest, for defendant in error.

DALE, C. J. Upon examination of the record filed in this case, we find that counsel have stipulated that the same may be taken upon the record without briefs. It being ascertained that the questions involved are identical with those decided in *Woodruff v. Wallace*, 3 Okl. 355, 41 Pac. 357, the judgment of the lower court is affirmed upon the authority of that case. SCOTT, J., having presided at the trial below, not sitting. The other justices concurring.

RADEBAUGH, Appellant, v. WOLF, Appellee. (Supreme Court of Oklahoma. Feb. 12, 1897.) Error from district court, Oklahoma county; before Justice Henry W. Scott. Action by William Wolf against Samuel S. Radebaugh. From a judgment for plaintiff, defendant brings error. Affirmed. Amos Green & Son, for appellant. J. H. Woods, for appellee.

PER CURIAM. This is an action instituted by William Wolf, plaintiff in the court below, in the district court of Oklahoma county, to obtain a mandatory injunction removing the defendant below, Samuel S. Radebaugh, from a certain quarter section of land. This case is in all respects similar to *Woodruff v. Wallace*, 3 Okl. 355, 41 Pac. 357, and the decision of the lower court was in harmony with the decision therein, and that case must control in the one under consideration. Upon the authority of *Woodruff v. Wallace*, supra, the judgment of the lower court will be affirmed.

COOS BAY, R. & E. R. & NAV. CO., Appellant, v. COOS COUNTY et al., Respondents. (Supreme Court of Oregon. Feb. 23, 1897.) Appeal from circuit court, Coos county; J. C. Fullerton, Judge. Petition by the Coos Bay, Roseburg & Eastern Railroad & Navigation Company against Coos county and others for a writ of review. From a judgment dismissing the proceeding, petitioner appeals. Affirmed. J. W. Hamilton, for appellant. S. H. Hazard, for respondents.

WOLVERTON, J. The facts in this case are similar, being in many respects identical with those stated in the two cases of *Southern Oregon Co. v. Coos Co.* (just decided) 47 Pac. 852, infra, involving the validity of a tax levy upon the property of the plaintiff therein for the years 1893 and 1894, except that in this case the order of July 12, 1895, is exhibited by the return to the writ. The questions presented both by the record and at the argument are the same as in the two cases above referred to, which are therefore decisive of this.

SOUTHERN OREGON CO., Appellant, v. GAGE, Sheriff, et al., Respondents. (Supreme Court of Oregon. Feb. 23, 1897.) Appeal from circuit court, Coos county; J. C. Fullerton, Judge. Petition by the Southern Oregon Company against Gage, sheriff, and others for a writ of review. From a judgment dismissing the proceeding petitioner appeals. Affirmed.

This is a proceeding by writ of review. The petition was filed in the court below September 10, 1895, and, omitting formal matters, states in substance that on the 18th day of July, 1895, a warrant was issued out of the county court of Coos county to the sheriff, commanding him to collect certain delinquent taxes for

the year 1894, among which was a pretended tax against the plaintiff of \$5,415.60, and that by virtue thereof the sheriff was about to seize upon certain personal property of the plaintiff in order to make the amount of such tax; that the warrant is based upon an order of the county court made July 12, 1895, directing its issuance; that the assessor failed to file the assessment roll until September 1, 1894, being after the time prescribed by law, and the extension thereof granted by the county court; that an unfinished roll was filed prior to the last Monday in August, 1894, but the assessor continued the work of assessment, and did not, in fact, complete it until the meeting of the board of equalization on August 27, 1894; that the county court failed to levy the tax at the September term, 1894, and did not make such levy until January 19, 1895, after the time fixed by law for so doing had expired; and that, in the estimate of expenditures, the court had unwarrantably included an item of \$7,000, being interest upon excessive and illegal indebtedness of the county. After setting out the effect of the evidence before the board of equalization touching the comparative value of certain pieces of property, the petition assigns as error (1) that the order of July 12, 1895, is insufficient, in that it does not show that any taxes were levied upon plaintiff's property for the year 1894, or that any such taxes remained unpaid or delinquent; (2) that it appears from the record that no taxes had been legally levied against the property of plaintiff; (3) that the attempted levy is based upon an unwarranted estimate of taxes; (4) that it was made without jurisdiction; (5) that the court failed to find in its said order what, if any, taxes assessed against plaintiff were delinquent and unpaid; (6) that plaintiff had no opportunity to be heard before the order was made; (7) that the county court, sitting as a board of equalization, placed a valuation upon the land of plaintiff in excess of that warranted by the evidence. The return, in brief, shows certain orders and proceedings were made and had as follows: On August 27, 1894, the board of equalization, having under consideration the plaintiff's petition for a reduction of its assessment, continued the hearing thereon from day to day during the week, when the board adjourned and certified its proceedings to the county court, which met September 5th, and continued the hearing from time to time until the 21st, when it ordered a large reduction of plaintiff's assessment. On the 22d the court continued the matter of levying the tax for 1894 until the regular January term thereof, and on January 24, 1895, the same being an adjourned day of said term, made its estimate of expenditures for the year, including therein \$7,000 interest upon county indebtedness, and levied a tax of 19 mills on the dollar. A warrant issued March 2, 1895. On April 3d the court extended the time for the return of delinquent taxes to July 6, 1895. On July 11th the sheriff filed the same, with his certificate annexed, and on July 18th the warrant referred to in the petition was issued by the clerk. Although alleged in the petition, the return does not show that any order whatever was made directing the issuance of this warrant. A motion to quash the writ having been sustained, judgment was given dismissing the proceedings, from which this appeal is prosecuted.

J. W. Hamilton and Rufus Mallory, for appellant. S. H. Hazard, for respondents.

WOLVERTON, J. (after stating the facts). This record presents questions identical with those discussed and determined in a case just decided between the same parties, involving the assessment and levy of taxes on plaintiff's property for the year 1893, and it was so treated by counsel at the argument. 47 Pac. 852. That case is therefore decisive of this, and it is unnecessary to reiterate the reasoning

here upon which the conclusions are based. The judgment of the court below will be affirmed.

**STANTON v. HARDY, Sheriff.** (Supreme Court of Utah. Dec. 21, 1896.) Application of Charles E. Stanton against Harvey Hardy, sheriff, for a writ of habeas corpus. Denied. Arthur Brown, C. F. Loofbourrow, John M. Zane, and C. O. Whittemore, for plaintiff. W. H. Dickson, H. P. Henderson, J. W. Judd, and Richard B. Shepard, for defendant.

ZANE, C. J. This is a habeas corpus proceeding instituted in this court for the purpose of obtaining the release of the plaintiff from imprisonment by the defendant, in pursuance of a writ in his hands as sheriff. All the material points relied upon by the plaintiff for his discharge were decided in the case of *Ritchie v. Richards* (this day filed) 47 Pac. 670, as will appear from an examination of the opinion. The application for the writ is denied, and the plaintiff is remanded to the custody of the sheriff until discharged according to law. BARTCH and MINER, JJ., concur in the result.

**BACON et al., Appellants, v. CITY OF SEATTLE, Respondent.** (Supreme Court of Washington. Nov. 27, 1896.) Appeal from superior court, King county; J. W. Langley, Judge. Action by E. D. Bacon and others against the city of Seattle to have reassessments of the cost of street improvement levied on plaintiffs' property declared invalid. From a judgment sustaining the reassessment except as against land of one of the plaintiffs, plaintiffs appeal. Affirmed. Stratton, Lewis & Gilman, for appellants. John K. Brown and Battle & Shipley, for respondent.

PER CURIAM. The appellants, in the elaborate brief filed in this cause, have attempted to distinguish it from the cases of *Frederick v. City of Seattle*, 13 Wash. 428, 43 Pac. 364, and *Cline v. City of Seattle*, 13 Wash. 444, 43 Pac. 367, but a careful examination of every question discussed has failed to satisfy us that this case does not fall fairly within the principles therein announced, and upon the authority of those cases the judgment must be affirmed.

**CITY OF NEW WHATCOM, Respondent, v. BELLINGHAM BAY IMP. CO., Appellant.** (Supreme Court of Washington. Dec. 8, 1896.) Appeal from superior court, Whatcom county; John R. Winn, Judge. Action by the city of New Whatcom against the Bellingham Bay Improvement Company. Judgment for plaintiff, and defendant appeals. Affirmed. Newman & Howard, for appellant. T. E. Cade, D. W. Freeman, and Kerr & McCord, for respondent.

PER CURIAM. This action is similar to another case between the same parties, just decided (47 Pac. 236), with the exception that the defendant sought to offset a claim for lumber furnished the contractors in making the improvements, and its defense was stricken from the answer. The contractors were not parties to the proceeding. The warrants for the improvement were outstanding, and the defense was not available in an action by the city to foreclose the assessment liens.

**CITY OF NEW WHATCOM, Respondent, v. BELLINGHAM BAY IMP. CO., Appellant.** (Supreme Court of Washington. Dec. 8, 1896.) Appeal from superior court, Whatcom county; John R. Winn, Judge. Action by the city of New Whatcom against the Bellingham Bay Improvement Company. Judgment for plain-

tiff, and defendant appeals. Affirmed. Newman & Howard, for appellant. T. E. Cade, D. W. Freeman, and Kerr & McCord, for respondent.

PER CURIAM. On the authority of the cases just decided between these parties (47 Pac. 236, 237), the judgment herein is affirmed.

FIRST NAT. BANK OF PORT TOWNSEND, Appellant, v. CITY OF PORT TOWNSEND, Respondent. (Supreme Court of Washington. Feb. 11, 1897.) Appeal from superior court, Jefferson county; R. A. Ballinger, Judge. Action by the First National Bank of Port Townsend against the city of Port Townsend. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed. Trumbull & Trumbull, for respondent.

PER CURIAM. This case involves the identical issues that were presented and determined in the Case of Bank of British Columbia of Victoria (just decided) 47 Pac. 896, and upon the stipulation of the respective parties filed therein, and for the reasons given in the opinion of the court in that case, the judgment of the court below is reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

GERMAN-AMERICAN SAV. BANK OF BURLINGTON, IOWA, Respondent, v. CITY OF SPOKANE, Appellant. (Supreme Court of Washington. Dec. 15, 1896.) Appeal from superior court, Spokane county; Norman Buck, Judge. Action by the German-American Savings Bank of Burlington, Iowa, against the city of Spokane. Judgment for plaintiff, and defendant appeals. Affirmed. W. H. Plummer, for appellant. Kennan & Belden, for respondent.

PER CURIAM. This case falls squarely within the rule announced by this court in the case of McEwan v. City of Spokane (decided Dec. 15, 1896) 47 Pac. 433, and the judgment will therefore be affirmed.

HEUSCHOBBER, Appellant, v. CITY OF PORT TOWNSEND, Respondent. (Supreme Court of Washington. Feb. 11, 1897.) Appeal from superior court, Jefferson county; R. A. Ballinger, Judge. Action by Emil Heuschobber against the city of Port Townsend. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed. Trumbull & Trumbull, for respondent.

PER CURIAM. This case involves the identical issues that were presented and determined in the Case of Bank of British Columbia of Victoria (just decided) 47 Pac. 896, and upon the stipulation of the respective parties filed therein, and for the reasons given in the opinion of the court in that case, the judgment of the court below is reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

ILLMAN, Respondent, v. GREAT NORTHERN RY. CO., Appellant. (Supreme Court of Washington. Feb. 5, 1897.) Appeal from su-

perior court, Snohomish county; John C. Denney, Judge. Action by W. H. Illman against the Great Northern Railway Company. Dismissed. Burke, Shepard & McGilvra, for appellant. L. H. Coon, for respondent.

PER CURIAM. This cause is similar to No. 2,383 (Henry v. Railway Co. [just dismissed] 47 Pac. 895), and it is likewise dismissed, with costs against the appellant only.

JOHNSON, Appellant, v. CITY OF PORT TOWNSEND, Respondent. (Supreme Court of Washington. Feb. 11, 1897.) Appeal from superior court, Jefferson county; R. A. Ballinger, Judge. Action by E. M. Johnson against the city of Port Townsend. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed. Trumbull & Trumbull, for respondent.

PER CURIAM. This case involves the identical issues that were presented and determined in the Case of Bank of British Columbia of Victoria (just decided) 47 Pac. 896, and upon the stipulation of the respective parties filed therein, and for the reasons given in the opinion of the court in that case, the judgment of the court below is reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

MURRAY, Respondent, v. MONTGOMERY et al., Appellants. (Supreme Court of Washington. Dec. 24, 1896.) Appeal from superior court, Kittitas county; Carroll B. Graves, Judge. Action by Katharina Murray against James F. Montgomery, S. F. Montgomery, and R. M. Christiansen. From a decree for plaintiff, defendants appeal. Reversed. Ralph Kauffman and E. Pruyn, for appellants. Frank H. Rudkin and D. H. Carey, for respondent.

PER CURIAM. In accordance with the stipulation filed by the attorneys for the respective parties in this case, to the effect that the judgment should follow that in the case of Clerf v. Montgomery (decided Nov. 12, 1896) 46 Pac. 1028, the judgment will be reversed, and the cause remanded to the lower court with instructions to modify the judgment so that the decree shall not apply to the lands purchased by the appellant Christiansen.

STATE ex rel. AMSTERDAMSCH TRUSTEES KANTOOR v. SUPERIOR COURT OF SPOKANE COUNTY et al. (Supreme Court of Washington. Nov. 30, 1896.) Application by the state of Washington on the relation of Amsterdamsch Trustees Kantoor for a writ of prohibition to the superior court of Spokane county, and Norman Buck, judge of such court. Writ granted. Binkley, Taylor & McLaren and Graves, Wolf & Graves, for relator. Cyrus Hoppy, for respondents.

ANDERS, J. This case presents substantially the same questions that were involved and determined in the case of State v. Superior Court of Spokane Co. (just decided) 47 Pac. 31, and for the reasons given in the opinion therein the peremptory writ of prohibition must be granted. HOYT, C. J., and SCOTT, J., concur.













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